Oral Argument in the Roberts Court

by Timothy S. Bishop

"Why do they debeak chickens?" Justice Antonin Scalia asked the attorney standing before the Supreme Court. "I didn't know they did that. Why do they do that?"

This off-beat question from Justice Scalia might have blindsided some advocates. Worse, it might have tempted an astonished few to point out its irrelevance to the legal issues before the Court. But in this 1996 case, the attorney was prepared. He responded that farmers trim chickens' beaks so they don't harm themselves or each other when they are cooped. "On that note," Chief Justice William Rehnquist submitted the case, to the sound of laughter in the courtroom. Transcript of Oral Argument at 56, *Holly Farms Corp. v. National Labor Relations Board*, No. 95-210 (Feb. 21, 1996).

Shortly before that argument, the attorney so knowledgeable about chickens' beaks had been asked the same question by John Roberts—then a prominent Supreme Court practitioner with a District of Columbia law firm—while Roberts was sitting as a judge in a moot court session. Roberts's instinct for anticipating questions, and his diligence in preparing and rehearsing his answers, helped make Roberts a consummate practitioner of what may be the most exacting and exhilarating craft in the law: oral argument in the Supreme Court of the United States.

If you are called upon to argue before the Supreme Court, your task at oral argument will be to crystallize the issues and the reasons why your client's position should prevail. You are sure to face a barrage of 60 or even 80 questions within a fleeting 30 minutes, so it is easy to go offtrack and let the winning arguments slip through your grasp. To set the argument on their own terms right from the start, effective advocates craft their opening remarks with extraordinary thoughtfulness and care. A concise and pointed opening can initiate a discussion with the Justices on favorable terrain. Be expeditious about it because the Court will be eager to pose questions within the first minute or two. The Chief Justice recommends paying special attention to your first sentence. Be sure it includes your main points and key facts because it "might well be the only complete one [you get] out." John G. Roberts Jr., "Oral Advocacy and the Re-emergence of a Supreme Court Bar," 30 *J. S. Ct. History* 68, 71 (2005).

Rehearse your opening remarks to the point that you have them effectively memorized or "internalized," so you can deliver them naturally and confidently. You should not have to think through these pivotal sentences on your feet. Nor do you want an interruption or a quip from the bench to knock you off course when you claim, for instance, that the lower court's test must be read in the context of a particular statutory provision. If you begin, "I think you can't understand what the whole test that the Federal Circuit is employing means . . . " Justice Scalia might interject, mid-sentence, "You're right about that." Transcript of Oral Argument at 28, *KSR v. Teleflex*, No. 04-1350 (Nov. 28, 2006). Only diligent rehearsal will allow you to finish your sentence ". . . without starting from the statute itself." The intervening quip and ensuing laughter could easily derail you if you haven't thoroughly internalized your opening remarks.

An effective opening does not allow for bland or general rehearsals of the question presented or anything else the Justices already know from reading the briefs. See Supreme Court Rule 28.1. Focus on "moving the ball": Guide the Court to ask the question you want, or run the risk of kicking off the argument with the question you won't be able to answer. Frame your opening remarks in a way that makes your main argument and conveys its focus to the Court right from the start.

If the strength of your position rests on precedent, start there: "The pivotal question in this case is whether this Court's decisions in *Gordon* and *NASD* require implied antitrust immunity as the district court believed. And we submit that the answer

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is yes." Transcript of Oral Argument at 3, *Credit Suisse Sec. v. Billing*, No. 05-1157 (Mar. 27, 2007). Or you might begin by placing the rule you want the Court to adopt right up front: "The per se illegality rule for resale price maintenance is widely recognized to be outdated, misguided and anticompetitive. It should be replaced with the same rule of reason standard that applies to . . ." Transcript of Oral Argument at 3, *Leegin Creative Leather Prods. v. PSKS, Inc.*, No. 06-480 (Mar. 26, 2007). General statements that do not convey your specific arguments are less effective. Opening with "Illegal drugs and the glorification of the drug culture are profoundly serious problems for our nation. . . . The magnitude of the problem is captured in the amicus brief . . ." may prompt a Justice to jump in and ask, "What is the rule that you want us to adopt for deciding this case?" Transcript of Oral Argument at 3, *Morse v. Frederick*, No. 06-278 (Mar. 19, 2007). Counsel would have saved time by starting with, and crystallizing, his answer to that question.

