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Oral Argument

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14.1 Importance of Oral Argument

Lawyers frequently wonder whether, when a case has been fully briefed, the oral argument is important. If the briefs have been read, can the argument make any meaningful contribution to the judge’s understanding of the case? If the briefs have not been carefully studied in advance, can the judges obtain an adequate first impression of a case from a short oral presentation? How relevant is the oral argument to the decision-making process?

Only judges are in a position to give authoritative answers to those questions. What they have said and written indicates that they find the oral argument desirable and important,¹ particularly for a Court that, like the Supreme Court, is likely to accept for oral argument cases that raise questions of a

¹For more extensive treatments of this subject, see R. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* 363–437 (2d ed. 1989); F. WIENER, *BRIEFING AND ARGUING FEDERAL APPEALS*, chs. VI–IX (1967). See also John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HISTORY 68 (2005) (“Oral Advocacy”); John G. Roberts, Jr., *Thoughts on Presenting an Effective Oral Argument*, SCHOOL LAW IN REVIEW (1997), available at www.nsba.org/site/docs/36400/36316.pdf (“Thoughts”); Chief Justice Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015 (1984); Chief Justice Rehnquist, *From Webster to Word Processing*, 1 J. APP. PRAC. & PROCESS 1 (1999); Justice Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567 (1999); CHIEF JUSTICE HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 61–63 (1928); J.W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895 (1940); Justice Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801 (1951); Justice Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6 (1955); Justice Rutledge, *The Appellate Brief*, 9 D.C.B.A.J. 147 and 28 A.B.A. J. 51 (1942); Judge E.B. Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285 (1953); Judge G. Rossman, *Appellate Court Advocacy: The Importance of Oral Argument*, 45 A.B.A. J. 675 (1959); Chief Justice W. Schaefer, *The Appellate Court*, 3 U. CHI. L.S. REC. 10, 11 (1954), and *Appellate Advocacy*, 23 TENN. L. REV. 471, 473 (1954); E. Griswold, *Appellate Advocacy*, 26 REC. ASS’N B. N.Y. CITY 342 (1971); Judge J. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801 (1976); Judge D. Friedman, *Winning on Appeal*, 9 LITIGATION 15 (Spring 1983); Judge P. Wald, *19 Tips From 19 Years on the Bench*, 1 J. APP. PRAC. & PROCESS 7 (1999); Judge M. Bright, *How to Win on Appeal*, TRIAL (July 1996); JUDGE F. COFFIN, *ON APPEAL* 127–47 (1994); JUDGE R. ALDISERT, *WINNING ON APPEAL* 299–346 (1992); Judge Joseph W. Hatchett, *The Importance of Appellate Oral Argument*, 33 STETSON L. REV. 139 (2003); E.B. Prettyman, Jr., *Supreme Court Advocacy: Random Thoughts in a Day of Time Restrictions*, 4 LITIGATION 16 (Winter, 1978); S. Shapiro, *Oral Argument in the Supreme Court of the United States*, 33 CATH. U.L. REV. 529 (1984); S. Shapiro, *Questions, Answers, and Prepared Remarks*, 15 LITIGATION 33 (Spring 1989); C. Phillips, *Advocacy Before the United States Supreme Court*, 15 TH. M. COOLEY L. REV. 177 (1998); R. Seamon, *Preparing for Oral Argument in the United States Supreme Court*, 50 S.C. L. REV. 603 (1999); DAVID C. FREDERICK, *SUPREME COURT &*

substantial and difficult character. To resolve such questions, the Court needs the fullest possible assistance from counsel, both in their briefs and their oral arguments. Counsel are expected to engage in a dialogue with the Justices that will serve to clarify the facts and the issues in the case and that will make a decisive impression as to the merits of the dispute. Only the lawyer who is fully prepared, articulate, and at ease can expect to fulfill the role assigned to him or her in this great process.

It is in that context that oral argument before the Supreme Court assumes a unique importance. The Court needs and responds to intelligent and creative discussions by counsel as it struggles to resolve some of the more difficult legal problems of the times. And it is in that context that the Justices have spoken of the importance of oral argument. The current Chief Justice, John G. Roberts, Jr., a veteran of 39 Supreme Court arguments, has summed up the undeniable significance of the exercise: “oral argument is terribly, terribly important.” “Oral argument matters,” then-Judge Roberts wrote, “not just because of what the lawyers have to say,” but because “[i]t is the organizing point for the entire judicial process.” The Justices read the briefs and research the issues in preparation for argument, and they conference about the case directly after the argument, undoubtedly focusing on what was said (or not said) by the lawyers, particularly in response to the Justices’ questions. Oral argument is thus a time “when ideas that have been percolating for some time begin to crystallize,” and as the doors of receptivity to various ideas “begin to close at oral argument,” because “the luxury of skepticism will have to yield to the necessity of decision,” oral argument can often give a “push” to those doors.²

Chief Justice Roberts’ view of oral argument echoes the beliefs of his predecessors. As Chief Justice Hughes once wrote, “the desirability * * * of a full exposition by oral argument in the highest court is not to be gainsaid,”³ for it is “a great saving of time of the court in the examination of extended records and briefs, to obtain the grasp of the case that is made possible by oral discussion and to be able more quickly to separate the wheat from the chaff.” Chief Justice Hughes also observed: “I suppose that, aside from cases of exceptional difficulty, the impression that a judge has at the close of a full oral argument accords with the conviction which controls his final vote.”⁴

APPELLATE ADVOCACY (2003). See also statement of the views of all the judges of the Third Circuit, *In the Matter of Oral Argument*, 1 PRAC. LAW. 12 (1955). All of the above writers except Davis, Griswold, Prettyman, Jr., Wiener, Stern, Shapiro, Phillips, Frederick, and Seamon have been judges on appellate courts.

²Roberts, *Oral Advocacy*, 30 J. SUP. CT. HISTORY at 68, 69, 70. The Chief Justice has stated that just as “medieval stonemasons” meticulously built their great cathedrals with a “higher purpose,” so too must the oral advocate “infuse his craft with a higher purpose.” *Id.* at 79. “That higher purpose will steel him for the long and lonely work of preparation, will bring the proper passion to his cause, will assuage the bitterness of defeat and moderate the elation of victory, and will, more and more, forge a special bond with his colleagues at the Supreme Court bar.” *Id.* at 80. There is empirical support for the importance of oral argument. One study examined Justice Blackmun’s papers, and found that oral argument plays a key role in how the Court decides cases. Timothy R. Johnson et al., *Supreme Court Oral Advocacy: Does It Affect the Justices’ Decisions?* WASH. U. L. REV. (Forthcoming).

³CHIEF JUSTICE HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 62–63 (1928).

⁴*Id.* at 61. See also Justice Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801 (1951).

The second Justice Harlan agreed with Chief Justice Hughes' statement that the reactions to the oral argument usually remain unchanged. He stated that since the Court usually takes its first and oft-decisive vote in the conferences held within a day or two following the oral arguments heard that week, the oral presentation is fresh in the Court's mind at this critical point. He emphatically disagreed with those who regarded "the oral argument as little more than a traditionally tolerated part of the appellate process," stating that "your oral argument on appeal is perhaps the most effective weapon you have got."⁵

Justice Brennan later stated that "oral argument is the absolutely indispensable ingredient of appellate advocacy. * * * [O]ften my whole notion of what a case is about crystallizes at oral argument. This happens even though I read the briefs before oral argument; indeed, that is the practice now of all the members of the Supreme Court. * * * Often my idea of how a case shapes up is changed by oral argument. * * * Oral argument with us is a Socratic dialogue between Justices and counsel."⁶

Similarly, Justice Powell has said, "the fact is, as every judge knows, that the quality of advocacy—the research, briefing and oral argument of the close and difficult cases—does contribute significantly to the development of precedents."⁷ In the words of Chief Justice Rehnquist, "it does make a difference: I think that in a significant minority of the cases in which I have heard oral argument, I have left the bench feeling different about the case than I did when I came on the bench."⁸ Justice Ginsburg has explained that oral argument gives counsel "notice and a last clear chance to convince the Court concerning points on which the decision may turn." Address to the Dinner of the American Law Institute 58 (May 19, 1994). Justice Ginsburg elsewhere has described the impact of oral argument as follows: "[I]t is in most cases a hold-the-line operation. In over eighteen years on the bench, I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs. But I have seen several potential winners become losers in whole or in part because of clarification elicited at argument."⁹ A study by political scientists confirms these views of the Justices, concluding that oral argument often is important to the disposition of a case "and at times determinative of the outcome." S. Wasby, S. Peterson, J. Schubert & G. Schubert, *The Supreme Court's Use of Per Curiam Dispositions: The Connection to Oral Argument*, 13 N. ILL. U. L. REV. 1, 30 (1992).

⁵Justice Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?* 41 CORNELL L.Q. 6, 7, 11 (1955); Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108 (1959).

⁶Justice Brennan, quoted in Harvard Law School Occasional Pamphlet No. 9, 22–23 (1967).

⁷Remarks of Justice Powell at Fifth Circuit Judicial Conference, *The Level of Supreme Court Advocacy* 4 (May 27, 1974) (unpublished manuscript).

⁸CHIEF JUSTICE REHNQUIST, *THE SUPREME COURT* 243 (2001).

⁹Justice Ginsburg, 50 S.C. L. REV. at 570. See also Ruth Bader Ginsburg, *Foreword*, in DAVID C. FREDERICK, *SUPREME COURT & APPELLATE ADVOCACY* viii (2003) ("Not many cases, it is true, are won on the oral argument alone, but a case can be lost if a lawyer is unable or unwilling to answer a justice's question honestly and persuasively.").

As if to emphasize the high value thus placed by the Court on oral argument, some members of the Court have voiced displeasure with the quality of some of the oral arguments that are made. Justice Powell, for example, noted his “disappointment in the quality of briefs and oral arguments” before the Court, adding:

I am generalizing, of course, and should not be understood as saying that all or even the great majority of cases before us are poorly briefed or argued. The Chief Justice has spoken on this subject with his usual perception and force. As he has noted, and as we all recognize, the quality of written and verbal advocacy varies quite widely. Many of our cases are superbly presented by highly competent counsel, and that competency is not necessarily related to age and experience. Some of the best advocacy I have witnessed has come from fairly young members of the bar, who tend to be especially thorough in their research and briefing.

But the delight of the occasional high level of counsel performance is diluted by the more numerous performances that one must rate as “average or poor.” Of course, no one expects a John W. Davis in every case, but I had hoped for greater assistance from briefs and oral arguments than we often receive. I certainly had expected that there would be relatively few mediocre performances before our Court. I regret to say that performance has not measured up to my expectations.

* * * * *

I have only admiration for those who recognize the potential importance of, and who prepare carefully for, Supreme Court litigation. I wish their example were more widely followed.¹⁰

Justice Powell was not alone: Chief Justice Burger singled out representatives of state and local government for poor oral advocacy, Justice Douglas commented that 40 percent of oral advocates before the Court were “incompetent,” and Chief Justice Rehnquist once highlighted the poor quality of oral argument by observing that many advocates believe oral argument to be an opportunity to rehash their brief “with gestures.”¹¹ In more recent years, a resurgent and increasingly specialized private Supreme Court bar, multiple law school clinics, Supreme Court advocacy institutes, and a concerted effort by state and local officials to improve argument have enhanced the quality of oral argument before the Court.¹²

The fact that the Court amended its rules in 1970 to reduce from one hour to one-half hour the time allotted each side for oral argument in most

¹⁰Remarks of Justice Powell at Fifth Circuit Judicial Conference, *The Level of Supreme Court Advocacy* 1–2, 6 (May 27, 1974) (unpublished manuscript). Chief Justice Burger, in speaking of the caliber of some lawyers who appear before the Court, has stated: “The quality is far below what it could be.” Remarks to District of Columbia Judicial Conference, reported in *The Washington Post*, June 4, 1975. See also Chief Justice Warren E. Burger, *The Special Skills of Advocacy*, 42 *FORDHAM L. REV.* 227, 234 (1973) (“[F]rom one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation”).

¹¹Chief Justice Warren E. Burger, Opening Remarks at the Conference on Supreme Court Advocacy (Oct. 17, 1983), in 33 *CATH. U. L. REV.* 525 (1984); WILLIAM O. DOUGLAS, *THE COURT YEARS* 183 (1980); William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 *MERCER L. REV.* 1015, 1024 (1984).

¹²Roberts, *Oral Advocacy*, 30 *J. SUP. CT. HISTORY* at 78.

cases does not reflect any diminution in the Court's recognition of the potential value of oral argument. Other appellate courts have severely limited the time available for oral argument, and, in some cases, have eliminated oral argument completely; but they have done so largely to conserve their judicial energies in disposing of the ever-increasing numbers of appeals as of right, a situation that does not pertain to the Supreme Court.¹³

The reduction of the time allowed for oral argument was the culmination of the Court's experience with the longer one-hour argument per side. Long before 1970 the Court had found that the issues in most cases could be adequately explored in arguments limited to one-half hour, and more and more cases came to be placed on what was known as the "summary calendar." The oral argument in cases previously put on the summary calendar was limited to one-half hour per side. The summary calendar limitation on oral argument came to be the norm, however, and what is now Rule 28 merely codified that norm. Longer argument time can still be obtained, of course, for those rare cases that are shown to be so complex or important as to justify it. E.g., *AT&T v. Iowa Utils. Bd.*, 523 U.S. 1135 (1998) (allowing two hours for oral argument in complex telecommunications case); *Bush v. Gore*, 531 U.S. 1046 (2000) (allowing 90 minutes for oral argument in a case of great public importance); *McConnell v. FEC*, 539 U.S. 911 (2003) (permitting four hours of oral argument in consolidated cases concerning campaign finance legislation); *United States v. Booker*, 542 U.S. 956 (2004) (consolidating case with *United States v. Fanfan* and allowing two hours for oral argument in federal sentencing guidelines case); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 823 (2005) (permitting 90 minutes for oral argument, divided four ways); *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 827 (2005) (consolidation with three other cases with two hours of oral argument in Texas gerrymandering case); *Rapanos v. United States*, 126 S. Ct. 617 (2005) (consolidation with *Carabell v. United States* with 80 minutes for oral argument in Clean Water Act case); *Hamdan v. Rumsfeld*, 2006 U.S. LEXIS 1127 (Feb. 17, 2006) (allowing 90 minutes for oral argument in enemy combatant case, and the argument went even longer). Rule 28.3 states that "[a]dditional time is rarely accorded," and of the 76 oral arguments in the 2005 Term, oral argument was extended in only four instances.

14.2 Submission Without Oral Argument by Counsel Disfavored

The Court summarily decides the merits of some of its certiorari cases on the basis of the preliminary papers without further briefing or any oral argument.¹⁴ See Secs. 5.12, 5.17, and 5.20, *supra*. But where the petition for

¹³Rule 34(a) of the Federal Rules of Appellate Procedure permits the courts of appeals to dispense with oral argument where (1) the appeal is frivolous, (2) the dispositive issue or issues have already been decided, or (3) the briefs and record are sufficient and oral argument would not significantly aid in the decisional process. The number of appeals disposed of without oral argument is large. Of the 27,354 courts of appeals cases terminated on the merits in 2005, only 8,573, or 31%, had some oral hearing.

¹⁴E.g., *United States v. Indrelunas*, 411 U.S. 216, 218 (1973) ("Consideration of the petition for certiorari and the response has led us to conclude that further briefs and oral arguments would not

certiorari is granted or probable jurisdiction is noted in an appeal, with no simultaneous summary action on the merits, further briefing and oral argument are expected by the Court. As adopted in 1980, former Rule 38.1 stated that the Court is

reluctant to accept the submission of briefs, without oral argument, of any case in which jurisdiction has been noted or postponed to the merits or certiorari has been granted. Notwithstanding any such submission, the Court may require oral argument by the parties.

The 1990 rules amendments eliminated any reference to the practice of submitting a case without oral argument, and the Court has denied leave to proceed on that basis. *Franchise Tax Bd. v. Alcan Aluminum, Ltd.*, 493 U.S. 930 (1989) (“The request of respondents to submit the case on the briefs is denied.”).

When for any reason counsel is not available to present argument on one side, the Court may appoint a private lawyer, who may or may not have filed a brief in the case as counsel or as amicus, to present an argument on that side of the case as an amicus curiae. Since the Court accepts a case for oral argument because it presents issues of importance to the public, and not merely to the parties, it wants the benefit of argument by skilled counsel on both sides, and not merely one side, before it reaches its decision. This type of amicus presentation is not governed by Rule 28.7. The amicus may be invited to brief and argue the case or, if a brief has already been filed, merely to present oral argument. An amicus invited by the Supreme Court to argue is entitled to be reimbursed for “necessary travel expenses,” as to which the Clerk’s Office should be consulted. See Sec. 8.16, *supra*.

The Court has thus denied leave to submit without oral argument an important divorce case and, in view of “the lack of genuine adversary proceedings at any stage in this litigation, * * * the Court invited specially qualified counsel ‘to appear and present oral argument, as *amicus curiae*, in support of the judgment below.’” *Granville-Smith v. Granville-Smith*, 348 U.S. 885, 349 U.S. 1, 4 (1954). And in *Williams v. Georgia*, 349 U.S. 375, 380–81 n.4 (1955), a capital case, the Court appointed an attorney amicus curiae to present argument on behalf of the indigent petitioner after being advised by the counsel appointed by the state court below “that he would not be in a position to present oral argument before the Court” and had “little or nothing to add to the brief.” See also *Mathews v. Weber*, 423 U.S. 261, 265 n.2 (1976), where an attorney was invited to brief and argue as an amicus curiae to support the decision of the court below “[b]ecause respondent has declined to appear.” The same kind of appointment occurred in *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 829 n.3 (1988).

In *Bob Jones University v. United States*, 456 U.S. 922 (1982), 459 U.S. 812 (1983), after the United States refused to defend the position on which it had prevailed in the court of appeals—that a private university that

materially assist in our disposition of the case and, for the reasons hereafter stated, we grant certiorari and reverse the judgment of the Court of Appeals”); *Maryland v. Dyson*, 527 U.S. 465, 468 (1999) (Breyer, J., dissenting).

discriminated racially did not qualify for tax exemption under the Internal Revenue Code—the Court appointed a distinguished attorney to file a brief and argue in support of the decision below. See also *Clay v. United States*, 537 U.S. 522, 526 n.2 (2003) (inviting private counsel to brief and argue as amicus curiae in support of the Seventh Circuit’s judgment after the United States eventually sided with petitioner; such an invitation permitted the Court “to decide the case satisfied that the relevant issues have been fully aired”); *Alabama v. Shelton*, 534 U.S. 987 (2001) (inviting amicus to submit a brief and argue in opposition to the judgment below); *Becker v. Montgomery*, 532 U.S. 757 (2001) (appointing private counsel to brief and argue as amicus curiae, where there was no “party to defend the Sixth Circuit’s position”); *Dickerson v. United States*, 528 U.S. 1045 (1999) (appointing private counsel to brief and argue as amicus curiae in support of court of appeals’ decision that federal voluntary confession statute superseded the Court’s *Miranda* ruling after the United States refused to do so); *Bousley v. Brooks*, 522 U.S. 990 (1997). In other cases in which a party has discharged his counsel shortly before the oral argument and then sought leave to argue pro se, the Court has denied such leave and simultaneously appointed other counsel as amicus curiae to argue on behalf of that party’s position, such as arguing in support of the judgment below. *Kolender v. Lawson*, 459 U.S. 964 (1982), 461 U.S. 352 (1983); *Keeton v. Hustler Magazine*, 459 U.S. 1169 (1983), 465 U.S. 770 (1984).¹⁵ See also *United States v. Cronin*, 460 U.S. 1035 (1983).

