



ORAL ARGUMENT:

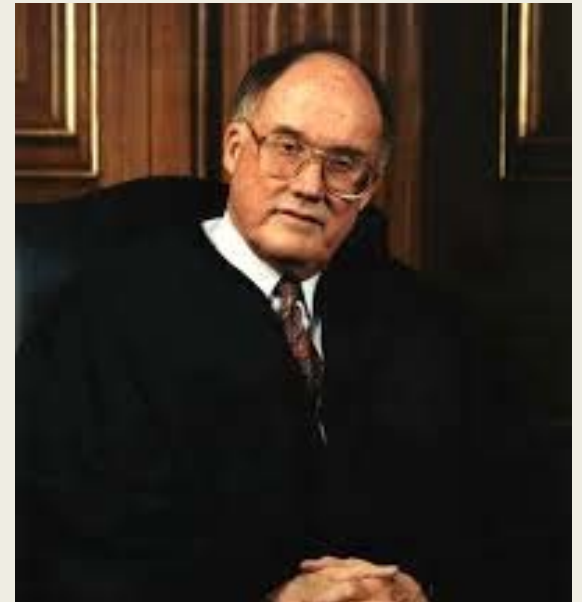
DOS, DON'TS AND
PERSUASION POINTERS



The Importance of Oral Arguments

- Chief Justice William Rehnquist explained the importance of this unique opportunity:

"You could write hundreds of pages of briefs, and you are still never absolutely sure that the judge is focused on exactly what you want him to focus on in that brief. Right there at the time of oral argument you know that you do have an opportunity to engage or get into the judge's mental process."

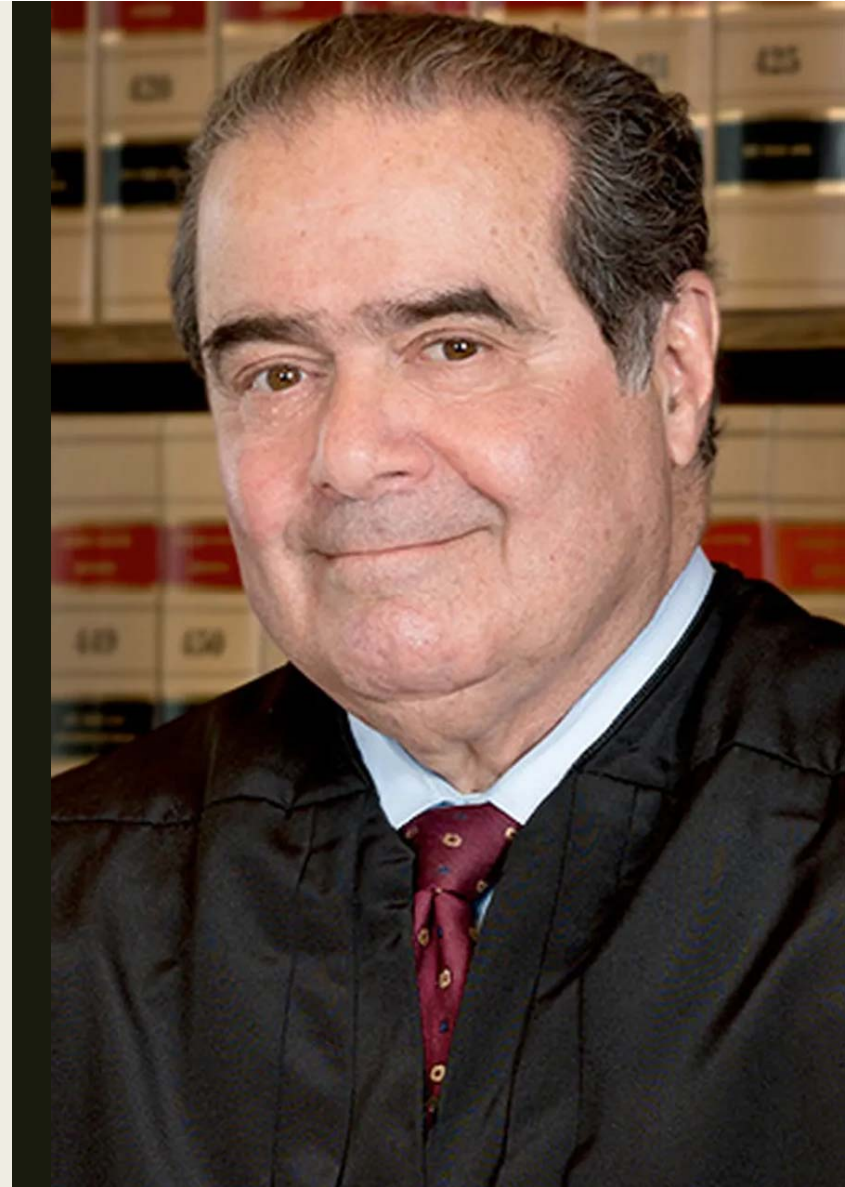


The Objectives of a Successful Oral Argument

Justice Scalia described 6 Objectives for an oral argument:

1. To answer any questions and satisfy any doubts that have arisen in the judges' minds.
2. If you're counsel for the appellee, to answer new and telling points raised in the appellant's reply brief. Oral argument is your only chance.
3. To call to the judges' minds and reinforce the most important substantive points made in your brief.
4. To demonstrate to the court, by substance and manner of your presentation, that you are trustworthy, open, and forthright.
5. To demonstrate to the court, by the substance and manner of your presentation, that you have thought long and hard about this case and are familiar with all its details.
6. To demonstrate to the court, mostly by the manner of your presentation, that you are likable and not mean spirited.