After an opening sentence or two that "go for the jugular," encapsulate the principal arguments why your position should prevail. A "road map" provides structure and organization, and makes it easier for the Justices to engage your argument on its own terms. If your position is that the Court should rule in your favor by applying the test from *Brooke Group*, tell the Court directly that "the *Brooke Group* test applies because the four key underpinnings of the Court's ruling apply fully here," before discussing each point in turn. But don't assume you will be able to map it all out. A Justice may want to "ask you a preliminary question before you get too far into your argument"—even before you reach the second of your four points. Transcript of Oral Argument at 3–4, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, No. 05-381 (Nov. 28, 2006). The Court may cut off your opening remarks after you've explained "the first of the three reasons that the decision below should be reversed," but Chief Justice Roberts—knowing that you have three points to make—may later prompt you to return to them by asking, "did you say you had a second and third point?" Transcript of Oral Argument at 3, 27, *Exxon Shipping Co. v. Baker*, No. 07-219 (Feb. 27, 2008). Of course, you should take the Chief Justice's cue.

Notably, the Chief Justice has established a new atmosphere in which you might be allowed to speak for a few minutes before facing a question—a dramatic change from his own days as an advocate. Linda Greenhouse, "In the Roberts Court, More Room for Argument," *N.Y. Times*, May 3, 2006, at A19. Yet, as arguments like those in *Weyerhaeuser* and *Baker* remind us, you cannot assume that such grace will always be forthcoming. As in all aspects of the delicate and unpredictable art of appellate argument, flexibility is key. Come prepared to deliver your carefully crafted opening statement, in whole or in part, or to respond instantly to any question that interrupts your delivery, whether after 30 seconds or three minutes. Bear in mind that the more helpful your remarks are to the Court—the more they cut right to the heart of the matter—the more likely you are to receive enough uninterrupted time to deliver them.

Chief Justice Roberts has also been more forgiving with rebuttal time—at least when counsel's attempt to reserve time is thwarted by persistent questioning from the Court. He may restore your reserved time when the Court's questions have consumed it. "Your rebuttal time was used up but not primarily by you. If you want to take two minutes for rebuttal?" Transcript of Oral Argument at 51, *Panetti v. Quarterman*, No. 06-6407 (Apr. 18, 2007). Or he may direct you to continue answering the Court's questions, and promise that it will not count against your reserved time: "Why don't you remain, [counsel]. We'll make sure that you have rebuttal," Transcript of Oral Argument at 25, *District of Columbia v. Heller*, No. 07-290 (Mar. 18, 2008); "Why don't you take five extra minutes? And we'll give you your rebuttal time." Transcript of Oral Argument at 18, *Medellin v. Texas*, No. 06-984 (Oct. 10, 2007). When Justice David Souter had a "quick question" but didn't want to "interfere" with counsel's rebuttal time, Chief Justice Roberts advised counsel that he would not lose rebuttal time by answering. Transcript of Oral Argument at 24, 32 *Boumediene v. Bush*, No. 06-1195 (Dec. 5, 2007). Of course, the Justices may continue to pose questions after you have asked to reserve rebuttal. If the ensuing questions do not expend substantial time, the Chief Justice may not restore it. Your best strategy in these circumstances is to answer the question directly and concisely, ask again to reserve the remainder of your time, and sit down.

Chief Justice Rehnquist would rarely restore petitioner's reserved time when the Court had cut into it with questions, and advocates can only welcome the new accommodation. Rebuttal argument is your last chance to control the Court's impression of the case before the Justices vote at conference. To leave the Court with the right impression, Justice Samuel Alito—another experienced Supreme Court advocate before his appointment to the bench—recommends that you distill your case to essentials and summarize all the important points coherently in the two to five minutes typically reserved for rebuttal. (*See* Bryan A. Garner's interviews with Justice Alito and other Supreme Court Justices, available in video format at www.lawprose.org/supreme_court.php.)