On rare occasion the Court, without explanation, has permitted parties to argue pro se. For example, the Court permitted Michael Newdow, a nonpracticing attorney, to argue as respondent in an Establishment Clause case concerning the “Pledge of Allegiance.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 3 (2004). Civil cases: *Hoffman v. Connecticut Dep’t of Income Maint.*, 492 U.S. 96 (1989) (petitioner was a bankruptcy trustee); *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287 (1998) (petitioner was an attorney); *Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136 (1994) (petitioner was an attorney in case concerning attorney advertising); *Dalton v. Specter*, 511 U.S. 462 (1994) (United States senator arguing as respondent in base closure case); *SEC v. Sloan*, 436 U.S. 103 (1978). Criminal cases: *Andresen v. Maryland*, 427 U.S. 463, 465 (1976) (defendant was an attorney); *Parker v. Illinois*, 333 U.S. 571, 575 (1948) (contempt case). See also *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279–80 (1942); *Carter v. Illinois*, 329 U.S. 173, 174–75 (1946). The *Hoffman* and *Lunding* cases differ from *Kolender* and *Keeton* in that the parties wishing to argue pro se in the former cases had themselves prepared the briefs in the Supreme Court, whereas in the latter cases the briefs had been submitted by counsel that the parties wished to supersede for the oral argument. Cf. *United States v. Fausto*, 480 U.S. 904 (1987) (granting leave to file brief pro se but refusing to allow pro se argument and appointing amicus curiae to both brief and argue the case in defense of the judgment below).

¹⁵In *Keeton* the Court denied a respondent, who had discharged his attorney five days before the argument, leave to argue pro se, and instead requested argument by a lawyer who had previously submitted an amicus brief on the same side.

In *Price v. Johnston*, 334 U.S. 266, 278–86 (1948), the Court held that a federal court of appeals has power under the All Writs Statute, 28 U.S.C. §1651(a), to command that a federal prisoner be produced to argue the prisoner’s own appeal, but that the exercise of that power is a matter of sound judicial discretion. *Faretta v. California*, 422 U.S. 806 (1975), adding a constitutional dimension to the problem at least in criminal cases, held that a state criminal defendant has a constitutional right to proceed pro se in the trial court without appointed counsel when the defendant voluntarily and intelligently elects to do so. The *Faretta* case was not concerned with appeals, however, and *Price* stated that “oral argument on appeal is not an essential ingredient of due process.” 334 U.S. at 286.¹⁶ The Court resolved the question whether a criminal defendant has a constitutional right to represent himself pro se on appeal in *Martinez v. Court of Appeal*, 526 U.S. 1110 (1999). The Court held that neither the Sixth Amendment nor the Due Process Clause entitles a criminal defendant to represent himself on appeal, but that the appellate courts have the discretion to permit such representation. Occasionally, the Court observed, litigants have “done so effectively” (citing *SEC v. Sloan*, where the respondent “argued, briefed, and prevailed in the Court of Appeals for the Second Circuit and this Court”).

Relevant factors in prisoner cases, the Court noted in *Price*, would be whether a party would or would not be capable of making “an intelligent and responsible argument,” whether “his presence in the courtroom may be secured without undue inconvenience or danger,” and whether pro se representation was requested because of “something more than a mere desire to be freed temporarily from the confines of the prison.” 334 U.S. at 284–85. The first of these factors would apply in most cases, and might usually cause the Court to find that only argument by an able lawyer would aid it in deciding the important and difficult cases that it agrees to hear. Fortunately, few litigants are brash enough to insist on arguing themselves, particularly in criminal cases in which the Court will appoint counsel for them.

What has been said should be sufficient to show the inadvisability of attempting to submit on the brief without argument if counsel wishes to do everything possible toward winning his case. The time allotted each counsel for oral argument is the one point where counsel can converse directly with the nine Justices and personally seek to persuade and motivate them to decide the case in his or her favor. It is an opportunity for interchange between Court and counsel that no written brief can provide. And it is an opportunity that the Court itself welcomes, for its high function of decision-making often depends on skillful and intelligent oral advocacy.

14.3 When Oral Arguments Are Heard

The Court convenes each year after the summer recess on the first Monday in October in accordance with 28 U.S.C. §2 and the Court’s own Rule 3, both of which state that the Court shall hold an annual term “commencing

¹⁶Other cases are collected in Annot., 24 A.L.R. 4th 430 (1983).

on the first Monday in October.” Special terms may be ordered by the Court “whenever necessary.” 28 U.S.C. §2. See Sec. 1.3, *supra*.

Since the 1975 Term oral arguments have begun on the first day of the term. On that day the Court also issues its list of orders disposing of most of the petitions for certiorari, appeals, and miscellaneous matters that have accumulated during the summer recess or that had not been ready for disposition at the end of the preceding term.¹⁷ These matters have been considered in conferences held during the week preceding the new term. In 1999 the Court departed from this pattern by issuing order lists noting grants of certiorari during the month of September, several weeks before the commencement of oral argument sessions in October. As it has done in recent years, in September 2006, the Court granted certiorari in several cases the Tuesday before the term began. Miscellaneous items, such as stay requests and requests for amicus participation, may be dealt with in abbreviated order lists during the summer.

Once the arguments get underway, they continue for a two-week period. Arguments are normally heard only on Mondays, Tuesdays, and Wednesdays of the scheduled argument weeks, with the exception of national holidays, such as Columbus Day, Martin Luther King, Jr. Day, and Presidents’ Day, which often fall within oral argument periods. The Court then adjourns for two weeks and sits to hear oral arguments again the following two weeks. This alternating pattern of two weeks of arguments and two weeks of adjournment is generally followed throughout the term, although in recent years the Court has taken two recesses of four weeks each in the December–February period. Argument days may also be added or omitted to suit the Court’s convenience or to adjust to the availability of cases ready for argument. The argument schedule normally terminates at the end of April. On rare occasion, an argument is held after April. See *McConnell v. FEC*, 540 U.S. 93 (2003) (argued in September 2003 as part of October 2002 Term).

The Court sits to hear arguments from 10 a.m. to noon and may also sit from 1 p.m. to 3 p.m. See Rule 4.1 and Sec. 1.2, *supra*. The luncheon recess is one hour long, from noon to 1 p.m. In recent terms, the Court has not generally scheduled arguments in the afternoon; this reflects the reduction in its caseload discussed in Sec. 1.20, *supra*.

With most arguments limited to 30 minutes per side, arguments in two to four cases can usually be scheduled and heard on a given day. The grant of additional argument time in some cases causes variations in such scheduling. But every effort is made to reach a case on the day assigned to it. On occasion the Court sits overtime for a short period to permit the completion of an argument the same day.

The Supreme Court has adhered to its argument schedule even in times of national emergency. During the week of October 29, 2001, the Court was forced to convene to hear the scheduled oral arguments in the Ceremonial Courtroom of the United States Court of Appeals for the District of Columbia Circuit in Washington, D.C., rather than in its own courtroom. It took

¹⁷The Order List issued on October 2, 2006 disposed of 2,059 matters.

that action following the discovery of anthrax spores in its own building. The Chief Justice read a statement noting that this was the first time since the Court moved into its own building in 1935 that it had not been able to use its own Courtroom for oral argument.

14.4 Date of Argument—Advancements

The Clerk arranges the schedule of arguments. Rule 27.1 provides: “From time to time the Clerk will prepare a calendar of cases ready for argument.” Additions and rearrangements may be made during the term as circumstances require. The Clerk is to “publish a hearing list in advance of each argument session for the convenience of counsel and the information of the public,” and to “advise counsel when they are required to appear for oral argument.” Rule 27.2.

Rule 27.1 specifies:

A case ordinarily will not be called for argument less than two weeks after the brief on the merits of the respondent or appellee is due.

This normally allows at least a week to prepare and file a reply brief, which would often seem insufficient. Cf. Rule 25.3. But usually the schedule will not be that tight, and more time will be available. In the normal course, a case will be heard not less than three months after certiorari is granted or probable jurisdiction noted. In most but not all recent terms, when review of a case was granted prior to mid-January, oral argument was scheduled within the same term.¹⁸ Nevertheless, the importance of rapidly preparing and filing a reply brief should not be overlooked; in many instances a reply brief will be due only a few weeks before oral argument. Any professional or religious commitments that preclude counsel from appearing for argument on a particular date should be communicated to the Clerk by letter, with a copy to opposing counsel, as soon as possible after certiorari is granted. Once the Clerk sends out notice of the argument date and schedule, usually a month or two before the argument, the schedule will not be changed because of such conflicts. Counsel should immediately complete and return the form enclosed with the Clerk’s scheduling notice and include any request for necessary accommodations, such as a wheelchair, amplified earphones for the hearing impaired, or a sign reader for a deaf party.

¹⁸The Court rejected a suggestion from a group of Court practitioners that it eliminate the current January session of oral arguments and advance the February, March, and April sessions by several weeks. This recommendation rested on the view that such a scheduling change would enable the parties to produce better briefs and provide the Court with more time towards the end of the term to render its opinions. But the Chief Justice responded by letter that there are “at least equally cogent reasons supporting the present arrangements.” See B. Boskey & E. Gressman, *The Supreme Court’s 1999 Revisions of Its Rules*, 183 E.R.D. 603, 612 (1999). The Court has indicated, however, that it will consider a suggestion from the Solicitor General that it review its recent practice of setting cases for oral argument as soon as possible after granting review, which may require expedited briefing. The Solicitor General explained that when numerous grants of review are entered on the same day, as usually happens at the beginning of a term, expedited briefing may “place a considerable strain on the resources” of his office. See *id.* at 612–13.

Cases can be advanced for oral argument to any extent necessary where the matter is an important and urgent one—even to the day the petition is filed. *Ex parte Quirin*, 317 U.S. 1 (1942), discussed in Sec. 2.3, note 6, *supra*.¹⁹ As to the setting of special cases for argument during the summer recess, see Sec. 1.3, *supra*. Some types of cases, though not with great success,²⁰ are required by statute to be handled by the Court with special expedition. State criminal cases, in other words, are expedited only if the Court grants a party's motion to expedite. Compare *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 116 n.1 (1974).

¹⁹Cases advanced for argument include: (1) *Aaron v. Cooper*, 358 U.S. 27, 1 (1958), the Little Rock School case, which was argued on two weeks notice, three days after the petition for certiorari was filed; (2) *United Steel Workers v. United States*, 361 U.S. 39 (1959), the steel strike case, in which argument was scheduled four days after certiorari was granted; (3) *Hammah v. Larche*, 361 U.S. 910 (1959), 363 U.S. 420 (1960), where, in cases involving the validity of operations of the Civil Rights Commission, the Court on motion by the United States advanced oral argument so as to consider the certiorari and appeal papers simultaneously with the merits of the cases; (4) *Power Authority v. Tuscarora Indian Nation*, 360 U.S. 915, 361 U.S. 892 (1959), 362 U.S. 99 (1960), in which oral argument was advanced about a month on an asserted need to proceed with the construction of a large power project; (5) *Lurk v. United States*, 365 U.S. 832, 366 U.S. 712 (1961), where oral argument was advanced so as to be heard before the end of the term, the case involving an important constitutional issue affecting other cases pending in the court below and the petitioner being unable to raise bail to obtain release from prison pending review; (6) *Katzenbach v. McClung*, 379 U.S. 294 (1964), an important case under the Civil Rights Act of 1964, where the argument was scheduled within two weeks of action by an individual Justice on a stay application (85 S. Ct. 6 (1964)); (7) *Williams v. Rhodes*, 393 U.S. 23 (1968), where oral argument was scheduled within a month in a state election law case, the expedited schedule being established prior to the filing of the appeal papers as part of the conditions of an injunctive order issued by Justice Stewart (89 S. Ct. 1, 21 (1968)); (8) *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), where briefs were ordered filed and oral argument was scheduled about two weeks after the grant of certiorari in a case involving the rights of "many thousands of school children, who are presently attending Mississippi schools under segregated conditions"; (9) *Trbovich v. United Mine Workers*, 404 U.S. 528, 530 n.4, 880 (1972), where, in a case involving a union member's intervention in a suit to set aside a union election, oral argument occurred one month after the grant of certiorari "in view of the fact that the litigation is presently pending in the District Court and it has not been stayed"; (10) *United States v. Nixon*, 418 U.S. 683, 690 (1974), where, following an expedited briefing schedule in an important case involving a presidential claim of executive privilege, oral argument was held five-and-a-half weeks after the grant of certiorari; (11) *Dames & Moore v. Regan*, 452 U.S. 932, 453 U.S. 654 (1981) (Iranian settlement case; petition for certiorari before judgment in court of appeals filed June 10, 1981, granted June 11, case argued June 24, decided July 2); (12) *United States v. Eichman*, 494 U.S. 1063, 496 U.S. 310 (1990), where, following expedited consideration of jurisdictional statements and expedited briefing in two flag-burning cases, the Court held oral argument after completion of its regular argument schedule (on May 14) and decided the cases before its summer recess (on June 11); (13) *Raines v. Byrd*, 521 U.S. 811 (1997) (Line Item Veto case; the Court noted probable jurisdiction on April 23 and heard oral argument on May 27); (14) *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 1004 (2000), where the Court ordered oral argument seven days after granting certiorari in case involving disputed ballots in presidential election; (15) *Bush v. Gore*, 531 U.S. 1046 (2000), where the Court ordered oral argument just two days after granting certiorari in case involving disputed outcome of presidential election; and (16) *United States v. Booker*, 542 U.S. 956 (2004), where the Court, upon the urging of the Solicitor General, advanced oral arguments to the first day of the Court's fall term and allowed two hours of argument on the constitutionality of federal sentencing guidelines. The form of the motion to advance oral argument, as used in the *Lurk* case, is set forth in Appendix IV.CC, *infra*.

²⁰Congressional directions that the Supreme Court expedite certain types of cases have limited impact, for the Court is protective of its own control over its docket. For example, 28 U.S.C. §2102 provides that criminal cases on review from state courts "shall have priority, on the docket of the Supreme Court, over all cases except cases to which the United States is a party and such other cases as the court may decide to be of public importance." But such cases are given no expedition by the Court with respect to initial consideration, briefing, oral argument, or decision, although the Clerk may sometimes circulate the initial papers ahead of those in nonpriority cases awaiting circulation to the Justices.

The Court may advance cases for argument on its own accord or on motion of a party. A party wishing to advance a case should first discuss the matter informally with the Clerk's Office, which often will be able to adjust the schedule satisfactorily without need for a motion. If a motion is made, it should contain a brief statement of the matter involved and of the reasons why advancement is desired. It need not be printed, but an original and 10 legible copies should be provided. See Chapter 16, *infra*. A form is set forth in Appendix IV.CC, *infra*.

Counsel are more likely to wish to have the argument of a case postponed. This cannot be done by stipulation. The Clerk must be persuaded that there is an especially good reason for the postponement, such as illness of counsel. For example, the Court granted an emergency motion to postpone a scheduled oral argument because of a severe snowstorm that blocked transportation into Washington. *Koons v. United States*, 516 U.S. 1039 (1996). The matter is usually first taken up with the Clerk's Office informally; a formal motion to the Court should be made only if necessary. E.g., *Nuclear Regulatory Comm'n v. Sholly*, 451 U.S. 1050 (1981); *Texas v. Cobb*, 531 U.S. 1004 (2000). Save for the most extraordinary reason, such as counsel's sudden illness or a death in the immediate family, any postponement request should be made as far in advance—preferably a few weeks—of the likely or scheduled argument date as possible. A request made a few days before the scheduled date is otherwise almost certain to be denied. See, e.g., *Phelps v. United States*, 421 U.S. 907 (1975).

In addition, the Court may order a postponement on its own motion. In one case, the Court postponed oral argument and ordered supplemental briefing on a question related to but different from the issue on which it had granted certiorari. See *Gustafson v. Alloyd Co.*, 512 U.S. 1280 (1994).

14.5 Number of Counsel

Rule 28.4 provides:

Only one attorney will be heard for each side, except by leave of the Court on motion filed in time to be considered at a scheduled Conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed. Any request for divided argument shall be presented by motion under Rule 21 and shall set out specifically and concisely why more than one attorney should be allowed to argue. Divided argument is not favored.

Under the rules prior to 1980, permission was not necessary for two counsel to argue on the same side if additional time (over 30 minutes) to argue had been allowed.²¹ Now permission is always necessary, and seldom granted, except for the Solicitor General. Before Rule 28.4 was revised in 1995, a motion for divided argument had to be filed "not later than 15 days after service of the petitioner's or appellant's brief on the merits." That placed the respondent at a disadvantage. Whereas the petitioner had ample time to read any

²¹See pp. 747–48 of the fifth edition of this book.

supporting amicus brief and decide whether to join in a motion for leave to divide the argument, the respondent had to decide whether to move for divided argument before a supporting amicus had filed its brief. The revision removed that handicap by providing the respondent with an opportunity to make its decision after filing its merits brief.

In October 2007, the Court made further revisions to Rule 28.4. The Court found that different deadlines for motions for additional time to argue and for divided argument caused confusion, particularly given that such motions are often consolidated. The Court thus synchronized the deadlines, shortening them from 15 to 7 days because the longer period seemed excessive given the required electronic filing of merits-stage briefing. Finally, the Court tied the deadline to the conference schedule to remind counsel that a motion for divided argument needs to be considered by the Justices prior to oral argument. Rule 28.4 continues to warn that divided argument “is not favored” by the Court.

The reasons why “divided argument is not favored” by the Court, and is not good advocacy in any event, have been eloquently stated by Justice Jackson:

If my experience at the bar and on the bench unite in dictating one imperative, it is: Never divide between two or more counsel the argument on behalf of a single interest. Sometimes conflicting interests are joined on one side and division is compelled, but otherwise it should not be risked.

When two lawyers undertake to share a single presentation, their two arguments at best will be somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing. * * * If I had my way, the Court rules would permit only one counsel to argue for a single interest. But while my colleagues think such a rule would be too drastic, I think they all agree that an argument almost invariably is less helpful to us for being parceled out to several counsel.²²

Because of questioning, the first speaker almost invariably tends to run on into the time allotted to the second, to the chagrin of both. And it is embarrassing to the speaker and unsatisfying to the Court to have questions referred to the following speaker because they relate to his part of the argument. “Judges of reviewing courts,” according to Chief Justice Schaefer of Illinois, “have a highly developed perverse instinct for putting the questions” to the lawyer prepared to argue the other parts of the case.²³

Having more than one lawyer argue on a side is justifiable, as Justice Jackson admitted, when they represent different parties with different interests or positions. E.g., *Rapanos v. United States*, 126 S. Ct. 617 (2005) (permitting divided argument where petitioners had factually distinct positions concerning application of Clean Water Act); *Clinton v. City of New York*, 523 U.S. 1058 (1998) (permitting divided argument where appellees had distinct positions on their standing to challenge line item veto). The insistence of different parties with the same interest on being represented by different lawyers, or even more obviously, the desire of more than one lawyer to participate in the argument, is not a sufficient reason. E.g., *Illinois v. Abbott & Assocs.*, 459

²²Justice Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 802 (1951).

²³Chief Justice Schaefer, *Appellate Advocacy*, 23 TENN. L. REV. 471, 473 (1954).

U.S. 1012, 1031 (1982). Nor will permission be granted to enable one lawyer to open the argument and another to close. Whether time will be available for rebuttal and how much will not be known until the opening argument is concluded.

