

## EDWARD W. HINTON MOOT COURT COMPETITION

### Tips for Successful Oral Advocacy<sup>†</sup>

#### INTRODUCTION

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This guide is meant to serve as a brief primer on how to be a successful oral advocate. What follows is a series of general tips; some are specific to moot court or oral advocacy, while others are simply tips for good public speaking. Many of these tips are among the most common suggestions offered to competitors. Hopefully this will help you prepare for this year's competition.

This primer is by no means meant to serve as a complete guide. Great advocates develop their own style, realizing which techniques and style of argument work for them (and which do not). However, mastery of the suggestions below is more likely than not to leave you better than you began.

Good luck!

#### RESOURCES

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One of the more popular guides to appellate advocacy is Making Your Case: The Art of Persuading Judges, written by Justice Antonin Scalia and Bryan Garner (West 2008). The book provides a great deal of practical advice on both written and oral advocacy. Other resources on reserve in the law library include:

- Mary Beth Beazley, A Practical Guide to Appellate Advocacy (Aspen 2010)
- Carole C. Berry, Effective Appellate Advocacy: Brief Writing and Oral Argument (West 2009)
- Michael R. Fontham et al., Persuasive Written and Oral Advocacy in Trial and Appellate Courts (Wolters Kluwer 2007)
- Alan D. Hornstein, Appellate Advocacy in a Nutshell (West 1998)
- Michael D. Murray and Christy Hallam DeSanctis, Appellate Advocacy and Moot Court (West 2006)

Another great resource is hearing talented oral advocates in action—listening to how they address judges, how they conclude an argument, how they handle rapid-fire questions (and what type of questions they get), how they are able to pivot from an accusatory question into a point in their favor, etc. You can listen to Supreme Court oral arguments at [oyez.org](http://oyez.org), where you can also search by advocate. Some of the finest oral advocates of the past generation include: pre-bench John Roberts, Ted Olson, Seth Waxman, Carter Phillips, Paul Clement, Maureen Mahoney, Paul Smith, and Walter Dellinger.

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<sup>†</sup> This guide was originally compiled by Cleve Doty (JD '09) in Fall 2008. It appears here as amended by Prerak Shah (JD '10) in Fall 2009 and Nick Tarasen (JD '12) in Fall 2011.

## GENERAL TIPS

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- Always address the judges as “your Honor” or “Justice/Judge \_\_\_\_\_.”
- Speak slowly. Take your time. There is no prize for saying the most during an oral argument. Almost all competitors speak more quickly than they think they are, and it is better to be slow and clear. And if you speak quickly, it will be obvious to the judges when you are caught off guard.
- Do not come to a round with a fully prepared speech to read. Yes, you should be able to speak for minutes on end if necessary—*and sometimes a judge will let you go on that long without any questions*—but, more importantly, come with an outline. Be prepared to mix, match, or reorder your arguments in order to get your points across.
- Brainstorm a list of potential questions. Where are the hard issues? What hard hypotheticals are there? Where are the key disagreements? What practicalities could impact the weight of the arguments (that is, what real or hypothetical facts, if slightly altered, could influence the outcome)? What are the most likely counterarguments to your points? Then consider answers to all of those questions. All well-prepared advocates will have considered the key questions in advance. Most will outline answers to these questions or rehearse their answers.
- One technique that some have found helpful is to create several brief sheets to prepare. Make one with key statutory/case references. Make another with the outline of your argument. Make a third with counterarguments or an outline of responses to points that might come up. (Petitioners might also create a list of points for rebuttal.) Be prepared to speak extemporaneously from your outline. *Do not read from the page* and do not take more paper in than you can see while standing at the podium without shuffling through them. A practice or two will help you memorize key points; if you do not have them memorized then at least know where to find things immediately.
- Try to relax and to engage the judges—if you can, treat argument as a conversation, not a debate. Justice Scalia’s book recommends treating oral argument as a discussion between a young associate and a senior partner.
- Make sure you know and understand the case, the facts, and the law. You want the judges to trust you and your judgment about the case.
- Practicing in front of your friends may help you work on smooth transitions and become more comfortable with the subjects (thus avoiding the admonition against pronouns, discussed below).

## THE INTRODUCTION

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- The standard Supreme Court oral argument opens with “Mr. Chief Justice, and may it please the court...” For purposes of moot court (and to avoid gender issues and ambiguity regarding who is chief), this may be reduced to “May it please the court...”
- Memorize a short intro that includes a one-sentence synopsis of each of your arguments. You can proceed from there to a longer explanation if the judges allow it.
- Begin with your arguments. Do not waste your already-short time by summarizing the issues, the law, the standards, or anything else that was in the briefs. Give detail if the judges seem unfamiliar with a point or want more detail, but in general you should assume that the judges are familiar with the underlying issues. They do their jobs and are usually well-prepared for argument, so they will quickly tire of overviews and summaries of the case.