Your synthesis of the case in rebuttal will be most effective when you crystallize your principal arguments and deploy them—either to address new arguments respondent has raised or to address questions the Justices have posed to respondent's counsel. During respondent's argument, prepare concise and pointed answers to the questions that seem most pressing to the Court: "With respect to the story of how this instruction came to be . . ."; "With respect to the question about purchasing more logs than they needed . . ." Transcript of Oral Argument at 52-53, *Weyerhaeuser*, No. 05-381. This will help fend off any appearance that crucial questions have been left unanswered or that opposing counsel answered them correctly.

On rare occasions, a respondent's argument may even drop a bombshell on the Court, and you will need your rebuttal time to recover control of the case. In *Allison Engine v. United States*, No. 07-214 (Feb. 26, 2008), respondent's counsel argued that the crucial facts of the case were not what they appeared to be. The Court had granted the writ of certiorari on the assumption that a fraudulent bill was charged by a subcontractor but was never presented to the Navy. During argument, respondent's counsel alleged that the contractor provided "certificates of conformance" to the Navy, *id.* at 44, and cited evidence—in the appendix filed in the circuit court ruling—that all underlying documentation, including the subcontractor's bills, had to be "available" to the Navy along with such certificates. *Id.* at 51. Justice Scalia seemed exasperated that an apparent dispute over the material facts would not have surfaced before oral argument, at various points remarking,

"Well, then there's less to this case than we had thought," *id.* at 44; "I wish you had said that in your brief," *id.* at 45; "Did you make this point in response to the petition for cert?" *Id.* at 53. Chief Justice Roberts wondered whether "the question presented in this case is not in fact presented here," *id.*, and Justice Scalia sharply reminded counsel that if not, "you should have told us that." *Id.* Counsel for petitioner was left with the unusual task in rebuttal of calmly assuring the Justices that the question presented actually matched the facts in the record. If counsel had not reserved time for rebuttal and had not been adequately prepared to address the factual record, the Court's last impression would have been that petitioner's case was improvidently before it.

Chief Justice Roberts's increased accommodation of opening remarks and rebuttal seems to be part of an effort to ensure that you have the latitude to present your case and respond to the Court's questions effectively—an approach some credit with fostering "a new coherence and civility" in the Court's sessions. Greenhouse, "In the Roberts Court," *supra*, at A19. Professor Richard Lazarus, an accomplished Supreme Court scholar and practitioner who leads the Supreme Court Advocacy program at Georgetown University Law Center, observes

Answering the Court's questions remains your most daunting task.

that "The tone has changed. . . . They're not stepping on each other. . . . They give the lawyers more time to answer." *Id.* This new tone notwithstanding, answering the Court's questions remains your most daunting task as an advocate and by far your most important. Nine Justices have 30 minutes (less if they allow you opening remarks or rebuttal time) to seek answers to all their questions in a case that their grant of certiorari marks as one of considerable importance and complexity. So you can be sure that the Court will question your position, in all likelihood with a vigor and intensity that outstrips what you have experienced in other appellate courts. To succeed, you will have to bring equal intensity to the task of preparing for your argument.

Oral argument in the Supreme Court demands a truly extraordinary course of preparation. Recalling his days as a practitioner before the Court, Chief Justice Roberts has compared the advocate to a medieval stonemason whose sense of serving a "higher purpose" steeled him for the task of meticulously carving gargoyles for the upper reaches of a cathedral, gargoyles that would never be seen from the ground anyhow. Roberts, "Oral Advocacy," *supra*, at 79. Likewise, the well-prepared advocate must meticulously prepare and rehearse answers to countless questions the Court will never pose. In 30 minutes, the Court may pose 60 to 80 questions, but be ready to answer hundreds more. Unlike in your briefs, you are no longer in control. A Justice might ask anything he or she thinks could be helpful in deciding the case, so you must be prepared to navigate a vast terrain.