Notwithstanding the language in Rule 28.4, the Court in recent years has permitted some arguments to be divided. For example, in the 2005 Term, the Court allowed divided argument for parties other than the Solicitor General on five occasions, see, e.g., *DaimlerChrysler v. Cuno*, 2006 U.S. LEXIS 1096 (Feb. 17, 2006), and the first argument of the 2006 Term featured a divided argument, see *Lopez v. Gonzalez*, 2006 U.S. LEXIS 5387 (Sept. 1, 2006). Often, but not always, argument is divided along with the Court granting over 30 minutes per side for the argument.²⁴ The Court frequently grants motions of the Solicitor General for divided argument, even when it denies similar motions by opposing parties in the same case.²⁵ Whether the lawyers agree to the division is also a relevant factor, though by no means decisive. In cases of special importance and complexity involving a number of parties with different interests who desire to present different arguments and issues, the Court has, on rare occasions, allowed several lawyers to argue on each side. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court permitted a group of seven attorneys, which included two former Solicitors General, to argue for four hours. In *Ohio v. Wyandotte Chemicals Corp.*, 400 U.S. 963 (1970), an original action, the Court granted a motion to permit three attorneys to participate in an argument of 50 minutes on behalf of defendants. Sixteen lawyers were allowed to argue a total of eight hours in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); and six lawyers, including one counsel for amici, were allowed to argue three hours in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). But, in the ordinary case allotted a total of one hour for argument, the Court usually denies divided argument even if the parties on one side of the case have divergent interests or perspectives. See, e.g., *Michigan Citizens v. Thornburgh*, 493 U.S. 888 (1989) (refusing to permit separate argument from the Solicitor General and a newspaper that had received government approval to enter into a joint operating agreement under the Newspaper

²⁴E.g., *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 827 (2005) (granting 60 minutes of argument; one petitioner had 40 minutes, the other had 20); *NASA v. FLRA*, 527 U.S. 229 (1999); *AT&T v. Iowa Utils. Bd.*, 523 U.S. 1135 (1998). In two cases in which the United States changed its position after certiorari had been granted, the Court appointed private counsel to argue as amicus curiae in support of the judgments below, giving him 30 minutes, and the United States and each of the two petitioners 15 minutes. *Goldsboro Christian Schs. v. United States* and *Bob Jones Univ. v. United States*, 456 U.S. 922 (1982), 459 U.S. 812 (1983).

²⁵In the 2005 Term, the Solicitor General's motions for leave to participate in oral argument as amicus curiae and for divided argument were granted more than 30 times. Other instances include *Environmental Defense v. Duke Energy Corp.*, 2006 U.S. LEXIS 5675 (Oct. 2, 2006); *Kimel v. Florida Board of Regents*, 527 U.S. 1067 (1999); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *Motor Vehicle Manufacturers Ass'n v. State Farm Insurance Co.*, 459 U.S. 1197 (1983). In *Environmental Defense v. Duke*, the Court granted the Solicitor General's motion for divided argument even as it denied Alabama's motion to participate as amicus and divide argument. As Chief Justice Burger has explained: "There is great reluctance on the part of the Justices to grant motions for divided argument, unless the time is divided with the Office of the Solicitor General of the United States whose presentations are consistently superior." *Conference On Supreme Court Advocacy, Opening Remarks*, 33 CATH. U. L. REV. 525, 526-27 (1984). The Court ordinarily requires that time for the Solicitor General's argument as amicus curiae be taken from the time otherwise allotted to the party that the Solicitor General supports. See *City of Chicago v. Environmental Def. Fund*, 510 U.S. 961 (1993).

Preservation Act); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 521 U.S. 1150 (1997) (refusing to allow separate argument from co-defendants making overlapping but divergent points in their briefs).

The Court seldom grants motions of nonparties to participate in oral argument as amici. See, e.g., *United States v. Caldwell*, 404 U.S. 815 (1971), where the New York Times and the Washington Post were denied leave to argue as amici curiae in a case involving the constitutional rights of a New York Times reporter. One difficulty is that the Court seldom is willing to permit more than 30 minutes of argument per side and allowing an outsider less than 10 minutes is disfavored by the Court and not likely to be valuable. However, the Court often invites or permits the Solicitor General to participate. See, e.g., *Whorton v. Bockting*, 2006 U.S. LEXIS 5673 (Oct. 2, 2006) (granting Solicitor General leave to participate as amicus and dividing argument); *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 2006 U.S. LEXIS 5390 (Sept. 1, 2006). The Court also has permitted representatives of an interested state to argue as amici. For example, the Attorney General of California was granted 15 minutes to appear as amicus on the side of appellant, with equal extra time granted to appellees, in *City of Burbank v. Lockheed*, 409 U.S. 1073 (1972). As to argument by amici curiae, see Sec. 14.7, *infra*. See also *Holmes v. South Carolina*, 2006 U.S. LEXIS 1095 (Feb. 17, 2006) (granting motion of Kansas to participate in oral argument as amicus); *Goodman v. Georgia*, 126 S. Ct. 476 (2005) (granting motion of Tennessee to participate in oral argument as amicus); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). A notable exception to the general rule against permitting nonparties to participate is *Intel Corp. v. Advanced Micro Devices, Inc.*, 541 U.S. 901 (2004), where the Court granted the motion of the Commission of European Communities to participate, marking the first time the Court had allowed a foreign governmental body to argue as amicus.

Normally, the Court will not designate who should argue when the parties in a case cannot agree. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 449 U.S. 1059 (1980), 449 U.S. 1121 (1981). But see *United States v. Bestfoods*, 523 U.S. 1002 (1998); *Director, Office of Workmen's Comp. Programs v. Greenwich Collieries*, 511 U.S. 1028 (1994) (both designating one party to argue for respondents). The Clerk's Office advises counsel that if they cannot agree on who should argue, the matter should be resolved by drawing lots; that generally seems to produce agreement. In *Glickman v. Wileman Bros.*, 521 U.S. 457 (1999), however, the Clerk flipped a coin to resolve a dispute over who would argue for the respondents. See Sec. 14.13, *infra*.²⁶

Where counsel for different parties on the same side in different cases that have been consolidated cannot agree as to how to divide the allotted time, the Clerk makes every effort to induce the parties to agree. If that fails, the Court has settled the matter by order. *Federal Election Comm'n v. Democratic*

²⁶In *Illinois v. Abbott & Assocs.*, 460 U.S. 557 (1983), all but two of over 80 respondents had agreed upon the lawyer who should argue on their behalf, but the other two respondents and their lawyer refused to agree. When the Court denied their motion for divided argument, 459 U.S. 1012 (1982), and the Clerk advised them that the Court would not make the selection, the lawyers drew lots. The result was that the lawyer for the two respondents argued the case, and won it.

Senatorial Campaign Comm., 451 U.S. 980 (1981); *Connolly v. PBGC*, 474 U.S. 810, 811 (1985). In each of those cases, the Court had consolidated for argument two cases with separate counsel; in each it allotted 20 minutes to the lawyers in one case and 10 minutes to those in the other.

An application for permission to have more than one counsel argue on a side should be presented by motion in accordance with Rule 21, which requires the submission of an original plus 10 copies, or 11 copies in all. Rule 28.4. See Sec. 16.2, *infra*. The application should be submitted through the Clerk's Office no more than 7 days after the respondent's or appellee's brief on the merits is filed and in time to be considered at a scheduled conference. Rule 28.4. It must "set out specifically and concisely why more than one attorney should be allowed to argue."

When more than one counsel will appear on the same side, the counsel that argues first normally will make the rebuttal argument. Questions concerning this subject should be directed to the Clerk.

14.6 Time and Order of Arguments in Consolidated and Companion Cases

A single lawsuit in which several petitions or appeals have been filed is usually treated as one case for purposes of argument, and the parties on each side are given one-half hour to be used jointly; special permission must be secured pursuant to Rule 28.4 if more than one counsel wish to argue for the several parties on a given side. When different cases presenting substantially the same issue come before the Court at the same time, the Court may grant review in one case and simply hold the petition or jurisdictional statement in the other case for summary disposition in light of the decision ultimately rendered in the first case. But sometimes the Court will grant review simultaneously in both cases. In that event, the Court is likely on its own motion to consolidate the cases for purposes of argument, pursuant to Rule 27.3, and to allot a total of one hour for oral argument. E.g., *Texaco v. Dagher Inc.*, 125 S. Ct. 2957 (2005). The Court also may, pursuant to Rule 27.3, consolidate cases on motion "of a party."²⁷

Such an order does not require that the briefs be consolidated, although where cross-petitions or cross-appeals have been granted or noted or where

²⁷Such a request for consolidation may be made in the petitions or jurisdictional statements themselves; or a motion for consolidation may be made after the Court has granted review of the two cases without having consolidated them on its own motion.

Where certiorari cases are consolidated on the Court's motion, the full order reads: "Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument." See consolidation of *Williams v. Overton* with *Jones v. Bock*, 2006 U.S. LEXIS 2030, 2031 (Mar. 6, 2006). Where appeal cases are consolidated, the full order reads: "Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument." See consolidation of *Branch v. Smith* with *Smith v. Branch*, 536 U.S. 903 (2002), and consolidation of *Hudson v. Palmer* with *Palmer v. Hudson* in 463 U.S. 1206 (1983).

The Court, of course, may grant more than a total of one hour for oral argument in such consolidated cases. See *Exxon Mobil Corp. v. Allapattah Servs.*, 543 U.S. 924 (2004) (consolidating and allotting 90 minutes); *Clinton v. Glavin*, 525 U.S. 924 (1998) (same); *Barclays Bank, PLC v. Franchise Tax Bd.*, 510 U.S. 942 (1993) (same).

one party (such as the United States) appears in both of the consolidated cases, a consolidated brief is usually preferable. Parties who are strangers to each other and who find themselves aligned through consolidation of their respective cases may want to join forces in a consolidated brief, but are not compelled to do so. But insofar as the oral argument is concerned in consolidated cases, counsel in both cases must follow the dictate of Rule 28.4 that only one counsel will normally be heard for each side as so consolidated. See Sec. 14.5, *supra*. Where there are several parties on the same side, as frequently occurs in consolidated cases, special permission must be sought in order to have counsel for each party on the same side present a divided argument. The motion should indicate how counsel wish to divide the time. The motion, which need not be lengthy, should be addressed to the Court, with 10 copies attached. If possible, the motion should be jointly made by counsel for the several parties or should show the consent of the second party's counsel to the other counsel's request for divided argument. See Sec. 14.5, *supra*.

Once special permission for a divided argument has been granted, the respective counsel should first endeavor to agree among themselves as to the precise order in which they wish to present their arguments and as to the division of the 30-minute argument time between them. The Clerk is always available to discuss with counsel any problems in this connection, and he will advise if any written motion or stipulation is necessary. In any event, the Clerk should be promptly advised of any agreement as to the order and time of the divided argument.

Where several counsel appear on a side, they should also attempt to divide the points argued so as to avoid repetition of the same arguments. The Court took occasion to state in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 766 n.32 (1968), a complex Federal Power Commission litigation in which 16 lawyers had been permitted to argue for a total of eight hours, that "it is proper to remark that the effectiveness and clarity with which issues are presented in cases of this complexity might be significantly increased if even greater efforts were made to focus and consolidate argumentation on behalf of parties with essentially similar views." That remark seems no less pertinent for consolidated cases of relative simplicity. Argumentation is not made more effective by two counsel repeating the same contentions.

A quite different situation is presented when the Court grants review of two similar cases coming before it at the same time and simultaneously sets the cases down for argument together, one immediately after the other or "in tandem." Such cases are kept quite separate for briefing and oral argument purposes. Each case is allowed a total of one hour for oral argument, or 30 minutes for each side, unless additional time has been granted. There is no consolidation of the oral arguments in the cases—although counsel on the same side should attempt to coordinate their arguments in advance to avoid repetition and thus save time for both. The Clerk generally determines which case will be argued first, as a part of the function of establishing the argument calendar. Counsel who has strong feelings about which case should be argued first should communicate to the Clerk before the arguments have been formally scheduled. Otherwise the Clerk will be guided by his own view as to which case more logically comes first or second.

14.7 Argument by Amici Curiae

Rule 28.7 states:

By leave of the Court, and subject to paragraph 4 of this Rule, counsel for an *amicus curiae* whose brief has been filed as provided in Rule 37 may argue orally on the side of a party, with the consent of that party. In the absence of consent, counsel for an *amicus curiae* may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available. Such a motion will be granted only in the most extraordinary circumstances.

The 1980 rule substituted for the prior admonition that such motions for leave to argue “are not favored” the much stronger warning that they will be “granted only in the most extraordinary circumstances.” Also omitted was the express exception for “motions made on behalf of the United States or of a State, Territory, Commonwealth, or Possession.” The result has been that since 1980 efforts of private amici to participate in arguments have seldom been successful. On the other hand, the Court is more liberal to the Solicitor General and representatives of states, apparently to the same extent as before.²⁸

The Court’s strictness as to allowing amici to argue reflects its general policy against allowing more than one advocate per side. In general it believes that the position of an *amicus* can adequately be set forth in writing.

A private *amicus curiae* usually cannot take part in the argument unless it is granted part of the time of the party whom it supports. But with only 30 minutes now available per side per argument, counsel for the parties before the Court are seldom willing to yield a part of their own time. Moreover, leave of Court must be obtained whether or not the party supported consents to sharing time with the *amicus*. Sometimes, but rarely, the Court grants leave. E.g., *Barefoot v. Estelle*, 460 U.S. 1067, 463 U.S. 880 (1983) (divided argument permitted to enable NAACP counsel to make part of the argument for petitioners; no additional time requested); *Renne v. Geary*, 499 U.S. 946 (1991) (Democratic Party permitted to participate in divided oral argument); *Gilbert v. Homer*, 520 U.S. 1113 (1997) (dividing argument to enable *amicus* National Treasury Employee Union to participate); *Alabama v. Shelton*, 534 U.S. 1110 (2002) (dividing argument to permit National Association of Criminal Defense Lawyers to participate in oral argument).

²⁸Even the Solicitor General is sometimes denied leave to participate in oral argument as *amicus curiae*. See *Martin v. Franklin Capital Corp.*, 126 S. Ct. 30 (2005) (denying Solicitor General’s motion in case interpreting attorneys’ fees provision of the federal removal statute); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 543 U.S. 1135 (2005) (retroactivity of Class Action Fairness Act); *del Rosario Ortega v. Star-Kist Foods, Inc.*, 543 U.S. 1135 (2005) (diversity jurisdiction issue); *Ford Motor Co. v. McCauley*, 537 U.S. 1 (2002) (writ of certiorari dismissed as improvidently granted, but not before the Solicitor General was denied leave to participate in oral argument as *amicus*); *Stenberg v. Cathart*, 529 U.S. 1051 (2000) (denying Solicitor General’s motion in case involving constitutionality of state statute regulating partial-birth abortions). Chief Justice Roberts has noted that the Solicitor General is granted leave to participate in approximately 80% of the cases the Court hears. Roberts, *Oral Advocacy*, 30 J. SUP. CT. at 79.

Representatives of the states are denied leave to participate as amici with more frequency. See *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 544 (2005) (denying Florida’s motion); *Bates v. Dow Agrosciences LLC*, 543 U.S. 1041 (2004) (denying Texas’ motion); *Lawrence v. Texas*, 538 U.S. 918 (2003) (denying Alabama’s motion); *Syngenta Crop Prot. v. Henson*, 537 U.S. 28 (2002) (denying Texas’ motion).

A motion to argue as amicus is a motion to the Court under Rule 21. The procedure is the same as for motions to divide the time to argue, discussed in the preceding section. The movant should endeavor to satisfy the heavy burden of convincing the Court why the amicus argument will provide “assistance to the Court not otherwise available” (Rule 28.7)—that it will present significant material or ideas not covered by the parties. Rule 28.7 is, of course, inapplicable to counsel who have been invited by the Court to argue as an amicus. See Secs. 13.14 and 14.2, *supra*.

14.8 When Counsel Must Be Present

The names of counsel who will argue should be given to the Clerk as soon as determined. Only one counsel will be arguing on each side in most cases. See Sec. 14.5, *supra*. The Clerk will request that information, if not already furnished, well in advance of the scheduled argument so that a printed list of all counsel arguing in cases scheduled during the given two-week period can be prepared.

The Clerk will advise counsel when a case is scheduled to be heard and when counsel must be in Washington. The Clerk customarily wants counsel whose cases are scheduled to be heard on a particular day to be in the Lawyers’ Lounge between 9:00 and 9:15 a.m. If counsel is not arguing until the afternoon session, there is no need to be present for the morning session (although observing the Court in the morning session is encouraged). Counsel arguing an afternoon case must report to the Lawyers’ Lounge between 12:00 and 12:15 p.m. The Clerk provides an orientation, answers questions, gives assistance, and issues passes. “If one is not familiar with the Court and its ways, it may be helpful to arrive a day or two early to observe its procedure, to see how the Court deals with counsel and how counsel gets on with the Court.”²⁹

14.9 Courtroom Etiquette

When certiorari is granted, the Clerk sends counsel of record a booklet, *Guide for Counsel*, which contains helpful information on Courtroom procedure and general advice on how to argue and respond to questions. This booklet is reproduced in Appendix III, *infra*. The importance of reading this Guide cannot be overstated. Counsel should avail themselves of this assistance, based on the Clerk’s observation of the Court’s practice in recent terms during which questioning from the bench has increased in intensity.

(a) Registration of Counsel and Seating in the Courtroom

When review is granted in a case, the Clerk’s Office informs counsel that the Clerk is responsible for seating arrangements at the counsel table in

²⁹Justice Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 861 (1951).

the Courtroom. The notice to counsel advises as follows: “When only one counsel will argue, there is space at the table for four (arguing counsel and three others). If divided argument has been granted and two counsel are to argue, there is room for two arguing counsel and two others.” All who sit at the table must be Supreme Court Bar members. Interested lawyers who are not members of the Supreme Court Bar must find a seat in the public section of the Courtroom.³⁰

The Clerk’s Office also forwards to counsel of record prior to the scheduled date of argument an Argument Form, which requires a designation of “arguing counsel,” as well as any other counsel who will be seated at counsel table. When the Court has permitted divided argument, the names of both arguing counsel are required.

Counsel who will argue, and co-counsel who will be seated with them at counsel tables, must report to the Lawyers’ Lounge between 9:00 and 9:15 a.m. on argument day. Counsel should enter the Court via the Maryland Avenue entrance. If there is a long line at the security station to enter the building, counsel should proceed to the front of the line and inform the guards that they are arguing before the Court that day. The Lawyers’ Lounge is located across from the Marshal’s Office on the first floor of the Court. At 9:15 a.m. the Clerk will brief counsel concerning procedures and protocol, answer questions, provide assistance, and issue identification cards. This normally takes about 15 minutes. If counsel wish to move the admission of an attorney, the Clerk should be notified at this time. Counsel may leave any coats and hats in the Lawyers’ Lounge. No personal computers, electronic equipment, or cellular phones are permitted in the Lawyers’ Lounge or Courtroom. Such items may be checked in a locker at the Court.

Counsel for the first two cases to be argued take their places at counsel tables around 9:30 a.m. If counsel for the United States are participating in an argument, they customarily sit at the table in front of the Bench on the right. This custom also applies to seating at the “backup tables,” which are tables located just to the rear of the front tables and are used by counsel who are to argue the case after the one being argued. Counsel must sit at the backup table during the preceding case. If the United States is not participating, counsel for petitioner or appellant sit on the left side and counsel for the respondent or appellee sit on the right. Argument of the first case begins at 10:00 a.m., or as soon as opinions have been announced and motions for admission have been concluded. Arguments almost always begin by 10:15 a.m. Upon hearing the Chief Justice announce that the Court will hear argument in your case, the Clerk’s Guide strongly recommends that arguing counsel “*immediately* proceed to the front counsel tables” and counsel for the petitioner should then proceed promptly to the lectern.