## DURING THE ARGUMENT

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- Stop speaking *immediately* when a judge asks a question. **Never speak over a judge.** If you were making a critical point, find a way to get back to it. (But ask yourself: was it really *that* important?)
- Never interrupt a judge as he or she is asking a question. Wait for the entire question.
- Show respect for the judges at *all* times. *Never* attack the judges, even if you disagree with their arguments. **Do not display frustration with a judge by sighing, rolling your eyes, or shaking your head.** Attempt to persuade, and if the judge is lost as far as your essential argument is concerned, you can respectfully acknowledge a disagreement or tactfully change the subject and try to persuade the remaining judges.
- Before the round, establish what you do and do not need to defend. Think about: (a) what you absolutely *must* defend (your bottom line), (b) what you *want* to persuade the court of in order to have a good chance of winning (your likely outcome), (c) and what is the most you could possibly *hope* to convince the court of (your best case scenario). Make a decision tree if necessary. Consider what impact losing one of your points would have for the rest of your argument: Do you have alternative or back up arguments? Or, is a seemingly minor/innocuous point actually quite crucial?
- A corollary to the above is that it may be well worth conceding a minor point (or simply moving on) for the sake of time. You only have so much time, and if you need to drop a minor point in order to get to your major issues, do so. Planning ahead will allow you to know which points you can drop (if only for the sake of argument) without conceding your entire case.
- Create a short list of the few points you *absolutely must* get out, and refer to it as your argument nears its end. This list should be shorter than you think; getting to all of them may be substantially more difficult than you anticipate.

DURING THE ARGUMENT (CONT.)

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- Be direct in your answers, but take time and get the answers correct. Pause to consider a question before answering, if necessary.
- Do not make your claims too broad. Know exactly how far you can push your assertions. If you claim too much, judges will demand that you support your claims—and if you can’t support them, then you will lose credibility. Establishing what you need to defend before the round will help you avoid this mistake. (Conversely, if you claim too little, you may not establish your case or may concede a key point—and the judges may think you too timid.)
- If possible, pause and break your answers down. Many skilled advocates will often do something like the following: “No, your Honor. That case does not control here, for three reasons. First...” But only do this when you have *three actual responses* to a point, because you may be asked for all three.
- Use concrete examples or analogies when possible. Think of some ahead of time.
- If there are important statutory provisions, cite to them: “Section 401 says X.” Similarly, if there are talismanic phrases from a case (e.g., “fair play and substantial justice”), be able to quote them. If you don’t want to memorize them, have a handy sheet ready with the key language and references. Memorize what you can but have the sheet ready for things that come up. Refer to page numbers of your brief (or appendix) if it will help.
- Make use of nonverbal communication skills. For example, rather than asking for a clarification afterwards, it is possible to signal confusion over a portion of a question. But be careful about doing this, and only do so sparingly.
- **Do not** ask questions of the judges (and *certainly* do not expect a response). If you need clarification of a question, it is possible to signal confusion over a portion of a question nonverbally. Or, you may begin your answer with “If I understand your Honor correctly that X means Y...” or “Perhaps I do not understand what your Honor meant by X, but...” If your understanding is not correct—or if there are several possible understandings—the judge will often jump in to clarify.
- Look at a judge’s questions as communicating to you what he or she is thinking. Try to understand each question as a concern: what bothering the judge and causing him or her to ask this question? The judge’s actual concern may lie much deeper than the particular question being asked. So address the question, but try not to do so superficially; *try to speak to the underlying concern*. Look for patterns in questions: is a judge asking several questions along a similar approach, or using similar arguments? If so, speak to that *argument* as well as answering the question.
- Try to transition from answering one question to discussing a different point you want to address. Use tie-ins to get back to points you want to make. Similarly, if there is a lull in the questions, take the initiative to lead the argument in a direction you want it to go.

## CLOSING

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- Have a short closing statement memorized. It should be about two sentences; you will likely not have time for more. Draft it in advance. If possible, emphasize a strong point from your round. You can be creative, but be brief.
- Your last statement, if you can, should be a simple request that the court affirm (or reverse) the court below.
- Do not ignore time limits, even if the judges move beyond them. If you are over time or are constantly peppered with questions even after time, you may mention that you are over time (“I see that my time has expired...”) and, in extreme cases, ask for permission to finish up. It is acceptable to give a short closing after time, but it should be the formulaic closing (“X, Y, ...please reverse the court below.”) and only last a few seconds.