Most of that terrain will be familiar and predictable: the crucial facts of the case, the key statutory language, the opinions below, the reasoning behind the Court's precedents. Generally, the Court is concerned with matters of reason and principle; you must convince the Justices that you are advocating for the correct result—even, given the limits of stare decisis, if there is prior Supreme Court precedent squarely in your favor. Of course, you must prepare to cite appropriate authorities if asked—especially if the Court thinks your brief is lacking in them. Justice Alito might press the point: "Is there any California case that says that this works this way? . . . There's no California case that says that, do you acknowledge?" Transcript of Oral Argument at 35, 44, *Preston v. Ferrer*, No. 06-1463 (Jan. 14, 2008); "your brief didn't cite very much authority for this." Transcript of Oral Argument at 43, *Wilkie v. Robbins*, No. 06-219 (Mar. 19, 2007). Be ready to explain the precise significance of the authorities that you cite in your brief, especially if they cannot support more than a "see also." A Justice may take that as a sign there's something wrong with that case. If asked, "Why did you say 'see also'?" you do not want to be left saying that you "don't remember."

Focus your preparation on—but do not confine it to—the predictable realm of material facts, pivotal arguments, and key authorities. The Court may want to look at the case in a broader economic or social context. If your position is that the government has relied on a particular interpretation of a provision in a criminal statute, the Court may want to know how many convictions the government has obtained by relying on it. At a minimum, you should have a ballpark figure to offer when asked, "About? About? Have any rough idea?"—or you risk having your last words to the Court be "I don't know." Transcript of Oral Argument at 49, *Watson v. United States*, No. 06-571 (Oct. 9, 2007). Or a Justice may ask you to educate the Court about your client's business, even in respects not directly relevant to the case. The Court's *Guide for Counsel* (at 6) gives the example of counsel who represented a brewing company being asked "What is the difference between beer and ale?" (Transcript of Oral Argument at 48, *Rubin v. Coors Brewing Co.*, No. 93-1631 (Nov. 30, 1994)) and being able to give a clear, concise answer. Demonstrating that sort of comprehensive command of the background to your case will impress and give the Court confidence in your answers to more important questions.

At oral argument, you will get to use only a small fraction of the material you have arduously studied and prepared. The Justices will do some of the filtering for you with their questions—but not all of it. One of your most important jobs as an advocate, advises Justice Alito, is to "simplify, summarize, synthesize." Learn to "leave out the things that are just not important." Garner interviews, *supra*. Not only will you save precious time, but you will also present a cleaner, more focused argument that the Justices can more readily digest. And a steadfast focus on essentials will demonstrate your clear command of the issues, bolstering your credibility with the Court. That being said, if a Justice is inclined to ask questions on—or even outside—the periphery of the issues, you should have good answers at your disposal.

As with your opening remarks, you should rehearse your answers to critical questions thoroughly enough to "internalize" them so that you do not have to think them through on your feet. An incorrect response or imprecise formulation can leave you having to retreat under the pressure of questioning. If you have to re-visit your answers to critical questions and

explain, "No, Your Honor. I overstated. Let me say it more clearly," you risk alienating the Justices. Chief Justice Roberts may counter, "Counsel, it's a good thing you've got a lot of fallback arguments because you fall back very quickly." Transcript of Oral Argument at 49, *PowerEx Corp. v. Reliant Energy Servs.*, No. 05-85 (Apr. 16, 2007). Diligent rehearsal will help to fend off such dangers.