³⁰In order to sit in the section of the Court reserved for members of the Supreme Court Bar, an attorney must have been admitted to the Bar. Applicants for the Bar cannot sit in the reserved section, but rather must sit in the public section of the Courtroom. The time it takes to be admitted varies depending on workload of the Clerk’s Office. Admission may not be instantaneous, and counsel wishing to ensure that they can sit in reserved section are encouraged to become Bar members as soon as they are eligible. Otherwise, applicants should contact the Clerk’s Office to determine how quickly admission can be completed.

When the first case has been completed, counsel who argued leave the Courtroom. Counsel seated at the “backup tables” move forward to the front tables and argument in the second case begins almost immediately. If a third argument is scheduled for the day, counsel for the third case take their places at the “backup tables.” The second case normally ends at noon. After the lunch break, counsel for the third case take their seats at the front tables, and counsel for the fourth case are seated at the “backup tables.” On occasion, the third case will begin before the noon recess, and the Chief Justice will declare a break at noon for lunch. In this instance, counsel in the fourth case are expected to be at the backup table while the third case is being argued. In recent terms, the Court has infrequently scheduled arguments in the afternoon, a reflection of its declining caseload, although in the October 2006 Term, the Court scheduled a number of afternoon arguments in the spring months. When such afternoon arguments do occur, they begin at 1:00 p.m. In general, the Clerk’s Office asks that arguing counsel advise the officials in the Courtroom if they must leave the Courtroom for any reason while prior cases are being argued.

The Clerk’s notice to counsel further advises that all other seating arrangements in the Courtroom are controlled by the Marshal’s Office. Admitted members of the Supreme Court Bar may sit inside the brass railing. In cases of wide public interest, when the number of Bar members exceeds the seating capacity of the Bar section in the Courtroom, the overflow group of Bar members may listen to the audio version of the oral arguments in the Lawyers’ Lounge. There is no guarantee of any number of seats for guests. But generally the arguing attorney is granted six spaces in the public section for guests, or four spaces if the argument is divided. A letter concerning reservations, including the names of guests, should be sent to: Marshal, Supreme Court of the United States, Washington, D.C. 20543. Guests must check coats, hats, briefcases, cameras, electronic equipment, and any writing materials in the cloakroom on the Courtroom level before proceeding to the Marshal’s Office where they will be received and eventually escorted into the Courtroom.

(b) Addressing the Court

The practice is for the Chief Justice to recognize counsel by name before counsel begins to speak with the customary “Mr. Chief Justice and may it please the Court.” The Clerk’s Guide states that counsel is to “say nothing until the Chief Justice recognizes you by name.” Counsel should not introduce himself or herself or co-counsel to the Court.

Prior to the 1981 Term, the Court, in its orders and opinions, had referred to its members as “Mr. Chief Justice” or “Mr. Justice.” Lawyers arguing before the Court customarily adhered to that practice, with or without the name of the Justice addressed, or used “Your Honor” instead. In 1981, before Justice Sandra O’Connor’s appointment, the Court let it be known that it would no longer use the “Mr.” The proper course for counsel addressing individual Justices during argument today is “Justice” with or without the name. If “Justice” by itself would seem awkward, adding the name or substituting “Your Honor” should solve the problem. When in doubt about the name of a Justice,

the wise course is to say “Your Honor.” It is, however, inappropriate to use the term “Justice” in reference to the “Chief Justice” or to refer to the Chief Justice or any Associate Justice as “Judge.” In at least two instances in the 1990 Term, Chief Justice Rehnquist reminded counsel that he should be addressed as “Chief Justice,” not as “Justice” and certainly not as “Judge.” See Margolick, *At the Bar*, N.Y. TIMES, Apr. 26, 1991, at B9. Some of this difficulty in referring properly to Chief Justice Rehnquist probably stems from the fact that prior to his elevation to the Chief Justiceship in 1986 he served for 14 years as an Associate Justice. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 499 (1999), where the dissent referred to an opinion by “then-Justice REHNQUIST.”

(c) *Dress*

Formal dress is no longer required for counsel arguing before the Supreme Court. Counsel who possess a cutaway and striped trousers—morning clothes, although the Court sits partially in the afternoon—may wear them, and it is the tradition for male Department of Justice attorneys to do so.³¹ But such formality is not necessary. Conservative business attire is satisfactory, preferably in a dark color in keeping with the dignity of the Court. Women should wear dark two-piece suits. In selecting his or her attire, counsel should be aware that the Courtroom is generally air-conditioned. If vestless, gentlemen should keep their jackets buttoned.

(d) *Tapes and Transcripts*

All oral arguments are both taped and transcribed. Two tapes are made, one by the Court and the other by a private reporting firm under contract with the Court.³² Counsel is not permitted to bring in a different reporter or recording device.

The Court’s own tapes are kept by the Marshal for the duration of the Court term in which the oral arguments occur. While in the Marshal’s custody, these tapes are generally available only to the Justices and their law clerks. The tapes are then transmitted to the National Archives, where they can be heard and purchased.³³

In recent years, the Court has made tapes available on the day of the argument in high profile cases. The first oral argument tapes to be released

³¹After arguing a case in 1972 in a pearl gray vest, a member of the Solicitor General’s Office received a call a few days later from the Chief Justice, who “cautioned that only a charcoal gray vest qualified as proper attire.” Andrew Frey, *Tilting at Windmills*, 5 J. APP. PRAC. & PROCESS 117, 119 (2003). Solicitor General Lee was also advised by the Chief Justice that a button-down collar on his white shirt was not “traditional attire.”

³²The Court contracts with Alderson Reporting Co.

³³These tapes are available—dating back to 1955—a the National Archives, Motion Picture, Sound & Video Branch, 8601 Adelphi Road, Room 3340, College Park, MD 20740-6001 (phone 301-713-7060, fax 301-837-3620, or at <http://www.archives.gov/research/formats/film-sound-video.html>). This service is free if users provide their own equipment and tapes. The Archives will also make a copy of a tape and mail it for a fee. Ordering information is available on the National Archives Web site at <http://www.archives.gov/>. Hundreds of selected oral arguments are also available in audio format on the Internet on an innovative Web site created by the Oyez Project of Northwestern University at <http://www.oyez.org/>.

quickly were the *Bush v. Gore* arguments in 2000. Tapes from seven cases were released quickly in 2003 and early 2004, but in 2005, the Court declined to release tapes quickly in several high profile cases. Tony Mauro, *No Quick Release of Audiotapes This Term*, LEGAL TIMES, May 2, 2005, at 16. The Court does not plan to make audio recordings available to the public immediately following argument as a matter of routine.

Beginning with the October 2006 Term, however, the Court has made transcripts of oral argument available for free the same day of an argument before the Court. This is a considerable benefit to practitioners, both in terms of speed (transcripts used to take one to two weeks to prepare) and economy (they cost up to \$3.00 per page). The transcripts are posted on the Court's Web site quickly; on October 4, 2006, the second day the Court began this practice, an indexed transcript appeared on the Court's Web site less than four hours after the conclusion of oral argument. See http://www.supremecourtus.gov/oral_arguments/oral_arguments.html. Should any errors appear in the initial version of the transcripts and be reported to the Court, corrected versions will appear automatically on the Web site. The Court's Web site also contains an archive of oral argument transcripts dating back to 2000. Transcripts from arguments preceding 2000 are available in the Library.

(e) *Speaking Into Microphone*

Since all oral arguments are taped and are otherwise amplified for the benefit of the Justices, it is important that counsel at all times during an argument speak into the microphone on the lectern so as to be audible to the Justices and provide clear tape recordings. When turning to visual aids or exhibits, counsel should be careful to remain within range of the microphone. Counsel should not weave about or walk away from the microphone. Counsel should also avoid having notes or books touch the microphone, which might interfere with the recording process. The height of the lectern is adjustable with a crank attached to its right side. This should be adjusted before the oral argument begins.

(f) *Nervousness*

Perhaps the most important advice for lawyers who have not argued in the Court before—and indeed for many who have—is not to be or appear to be nervous, excited, or scared. Nor should they be afraid beforehand that they will be nervous when their turn at the lectern comes. Most novices who appear before the Supreme Court are nervous to a degree, as are many experienced lawyers who have been there before. Even substantial experience in other courts will not provide immunity.³⁴

³⁴The nervous attorney travels in a well-worn path that has resulted in some extreme situations; there are at least three known instances of practitioners fainting during oral argument, including a gentleman (General Thomas Ewing) who fainted 40 years after his father, a United States senator and two-time cabinet member, had a similar misfortune during oral argument. Roberts, *Oral Advocacy*, 30 J. SUP. CT. HISTORY at 73. Preparation, food, and sleep should stave off similar embarrassments.

However, if counsel is adequately prepared on the facts and the law, any nervousness quickly subsides, usually within a minute or two. The self-assurance that naturally flows from thorough preparation and analysis, a preparation and analysis that no single Justice can afford to give to a particular case prior to the oral argument, is the best antidote for nervousness. A helpful device for some is to begin one's argument outline or notes with the opening sentence or two in full text, in large letters. This will enable counsel to get started and help overcome the effects of any initial anxiety. The Court treats counsel courteously, even though the questioning may be intense and challenging. The argument is conducted as a polite, serious intellectual discussion.

(g) *Eating Lunch*

There is a cafeteria and snack bar on the ground floor of the Supreme Court Building in which lunch may be obtained. This makes it possible for counsel to eat during the hour recess from noon to 1:00 p.m. if afternoon arguments are scheduled. See Sec. 1.3, *supra*. Each arguing counsel and co-counsel in the case being argued and the next case will receive prompt service in the cafeteria.

14.10 Time Allowed for Argument

Under Rule 28.3, each side is allowed "one-half hour for argument," unless additional time has been granted by the Court prior to the argument. Thus the total argument time in most cases is one hour, divided equally between the two sides. See Sec. 14.1, *supra*.³⁵

The Court will generally allow more than one-half hour per side only on application of counsel.³⁶ Rule 28.3, pursuant to the Court's October 2007 rule changes, now states that any such request for additional time "shall be presented by motion under Rule 21 in time to be considered at a scheduled conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed." The early timing of

³⁵Justice Frankfurter once said that "the best arguments we get are in cases * * * in which only a half an hour is allowed to counsel. If you have only a half an hour, you can't afford to waste most of it in spreading yourself. A number of lawyers think it is a constitutional duty to use an hour when they have got it." *Proceedings in Honor of Mr. Justice Frankfurter and Distinguished Alumni*, Harvard Law School Occasional Pamphlet No. 3, 18 (1960). Chief Justice Rehnquist summarized the Court's current practice as follows: "In the fifteen years I have been on the Court the presentation of each side of the case has been limited to one half hour except in cases of extraordinary public importance and difficulty. Three hours were allowed in *United States v. Nixon* in 1974, for example, and two hours for *Bowsher v. Synar* in 1986. * * * The Supreme Court of the United States does not generally review evidentiary matters, and so the only questions before us in a given case are pure questions of law. Even these are sometimes limited to one or two in number by the order granting certiorari. A good lawyer should be able to make his necessary points in such a case in one half hour." JUSTICE CHIEF REHNQUIST, *THE SUPREME COURT* at 241-42.

³⁶But just before oral argument addressing the lawfulness of the Communications Decency Act began in *ACLU v. Reno*, 521 U.S. 844 (1997), Chief Justice Rehnquist announced that each lawyer would be given 35 minutes instead of the usual 30 minutes. This came as a surprise to the lawyers, who had not requested extra time. Apparently, the Court had even more questions than usual and wanted to ensure that the lawyers had enough time to answer them.

the request is necessary so that the Clerk can fit the time allotted a particular case into the argument schedule, which is usually drawn up several weeks or more before the commencement of the argument period. Similar to the reasons for the change in Rule 28.4, see *supra* Sec. 14.5, the Court shortened the deadline for motions for additional time and required that such motions be submitted in time for consideration in conference prior to oral argument. To delay a request to the last minute, after the argument schedule has been formulated and printed, is to invite a denial of the request.

The motion must, in the language of Rule 28.3, “set out specifically and concisely why the case cannot be presented within the half-hour limitation.” An original and 10 duplicates of the motion should be filed. Appropriate forms appear in Appendix IV.EE, *infra*. A joint motion may appropriately be filed by both parties. But if the Court grants additional time to one party, it will invariably grant the same amount of time to the opposition.

In situations where an amicus curiae or intervenor has been granted time to argue in addition to the time allotted the party supported, opposing counsel will automatically be given the same amount of additional time. But if the amicus curiae or intervenor takes a neutral position as between the opposing parties and does not directly support the position of either party, additional time will probably not be granted to either party.

Counsel arguing should keep track of the allotted time—the starting time and how much time is left. There is a large clock in front of counsel above and behind the Chief Justice. A note on the counsel table admonishes counsel not to ask the Chief Justice how much time remains. Arrangements for additional and earlier warning lights, other than those normally given, can be made with the Marshal or a representative, who acts as timekeeper and who sits at the desk at the right end of the Bench.³⁷

When counsel has only five minutes left, a white light on the lectern immediately in front goes on (unless different arrangements have been made with the Marshal prior to the commencement of oral argument). When time has expired, a red light goes on. Counsel should stop at that time unless answering a question posed by a Justice. In that event, counsel should answer the question, but then cease arguing. The Chief Justice is likely to stop counsel immediately, seldom allowing him or her to do more than finish the sentence.³⁸ The red light also marks time to recess for lunch at noon and the end of the day’s session. When counsel have agreed to a division of argument, the use of more than the agreed-upon time by one attorney due to questions from the Court does not extend the total time allotted.

Counsel should not feel obliged to consume all the time available. Many cases can be, and are, argued in considerably less. The Court appreciates a

³⁷Counsel should avoid staring at the clock. Chief Justice Rehnquist once interrupted an advocate’s response to a question by telling him, “You don’t have to look at the clock.” *Neder v. United States*, No. 97-1985, 1999 WL 118302 (1999).

³⁸It has been said that at one time Chief Justice Hughes “called time on a leader of the New York Bar in the middle of the word ‘if.’” E. McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 17 (1949). The current Chief Justice is equally vigorous in enforcing the allotted time limit.

short argument, when that is all that the case requires. When counsel has finished covering the important parts of the case, counsel should sit down.³⁹

14.11 Impact of Questions on Time Limitations

Counsel should not rely on the time limits allowed by the rules to prepare an argument that will consume the full time allowed. The Supreme Court, more than most courts, asks a great many questions during the course of an argument. See Sec. 14.19, *infra*. Indeed, there is a “prevalence of ‘hot’ benches these days” and questioning by the Justices has become increasingly intensive.⁴⁰

The significance of the amount of questioning to be anticipated lies in its effect upon the length of the argument to be prepared. In general, questioning is likely to consume at least two-thirds of counsel’s time. There are, of course, some cases in which few questions are asked of counsel. But in most cases counsel is questioned steadily almost from the start. In some instances, questions and answers occupy the entire time allotted.

The answers to the questions will often cover a good deal of the matter included in the argument prepared in advance. But whether they do or not, *the Court does not allow extra time because of the questioning*, except, unpredictably, in unusual situations that may induce the Chief Justice to be lenient. Unless special permission is granted, counsel may properly keep talking after the time has expired only in response to questioning, although for the petitioner, answering questions after time has expired will come at the expense of any time allotted for a rebuttal argument. Counsel should not hesitate, however, to answer questions fully even though the red light is on.

Experience suggests that, in most cases where only 30 minutes are allowed, counsel would do well not to plan an argument taking over 15 minutes and should be prepared to make affirmative points in much less time if there are many questions. It is often difficult to pare down an argument to that extent; counsel frequently thinks it impossible. But hard as it may be, it is better for counsel to make allowance in advance for what is very likely to happen than to prepare a masterly oration there will not be time to deliver. Techniques are available that allow for the possibility that the Court’s questioning may not consume as much time as was anticipated. This can be done by preparing a longer argument (still, of course, within the time limit) but

³⁹Chief Justice Burger commented on the virtue of brevity as follows: “[I]f you can cover your case in twelve minutes do so and sit down. I am always pleasantly surprised when this happens. * * * [T]he Court cannot help but conclude that the advocate must think he has a pretty strong case if he only argues twelve minutes and sits down.” *Conference On Supreme Court Advocacy, Opening Remarks*, 33 CATH. U. L. REV. 525, 527 (1984). Other members of the Court have echoed this sentiment. Roberts, *Thoughts*, SCHOOL LAW IN REVIEW at 7-4 (“If you can end just before the red light goes on, it contributes significantly to conveying the important impression of confidence: I could go on talking, but I’ve said enough to convince you, so I’ll just stop now.”); Justice Breyer, Remarks to Judicial Conference of the United States Court of Appeals for the First Circuit (Summer 2001) (describing the “value of silence”); Justice Robert Jackson, *Advocacy Before the Supreme Court*, 37 A.B.A. J. 801, 861 (1951) (“Time has been bestowed upon you, not imposed upon you. It will show confidence in yourself and in your case * * * if you finish before the signal stops you.”).

⁴⁰Roberts, *Thoughts*, SCHOOL LAW IN REVIEW at 7-1.

marking (in brackets or otherwise) the portions that can best be omitted, or by arranging the material so that such matter comes at the end and can readily be dropped when time expires.⁴¹

14.12 Opening and Closing by Appellant or Petitioner

Rules 28.2 and 28.5, relating to oral argument, state that appellant or petitioner shall be entitled to open and close, and that “[r]egardless of the number of counsel participating in oral argument, counsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal.” Rule 28.2 adds:

A cross-writ of certiorari or cross-appeal will be argued with the initial writ of certiorari or appeal as one case in the time allowed for that one case, and the Court will advise the parties who shall open and close.

At one time the rules gave the plaintiff below the right to open and close when there were cross-appeals or cross-writs of certiorari. In several important cases,⁴² where the plaintiff had won in the district court but in which both parties petitioned for certiorari before judgment in the court of appeals, this provision resulted in giving the winning party below the right to open and close. The present language of Rule 28.2, enabling the Court in such cases to decide which party shall open and close, was designed to avoid the inflexibility of the old rule and the occasionally unreasonable consequences.⁴³

Counsel having the right to present the opening argument may reserve unused time for a reply or rebuttal argument without asking leave.

14.13 Methods of Preparing for Argument

How to prepare for an argument depends on what the arguer will be called upon to do. Oral argument before the Supreme Court is usually a combination of a speech, a conversation, and an inquisition. The proportion of each will not be known until the argument is concluded. Counsel must therefore be prepared to give everything from an uninterrupted talk to a series of answers to questions, only some of which can be anticipated.⁴⁴

Rule 28, entitled *Oral Argument*, begins by stating in paragraph .1:

Oral argument should emphasize and clarify the written arguments in the briefs on the merits.

This is not very helpful. The next sentence, perhaps written in response to the suggestion in the fifth edition of this book (p. 757) that “it would be

⁴¹E. B. Prettyman, Jr., *Supreme Court Advocacy: Random Thoughts in a Day of Time Restrictions*, 4 LITIGATION 16, 20 (Winter 1978).

⁴²*Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. United Mine Workers*, 330 U.S. 258 (1947).

⁴³The Court will not ordinarily permit the cross-petitioner to precede the petitioner. *Bonjorno v. Kaiser Aluminum Corp.*, 493 U.S. 974 (1989) (“The motion of respondents/cross-petitioners * * * to open oral argument and to present a summary outline of issues for use in determining the order of oral argument is denied.”).

⁴⁴Failure to prepare is hard to hide. Chief Justice Rehnquist told an advocate that his responses “made us gravely wonder, you know, how well-prepared you were for this argument.” Oral Argument Tr.

helpful if counsel preparing an argument knew whether the Court would read the briefs in advance of the argument,” declares that:

Counsel should assume that all Justices have read the briefs before oral argument.