## STYLE AND DEMEANOR

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- Avoid overusing hand gestures. Be aware of the gestures you are using. In general, it is best to avoid them if you are not sure you have control over what you are doing. If you are confident with your hand gestures, then it is possible to use them effectively for emphasis.
- Be aware of fidgeting with your hands, tie, pockets, skirt (or, conversely, having a death grip on your tie, jacket, etc.), or any other nervous habits that may be distracting.
- It is not uncommon for advocates’ hands to shake, particularly at the beginning of an argument. If they do, rest them gently on the podium or clasp them loosely in front of you.
- **Do not point at the judges.**
- Do not use a pen to point or hold it in your hand; it will only distract.
- Do not lean on the podium or brace yourself against it. Stand behind it (a minor step back or very slightly to the side can display your confidence), but do not use it for support.
- Do not pace. Moving around can be used to emphasize a point, but only if done so sparingly.
- Do not lean or shift your weight back and forth; keep your weight centered. Shuffling or swaying is distracting.
- Think about your volume. Be sure you can be heard by the judges. At the same time, be aware that yelling at the judges is aggressive and unpersuasive. Use your tone and volume to emphasize key points in your argument or key words in a phrase.
- Make eye contact with the judges. If there are multiple judges, share your eye contact with them all (focus on the one looking at you at a given time). But don’t stare—it’s creepy.

## TIPS FOR ANSWERING QUESTIONS

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- Speak *directly*. Do not use “I think,” “I believe,” “we believe,” “we argue,” or any variation of these. Speak as though everything you say is a fact: “That is correct because...” or “Case X does not apply here...” Phrases and terms that distance you from your own arguments detract from their strength, leave room for disagreement, and suggest to the judge that even you do not truly believe what you are saying.
- Speak *clearly*. Be familiar with the subjects—especially your client’s name and the names of major figures—and avoid using pronouns (which is easier if you speak slowly and practice ahead of time). Avoid “this thing,” “he,” “she,” “they” etc.
- Avoid verbal ticks and “fillers.” Do not say “oh,” “um,” “uh,” or similar words; likewise, do not fill every pause with “your honor.” Avoid repeatedly beginning sentences with “well,” “however,” or “and.” If you catch yourself doing this in a practice, concentrate on not doing it. Practice and get someone to stop you (or point out the offending word/phrase) each time you utter these words.
- Often, when you say “respectfully,” it’s when you’re *not* being respectful. Use sparingly, and only when you’re directly disagreeing with the judge. (Consider whether it is wise to do so.)
- Try to *directly* answer the question the judge puts to you before you expand on your answer. Almost all questions can be answered with a simple “yes” or “no,” followed by explanation. Or a “yes, however...” followed by an explanation. If you can answer a question in this way, do so.
- Never dodge or ignore questions. It is better to give an answer that may not persuade the judge than give none at all. If the judge found your answer particularly unsatisfactory, you can always go back later if you think of something to address the judge’s concern.
- Don’t fight hypotheticals or try to dodge them by saying “that’s not this case.” Of course it’s not this case—*that’s why it’s a hypothetical*. But the judge still wants an answer, so give one and *then* distinguish the hypothetical or explain to the court why it is flawed. Otherwise you may sound petulant and unwilling to answer the questions, and your judges will be annoyed.
- Some judges (like some professors) may try to make you lose your confidence or throw you off by questioning or conveying skepticism about something when you’re actually right. If your point is accurate or worth making, stick to your guns even if the questions are derisive or incredulous. (This rule may work less well in real life.)
- Don’t reflexively reject everything a judge says. Some judges will ask you questions that *help* you—sometimes because they want to refocus the conversation or convey something to a fellow judge. Help them help you by accepting that aid whenever it’s handed out.

TIPS FOR ANSWERING QUESTIONS (CONT.)

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- Candor may be a virtue. If there's a question you don't know the answer to, it's acceptable, very occasionally, to admit you don't know and either offer a reasoned guess (or a reason why the answer is irrelevant) or move on. The judges do not expect you to have an encyclopedic knowledge of the law, and (if they're good) they'll push you into territory you're not expecting. This, of course, is not an excuse for not knowing answers regarding the core legal and factual issues of your case.
- Sarcasm or indignation should almost never be used. In a courtroom, they signal an inability to be professional and engage arguments on their merits.
- In the vast majority of circumstances, humor in a courtroom falls embarrassingly flat (at least the intentional kind). Only use humor if you *know* you have developed a rapport with your judges and you are 110% certain you will not squander that rapport. In general, humor should be avoided.
- Be professional and courteous to your opponent (who is "your colleague" or "opposing counsel" or "counsel for Petitioner/Respondent"). Disagree with his argument; use his words against him; but don't be petty, belittling, or unfair; don't mischaracterize or misquote him; and, above all, do not make personal attacks.