Anticipating potential lines of inquiry is essential to sound preparation. At oral argument, you hope to engage the Court in a "dialogue among equals," as the Chief Justice has described the ideal argument. Garner interviews, *supra*. This will be exceedingly difficult if you are trying to respond on the spur of the moment to the Court's rapid-fire questioning. You need to understand where a question leads and where your answer will take you. Try to anticipate sequences of questions, rather than isolated questions, by thinking "several moves ahead" of each potential question and proposed answer. *Id.* Knowing in advance where a question is leading, and what your answer will commit you to later on, will help you avoid answers that turn out to be damaging or fatal concessions for your client's position. If a Justice suggests that you "just swallow all these things and say, yeah . . . but my point stands" (Transcript of Oral Argument at 8, *Gall v. United States*, No. 06-7949 (Oct. 2, 2007)), you should already know whether you are walking into a trap. And because the Court is primarily concerned with fashioning the correct legal rules, not with achieving justice for your client in the particular case, the Justices will be keen to understand the implications of your proposed rule in varied factual circumstances. Justice Alito therefore advises that the "exact contours of the argument that you are making, the borders of your argument, those are what's most important." Garner interviews, *supra*. You cannot wait until you are before the Court in oral argument to discern those borders on the fly.

One tried and true preparation technique is to have everyone on your team—your own partners and associates, the trial and intermediate appellate lawyers, and the client—generate questions that occur to them. Ask one or two colleagues who have Supreme Court experience, but who have not worked on the case, to read the papers and produce a page of questions. Then work through and write out answers to all these questions, editing them until you have a concise one- or two-sentence answer that you may be able to get out without interruption from a Justice. A carefully edited document like this allows you to judge how the answers fit together and enables you to make sure the answers get back to your main themes. Trying to keep all this in your head, for hundreds of questions, is a hopeless task for most of us. A document you can consult daily in the lead-up to argument will build your confidence and provide the grounding needed to respond flexibly to any question that comes your way.

Moot courts are another indispensable tool for anticipating questions the Court might ask and for tracing out the implications of your answers in advance. Even the most experienced advocates will rarely be able to anticipate everything without the collaboration of other attorneys. A moot court can greatly increase your chances of facing most of the Justices' questions in advance of the main event. To conduct your moot, Chief Justice Roberts recommends finding attorneys who are unsympathetic to your client's position, for they are the ones who will ask the difficult, hostile questions that you are sure to face. Garner interviews, *supra*. Sympathetic or like-minded judges are less likely to pose questions that you haven't anticipated on your own and less apt to probe the boundaries of your position as vigorously as someone who is more skeptical of your argument.

It is equally important to find attorneys who are not experts in the field to serve as moot judges. Subject-matter experts will force you to answer difficult, sophisticated questions, but they are less likely to pose the questions that someone approaching the issues fresh might need answered. Chief Justice Roberts advises that you must be prepared to answer questions at all levels of sophistication and warns that at oral arguments, lawyers who are subject-matter experts are too often "befuddled by the simple question." Garner interviews, *supra*. Remember that the Court has nine different levels of sophistication in any given area; one Justice may understand the issues in your case inside and out, while another is approaching them in earnest for the first time.

You might be the leading expert in your field, but that expertise will help your client at oral argument only if you can make it accessible to generalists. Garner interviews, *supra*. Like nearly all appellate judges, the Justices decide cases across the entire spectrum of the law; by necessity, they are generalists, with dockets too diverse and demanding to acquire an expertise to rival that of a specialized practitioner. Much of the craft of appellate and Supreme Court advocacy consists in mastering a complex question—and distilling it into a clear, focused inquiry for the generalists on the bench. In recent years, studies suggest, sophisticated clients have increasingly recognized the unique skills of generalist appellate advocates and have hired them to brief and argue their cases in the Court. *See* Richard J. Lazarus, "Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar," 96 *Geo. L.J.* 1487 (2008).