The third sentence admonishes that:

Oral argument read from a prepared text is not favored.

Any appellate advocate should know that reading a text is not an effective way of arguing; it draws a curtain between reader and listener, and lacks the spontaneity and flexibility essential to a persuasive presentation. The Court’s need to emphasize the undesirability of reading an argument reflects its annoyance with a practice that had become all too frequent.

The rules go no further in telling counsel how to argue. More detailed generalized instruction would have been inadvisable, since the technique that is most reasonable will often depend on the nature of the case and what best fits the abilities of the individual lawyer. Nevertheless, a description of the methods of argument preparation and techniques employed by a number of able appellate practitioners should be helpful.⁴⁵

It goes without saying that before preparing the argument the advocate must become fully familiar with the record, authorities, and briefs in the case, particularly with the opposing briefs. How long this preparation will take will depend upon the length of the briefs and records, and upon the advocate’s prior familiarity with the case—whether the advocate tried the case, wrote the brief, and did the research, and whether that occurred years, months, or weeks before.

“Familiarity with the record is probably the most important aspect of appellate advocacy.” Judge A. Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. REV.

Shalala v. Whitecotton, No. 94-372, 1995 WL 116213 (Mar. 13, 1995). One Supreme Court respondent sued its attorney for malpractice in state court, arguing that the attorney’s oral argument was deficient. See Krista M. Enns, Note, *Can a California Litigant Prevail in an Action for Legal Malpractice Based on an Attorney’s Oral Argument Before the United States Supreme Court?* 48 DUKE L.J. 111, 112 (1999). After the Court granted certiorari in *Glickman v. Wileman Bros. & Elliott Inc.*, 521 U.S. 457 (1999), a commercial speech case, counsel of record refused entreaties from 13 of the 16 respondents to permit a First Amendment expert and experienced Supreme Court advocate to do the briefing and argument. Supreme Court Clerk William Suter flipped a coin to resolve the dispute. The attorney who won the coin toss lost the case by a 5–4 vote. See T. Mauro, *Calling a Bad Day in Court Malpractice?*, LEGAL TIMES, July 20, 1998, at 7.

⁴⁵“There is no single ‘right’ way to prepare for oral argument. Indeed, experienced Supreme Court practitioners vary widely in their methods of preparations. Some engage in exhaustive preparation, including reading and re-reading the briefs, reviewing some or all of the record, writing (and re-writing) a ‘script’ of what they intend to say, outlining or diagramming points or arguments and possible responses, compiling lists of questions that might arise (and possible answers), discussing the case informally with colleagues, and holding one or more mock ‘moot courts.’ Others prepare much more lightly, principally by thinking through their arguments, reviewing the briefs and selected portions of the brief, and deciding what they wish to say.” K. Geller, J. Sullivan & A. Untereiner, *Appeals to the Supreme Court* in 3 BUSINESS AND COMMERCIAL LITIGATION IN THE FEDERAL COURTS §50.6(c)(1), at 1114 (1998). For most cases and most advocates, exhaustive preparation is the prudent course. See John G. Roberts, Jr., *Thoughts on Presenting an Effective Oral Argument*, SCHOOL LAW IN REVIEW (1997); S. Shapiro, *Oral Argument in the Supreme Court of the United States*, 33 CATH. U. L. REV. 529 (1984); R. Lee, *Oral Argument Before the Supreme Court*, 72 A.B.A. J. 60 (1986); C. Phillips, *Advocacy Before the United States Supreme Court*, 15 TH. M. COOLEY L. REV. 177 (1998); R. Seamon, *Preparing for Oral Argument in the United States Supreme Court*, 50 S.C. L. REV. 603 (1999). For a description of the successful argument preparation efforts of an attorney appearing before the Supreme Court for the first time, see C. Hogan, *May It Please the Court*, 27 LITIGATION 8 (Summer 2001).

325, 330 (1992). Thorough mastery of the record materials allows educated choices and judgments about which are the key points and how to order them. For this reason, Chief Justice Rehnquist questions the occasional practice of having someone argue who was not involved in the preparation of the briefs. “If the advocate takes a position different from that taken in the brief on any particular point, eyebrows will be raised and doubt cast upon both positions.” But “far worse” is the oral advocate “who seems actually unfamiliar with his client’s brief.” Speech to the ABA Tenth Annual Appellant Advocate Institute Luncheon 9 (May 17, 1996). “This sort of insouciance offends the Court and can do nothing but harm to the client’s cause.” *Id.* at 10. Chief Justice Rehnquist also has explained that “[t]he questions you get in oral argument are often ones not squarely covered in the brief * * * so an advocate who has not gone beneath the surface of the brief to understand how its parts fit together into a coherent argument will be at a considerable disadvantage.” Chief Justice Rehnquist, *From Webster to Word-Processing*, 1 J. APP. PRAC. & PROCESS 1, 5 (1999).

The points to be argued should be selected and the argument roughly outlined. Not many points can be covered in 30 minutes. Some points are hard to explain orally; details can often be better left to the brief. Oral argument does not get through unless it is simple and colloquial—unless it can be “caught on the fly.” Weak—or weaker—arguments should often be omitted, unless they are essential to success in the case. As to such matters, consultation with colleagues is often helpful.

This will usually lead to a more detailed outline of the argument. Lawyers differ as to how much detail they need, or will need, in the Courtroom. Some will outline in detail but use only broad topical headings when they speak. Others want detailed notes before them, others only a few words. Almost all lawyers have notes or catchwords before them when they argue. Having read that famed advocate John W. Davis used note cards when he argued, now-Judge Randolph tried to do the same at his first argument. “I realized what a terrible system it was: I put the cards down and they immediately slipped to the bottom of the lectern. I almost had to double myself over to even see the cards [and] they kept slipping down and got out of order.” Jeffrey Cole, “An Interview with Judge Randolph,” 25 *Litigation* 16, 18 (Winter 1999). Some advocates do, however, rely on note cards rather than pages of outline notes. Note cards can be particularly helpful when jotting down points to make during a short rebuttal argument. The size of the paper upon which notes appear does make a difference; a legal-sized pad will not fit on the lectern.

Many lawyers write out a draft of the argument, which they do not intend to read to the Court. Although many do not even have it before them when they argue, they find that the process of writing the argument in advance, and then reducing it to notes or catchwords, fixes the arrangement, substance, and phraseology in their heads, and that the notes or catchwords serve as adequate reminders during the argument. Those who write out an argument and have the text before them should be careful not to read it, and not to look down any more than if they were arguing merely from notes. Most counsel know this, but the Court’s experience indicates that some still read. Furthermore, an outline is easier than a prepared text to rearrange instantaneously during questioning from the Justices.

On the other hand, counsel should not attempt to memorize the argument or to speak without any notes. A few do it and can get away with it, but in general it is not worth the effort even for persons who have a good enough memory. And questioning or the opposing argument may throw the memorizer off stride. “Even good memories can play tricks, and in the pressure of an oral argument a significant point may be overlooked if notes are not available.”⁴⁶

Rehearsal of the argument aloud, whether to oneself or to a moot court, is essential, whether the text is written out or not. This is particularly important now that only 30 minutes are allowed for argument, including questions. Counsel must *know* in advance how much can be said in 20 minutes or less, leaving remaining time for questioning. The argument must be reduced, or the less essential matters left to the end or marked for omission if time runs short. Arguing counsel should prepare an argument with an accordion-like capacity to expand or contract to accommodate an unpredictable amount of questioning. If questioning is very intense, it may be necessary to boil the presentation down to three or four key points that can be simply explained in only a few minutes. Be ready, in other words, to “paint the big picture,” leaving smaller points to the briefs. Nothing is worse than hearing the Chief Justice state unexpectedly in the middle of a critical argument: “Counsel, your time has expired.” Rehearsal also gives counsel the feel for what points, sentences, phrases, or words may not come across orally, or need simplification. Listening to a recording of one’s rehearsed argument may be very helpful for this purpose.

A team approach to preparing for argument usually works best. Where appellate counsel did not try the case, input from the trial team is essential. Outside experts, including academics who are thoroughly familiar with the issues in the case, often make valuable contributions. Former Supreme Court clerks, too, may have useful insights. Asking colleagues to help anticipate questions will result in fresh perspectives that might never occur to the lawyers who briefed the case. Having colleagues develop an extensive list of questions and answers serves as an excellent preparation tool for oral argument. Questions should run the gamut from obvious to obscure, and model answers should not be longer than a few sentences.

Questioning by a moot court, or by other lawyers not purporting to sit as a court, is an invaluable part of the preparation process, since it may reveal difficulties with the argument or suggest the questions that the Justices may ask. As a practitioner, Chief Justice Roberts recommended that attorneys schedule three moot court sessions a week apart, with the last session occurring no more than a week before argument. The first moot court would serve as a sounding board for ideas and oral argument approaches, the second would permit arguing counsel to practice the give-and-take of questioning, and the third would be a full dress rehearsal.⁴⁷ Whether or not one follows Chief Justice Roberts’ moot court schedule, it is helpful to have some early sessions, where argument points can be fleshed out, and later sessions that are designed

⁴⁶H. Fitzgerald & D. Hartnett, *Effective Oral Argument*, 18 PRAC. LAW. 60 (Apr. 1972).

⁴⁷Roberts, *Thoughts*, SCHOOL LAW IN REVIEW at 7-2.

to prepare counsel for the time pressure and rapid-fire questioning of argument. No matter the number of moot courts, however, counsel should consider bringing in outside attorneys, academics, and experts to join attorneys who have been closely involved with the case as “judges” for the moot court.⁴⁸ Lawyers who know nothing about the case except what is in the briefs often spot issues that counsel immersed in the case have missed.

The several functions that can be served by rehearsing an argument are often not obtainable at the same time. At a minimum, counsel should recite the prepared argument, whether on the basis of notes, a text, or neither, and time it. This will enable counsel to tell how long the argument will take without questions, and thus to ascertain if anything must be eliminated. Such a recital will also reveal what passages will not sound good orally, either because they are too formal for oral presentation or too complicated. A rehearsal for these purposes does not require a panel of listeners who can ask questions. On the other hand, a moot court or panel to test counsel’s ability to answer questions that a Justice might ask should, to serve its purpose, ask as many reasonable questions as possible without regard for the time limits on the actual argument. No one, of course, can predict what a Justice will ask, and it will be helpful for counsel to attempt to answer any relevant questions, preferably with the questions and discussion recorded for further study. The panel should thus hear the argument separately from the timed recital.

If argument is scheduled for a Tuesday or Wednesday, observing the arguments on the previous day is sure to be instructive. In addition, counsel can listen to oral arguments from past terms without difficulty. Some 800 hours of oral arguments (500 cases and counting) are now available on the Internet at <http://www.oyez.org/>. The cases are digitized from copies of the official argument tapes held by the National Archives. The site’s coordinator, Jerry Goldman, a political science professor at Northwestern University, also has issued a compact disc, entitled “The Supreme Court’s Greatest Hits,” with more than 70 hours of entire oral arguments from 50 Supreme Court cases.⁴⁹ Selected oral arguments are also available at C-SPAN (<http://www.c-span.org/courts/oralarguments.asp>).

⁴⁸*Id.* (“You should select as your judges both lawyers who have worked on the case and some who have only read the briefs; experts in the area as well as non-experts.”). Counsel can often seek help with moot court panels from law firms, law schools, and non-profit organizations. For example, the Georgetown Supreme Court Institute, the Yale Law School Supreme Court Advocacy Clinic, the Stanford Supreme Court Litigation Clinic, the National Association of Attorneys General (for state attorneys general), the State and Local Legal Center (for state and local government counsel), the Public Citizen’s Supreme Court Assistance Project (for tort, civil rights, and employment litigators), and the U.S. Chamber of Commerce (for business-oriented litigators) all provide assistance with moot courts. Moreover, law firms specializing in Supreme Court practice can offer advice on oral argument and stage moot courts. For more, see Charles A. Rothfield, *Avoiding Missteps in the Supreme Court: A Guide to Resources for Counsel*, 7 J. APP. PRAC. & PROCESS 249, 252–54 (2005).

⁴⁹In the past, the Supreme Court frowned on efforts to publish oral argument excerpts in a package entitled “May It Please the Court.” The Court subsequently removed its longstanding restrictions on using tapes of its oral arguments. See T. Mauro, *CD Receives Court’s Tacit OK*, LEGAL TIMES, Aug. 23, 1999, at 12.

14.14 Content of Argument—In General

In preparing an oral argument for the Supreme Court, counsel must keep in mind the nature of the Court and its functions. Because of the time limitations, counsel must concentrate on what the Court will want to know, and on those factors that are most likely to persuade the Court. In the words of Justice Ginsburg, it is “a waste of precious time to recapitulate the briefing instead of uncovering what is in the decisionmakers’ minds.” Address to the Annual Dinner of the American Law Institute 59 (May 19, 1994).

Counsel must not waste valuable time on what the Justices know or are likely to know. This applies to both facts and law. The Justices are likely to know a great deal about principles of law with which they are frequently called upon to deal, but much less about factors or law relating to the particular case, even if they are described in briefs the Justices may have read. Although, as Rule 28.1 states, counsel should assume that the briefs have been read, they should recognize that the Justices are called upon to read a great many briefs, that some have been read long before the argument, and that details often may not be recalled without refreshment of memory by the arguer.

The suggestions in this chapter represent the substantially identical views of Justices of the Supreme Court and of other appellate courts and of practitioners with ample Supreme Court experience.⁵⁰

14.15 Beginning the Argument

The first few minutes of oral argument can shape the rest of the advocate’s time before the Justices. Commencing the argument often frames the dialogue that follows and may be the only time in which the advocate can speak for a short period of time without questioning.

How much time the advocate has before the questions begin has changed over the years. John W. Davis once told advocates that they should state the nature of the case, its prior history, the facts, and the applicable rules of law.⁵¹ Justice Jackson advised a similar approach, leading off with a concise history of the case including the holding of the courts below and a recitation of the facts.⁵² Such a course of argument is unimaginable today when questions usually emerge within the first few minutes of an argument. Under Chief Justice Roberts, practitioners have begun to notice that they have a little more uninterrupted time at the beginning of an argument than they had under Chief Justice Rehnquist. Counsel may even have three to four minutes before a question is asked.⁵³

⁵⁰See the articles and books cited in note 1, *supra*. See also the Clerk’s *Guide for Counsel*, Appendix III, *infra*.

⁵¹John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 896–97 (1940).

⁵²Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803 (1951).

⁵³See Linda Greenhouse, *In the Roberts Court, More Room for Argument*, N.Y. TIMES, May 3, 2006, at A19. In the first four arguments of the 2006 Term, counsel delivered between four and seven sentences before a Justice asked a question.

In this dynamic environment, the key is flexibility, and flexibility is a product of sound preparation. Counsel must expect to be interrupted within minutes or even seconds, and should not be thrown off by questioning that is both early and frequent. However, counsel must also be prepared to speak for a few minutes at the outset, arriving at the podium with a well-considered opening statement in mind.

Some leading Supreme Court practitioners have offered their viewpoints on the best way to start an argument. Chief Justice Roberts has noted that he worked extremely hard on the first sentence, trying to encapsulate central points and key facts, because he understood “that the first sentence might well be the only complete one” he had during the argument.”⁵⁴ Judge Kenneth Starr, a former Solicitor General, believes it is best to begin with a “professional, non argumentative opening.” First, he recommends a clear, uncharged sentence that sets out the precise issue before the Court. Second, he advises giving an answer to the question, i.e., “the statute violates the First Amendment.” Third, he suggests that counsel offer a succinct explanation of the reason why that answer is correct.⁵⁵ Naturally, different practitioners will approach the commencement of the argument with variation, depending on the nature of the case. However, it is never wise to begin with a long statement of facts or the law. One should assume that the Justices have acquired familiarity with the case at the time certiorari was granted and by reading the briefs. “[A]ll the members of the Court read the briefs in advance, at least sufficiently to be familiar with what the case is about. So a lawyer need not spend a lot of time on the procedural history of the case or such things as that.”⁵⁶ The advocate who dwells too long on a recitation of the background not only begs for a question designed to move the argument along, but misses an opportunity; “[m]ost judges today are well prepared, will be bored by a recitation of the facts or holding below, and will move you to the heart of the case with questions if you tarry on background. Much better to get there on your own terms, right away.”⁵⁷

14.16 Presenting the Facts

There may have been a time when the Court afforded practitioners latitude to provide a detailed factual recitation. That time has passed, however, and the presentation of facts must be woven into the fabric of the oral argument and its legal development. This is not to say that facts are of reduced importance. Counsel’s treatment of the facts may be the most important part of the argument, depending on the nature of the issue before the Court.⁵⁸ As

⁵⁴Roberts, *Thoughts*, 30 J. SUP. CT. HISTORY at 71.

⁵⁵E-mail from Judge Kenneth Starr to Stephen M. Shapiro of February 7, 2006 (on file with authors).

⁵⁶Justice Stewart, *Reflections On The Supreme Court*, 8 LITIGATION 8 (Spring 1982).

⁵⁷Roberts, *Thoughts*, SCHOOL LAW IN REVIEW at 7-4. For examples of argument openings in recent cases, see DAVID C. FREDERICK, SUPREME COURT & APPELLATE ADVOCACY 160-78, 269-95 (2003).

⁵⁸“The purpose of a hearing is that the Court may learn what it does not know, and it knows least about the facts. It may sound paradoxical, but most contentions of law are won or lost on the facts. The facts often incline a judge to one side or the other. A large part of the time of conference is given to

Chief Justice Rehnquist has observed, the facts may be so compelling in a particular case as to require a reconsideration of legal doctrine.⁵⁹ Of course, if the issues to be decided are entirely or mainly legal—as they often are in the Supreme Court—counsel should focus only on the facts that provide the necessary background so that counsel will be able to devote most of the time to the argument on the law. In other words, the amount of scarce argument time devoted to the facts will depend on the importance of the facts to a correct decision. Arguing counsel must cover the dispositive issues before the Court, without becoming bogged down in factual discussion that contributes little or nothing to winning the case.

A clear statement of the critical facts, which will be easily understandable to a listener who, it should be assumed, knows nothing about them, is essential. Time will not permit reference to facts that are not pertinent or important to the issues before the Court. Minutiae of little or no consequence should be omitted. A statement of irrelevant facts (even if these facts are in the record) may have an emotional appeal, but will be recognized by the Court for what it usually is—an attempt to pull the wool over the Court's eyes. Going outside the record is even worse. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 n.5 (1986).

Facts must be stated fairly and candidly. Any exaggeration, or omission of significantly unfavorable matter, is likely to be detected by one of the Justices, and is almost certain to be pointed out by opposing counsel. This will only embarrass the speaker, and weaken the force of his or her argument. Therefore, unfavorable facts should be fairly stated, and accompanied by any further statement of fact or argument that will minimize their force. But a petitioner or appellant should not let the Court hear them for the first time from opposing counsel.⁶⁰ Justice Harlan has said: “There is rarely a case * * *

discussion of facts, to determine under what rule of law they fall.” Justice Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803 (1951).

⁵⁹“I think it can be fairly said that * * * a majority of us felt that the facts simply ‘reeked’ of probable cause, and that if there were previous decisions of our Court that would have prevented a finding of probable cause in this case, it was very likely those decisions were incorrect. That is exactly how the case [*Illinois v. Gates*, 462 U.S. 213 (1983)] was decided.” Chief Justice Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1027 (1984).

