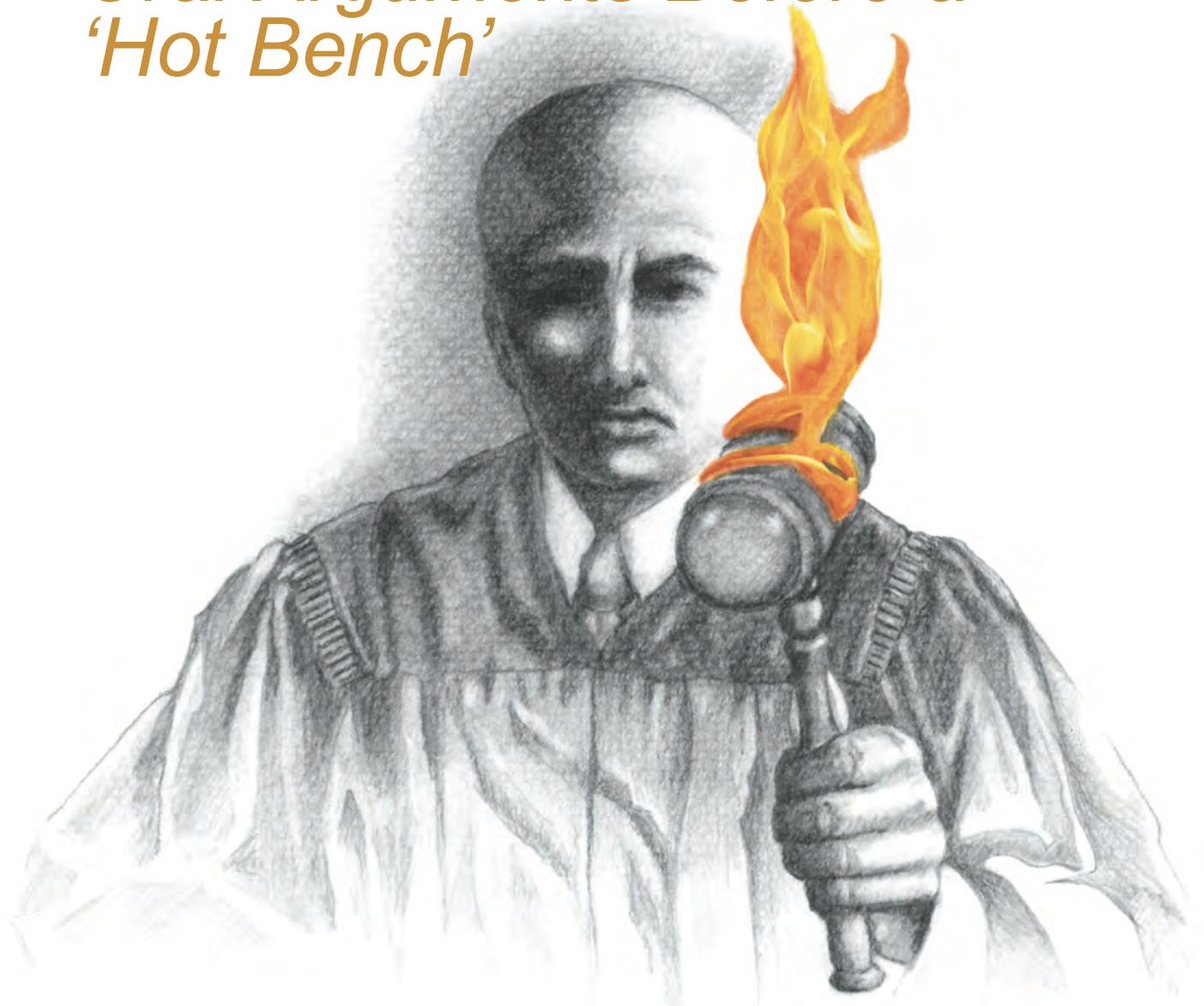


Turn Interruptions Into Opportunities:

*Oral Arguments Before a
'Hot Bench'*



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By Ken Broda-Bahm, Ph.D.

As counsel begins

her oral argument to the judge, everything is going according to plan. She systematically previews her main points and begins developing the first of several layered arguments. Then... the judge interrupts with a question. Then another question. Then a counterargument. Before she knows it, counsel is off track and her carefully prepared outline is out the window. This isn't an unusual circumstance at all when dealing with a "hot bench," a judge who is unusually active in controlling the flow of oral argument through questions and arguments from the bench.