One of your greatest challenges at oral argument is making a transition from a difficult or an unfavorable line of questioning back to your own affirmative points. Fluid transitions convey a greater sense of confidence in your argument. They allow you to guide the Court's questioning toward favorable issues without appearing evasive. In the dynamic environment of oral argument, you must be prepared to broach the issues of your case in any possible sequence. Flexibility is key—and for that, you need clarity about the essential points of your case and how they relate to each other. As an advocate, Chief Justice Roberts used a method of preparation to heighten flexibility: Reduce your case to four or five major points. Label them points A, B, C, D, and E (or however many you have) and write them down on separate index cards. Shuffle the cards and practice giving your argument in whatever order the cards are in, developing your transitions from one point to the next. Then shuffle the cards again and keep practicing, until you are comfortable making a transition from any point to any other. Garner interviews, *supra*. The same goes for your question-and-answer document. Read it back to front or from the middle sometimes. These techniques ensure that you are not too tied to a particular order of argument or question-and-answer sequences—flexibility that is critical in the rough and tumble of oral argument before the Roberts Court.

The goal is to be able to move between points smoothly and confidently so as to steer the argument in the direction you want it to go. If, for instance, your case involves a question about standing and a question on the merits, have a fluid transition between the two. The Court may begin questioning with a sustained inquiry about standing, even though your

opening remarks focused on the merits. You might not budge the Court from its standing inquiry at all by announcing, "Now, if I could turn to the merits."

Sometimes you will make a successful transition by explaining to the Court that you think it is "important" to return to points not yet fully developed. *E.g.*, Transcript of Oral Argument at 14, *Weyerhaeuser*, No. 05-381. Sometimes you will be able to make a transition out of a hostile line of questioning by appropriating a point made earlier by the Justice now questioning you, as counsel did in *Cuellar v. United States*, No. 06-1456 (Feb. 25, 2008). Justice Scalia pressed, "can't you give us something we can get this guy on? . . . He's carrying dirty money. It even smells of drugs. . . . You say he has to walk?" Counsel smoothly appropriated one of Justice Scalia's own points, responding, "I'm not uncomfortable with the notion of him walking, because I'm not uncomfortable with the notion you brought up earlier . . ." *Id.* at 58. The Chief Justice advises that the smoother and more artful your transition, the less likely you are to "lose a little bit of traction." Garner interviews, *supra*. Even a transition that falls below the Chief Justice's exacting standard is preferable to an attempt to evade or put off a question. Attempting to finish your own point before answering a question directly may earn you a sharp reply, such as the (not uncommon), "Would you answer my question first?" And "I'll get to that later," according to the Chief Justice, is the worst thing you can say. *Id.*

Chief Justice Roberts has been notable for his active management of oral argument and his attempts to re-focus the inquiry when it strays down less productive paths. He might interrupt a tangential colloquy initiated by another Justice, or by himself, imploring, "Can we get back to what the case is about?" Transcript of Oral Argument at 48, *Morse*, No. 06-278; "I think we've gotten off the track a little bit," Transcript of Oral Argument at 28, *Gall*, No. 06-7949; or "I'm sorry, we got off the track here. . . . I'm trying to find out . . ." Transcript of Oral Argument at 36, *Sprint Commc'ns Co. v. APCC Servs.*, No. 07-552 (Apr. 21, 2008). He will then re-focus the Court's questioning. Most advocates are likely to appreciate the Chief's assistance in extricating them from tangential and unanticipated inquiries. But this welcome assistance may or may not come in your case and is no substitute for working on transitions from an unfavorable line of questioning back to your own affirmative points.

Sometimes the Justices will argue among themselves, making it all but impossible for you to get a word in edgewise. Interrupting them is never appropriate. It is to be hoped that the Justices won't leave you in the lurch for too long, but if they do, the Chief Justice has been known to lend his assistance here as well. After three Justices engaged themselves in a lengthy discussion of the "metaphysics" of the Court's retroactivity jurisprudence—almost entirely to the exclusion of counsel—Chief Justice Roberts stepped in and quipped, "I think you're handling these questions very well." In the moment of levity, counsel seized his long-awaited opportunity to re-enter the discussion. Transcript of Oral Argument at 39-43, *Danforth v. Minnesota*, No. 06-8273 (Oct. 31, 2007).