⁶⁰In an address before the District of Columbia Bar Association (reported in 9 D.C. B.A.J. 147, 161, and in 28 A.B.A. J. 251, 254 (Apr. 1942)), Justice Rutledge (then a member of the Court of Appeals for the District of Columbia Circuit) stated:

Be candid. That applies to both facts and law. Nothing, perhaps, so detracts from the force and persuasiveness of an argument as for the lawyer to claim more than he is reasonably entitled to claim. Do not “stretch” cases cited and relied upon too far, making them appear to cover something to your benefit they do not cover. Do not try to dodge or minimize unduly the facts which are against you. If one cannot win without doing this—and it is seldom he can by doing it—the case should not be appealed. It is equally bad to give evasive answers to questions at oral argument. Conversely, few things add strength to an argument as does candid and full admission, whether as to facts or law, of the factors which are clearly against one. When this is made, judges know that the lawyer is worthy of full confidence, and every sentence he utters or writes carries force from the very fact that he makes it.

In the same connection, Justice Wilkins of the Supreme Judicial Court of Massachusetts, in a lecture entitled *The Argument of an Appeal*, 33 CORNELL L.Q. 40, 45–46 (1947), has said:

Statements off the record are just as bad in the oral argument as in the brief. The inevitable denouement may or may not be close at hand, but its effect, whenever it occurs, will be equally baleful. Equally devastating is the suppression of a vital fact. In a certain case of the Sherlock Holmes

that does not have its weak points; and I do not know any way of meeting a weak point except to face up to it. * * * [A]ttempted evasion in an oral argument is a cardinal sin. * * * With a court, lack of candor in meeting a difficult issue * * * goes far to destroy the effectiveness of a lawyer's argument, even as to other points on which he should have the better of it. For if a lawyer loses the confidence of the court, he is apt to end up almost anywhere."⁶¹

Counsel should also advise the Court of any recent factual developments not in the record, such as facts bearing on potential mootness, that may conceivably affect the outcome of the case. Such late-breaking developments should be discussed early in the oral argument and their implications explored in a frank manner—even if it means that the case becomes moot or is otherwise lost. There can be no compromise with counsel's duty to be honest and candid with the Court, regardless of the legal consequences. See Sec. 14.17(d), *infra*.⁶²

This obligation to discuss critical nonrecord developments, which usually will consist of indisputable facts subject to judicial notice or "legislative" facts⁶³ (as to which see Sec. 13.11(l), *supra*), contrasts sharply with counsel's general duty to refrain from attempting to influence the Court's disposition of the case by submitting, referring to, or utilizing facts outside the record. These facts are usually not in the category of recent developments, but are simply matters not incorporated in the record certified from the court below. It is manifestly improper to bring such facts to the Court's attention, either by brief or oral argument, to induce the Court to make a favorable disposition of the case. See *Russell v. Southard*, 12 How. 139, 158–59 (1851); *Hopt v. Utah*, 114 U.S. 488 (1885); *Adickes v. Kress & Co.*, 398 U.S. 144, 157–58 n.16 (1970); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990) ("we may not rely on the city's affidavit, because it is evidence first introduced to this Court and 'is not in the record of the proceedings below'"). And if the Court does not immediately detect the impropriety during the argument, opposing counsel may raise an appropriate objection during the ensuing argument; if no argument

type, the defendant's counsel argued his full time without mentioning anything remotely connecting his client with the crime. The presentation differed from Poe's truncated *Murders in the Rue Morgue* only in not being admittedly fragmentary. The prosecuting attorney in a few moments then supplied the omissions which rendered the whole evidence as cogent as that which satisfied Robinson Crusoe that he was not alone on the desert island. A delay of one hour in the full exposure of the facts is hardly worth while. To entertain an expectation that such exposure may not occur is sheer chauvinism. There was a wise saying in the Field Service Regulations of the United States Army which went something like this: "Always attribute to the enemy the same intelligence as your own even though he may not possess it." This is equally applicable to an argument on appeal.

⁶¹Justice Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?* 41 CORNELL L.Q. 6, 9 (1955).

⁶²See also Rule 25.5, discussed in Sec. 13.15, *supra*, which permits a party to file a supplemental brief up to the time the case is called for hearing, or by leave of Court thereafter, in order to present late authorities, newly enacted legislation, or other intervening matters that occurred too late to be included in the brief in chief. Counsel may discuss important new developments both in a supplemental brief and in the oral argument.

⁶³Such facts should, when possible as it usually is, be called to the attention of opposing counsel and the Court before the argument, normally in the briefs or, if the briefs have been filed before the new material is discovered, in a supplemental brief permitted by Rule 25.5. During argument in *Secretary of the Interior v. California*, 464 U.S. 312 (1984), counsel was rebuked for first mentioning material of this sort in his rebuttal argument, which his opponent would ordinarily have no chance to refute. In that case, the opponent was allowed to sur-rebut orally on that point, and also to file a supplementary document thereafter. See J. Mann, *Courtly Manners*, AM. LAW 62–63 (Jan. 1984).

time remains and if the matter is considered critical, the opposing counsel may ask leave of Court to file a postargument memorandum or brief. Those remedies render unnecessary any move to strike the offending portion of the oral argument. See *Kugler v. Helfant*, 421 U.S. 906 (1975) (motion to strike oral argument denied, on a claim that the argument contained references to facts outside the record). But counsel can, if necessary or directed to do so by the Court, go outside the record to answer a question from the Court, and advise the Court that its question requires going beyond the record and disclose the source of that information.

It should go without saying that a lawyer arguing before the Supreme Court should be thoroughly familiar with the record in the case. Only such knowledge will permit the ready answering of questions from the Bench, or the correction of opposing counsel as to the contents of the record. Attention should be paid to the procedural history of the case; the Clerk's Guide recommends that counsel be prepared to answer questions, such as "Why didn't you make a motion for summary judgment?" Related, knowledge of the findings below is especially important. Finally, it is important for arguing counsel to know the client's business, particularly if the issues in the case revolve around technical, industry-specific information about which the Court may ask.

Time spent thumbing through pages to find something that well-prepared counsel should be able to spot immediately is both time wasted and extremely unpersuasive; nor is the Court favorably impressed if counsel who is arguing must call upon associates or assistants for aid when questions are asked. No matter how important or busy counsel may otherwise be, the knowledge of associates will be of little help during a Supreme Court argument. In this connection, and especially where the appendix and the briefs are long, many lawyers in preparing for the oral argument will mark critical portions of the appendix and briefs with tabs. This makes for ready reference during the argument. It is even better for counsel to include in or attach to argument notes excerpts from cases or the record that counsel may wish to quote either as part of the prepared argument or in answer to questions.

In *New York Central Railroad Co. v. Johnson*, 279 U.S. 310, 319 (1929), the Court took pains "to remind counsel that the attempted presentation of cases without adequate preparation, and with want of fairness and candor, discredits the bar and obstructs the administration of justice." Chief Justice Rehnquist warned that it is a mistake for "the Attorney General of a State, the senior partner in a law firm," or "the head of a department" to "designate himself to argue the case" without thorough preparation. An "outward air of confidence and experience in a number of cases" are not "substitutes for a thorough understanding of the particular case." The impression made by such an advocate "is, to say the least, a disquieting one." Chief Justice Rehnquist, *From Webster to Word-Processing*, 1 J. APP. PRAC. & PROCESS 1, 5 (1999).

14.17 Presenting the Argument on the Law

Making an argument orally is not the same as briefing it. Arguments must be condensed, sentences must be short and colloquial, and all but the most important citations must be shelved. One advantage is that, as Judge Randolph has pointed out, "[i]n oral argument you can use analogies and

metaphors much better than in writing.”⁶⁴ Despite these differences, a number of suggestions made previously for dealing with the argumentative section of the brief (Sec. 13.11, *supra*) are applicable to the oral argument too. They are so important in relation to the oral argument that a partial restatement of them, at this point, along with other suggestions, seems justified.

(a) *Emphasize Reasoning, Not Authority*

The argument should attempt to convince the Court as a matter of reason and principle. Since this is even more important in the oral argument than in the brief, it bears repeating here. Supreme Court Justices cast a skeptical eye on contentions that they are bound to reach a certain result because of prior decisions of other courts, or even of the Supreme Court itself, and for no other reason. They may ultimately base their decision on the prior authorities, but they are more likely to do so if they are persuaded that the decision is right as a matter of principle. If it is not so persuaded, the Court will generally find little difficulty in distinguishing—or even ignoring—the earlier authorities. In only a small proportion of cases is a prior decision of the Supreme Court so closely on point, and so impossible to distinguish, that the Court has to consider whether or not to follow the principle of *stare decisis*.

Since this is true even of its own prior decisions, it is obvious that the Court will be less impressed by anything but the reasoning of decisions of lower courts. There are exceptions, of course, when there has been a long or uniformly accepted line of lower court rulings on a point, or when the common law rule has been long established, or when the issue is one upon which the Court applies the law of a particular state.

It is not suggested that authorities not be brought to the Court’s attention during the oral argument. But, except when there is a recent Supreme Court case directly on point, counsel should emphasize the appeal to reason and principles, rather than try to overwhelm the Court with authority—unless, of course, there is nothing else. Citation and discussion of lower court precedents can, in most cases, be left to the briefs.

By reason and principles we do not mean merely arguments of policy or logic but every factor—apart from mere legal precedent—that will demonstrate that a decision in your favor will be reasonable, fair, and correct. When issues are factual, the most persuasive argument will be tied to the facts of record. When issues relate to the meaning of a statute, the language, purpose, and legislative history of the statute and the consequences of a particular construction, all of which help the Court to determine the intentions of the legislature, should be analyzed to the extent required by the nature of the questions and permitted by limitations of time. The literal language and structure of statutory enactments are particularly persuasive in establishing their meaning, and should receive appropriate emphasis during argument. Arguments that a particular solution of the controversy will be sound from the

⁶⁴Jeffrey Cole, *An Interview with Judge Randolph*, 25 LITIGATION 16, 24 (Winter 1999).

standpoint of the purpose of a statute or constitutional provision will inevitably be based on factual elements in or out of the record.⁶⁵

The oral argument should emphasize these matters for the additional reason that the Court may not be familiar with them. As has been noted, a basic tenet for counsel who must present an argument in a limited period of time is to spend it helping the Court to understand what it does not already know. The Court will be acquainted with many of its own prior decisions, particularly the recent ones, and with pertinent legal principles; it may, however, not be any more familiar with the language of a particular statutory provision, or with its purpose, than with the facts of a particular case. In framing arguments to the Supreme Court, it is important to remember that the Justices do not view themselves as legislators empowered to prescribe public policy on a free-wheeling basis. Whenever possible, it is essential to tie policy arguments to the literal language, history, and purpose of statutory and constitutional provisions.

(b) *Get to the Heart of the Case*

This maxim has been variously phrased; perhaps the most dramatic expression is “Always go for the jugular vein.” It has both negative and positive aspects. Do not spend time on either factual or legal matters that are not really important. If they are not decisive, a Justice is likely to ask, “What difference does that make?” To be forced to answer, “No difference,” is embarrassing enough even without the implied, and sometimes expressed, next question, “Then why are you wasting time on it?”

But even more important from the advocate’s point of view, counsel who does not get to the crucial point with the best arguments promptly may never get to them. Weaker points are more likely to provoke prolonged questioning, on which convincing answers are more difficult. They may also instill in the Court the notion that, if this is the best that can be said, the case is not too strong. It is more difficult to dislodge an unfavorable first impression than to induce a “correct” one originally.

Effective argument requires that counsel get as quickly as possible to the point upon which the case will turn, even if that is not one of the strong points. Frequently, less important points need be argued not at all or, at most, only briefly summarized. There are many cases in which a court convinced on the main point will pay little attention to other questions. Since there are also cases in which the Court goes off on subsidiary issues, it is obvious that no generalization is safe in this field. Counsel must exercise judgment with respect to the particular case. Perhaps the best practice is to mention the subsidiary point, with the expectation that questioning will show whether any Justice is concerned about it.

Sometimes counsel cannot be sure there will be time to argue all the points believed to be important. Justice Harlan, himself an experienced advocate

⁶⁵See Chief Justice Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1025–28 (1984). See also the statements of Justice Rutledge, quoted in Sec. 13.11, notes 24 and 26, *supra*.

prior to his elevation to the Bench, once stated that “it often happens that lawyers who attempt to cover *all* of the issues in the case find themselves left with the uncomfortable feeling that they have failed to deal with any of the issues adequately.”⁶⁶ Selectivity is as essential in this situation as with respect to subordinate questions. A lawyer faced with this difficult situation should try to concentrate on the best point (if that will win the case) or on the important points about which the Court knows least, leaving the remainder to less complete oral treatment and to the brief. See Sec. 14.11, *supra*.

(c) *The Handling of Cases*

In most arguments counsel will wish to discuss one or two cases, despite the admonition as to the need for emphasizing other matters. Except where state law governs, the Court is not likely to be sufficiently impressed with any but its own prior decisions to warrant more than a brief reference to lower court decisions. If five decisions in three federal courts of appeals, and five in five district courts, support a proposition, say so—but do not go into detail as to the facts of the cases or the holdings, or quote from them. In all events, long lists of citations as well as long quotations should be avoided. In the average argument “it does you no good, for example, to cite a case by the full citation, including the page reference and copious quotations. Of course, you want to place the case cited in point of time, and you can do that usually by naming a volume or the approximate year of the decision”⁶⁷—such as “this Court’s decision in the *Lucas* case in 505 U.S.” or “the 1990 decision of this Court in the *Rutan* case.” Counsel should refrain from referring to cases not cited in their briefs unless the cases were decided after submission of the briefs. As discussed in Sec. 13.15, *supra*, supplemental briefs may be submitted to cite such cases.

The amount of time devoted to prior Supreme Court precedent will, of course, depend upon their closeness to the case at bar, their date, and the availability of other good arguments in your favor. Helpful Supreme Court decisions should be mentioned, with sufficient definiteness as to holding or language to make the reference meaningful, but even as to such cases, a detailed discussion is seldom necessary.⁶⁸ Although the most recent cases obviously carry the most weight, they may require the least discussion, inasmuch as the Court will doubtless remember them. Counsel should be aware that the Court may read its own decisions or language more narrowly than the words of a particular passage may suggest. Having a page with abstracts of the pertinent cases attached to your notes may help to keep the cases straight.

⁶⁶Justice Harlan, 41 CORNELL L.Q. at 8.

⁶⁷Chief Justice Schaefer, *The Appellate Court*, 3 U. CHI. L.S. REC. 10, 12 (1954).

⁶⁸Justice Wilkins of the Supreme Judicial Court of Massachusetts (*The Argument of an Appeal*, 33 CORNELL L.Q. 40, 47 (1947)) has said in this connection:

Do not relate the facts of cited cases in painful detail. They are too many to be absorbed from oral presentation. It wastes time that can be utilized to better advantage. In the average case it is sufficient to announce that you rely on such and such case. The court, before deciding the case, will read them just as carefully as have counsel if they are even remotely material to the reasoning of the opinion.

In dealing with well-known legal principles, such as established doctrines of constitutional or administrative law, or rules of statutory construction, for which a wealth of authority could be cited, no specific citation is needed for the Court knows the cases better than counsel does. Although a detailed, well-documented argument on such matters may sound learned and impressive, it will be a waste of time. Just refer to the principle, and expand, if necessary, on its application to your case. If you are attempting to show that a recognized rule is inapplicable to a particular situation, a reference to a pertinent authority will be helpful.

In discussing cases, there are a few pitfalls that counsel should avoid. The Clerk's Guide reminds counsel not to distort the meaning of precedent because "[t]he author of the opinion is likely to be a member of the Court and to have a remarkable memory of exactly what the opinion says." Counsel should indicate whether an opinion being cited was a plurality opinion where there was no opinion for the Court. Counsel should not refer to an opinion as, for example, "Justice Scalia's opinion." Instead, the Clerk advises that counsel say, "The Court's opinion, written by Justice Scalia."

(d) *Discuss Candidly Relevant New Legal Developments*

Finally, as is true with respect to supervening factual developments (see Sec. 14.16, *supra*), counsel must discuss in the course of the argument any recent legal developments that might affect the outcome of the case. The obligation to inform the Court of such matters is present at all stages of Supreme Court litigation, by way both of briefs and oral arguments.⁶⁹ The Court expects counsel to advise it if the statute under review has just been amended or repealed, or if something else has happened that might moot the case. And if there has been some recent judicial decision or legislative enactment that bears directly on the point in issue, the Court should be so advised. Failure to bring such legal developments to the Court's attention is more than a breach of the attorney's obligation to the Court; it can also embarrass the Court and conceivably might mislead the Court into a faulty result. At the very least, the Court's tasks are made more difficult if counsel neglects to inform the Court of such relevant new matters. In one such instance, the Court found it "difficult to understand the failure of counsel fully to inform the Court" of recent amendments to a state statute under constitutional review. *Fusari v. Steinberg*, 419 U.S. 379, 387 n.12 (1975). And in a later case, where the Court learned at oral argument that one of the respondents had gone out of business, rendering the case moot, the Court found it necessary "to remind counsel that they have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation." *Board of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985).

⁶⁹Rule 25.5 is addressed directly to this obligation. It provides that "a party wishing to present late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief may file 40 copies of a supplemental brief, restricted to such new matter and otherwise presented in conformity with these Rules, up to the time the case is called for oral argument or by leave of the Court thereafter."

See Sec. 13.11(k), *supra*, as to the difference between disclosure of facts of this sort and the generally impermissible resort to facts outside the record.⁷⁰

14.18 Reading and Quoting

What has been said should be sufficient to demonstrate the futility in a Supreme Court argument of a long series of abstracts or summaries of cases and, even more, of long quotations from opinions. There is no longer time for this sort of argument. Apart from its lack of persuasive effect, such an argument is always difficult to follow and will not hold the attention of the Justices. In some arguments, it will, of course, be necessary to compare the facts of a prior Supreme Court decision with the case at bar, where the authority is close enough so that it may be regarded as controlling. And short passages may often be effectively quoted. But make the quotation the exception rather than the rule.

Rule 28.1 makes plain that “[o]ral argument read from a prepared text is not favored.” The Clerk’s *Guide for Counsel* is even more explicit: “Under *no circumstances* should you read your argument from a prepared script.” Such a practice is not only forbidden, it is foolhardy: nothing is better calculated to put the Justices to sleep, or at least to divert their attention to other matters. “Regardless of what is read, the very act of reading draws an iron curtain between counsel and the sympathetic attention of the Court.”⁷¹ Sometimes, of course, quotation is essential. The Court will usually want quoted rather than paraphrased the pertinent language of a statute, regulation, or contract, and the same will often be true of critical excerpts from other documents or even oral testimony where the precise words are important. Such quotations should, however, be kept as short as possible, and the Court referred to the page of the brief or record where the passage is found so that it may read along with you. Counsel must be ready for the question: “What is the statutory language you rely on, and where is it quoted in your brief or petition?”

14.19 Flexibility and Questioning

Counsel should, of course, prepare the oral argument before coming into Court. But this must be done with full awareness of the fact that the great advantage of the oral presentation over the written is its flexibility. All of the points will presumably have been covered in the brief, usually in much greater detail than will be possible orally. The oral argument should not be a mere recitation of the contents of the brief. It should be adapted, as it goes along, to whatever the Court does not seem to understand or appreciate. It goes without saying that the argument of the respondent or appellee, and of the

⁷⁰Justice Ginsburg has stressed the need to observe ethical bounds while zealously representing clients before the Court. *Supreme Court Discourse on the Good Behavior of Lawyers*, 44 DRAKE L. REV. 183 (1996). See also Judge R. Miner, *Professional Responsibility in Appellate Practice*, 19 PACE L. REV. 323 (1999).