As common as it is, the "hot bench" can be unnerving for even experienced presenters. After all, one premise of giving a speech is that the speaker controls the time, the structure, and the content. But not so when a judge wants to control all three. In that situation, attorneys often respond in one of two unproductive ways. At one extreme, some attorneys will simply surrender, e.g., *"Why prepare a presentation at all? The judge will decide what we talk about...I'll know the facts and the law well enough, but I'm not going to worry about having a plan of what to say first, or second, or last...because I can't control that."* At the other extreme, some attorneys will engage the judge in a struggle for control, e.g., *"Yes, your honor. If you will allow me to continue, I was planning on addressing that point in a minute...As I was saying..."*

Neither response is ideal. While the first gives up on a speaker's most fundamental obligations to clarify and organize, the second fails to accommodate the critical target audience: the judge. Thankfully, there are other approaches. Taking several examples from the historic oral arguments before the Supreme Court this Spring focusing on the healthcare law, this article focuses on effective oral argument before judges, and draws conclusions that apply not only to appellate practice, but to any instance of oral argument.

In the recent historic oral arguments before the Supreme Court on the constitutionality of the President's healthcare reform, the Justices allowed an unprecedented six hours of oral arguments from March 26 to 28th, 2012. While still not appearing on television, the Court allowed the next best thing: same day access to [transcripts and audio recordings](#). Some Americans tuning in to the phenomena of oral argument for the first time might have expected long and impassioned legal rhetoric from the lawyers while the judges listened. The reality: not so much uninterrupted speech time. The question is how the attorneys present effectively while still remaining responsive to the judges. This article focuses on that challenge while drawing from the recent example of the Supreme Court's oral arguments on healthcare reform.



Overarching approach: Practice the “three P’s” of oral argument.

As I’ve reviewed the transcripts and audio recordings of the unprecedented six hours of oral argument on The Affordable Care Act, I’ve been struck by the skills of one advocate in particular: Paul Clement, who represents the 26 states challenging the constitutionality of the Affordable Care Act. I hasten to add that I wasn’t impressed by Mr. Clement based on the position he advocates -- in fact, I personally hope for a constitutional solution that does not involve throwing as many as [thirty-two million Americans](#) out of the health insurance market, but I was impressed by the quality and style of argument from the states’ side.

It is no surprise that Paul Clement, the former Solicitor General and current Bancroft PLLC partner, would turn in a superior performance. After all, he is a Supreme Court superstar, scheduled to argue seven cases before the Court this term alone. Evan Tager of Mayer Brown even called him the “[LeBron James of law](#)” due to the bidding war that ensued in 2008 when he left government service. Observers tend to agree that he has lived

up to the hype. Veteran Supreme Court litigator Carter Phillips, for example, noted in an interview for [Above the Law](#) that Clement “did a spectacularly good job” and turned in “a very special performance” against the Act. So, focusing on the Court’s session on the individual mandate, I’d like to draw three lessons from the example of Mr. Clement’s argument: Prepare, prioritize and pivot. Prepare extensively, prioritize the judge’s question over all else, but pivot back to your own talking points wherever possible.

I. Prepare in order to know the case far better than your judges.

The first lesson is the most obvious. Oral argument is not just a natural extension of the briefing that you’ve already done, it is a different setting that requires more limited goals, more immediately accessible expression of complex arguments, and a more reactive and flexible approach. In Mr. Clement’s case, his preparation included at least five formal moot court sessions. As The New York Times reported, in the week before

the big showdown, “There were so many of the mock arguments that lawyers call moot courts, that they threatened to exhaust something that had never been thought in short supply: Washington lawyers willing to pretend to be Supreme Court justices.” Many of the examples in the argument are, naturally enough, very complex and not amenable to being summarized in our humble blog. To appreciate the strategic and thorough nature of the response, you should really [read](#) the transcript or, better yet, [listen](#) to the audio.