As a general rule, levity and humor should come from the bench; counsel's efforts to be funny or lighthearted usually backfire. And what counts as an appropriate quip from the podium and what counts as an appropriate quip from the bench are very different matters. The Justices may amuse themselves by making digs at each other or at other advocates; you must absolutely avoid entering into—or initiating—such exchanges. If the Chief Justice interrupts your discussion of a D.C. Circuit case decided by Judges Robert Bork, Scalia, and Edwards by joking, "They still might have gotten it right," maintain your composure and calmly continue, "They most assuredly did get it right, Mr. Chief Justice." Then proceed without delay to a sober discussion of the case. Transcript of Oral Argument at 6, *Watson v. Philip Morris Cos.*, No. 05-1284 (Apr. 25, 2007). Acquiescing in the moment of levity—at Justice Scalia's expense—has the potential to wreak havoc with your argument.

Similarly, if a Justice makes a dig at you during argument, you must suppress any urge to return the favor. At times, the Justices can be severe. The Chief Justice may remark that "it is a fundamental verbal embarrassment for your argument that you would say . . ." An air of composed, self-deprecating humor may help to stave off any lingering harsh tone to the inquiry. You might effectively respond, "Well, I am not embarrassed by that, Your Honor. Perhaps I'm too resistant to embarrassment." After a brief moment of laughter in the courtroom, you can calmly explain, for instance, that "it's entirely a question of how you take the congressional meaning of the term punishment. . . ." Transcript of Oral Argument at 47–48, *United States v. Rodriquez*, No. 06-1646 (Jan. 15, 2008).

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Indeed, although humor is primarily a privilege of the Justices, you should appreciate that a well-placed moment of levity can help you skirt a potentially awkward or unwelcome situation. If a Justice is worried that you've raised enough "open questions" to make yours "the case of the century," confident counsel might respond, "I was just looking for the case of the day, Your Honor." The Justice may even acknowledge the "overstatement" and rephrase the inquiry on more tractable terms for you. Transcript of Oral Argument at 12–13, *Hall St. Assocs. v. Mattel, Inc.*, No. 06-989 (Nov. 7, 2007). Or if a Justice poses an unfavorable hypothetical and asks, "would that be an illegitimate . . . or an unwise thing for us to do?" you may be able to turn the awkward question with "I'll stick with unwise, Justice Souter." Transcript of Oral Argument at 68, *Exxon Shipping*, No. 07-219.

Levity sometimes comes from candor, from speaking a plain truth you would not ordinarily offer. But the moment needs to be exactly right, or the backfire can be treacherous. Justice Alito once asked counsel whether he thought his argument "ma[d]e a lot of sense in an abstract sense" or was just "the best that can be done within the body of precedent that the Court has handed down." Counsel replied, "The latter, Justice Alito . . . I appreciate the question." At that point, Justice Scalia jumped in with, "Why didn't you say so? . . . I've been trying to make sense out of what you're saying."

Counsel retorted, "Well, and I've been trying to make sense out of this Court's precedents." Transcript of Oral Argument at 20, *Hein v. Freedom from Religion Foundation*, No. 06-157 (Feb. 28, 2007). That is a rare form of humor to pull off in oral argument, and the context had to be just right. Justice Alito's question captured the tone of a long stretch of argument in which the Court struggled to pin down counsel's argument and the implications of its own precedent. Without that stage-setting from the bench, counsel's candid disclosure would have been ill advised. In oral argument—even more so than elsewhere—be sure to gauge the tone of your audience carefully, and wait for precisely the right moment, before risking such a bold attempt at humor.

Oral argument in the Roberts Court remains a unique and formidable challenge, even for the most skillful advocates. Perhaps the Chief Justice's experience at the podium accounts for the favorable changes he has brought to the Court's recent sessions. But he also brings the exacting standards of a true master of the craft. If you are lucky enough to have your case before the Court, stay true to the fundamentals. With meticulous preparation, you can achieve the clarity, flexibility, and unfailing responsiveness to the Court's questions that distinguish the most effective Supreme Court advocates—and be well on your way to making your oral argument an effective weapon on appeal. ◻