Making Your Case: The Art of Persuading Judges, Antonin Scalia and Bryan Garner, p. 141.



Preparing your Oral Argument

- Consider the oral argument from the Judges' point of view. Ask yourself what facts and arguments you would and wouldn't want to hear and what questions you would want answered.
- Pinpoint the weaknesses in your case and be ready to address arguments and questions on these points. It is important to take these issues head on and not dance around questions or paper over weaknesses.
- Start Early! Familiarize yourself with the facts of the case and the authorities you cite so that you can refer to them without having to sift through your materials.
- Practice making your case, but don't memorize a script to rehearse verbatim, except maybe a small opening or closing piece.
- Research your Judges. You may learn something that you could use to your advantage.

"Effective Oral Argument: Six Pitches, Five Do's, and Five Don'ts from One Judge and Two Lawyers" Judge Stephen J. Dwyer, Leonard J. Feldman, and Robert G. Nylander

"Practitioner Prospective: Oral Arguments" Squire Patton Boggs, Sixth Circuit Appellate Blog

Your Argument

- As Appellant, always lead with your strongest argument.
- As the Appellee, first rebut what arguments you find necessary, then move to your strength. You should adapt your argument to the Appellant's.
- As the Appellee, do not rehash the facts the appellant just explained, only add additional relevant facts or ones in conflict.
- Speaking of Facts: Give you the best context to make your case, but don't overdo it. The Judges have read your briefs.
- Don't waste time delving into the fact patterns of precedents. Stress what the cases hold, but go into their details only if the court requires.

Questions from the Bench

- Be ready for and open to questions.
- Make sure you understand what is being asked; seek clarification if necessary.
- If responsive, answer with “yes” or “no” so that the judges are sure of which way you answered. Then explain (if appropriate).
- If you are not sure of the answer to a question, admit it.
- When asked a question, answer it. Do not postpone answering, even if you planned to address the issue later.
- Do not evade a difficult question. Trying to evade the question can lead to even more time being spent on the difficult issue or diminish your credibility. Give your best answer and move on.
- If a Judge gives you a “favorable” question, do not waste time praising the court. Just answer the question.

Missteps and How to (Try to) Fix Them



Humor in Oral Argument? *Roe v. Wade*



Engaging with the Court

- Demonstrate respect for the Court and the involved parties
 1. Arrive early, don't risk being stuck in traffic or having problems parking.
 2. Dress appropriately. Not only through the style of clothing, but by choosing appropriately sober colors and patterns.
 3. Refrain from fidgeting.
 4. Follow the rules of the Court and use the appropriate terminology.
 5. Remember that once you enter the courtroom your behavior is being observed.

Dos

- Be Flexible! Your argument should adjust to the questioning of the court as well as your opponent's presentation.
- As the Appellant, you have the special opportunity for rebuttal, always take this opportunity and use it wisely. Your voice will be the last the Judges hear.
- Always stop at the end of your time, even if you have more to say. By doing so you demonstrate your respect for the court and its rules.
- Make eye-contact with the Judges while speaking. Doing so grabs the attention of the judges and is far more engaging than if you are looking down at a sheet of paper.

Don'ts

- **Don't speak over a judge**, even if they are interrupting you.
- **Don't attack opposing counsel.**
- **Don't ask how much time you have left.** Be confident in your preparation, don't waste the time it would take or the distraction from your argument that would result.
- **Don't read from a script.** When you read from a script it shows a lack of preparation and makes flexibility nearly impossible. It also is far less engaging for the listener.
- **Don't venture off-topic.** Your time for oral argument is precious and limited, don't waste it by allowing yourself to get distracted by unimportant or irrelevant subjects.
- **Don't rely on the use of a visual aid.** If possible, include the aid as an appendix to your brief.
- **Don't put a question to the judges** unless you are (1) confirming that your understanding of a question is correct, or (2) asking whether the court has any further questions.

The Essentials

- At all times demonstrate respect for the Court and all involved parties.
- Build credibility through your knowledge of the case and your authorities and conversely by accepting obvious weaknesses in your case or gaps in your understanding.
- Be flexible, the best oral argument is one that effectively responds to the opposing argument while being responsive to the questions and attitudes of the judges.
- Remember that you are not giving an uninterrupted speech, be open to questions and ready for interruptions.
- Make sure the judges leave knowing what you want them to rule.