Oral argument in appellate court generally means being tested by those judges who disagree with you. Repeatedly, however, Mr. Clement answers one of the Justice’s pointed case references by going immediately to the case and reciting specific facts or circumstances that differentiate the case from the point the Judge is trying to make. When Justice Sotomayor challenges the states on some of the argument’s less central ground on the government’s taxation power, Mr. Clement responds by dredging up a historic argument between James Madison and Alexander Hamilton on whether the government could place a tax on horse-drawn carriages, and leveraging that case to make the point that the framers would have agreed that the government cannot constitutionally tax the failure to buy something (the failure to buy a carriage, or in this case, insurance) without running afoul of the prohibition on a direct tax. The advocate’s ability to quickly adopt to overlapping challenges thrown out by multiple judges, and to retrieve and apply such a wide array of historic and legal knowledge is the product of one thing: preparation.

2. Prioritize the judge's question over all else.

Preparing for oral argument naturally entails selecting your most critical areas of emphasis. But the demands of an active judge or panel means that, at any moment, you need to be able to drop what you were planning to say and immediately transition to your judge's question. Even where the judge interrupts the flow of an important argument, and even when the question is leading you down what seems to be a side road, the situation demands the kind of humility that allows you to say to yourself, "Whatever I was saying can wait...let me give full attention to what the judge wants." This ability to tailor one's focus is a constant running through all of the advocates' arguments, not just Mr. Clement's. To my eyes, the entire transcript is free of any attempts to set aside a Justice's question in order to get back on script. One might expect that in the Supreme Court, but even in an oral hearing before the county magistrate, the same principle should apply. If the decision maker has a concern that is important enough to interrupt your flow of argument, then by definition that interruption has now become the most important part of your argument. There is a guiding principle in all oral arguments, and it is found in the first words that often come out of an advocate's mouth. It isn't, "May it be what I planned to say," it is "May it please the court."

3. Pivot back to your own talking points wherever possible.

Still, getting to what you plan to say is important, and you do that by consistently pivoting on your answers. The term "pivot" is familiar in media and political communication circles, but may be less familiar in law. But the strategy is involved in nearly every oral argument answer I see in the transcript. You pivot by moving from facing one way to facing another, in this case, from facing their argument to facing your's. Your first response after the judge interrupts is always to answer the judge's question. Always. If you're not answering, then you're not adapting and not persuading.

But the response doesn't end there. If all you do is answer, then you are forever on the defensive, doomed to fending off attacks without ever building your own arguments. In effective oral argument, you answer the judge's point first, then naturally pivot back to one of your own affirmative arguments. This is where Mr. Clement truly shows the mastery of an experienced appellate attorney. For example, Justice Kagan challenges Mr. Clement with the central argument that individuals without insurance are still in commerce, and hence subject to regulation, because "they are making decisions that are affecting the price everybody pays for this service" due to the fact that the uninsured receive uncompensated care in emergency situations.

Mr. Clement first directly answers Justice Kagan's claim: "If all we were concerned about is the cost sharing that took place because of uncompensated care in emergency rooms, presumably we would have before us a statute that only addressed emergency care and catastrophic insurance. But it covers everything, soup to nuts..."

Then he pivots this point back to one of his own central arguments: "But there is a much bigger cost shifting going on here, and that's the cost shifting that goes on when you force healthy people into an insurance market precisely because they are healthy, precisely because they are not likely to go to the emergency room, precisely because they are not likely to use the insurance they are forced to buy in the [Act]. That creates a huge windfall. It lowers the price of premiums." That argument then comes back to the states' central position that Congress cannot constitutionally have the power to "compel individuals to enter commerce in order to better regulate commerce." The mark of a successful pivot is that you end up on your own ground. You land on a powerful argument for your position, and not just on a rejoinder to a point against you.

Preparing for oral arguments often involves reading a ton of briefs, and that is understandable. The briefing is the foundation for the argument and the ultimate decision. But briefs don't complete the argument, and briefs can't engage in a spontaneous and dynamic high-level dialogue in the way that oral argument can. In addition to memorizing the briefs and everything behind them, advocates with an oral argument in their future might also prepare by studying the examples of great advocates.



Introductions: Cut in to your case before you're cut off by your judge.

A lot can happen in fifty-two seconds. Fifty-two seconds is the average amount of time a lawyer was allowed to talk at the start of his argument before being cut off by a judge, out of the 11 oral arguments presented to the Court on the Affordable Care Act, not counting rebuttals. Oral argument isn't always the decisive ingredient in a decision, and within oral argument it is far more important to answer the judge's questions than to have a great introduction. Still, those first few moments and what the attorney is able to do with them can be very important. As Bryan Garner and Justice Antonin Scalia write in [Making Your Case: The Art of Persuading Judges](#), "setting forth at the outset the full range of what you hope to address may induce the judges to make their questions more concise." Taking a look at the 11 introductions from the healthcare oral arguments, this section examines a few examples and draws some lessons on what should be done in the sentences that come before the interruption.