⁷¹Justice Wilkins, *The Argument of an Appeal*, 33 CORNELL L.Q. 40, 47 (1947). See also CHIEF JUSTICE REHNQUIST, *THE SUPREME COURT* at 246 (persuasive advocacy “simply can’t be done while you are reading your presentation”).

petitioner or appellant in rebuttal, must also be adapted to meet what opposing counsel has said, and to the Court's reaction to it.

In the Supreme Court, flexibility is especially essential. Chief Justice Hughes in 1928 characterized the argument before the Supreme Court as an "oral discussion." Then-Professor Frankfurter stated in 1932 that "[t]he atmosphere of the Court is uncongenial to oratory and the restrictions imposed on counsel tend to deflate rhetoric. But true argument—the exploration of issues, particularly through sharp questioning from the bench—continues to be one of the liveliest traditions of the Court."⁷²

The Court has in no way departed from this lively tradition in recent years. As Justice Ginsburg stated, "Oral argument, at its best, is an exchange of ideas about the case, a dialogue or discussion between court and counsel. Questions should not be resented as intrusions into a well-planned lecture."⁷³ These questions will tend to issue from the Bench almost as soon as the words "Mr. Chief Justice" are spoken, and they follow hard upon the heels of each other. As Chief Justice Rehnquist observed with a good deal of understatement, "an advocate before our Court can expect to be interrupted with questions from the bench with some frequency."⁷⁴ These rapid fire questions sometimes reflect a dialogue taking place among the Justices. The difficulties posed for the advocate may be illustrated by the argument in *Sutton v. United Air Lines*, 527 U.S. 471 (1999), where within a brief period of time the Justices propounded four "questions" to United's attorney without giving him an opportunity to respond. In this environment, the advocate has little choice but to move quickly to the most important points and forgo the traditional "roadmap" opening.⁷⁵

⁷²F. Frankfurter & J. Landis, *The Business of the Supreme Court at October Term, 1931*, 46 HARV. L. REV. 226, 237 (1932).

⁷³Ginsburg, 50 S.C. L. REV. at 569. Judge Frank Easterbrook, a veteran of many Supreme Court arguments, concurs: "Argument is the court's time. The brief is counsel's monologue, argument the dialogue." How Appealing, *20 Questions for Circuit Judge Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit* (Aug. 2, 2004), available at http://howappealing.law.com/20q/2004_08_01_20q-appellateblog_archive.html. According to Judge Easterbrook "[g]ood appellate arguments are like conversations," in which the lawyer, steeped in the specific area of law that determines the case, gives the generalist judge the tools to resolve the matter. Paraphrasing John W. Davis, Judge Easterbrook recommends changing places mentally with the court and imagining what a generalist judge would find troubling about your position.

⁷⁴Speech to the ABA Tenth Annual Appellate Advocate Institute Luncheon 10–11 (May 17, 1996). See also D. Savage, *Say the Right Thing*, 83 A.B.A. J. 54 (Sept. 1997) (the Supreme Court today "includes an extraordinary number of astute and aggressive questioners"). Studies of questioning are rare, but a recent look at questioning practices from the 2002 Term shows that Justice Ginsburg asked the most questions and Justice Thomas asked the fewest. Sarah Levien Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271, 278 (2004). The article described a correlation between a smaller number of questions asked by the Justices and ultimate victory in the case. *Id.* See also Tony Mauro, *Speaking Wisely At The Supreme Court*, LEGAL TIMES, Sept. 13, 2004. A subsequent study based on the 2006 Term similarly showed that Justices asked more questions of the side they opposed. In 23 of the 25 decisions with a 5–4 outcome, Chief Justice Roberts, for example, asked more questions of the side he opposed (a mean of 14.3) than the side he favored (a mean of 3.6). Tony Mauro, *Roberts' Questions Indicate Outcome*, NAT'L L. J., July 11, 2007.

⁷⁵That this is nothing new appears from ex-Attorney General Garland's statement in 1898 that "[v]ery often I have seen lawyers high up in their profession, but not used to the ways and manners of this court in this respect, frightened, so to speak, out of their wits into forgetfulness of the entire case, when suddenly pulled up by the court to know this or that before they had time to tell anything of it, and when they were getting ready to tell it * * *." A.H. GARLAND, *EXPERIENCE IN THE U.S. SUPREME COURT* 46 (1898).

Questions enable counsel to know the point upon which a Justice wishes further information, or the issue of law upon which a Justice must be satisfied. Questioning gives counsel a clue as to which aspects of the argument need further elaboration, and which can be bypassed or cut down. Since the task of counsel is to persuade the Justices rather than to make a speech, the questions are to be welcomed, and not regarded merely as interruptions to the argument or as “subversive intrusions.”⁷⁶ Chief Justice Roberts has remarked (quoting John W. Davis) that advocates should “‘rejoice’ when the judges ask questions because it (1) shows that you have not yet put the panel to sleep, and (2) allows you to focus on precisely what at least one judge is interested in.”⁷⁷

It is considerably more difficult to maintain the planned order of an argument before the nine-member Supreme Court than before a three-member court of appeals panel. Given the almost inevitable barrage of questions from the bench, “much of the actual performance must of necessity be all but spontaneous.”⁷⁸ It is much more important to answer questions fully and accurately as to matters with respect to which the Court is in doubt than to complete the prepared argument on points that may not bother the Justices at all. Most lawyers recognize this in the abstract, but have great difficulty appreciating it in the course of argument when the questioning prevents them from reaching what they conceive to be essential matters. Counsel must be prepared to curtail the argument by summarization of various points and elimination of subordinate matter if the questioning is prolonged. The Court will almost certainly examine the briefs on any points not argued if it regards them as significant.

Only careful preparation will enable the required spontaneity and flexibility. According to Chief Justice Rehnquist, the “greatest deficiency” in Supreme Court oral advocacy is failure to be sufficiently prepared to answer the Justices’ questions, including “hypothetical questions posing slightly different factual situations from yours.”⁷⁹ In preparing for oral argument, it is helpful to envision the process as an early stage of the conference in which the case will be decided. As Justice White has explained, “[i]t is then that all of the Justices

⁷⁶Justice Harlan, 41 CORNELL L.Q. at 10. Chief Justice Hughes has said:

The judges of the Supreme Court are quite free in addressing questions to counsel during argument. The Bar is divided as to the wisdom of this practice in courts of last resort. Some think that as a rule the court will get at the case more quickly if counsel are permitted to present it in their own way. Well-prepared and experienced counsel, however, do not object to inquiries from the bench, if the time allowed for argument is not unduly curtailed, as they would much prefer to have the opportunity of knowing the difficulties in the minds of the court and of attempting to meet them rather than to have them concealed and presented in conference when counsel are not present. They prefer an open attack to a masked battery. From the standpoint of the bench, the desirability of questions is quite obvious as the judges are not there to listen to speeches but to decide the case. They have an irrepressible desire for immediate knowledge as to the points to be determined.

CHIEF JUSTICE HUGHES, THE SUPREME COURT OF THE UNITED STATES 62 (1928).

⁷⁷Roberts, *Thoughts*, SCHOOL LAW IN REVIEW at 7-5.

⁷⁸Chief Justice Rehnquist, Speech to the ABA Tenth Annual Appellate Advocate Institute Luncheon 15 (May 17, 1996).

⁷⁹*Id.* at 10-11.

are working on the case together, having read the briefs and anticipating that they will have to vote very soon, and attempting 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.”⁸⁰ In the words of Justice Scalia, “[y]ou hear the questions of others and see how their minds are working, and that stimulates your own thinking. * * * I use it to give counsel his or her best shot at meeting my major difficulty with that side of the case. Here’s what’s preventing me from going along with you. If you can explain why that’s wrong, you have me.”⁸¹ “Oral argument,” comments Chief Justice Roberts, “is not some quiz show, in which you win so long as you avoid any pitfalls the judges may try to spring on you.”⁸²

Counsel who is answering a question from the Bench when time expires should complete the answer. It is not necessary to ask the Chief Justice for leave to do so, provided the answer is kept succinct, although the Chief Justice may voluntarily grant such leave. Sometimes the Justices continue to ask questions after the time has expired, in which case, of course, counsel may continue to answer as fully as is believed necessary. But if counsel opening an argument intends to reserve time (customarily about five minutes) for rebuttal or reply, and questioning then continues after the time planned for the opening argument, counsel must continue to answer those questions even though it encroaches on the planned rebuttal time. That time is reduced or lost by such questioning unless the Chief Justice, with or without a request, is lenient.

Making concessions during argument is a two-edged sword. If concessions are not critical, they can enhance credibility with the Court. But counsel should be aware that the Court’s opinion may use against clients damaging admissions made in answering questions (which are available to the Justices on the tapes of the arguments). Then-Justice Rehnquist has said, once speaking for the Court and once in dissent:

We are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questions from the Court during oral argument.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 170 (1972); *Carey v. Brown*, 447 U.S. 455, 472 n.1 (1980) (dissent; see also the Court’s opinion at 461 n.5). Whether the Court will heed or disregard this admonition with respect to a particular question is, of course, completely unpredictable at the time it is answered. Perhaps counsel can take protective action by indicating tactfully that the responses are necessarily off the cuff and not fully considered.

In answering questions, counsel should not be evasive, for that will merely turn what may have started as a simple question into a cross-examination. The Clerk’s *Guide for Counsel* warns against answering a Justice’s question with a question. The Court has chastised counsel engaged in such fencing

⁸⁰Justice White, *The Work of the Supreme Court: A Nuts and Bolts Description*, N.Y. STATE BAR J. 346, 383 (Oct. 1982).

⁸¹Justice Scalia, Transcript, *This Honorable Court* (Program Two) pp. 8–9 (WETA 1988).

⁸²Roberts, *Thoughts*, SCHOOL LAW IN REVIEW at 7-5.

tactics for failing to respond properly. If the answer is “No,” or “I don’t know,” it should be quickly given—though a lawyer should not have to give the latter answer on a point important to the case. Under no circumstances should counsel attempt to “bluff” the Court with feigned knowledge of a case or record fact; the imposture will quickly be uncovered with far greater embarrassment than a simple acknowledgment of counsel’s lack of knowledge. Nor should counsel state an intention to get to the point of the question later in the argument unless (1) counsel is *absolutely certain* that it will be answered, *and does answer it*, and (2) the question cannot possibly be effectively answered out of the context of the other portion of the argument. Even then, counsel should answer the question immediately, though perhaps only in short form, to be elaborated later.⁸³ If counsel does not answer the question, the Court may well believe that he or she cannot.

Counsel also should not answer a hypothetical question with the comment that “this is not that case.”⁸⁴ Of course not—that is what makes it a hypothetical question. Answer the question, and then, if necessary, distinguish the hypothetical and explain why it should not bear on the decision in the case before the Court. However, the Clerk’s Guide does warn that counsel should be cautious in answering hypothetical questions, tailoring answers to fit the question; “[a] simple ‘yes’ or ‘no’ in response to a broad question might unintentionally concede something and produce a follow-on question the answer to which is damaging to your position.”

In addition to hypothetical questions, counsel may also be faced with the situation where a second Justice asks a question before counsel has the chance to answer the first Justice’s question. There is no set protocol for responding, and the Clerk’s Guide recommends taking a common-sense approach in determining which question to answer first. It may be logical to answer the second question first since that is the pending question, particularly if it aids in answering the first question. Or counsel may wish to go back and answer the first Justice’s question because it will permit counsel to advance a critical point in the argument. No matter which approach is taken,

⁸³It has been said that “nothing irked” Chief Justice Hughes “so much as the common answer that counsel would reach the point raised by the question at the appropriate point in his argument.” E. McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 17 (1949). Justice Jackson agreed (*Advocacy Before the Supreme Court*, 37 A.B.A. J. at 862):

I advise you never to postpone answer to a question, for that always gives an impression of evasion. It is better immediately to answer the question, even though you do so in short form and suggest that you expect to amplify and support your answer later.

⁸⁴Justice Ginsburg has commented on judicial frustration over advocates’ fear of hypothetical questions:

My colleague on both the D.C. Circuit and the Supreme Court, Justice Antonin Scalia, finds particularly unsettling lawyers’ aversion to one category of question—the hypothetical question, meant to test the limits of an argument. * * * [T]he response we get, as Justice Scalia described it, is so uniform, so invariable, judges suspect that a conspiracy among appellate advocates must be at work: “Your honor,” counsel intones, sometimes solemnly, sometimes smugly, but always with the same five dread words: “That is not this case.” The judge moves on, chastened by the lesson in rationality. She knows, of course, that her hypothetical is not this case, but she also knows the opinion she writes generally will affect more than this case.

Ginsburg, 50 S.C. L. REV. at 569–70.

counsel should indicate, if possible, that he or she plans to answer both Justices' questions.

On some occasions counsel may feel that the questioning is taking too much time, that the object is not so much to obtain an answer as to express the questioner's own view, that counsel is not being given an opportunity to respond, that the same question is being asked over and over again, and that the result is to prevent counsel from making the argument to the rest of the Court. All such notions should be sternly suppressed—at least until counsel is out of the Courtroom. This is not merely because of the deference due the Court; counsel, like a salesman, is trying to purvey an idea, and no salesman ever persuaded a customer by irritating him.

At the same time, counsel should endeavor to use questions, including hostile questions, as bridges or stepping stones to affirmative points in the planned presentation. This is when a short outline of your principal points may prove a life-saving roadmap. The art of oral argument is to provide sound answers to all questions from the Bench while returning flexibly to the key arguments that must be conveyed to win the case on the merits. Counsel should never sit down without giving the Court a clear explanation why he or she should win the case, whether conveyed in answers to questions or during uninterrupted interludes.⁸⁵

One way to cultivate the flexibility that oral argument requires, as recommended by Chief Justice Roberts, is to rehearse one's points in different sequences. If counsel has three main points, practice switching their order. This should reduce the likelihood of counsel being thrown off the planned path by questions directed at issues intended to be addressed later in the argument.⁸⁶

Counsel arguing before the Supreme Court will not infrequently find a number of the Justices reading or talking among themselves or otherwise not appearing to pay attention, and will wonder whether it would be impolite to halt or whether counsel must keep talking even though it may be a waste of breath. Perhaps the best advice as to what to do on such an occasion is that of Judge Medina (written before his appointment to the bench):

A problem of considerable difficulty is presented when the judges begin to talk among themselves and are apparently paying no attention to the argument. In some courts this is done a great deal and in others almost not at all. In such instances some lawyers will stop their argument entirely and remain silent until one of the judges directs them to proceed. The better course to pursue would seem to be to go right ahead with the argument, looking at the judge or judges who happen to be disengaged and who are apparently listening. To remain silent is bound to be interpreted as a criticism of the judges who are conversing together and it is apt to irritate them, as in almost every instance the judges are

⁸⁵But be wary of trying so hard to return to a prepared script that you miss signals embedded in the Justices' questions. Justice Ginsburg warns that at times a questioner "may be trying to cue counsel that an argument pursued with élan is a certain loser. * * * Counsel too intent on returning to a prepared script may miss the cue." Address to the Annual Dinner of the American Law Institute 59 (May 19, 1994). For a further discussion of flexibility during oral argument, see S. Shapiro, *Questions, Answers and Prepared Remarks*, 15 LITIGATION 33 (Spring 1989).

⁸⁶Roberts, *Thoughts*, SCHOOL LAW IN REVIEW at 7-5.

discussing some phase of the case on argument and they naturally feel that counsel should make no objection to their doing this. On the whole, there is no single feature of an appellate argument which causes more mental anguish to the lawyer than these conversations between the judges. Whether they are talking about the case or not, the effect upon the lawyer is bound to be extremely embarrassing.⁸⁷

The Supreme Court may be better served by the informal practice, observed in prior years, and perhaps reestablished by Chief Justice Roberts in some cases, of allowing counsel an uninterrupted interlude at the beginning of his or her argument. Counsel generally have new insights and information for the Court as a result of intensive oral argument preparation. Too great a barrage of questions from the outset may cut off useful information. The timing and volume of questioning, of course, are for the Court, and not counsel, to determine.

14.20 Rebuttal Arguments—Anticipating Opponent’s Argument

The opening argument should seek to anticipate the opponent’s contentions, since there is a definite advantage in having the Court know the answers to and weaknesses in the opposing arguments before the opponent makes them. Furthermore, it is dangerous to leave them to be dealt with in the rebuttal. Very often the questioning prevents counsel from saving time for rebuttal. The rebuttal should be reserved for new matter raised by the opponent during the argument, and to permit the expression of petitioner’s position with respect to questions from the Bench during respondent’s argument. Sometimes a rebuttal is unnecessary. If you have covered the critical points adequately, and it appears that the Court fully understands the case, do not get up in rebuttal merely because your time has not expired.

If you have a good idea of what your opponent will raise, you may want to have a point or two ready for rebuttal. As Deputy Solicitor General Lawrence Wallace, who argued 157 cases before the Court, observes, “If you can’t answer the question ‘What are the strongest points to be made for the other side?’ you’re not really prepared to argue the case.”⁸⁸

14.21 Respondent’s and Appellee’s Arguments

Everything said so far in this chapter is applicable to the answering argument as well as to the opening—except, of course, that respondent or appellee need not restate the issues and should not waste time restating facts that are not questioned by the other side. The respondent enters “the unfolding drama midstream” and risks losing the thread of the argument if counsel for the respondent does not pick up where counsel for the petitioner left off.⁸⁹

⁸⁷H. Medina, *The Oral Argument on Appeal*, 20 A.B.A. J. 139, 143, 184 (1934).

⁸⁸L. Wallace, *Taking It to the Top*, 84 A.B.A. J. 14 (1998). But be sure that your reply points amplify those made in the opening argument, rather than raise something completely new. Sandbagging runs the risk of offending the Court and having rebuttal points disregarded.

⁸⁹Roberts, *Thoughts*, SCHOOL LAW IN REVIEW at 7-5.

Counsel for respondent makes a mistake by pretending that the previous 30 minutes during which the Court questioned the petitioner did not occur.

Counsel for the respondent or appellee is much more likely to hold the Court's interest by pointing out immediately any significant difference in the facts that will affect the outcome of the case; that is one thing the Court is waiting to hear. But, the answering argument will generally be most effective if it seeks to establish its own affirmative case, and not merely to reply to the points made by the opponent. Counsel should, of course, anticipate having to modify the planned argument to meet what the opponent says, as well as the Court's reaction thereto as manifested in its questions.

The answering argument should take advantage of the expressions from the Bench during the opening. It may be desirable, for example, to start by correcting or amplifying opposing counsel's answers to questions. If questions indicate that some of the Justices appreciate a point that counsel intends to make, the lawyer should be grateful that they understand that side of the case and not spend time on that issue. Counsel can then focus on matters on which the Court has not manifested its agreement.

Refer to the opposing attorney by name or as petitioner's or respondent's counsel. When counsel for petitioners opened his rebuttal with "My adversary stated * * *," Justice Scalia interrupted to remind him that while the attorneys' clients may be adversaries, the respondent's counsel "is not your adversary. * * * He's your friend." Argument Tr. at 38, *Local 144 Nursing Home Pension Fund v. Demisay*, 1993 WL 751692.

14.22 Avoidance of Common Mistakes

Advice to counsel approaching an argument before the Supreme Court typically takes two forms: that which must be done, and that which must be avoided. Much of the preceding discussion has focused on the positive side of this equation. It is important for arguing counsel to recognize, however, that a number of pitfalls lie in wait, which can be easily avoided if identified in advance. Both judges and practitioners have offered cautionary advice of this kind, describing counterproductive actions of counsel that generate annoyance and undermine an effective oral presentation.⁹⁰ We offer a brief distillation.