I. Get to the point before your judge interrupts.

After downloading all of the audio and transcripts of the three days of oral argument, I listened to, read, and timed the 11 argument introductions delivered by seven men (yes, all men -- as I've reported before, there still [isn't quite gender equality](#) in advocacy before the highest court). The result provides an interesting snapshot of what some of the attorneys chose to do with the first few sentences. Chief Justice Roberts' advice from the [Bryan Garner interviews](#) is that "you want to convey exactly what you think the case turns on and why you should win . . . so they understand right from the beginning." But upon analyzing these 11 introductions, I noticed a few different approaches to the question of what you should say right after "May it please the Court."

Importance: One approach was to begin by emphasizing the importance of the hearing itself. For example, Donald Verrilli began the government's first presentation on Monday with an emphasis on the questions "of great moment" that the Court would be addressing. It stands to reason to stress what is at stake, but the danger is that it speaks more to the public than it does to the bench, who could have responded, "With all due respect General Verrilli, if it wasn't important this Court would not be addressing it."

Position: Another common approach was to begin by announcing one's position in the form of a thesis or theme. For example, Paul Clement arguing for the 26 states began Tuesday's argument with "The mandate represents an unprecedented effort by Congress to compel individuals to enter commerce in order to better regulate commerce." It is effective because it is short, punchy, and to the point, but for judges who are likely to be already well aware of your position, there is a third option that is probably better suited to oral argument at this level.

Issues: The third option is to use the opening sentences to frame the issues that remain after the briefing in order to identify the concerns you expect oral argument to focus on. This approach may be the one best suited to a situation where your decision makers are very familiar with the arguments and counterarguments of each side, but could benefit from the debate being boiled down to its central and essential differences. Within this approach, there is still the question of how detailed you ought to be. Using the metaphor of a building, you might think of issue identification as having several floors:

Ground Floor: This case is about whether the Affordable Care Act is Constitutional.

Second Floor: This case is about whether Congress can require an individual mandate as part of its power to regulate interstate commerce.

Third Floor: This case is about whether the government is regulating an existing market or creating a market in order to justify regulation.

Each level gains in sophistication and specificity. Depending on how mature the argument has become once you get to the point of oral argument, there may be many more floors as the distinctions between the parties rely on finer and finer points. The rule of thumb is this: Begin at the highest floor that includes your judge, or most of your judges. For a jurist well-steeped in the briefing and the case history, the lower floors can often be wasted words -- the specific decision will be based on answers to the higher floor issues.

Looking back at the Affordable Care Act oral arguments, I think there is a lesson in comparing the longest and the shortest preinterruption statements to the Court. The longest, clocking in at one minute thirty-two seconds, was Donald Verrilli's statement at the beginning of Tuesday's session on the individual mandate. I won't quote his at length, but the points he made in order were that:

- Healthcare is a fundamental and enduring problem in our economy.
- Insurance is the predominant means of paying for healthcare.
- Forty million Americans lack access to employer or government provided health insurance.
- For those individuals, the private insurance market doesn't provide affordable health insurance.
- All told, these are large economic problems that beget other economic problems.

While supporters of health insurance reform may be nodding in sympathy, from the perspective of the court's decision making, this introduction never gets off the ground floor of focusing on why the law is good. It does not get to the legal questions the Court will be basing its decision on. In the end, Justice Scalia sets all those concerns aside by asking "Why aren't those problems that the Federal Government can address directly?"

In contrast, the shortest introduction was just 15 seconds. However, that introduction, Paul Clement's on behalf of the states in the the final session, arguably got the job done. Before Justice Kagan cut it, Mr. Clement said, "The constitutionality of the Act's massive expansion of Medicaid depends on the answer to two related questions: 1) Is the expansion coercive? 2) Does that coercion matter?" Not much, but it does frame the main issues for the ensuing argument.

2. Get to the point, then welcome the interruption.

In emphasizing the advocate's need to frame the argument before the judge cuts in, I am in no way suggesting that the interruption is a bad thing. As litigators well know, some judges will listen attentively and let you unpack a detailed argument, asking questions only as a kind of cleanup exercise at the end, and other judges will engage you in a dialogue almost from the starting gun. The latter is sometimes referred to as a "hot bench," and the U.S. Supreme Court is arguably the hottest bench in the system. Rather than frustrating the advocate, however, the interruptions create an unprecedented opportunity. Before the passive audience, the advocate is forced to estimate what is important and to guess at what questions and counterarguments the decision maker has in mind. Before the active audience, however, that is all on the table and you have an opportunity to adopt to it, incorporate it, or challenge it. The hot bench, is a precious chance to wrap your advocacy around your decision maker's specific frame of mind.

When you are expecting that level of interaction, you know that the dialogue will play a greater role than the introduction. Still, give that introduction a serious amount of attention and think about what you want to accomplish in the limited time you have prior to interruption. An oral argument will rarely cause a prepared and committed judge to change their opinion by 180 degrees, but it can still make a difference. "It makes the difference," Garner and Scalia write, "because it provides information and perspective that the briefs don't and can't contain." So approach those arguments with the knowledge that you'll only be fully in the driver's seat for about a minute, maybe less.



Themes: Aim your oral argument at your judge's motivating principle.

All eyes were on Justice Kennedy at the conclusion of the Supreme Court's oral arguments on the constitutionality of the Affordable Care Act this past Spring. As a closely analyzed swing vote, the Justice's words were scrutinized like the tea leaves of the upcoming verdict expected this month. In a well-researched piece in [The New York Times](#), author Adam Liptak focuses on how the parties tailored their arguments to appeal to Justice Kennedy's central motivating principle: liberty. The analysis points to a lesson that all advocates who engage in oral arguments should take to heart: figure out what drives your judge's thinking and frame your arguments along those lines.

The concept is familiar to anyone who has studied public speaking or rhetoric. The essential lesson is that you need to adapt to your audience. But the legal arena, with its emphasis on the neutral standards of law, can sometimes trick advocates into a belief that success just depends on the correct application of law and facts. Without an appreciation of the uniqueness of your decision maker, however, you aren't really persuading.

This section takes a look at this principle as it relates to Justice Kennedy's dialogue in the healthcare oral arguments.

Here is a perspective that you may not have considered:

All persuasion is self-persuasion. Advocates merely try to help the process.

Persuaders might be tempted to think in terms of what I call a "consumer model" of argument in which we see audiences as either "buying" or "not buying" the ideas sold by an advocate. Essentially passive, the audience is simply seen as accepting or rejecting what it is presented. Anyone who has spent time analyzing audiences, and certainly anyone who has spent time interviewing jurors, knows this isn't the way it works. Persuasion is an internal process and it is engaged when your decision makers work through a problem on their own. They are informed and influenced by the advocate's appeals, definitely, but they ultimately own the critical process. In other words, your target is engaged in self-persuasion and you are just there to help.

I believe that this perspective applies to juries, but it applies most emphatically to the legally trained audience of judges. Good judges do not simply sit behind the bench, listen, and then accept or reject your position. They carefully construct a result and rationale that will ultimately become a written opinion. They use your communication -- briefs and oral arguments - as raw material, inspiration, foil, and sounding board. The implication of this is that you need to think about your advocacy, not as just presenting a finely crafted position to your judges, but as [reasoning with them](#). To do that, you need to focus on what generally drives and animates your judge's decisions.

Returning to the example of Justice Kennedy, I see three ways to apply that perspective to oral arguments:

I. Learn what motivates.

A judge's past decisions are a guide to their future ones, not in the narrow sense of predicting a verdict, but in the broader sense of predicting how they will reason about the new case. For Supreme Court swing voter Justice Kennedy, those who have closely followed and analyzed his decisions have focused on liberty as the central motivator. For example, in a recent unanimous opinion of the Court ([Bond v. United States](#), 564 U.S., 2011) on an issue that bears on issues underlying the Affordable Care Act, Justice Kennedy wrote about the role of federalism as a tool that "protects the liberty of the individual from arbitrary power," resolving disputes over the meaning of federal authority by returning at several points in the opinion to that central role. Two books written about Justice Kennedy have also focused on his particular concept of liberty: Helen Knowles' [The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty](#), and Frank Colucci's [Justice Kennedy's Jurisprudence: The Full and Necessary Meaning of Liberty](#).