Some mistakes of counsel undermine the presentation of arguments that have been planned in advance. Included in this category are the following:

- (1) Leading off the argument with a dubious or unnecessarily provocative contention that generates friction at the outset.
- (2) Sticking inflexibly to a prepared speech when the Court expresses interest in other areas.

⁹⁰See CHIEF JUSTICE REHNQUIST, *THE SUPREME COURT* 248–51 (2001); JUDGE COFFIN, *A LEXICON OF ORAL ADVOCACY* 17–103 (NITA 1984); Judge Miner, *The Don'ts of Oral Argument*, 14 *LITIGATION* 3 (Summer 1988); S. Shapiro, *Questions, Answers and Prepared Remarks*, 15 *LITIGATION* 33 (Spring 1989); Judge A. Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. REV. 325; DAVID C. FREDERICK, *SUPREME COURT & APPELLATE ADVOCACY* 189–227 (2003). For an account of deficiencies in legal education that contribute to inadequate performance on appeal, see *APPELLATE LITIGATION SKILLS TRAINING, THE ROLE OF THE LAW SCHOOLS* (Appellate Judges Conference, ABA 1985).

- (3) Attempting to cover all the points raised in the briefs rather than only a small number of the most important.
- (4) Failing to come to grips with the plain language of governing statutory or constitutional provisions, or of relevant judicial precedent.
- (5) Racing through the argument at a rapid speed while the Justices struggle to absorb the points delivered.
- (6) Using overstatement or exaggeration in describing record facts.
- (7) Using emotional argument or high-flown oratory.
- (8) Using imprecise language.
- (9) Speaking in the language of a business that is not well known without explaining to the Court what a particular term means.
- (10) Relying on strained or inapplicable metaphors and analogies.
- (11) Bellowing at the Justices in a stentorian voice, or, conversely, mumbling or muttering.
- (12) Introducing long delays while groping for page references, cases, or notes. Avoid this by making sure that such material is directly before you.
- (13) Using distracting body language, including wandering around or 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.⁹¹
- (14) Using dry, monotonous speech, without any variation in pitch, pace, or volume.
- (15) Reading at length from legislative history, opinions, statutes, regulations, or the trial record.
- (16) Referring to the Chief Justice as “Justice” or any Justice as “Judge.”
- (17) Confusing the names of particular Justices, and responding to questions with the wrong name.
- (18) Receiving a barrage of notes from co-counsel that distract the Court and delay the argument.
- (19) Engaging in prolonged discussion of background facts, the procedural history of the case, or basic legal principles well known to the Court while delaying discussion of the dispositive issues.
- (20) Expressing delight at the honor of being in the Supreme Court or otherwise flattering the Justices.
- (21) Offering strained flights of humor, passion, indignation, or rhetorical touches, which usually fall flat and often merit a judicial rebuke. Counsel should recall the words of Chief Justice Roberts, uttered when he was a practitioner: “Impassioned rhetoric doesn’t work. * * * If it did, I’d become impassioned.”⁹²

⁹¹Lest practitioners believe that their appearance and mannerisms go unnoticed, Justice Blackmun’s papers suggest otherwise. In addition to “grading” advocates who appeared before him, Justice Blackmun made notations about attorneys, such as “dark mustache,” “looks tired,” and “licks fingers.” LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 108 (2005).

⁹²Tony Mauro, *The Lawyer’s Lawyer*, *LEGAL TIMES*, Sept. 19, 2005, at 1.

Perhaps the most harmful errors of all are made by counsel while responding to questions. Such mistakes include the following:

- (1) Delaying answers to questions. Do not say you will get to the answer later.
- (2) Failing to distinguish among different types of questions, some of which call for a brief clarification of background fact while others go to the heart of the case and demand a more extensive treatment.
- (3) Responding while a Justice is still asking his or her question or otherwise interrupting a Justice.
- (4) Continuing with the argument when a Justice is trying to ask a question.
- (5) Giving unnecessarily long-winded answers to questions, or relying on complex factual descriptions in response to questions.
- (6) Bluffing about knowledge of a case, statute, or trial transcript.
- (7) Failing to listen carefully to questions, or providing a stock answer that does not meet the question from the bench.
- (8) Disclaiming essential knowledge of the record with the excuse, “I didn’t try the case, Your Honor.”
- (9) Giving fearful or timorous responses to overbearing questions, or displaying disappointment when questioning is hostile.
- (10) Attempting to answer questions by propounding other questions back to the Court.
- (11) Refusing to answer questions with a simple “yes” or “no,” when that answer can be given. It is essential to first answer the question directly and then offer any qualification or explanation.

Those who witness such errors have offered colorful characterizations of the transgressions of counsel. Chief Justice Rehnquist, for example, warned of the “lector,” who insists on reading the argument, offering the Court little more than the written brief “with gestures.” Next is the “debating champion,” who is “so full of his subject, and so desirous of demonstrating this to others, that he doesn’t listen carefully to questions. He is the authority, and every question from the bench is presumed to call for one of several stock answers, none of which may be particularly helpful to the inquiring judge.” Then there is the “Casey Jones” advocate who is “like an engineer on a non-stop train” and who races through his presentation. Finally, the Chief Justice remarks on the “spellbinder” with a “good voice” and “presence” who “tends to let his natural assets be a substitute for any careful analysis of the legal issues.”⁹³

⁹³CHIEF JUSTICE REHNQUIST, *THE SUPREME COURT* 245–48 (2001). Judge Coffin offers equally entertaining and insightful portraits of ineffective counsel in *A Lexicon of Oral Advocacy* 1–6 (NITA 1984). These include “the actor,” who “views oral argument as an exclusively theatrical occasion”; “the backbencher,” who uses “body English and pantomimicry” to show his disdain for opposing counsel’s argument; “the dancer,” who “believes that he can infuse strength into an otherwise flaccid case by substituting body dynamics for the spoken word”; “the big fish out of water,” an advocate with “a far flung reputation, perhaps deserved, in his field, but with no discernible aptitude for dealing effectively with an appellate court”; “the jury lawyer (without a jury),” who “makes the mistake of thinking that three or more appellate judges sitting behind a bench respond to the same approaches as do six to twelve jurors”; and “the scribbler,” who, while “sitting at counsel table listening to his adversary’s presentation, furiously covers long sheets of yellow foolscap with emphatic jottings.”

Fortunately, Chief Justice Rehnquist offered a portrait of the “All American oral advocate,” who deserves emulation (*id.* at 248):

If we were to combine the best in all of them, we would of course have the All American oral advocate. If the essential element of the case turns on how the statute is worded, she will pause and slowly read the crucial sentence or paragraph. She will realize that there is an element of drama in an oral argument, a drama in which for half an hour she is the protagonist. But she also realizes that her spoken lines must have substantive legal meaning, and does not waste her relatively short time with observations that do not advance the interest of her client. She has a theme and a plan for her argument, but is quite willing to pause and listen carefully to questions. The questions may reveal that the judge is ignorant, stupid, or both, but even such questions should have the best possible answer. She avoids table pounding and other hortatory mannerisms, but she realizes equally well that an oral argument on behalf of one’s client requires controlled enthusiasm and not an impression of *fin de siècle ennui*.

Through careful preparation and attention to the rules of good appellate advocacy, attorneys can strive to meet this standard whether or not they have argued previously in the Supreme Court.

14.23 Use of Maps, Charts, Models, and Motion Pictures

In some cases counsel may believe that arguments will be more effective if enlarged maps, charts, or models, taken from or based upon the record, are physically displayed to the Court. The value of such enlarged documents in the Courtroom is handicapped (1) by the length and shape of the Bench, which makes it very difficult for all the Justices to see the enlargement wherever it is placed, and (2) by the likelihood that counsel pointing to the enlargement will turn away from the Bench and microphone and not be heard by the Court. Because of these difficulties, the use of such devices must be cleared with the Clerk, who, with the Court’s approval, seeks to discourage them. Counsel must advise the Clerk of their intent to use an exhibit as soon as possible, and counsel are urged to speak with the Clerk to discuss whether the use of a particular exhibit will be feasible. Another, better technique is to provide smaller copies of the documents for each Justice. This can be done by filing 11 copies (which may be larger than pages of briefs) with the Clerk shortly before the argument. Copies should also be made available to opposing counsel, preferably several days in advance. The potential disadvantage of this technique should also be kept in mind. Exhibits of this sort can be distractions that divert the Court’s attention and precipitate time-consuming questions on collateral issues. During precious moments when the Justices are pondering a chart or map, they will not be able to attend to counsel’s argument, especially if the visual aid is complex. In any event, counsel should advise the Court where the exhibit can be found in the joint appendix or record. The Clerk’s *Guide for Counsel* points to a chart showing a state redistricting plan used in *Shaw v. Reno*, 509 U.S. 630, 658 (1993), as an example of an exhibit used at oral argument. In this instance, at least, a single picture was worth a thousand words.

If necessary, the Clerk’s Office will arrange for the Marshal’s Office to provide an easel upon which maps and charts of reasonable dimensions can

be displayed. Experience indicates that counsel often overestimates the visibility of maps and charts, particularly to the Justices at the ends of the Bench. The Clerk's Office recommends that any exhibits be capable of being read from a distance of 25 feet and moved easily. Accordingly, it is advisable that any exhibits intended to be so used should be brought to the Clerk's Office several days in advance of the argument. That Office will then assist counsel in determining whether the map or chart is large enough and if the pertinent parts are marked with sufficient clarity. If counsel from out of town cannot be present for such an advance testing of an exhibit, an arrangement should be made for local counsel to appear in place.

On rare occasions, particularly in patent cases, the Court has granted counsel special permission to explain and demonstrate bulky exhibits consisting of machinery or processes outside the Courtroom and at a time when the Court is not regularly in session. On one occasion an exhibit consisting of a moving picture of the functioning of machinery, with an accompanying explanation by counsel, was shown to the Court outside the Courtroom after the adjournment hour for the day.⁹⁴

On occasion, some of the Justices have viewed motion pictures at issue in censorship cases.⁹⁵ See *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974), where the Court's opinion (joined by five Justices) states: "Our own viewing of the film satisfies us that 'Carnal Knowledge' could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way." But the viewing is done solely as part of the Court's internal decisional processes. Movies are not viewed in response to a formal request by counsel, and no motion to that effect should be filed. Counsel may of course suggest in the brief or oral argument that the movie in issue should be viewed, just as counsel may suggest that any other exhibit or portion of the record should be read in its entirety.⁹⁶ But the Court does not welcome any special motion that it view a

⁹⁴This was done in connection with the argument in *Special Equipment Co. v. Coe*, 324 U.S. 370 (1945). In *Burr v. Duryee*, 1 Wall. 531 (1865), "the whole business of making hats, from the disintegrating of the fur to the production of a hat-body, was actually carried on in the court room; and the printed argument of counsel contained, as 'exhibits,' the skin of the beaver as it comes from the animal, with specimens of fur as thus exhibited in various conditions and processes, down to the very surface of the 'brush' and 'napped' hats." 4 WASH. L. REP. 22 (Jan. 22, 1877), reprinted in 87 WASH. L. REP. 296 (Mar. 23, 1959).

⁹⁵Not all Justices deem it necessary or appropriate to view allegedly obscene movies or other such materials. When Justice Douglas was on the Court, he wrote: "I never read or see the materials coming to the Court under charges of 'obscenity', because I have thought the First Amendment made it unconstitutional for me to act as a censor." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 71 (1973) (dissent).

But compare the opinion of Justice White, accompanying the denial of certiorari in *J-R District, Inc. v. Washington*, 418 U.S. 949 (1974), indicating that his own examination of allegedly obscene material affects his determination whether to grant or deny certiorari where "the issue of obscenity *vel non* is among the questions presented here." The opinion suggests that if a petitioner desires that serious attention be given to such a question he should file the materials at the time of filing his petition for certiorari so as "to preserve clearly the issues he wants reviewed." 418 U.S. at 950. The entire record, of course, may not be filed at the certiorari stage.

⁹⁶In a case to be briefed and argued, counsel who has not seen the motion picture at issue in the case may wish to view the movie before writing the brief and preparing the oral argument. If the movie has been lodged with the Court as an exhibit, counsel may make an informal arrangement with the Clerk to view the movie; counsel should bring projection equipment, however. Such was the arrangement followed by counsel in *Rabe v. Washington*, 405 U.S. 313 (1972).

particular movie or exhibit. Each Justice will personally decide what he or she wants to see or read. And if one or more Justices desire to view a movie, the Clerk makes the necessary arrangements with respect to the projection equipment and the viewing room (which is never the Courtroom). Such viewings are entirely private, without the presence or even the awareness of counsel in the case. Like other aspects of the decisional processes of the Court, counsel play no role whatever in these viewings. And, for the most part, the Justices seldom reveal publicly whether they have seen a movie that is in issue.

14.24 Submission of Additional Memoranda or Briefs Following Oral Argument

During the course of an oral argument before the Court, matters may be brought out by the Court or by counsel in response to queries. If any such matters appear to the Court to require further research by the parties, the Court may orally request that the parties file additional memoranda by a stated date, usually a few days after the argument. Counsel may also ask leave to file a memorandum to cover a new point raised during the argument. The procedure (date due, typewritten or not) is generally prescribed during or at the end of the oral argument and will vary according to the circumstances. Counsel who is uncertain should ask the Chief Justice at that time. Subsequent questions concerning such procedure should be addressed to the Clerk. Ordinarily, these additional memoranda may be submitted in regular 8.5- by 11-inch format, with an original and 10 copies being supplied and 40 copies duplicated pursuant to Rule 33.1 filed later.

The Court may also sua sponte submit additional questions to the parties after the oral argument and permit them to file supplemental briefs. Here again the procedure and the dates are set by the Court itself. See *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987); *Williams v. United States*, 502 U.S. 1069 (1992) (Court directs parties to address three specified questions with simultaneous briefs due in less than three weeks).

Submitting post-argument letters is appropriate in unusual circumstances. Counsel may wish to correct an unintended misstatement of a critical fact made during the oral argument, to respond to a question from the Court that was left unaddressed during oral argument, to inform the Court of the outcome of a pending case discussed during oral argument, or to alert the Court to changes in statutes or regulations at issue. However, any such letters must avoid legal argument or discussion, and merely state the relevant facts. Thus, counsel wishing to inform the Court of an error made by opposing counsel during argument must be precise and descriptive, not argumentative, and counsel should avoid deluging the Court with petty or insignificant points. Letters should be addressed to the Clerk. Eleven copies should be submitted, and a copy should be sent to opposing counsel. The Court has considered post-argument letters in the past. See *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422 (2006); *Clark v. Martinez*, 543 U.S. 371 (2005); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004). But, there can be no assurance that such a retraction or correction will be accepted by the Court. *Franchise Tax Bd. v.*

Alcan Aluminum, Ltd., 493 U.S. 1000 (1989) (refusing to expunge representation of counsel).

A supplemental brief following the oral argument may be filed only by leave of Court, provided that the brief is confined to “late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief.” Rules 25.5 and 25.6. See, e.g., *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2881 (2006) (granting leave to both parties to file supplemental memoranda); *McCreary County v. ACLU*, 544 U.S. 1030 (2005) (granting petitioners’ motion to file supplemental brief).⁹⁷ A motion for leave to file must accompany such a supplemental brief. Thus, the Court has granted a motion for leave to file a supplemental memorandum that not only called attention to an attached lower court decision rendered subsequent to the oral argument before the Court but commented critically on that decision, freely utilizing both legal arguments and citations. The motion and the eight-page memorandum, plus the lower court opinion, were printed together in one document, and 40 copies were submitted to the Court. *Watts v. Seward Sch. Bd.*, 391 U.S. 902 (1968). See also *McCreary County*, 544 U.S. 1030 (2005) (granting leave to file supplemental memorandum calling attention to appellate court decision rendered after oral argument); *Dura Pharm., Inc. v. Broudo*, 543 U.S. 1134 (2005) (granting leave to file supplemental brief calling Court’s attention to a district court decision rendered after oral argument); Sec. 13.14, *supra*. Other post-argument briefs are designed to inform the Court about a development in the facts of the case. See *McCreary County v. ACLU*, 544 U.S. 959 (2005) (granting petitioners’ motion to file supplemental brief calling Court’s attention to a subsequent factual development in the case). Parties have on occasion sought to file multiple post-argument briefs. See *McCreary County v. ACLU*, 544 U.S. 1030 (2005), and *McCreary County v. ACLU*, 544 U.S. 959 (2005) (granting motions to file supplemental briefs); *Halbert v. Michigan*, 544 U.S. 1059 (2005), and *Halbert v. Michigan*, 125 S. Ct. 2899 (2005) (granting and denying motions to file supplemental briefs). The grant of such a motion for leave is not automatic; the Court regularly denies them, sometimes permitting one party to file a supplemental brief but denying the other party leave. See, e.g., *GI Forum v. Perry*, 126 S. Ct. 1607 (2006) (granting appellee’s motion to file supplemental brief, but denying appellant’s motion); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 537 U.S. 1185 (2003) (denying respondent’s motion for leave to file supplemental brief after argument).

In the rare event of a reargument, the Court will entertain motions to file supplemental briefs on reargument. See *Hudson v. Michigan*, 126 S. Ct.

⁹⁷See also *Tennard v. Dretke*, 541 U.S. 1061 (2004) (granting both parties leave to file supplemental brief after argument); *Johnson v. California*, 541 U.S. 986 (2004) (granting petitioner’s motion to file supplemental briefs after argument); *Yarborough v. Alvarado*, 541 U.S. 933 (2004) (granting respondent’s motion to file supplemental brief after argument); *Verizon Md. v. PSC*, 535 U.S. 1076 (2002) (granting respondents’ motion to file second supplemental brief after argument and petitioner’s motions to file supplemental brief after argument); *Sutton v. United Air Lines, Inc.*, 526 U.S. 1109 (1999) (granting leave to file supplemental brief after argument commenting on oral argument made by government counsel in prior case); *Nevada v. United States*, 462 U.S. 1104 (1983) (granting leave to file supplemental brief); *Tillman v. Wheaton-Haven Recreation Ass’n*, 409 U.S. 1034 (1972) (same).

2159 (2006); *American Trucking Ass'ns v. Smith*, 493 U.S. 973 (1989); *INS v. Chadha*, 459 U.S. 1027 (1982).

14.25 Conducting Oral Argument In Camera

Almost without exception, the Court insists that oral arguments be conducted openly in the Courtroom, without either the public or the press being barred. But on rare occasions, such open discussion may be thought to be detrimental to the national security interests or to be unduly prejudicial for some other reason. In that event, counsel can submit a motion to the Court that all or part of the oral argument be conducted in camera before the Court.

The Court seems prone to solve this type of problem by means other than an *in camera* hearing. Thus, in *New York Times Co. v. United States*, 404 U.S. 944 (1971), the Chief Justice announced in open Court, just prior to the commencement of the oral argument, “that the Government’s motion to conduct part of oral arguments involving security matters *in camera* denied and under order granting writ counsel may submit arguments in writing under seal in lieu of *in camera* oral argument.” Three members of the Court, including the Chief Justice, announced they “would grant limited *in camera* argument.” See also *Roe v. Doe*, 419 U.S. 819 (1974), where the Court granted a motion to seal the record and appendix prior to the oral argument in a case involving the publication of psychiatric case histories.⁹⁸

On occasion, a Justice not present at the oral argument will listen to the argument on tape and participate in the conference and vote, as Justice Kennedy did in *Agostini v. Felton*. See 65 U.S.L.W. 3726 (Apr. 29, 1997).

⁹⁸Following the oral argument, however, the writ of certiorari was dismissed as improvidently granted. *Roe v. Doe*, 420 U.S. 307 (1974).