So you can bet that with Justice Kennedy widely expected to be the swing vote on healthcare reform, this motivator was closely studied by the advocates. For any judge, the driver of decisions may be the ideals of efficiency, reasonability, equity, simplicity or a more nuanced

constellation of attitudes. The conclusion that for Justice Kennedy, the touchstone is liberty, posed some challenges to the government's case that the Constitution permits an individual mandate under the Commerce Clause, as well as expanded federal mandates on the states.

2. Frame arguments in motivated terms.

You might say that the central notion of individual liberty, set against the government's power to regulate, was the central theme underlying all of the oral argument before the Supreme Court last week. But [in the concluding session](#), the idea moved to center stage. Solicitor General Donald Verrilli ended his time by noting the millions of people without insurance that the Act addresses, and the "important connection, a profound connection, between that problem and liberty." And he further noted that the Medicaid expansion would allow greater coverage: "As a result of the care that they will get, they will be unshackled from the disabilities that those diseases put on them and have the opportunity to enjoy the blessings of liberty."

Representing the states challenging the law, however, Paul Clement referred to the Solicitor in saying, "You think that the policy spreads the blessings of liberty. But I would respectfully suggest that it's a very funny conception of liberty that forces somebody to purchase an insurance policy whether they want it or not."

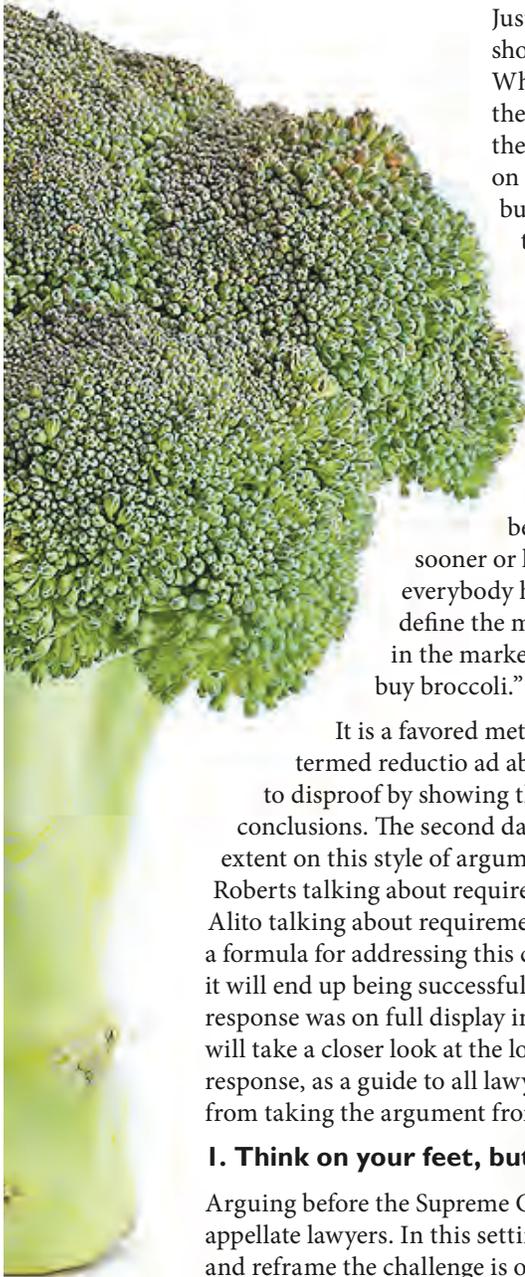
As I've written in the past, advocates and audiences alike inhabit a rhetorical universe with its own "[god terms](#)" and "[devil terms](#)." In the case of the example above, the advocates have intelligently seized on the Justice's known god term in framing their arguments. We will need to wait until June to see how much it influenced the Court's opinions.

3. Provide solutions.

The questions in oral argument are not the setting for a "quiz bowl" or a test. The judge is not asking the question in order to see if you know the answer. Instead, the judge is trying to work through an issue, to develop an idea with -- or quite often against -- your advocacy. Viewed in that light, a question requires not just an answer, but a solution to a problem.

A good example of this can be seen in [Tuesday's oral arguments](#) focusing on the individual mandate. Much of the questioning focused on the search for a "limiting principle" that would allow the Court to articulate why an individual mandate to buy health insurance is constitutional, while other examples of compelled purchase, like broccoli, is not. Early in the argument, for example, Justice Kennedy asked Donald Verrilli, "Can you identify for us some limits on the Commerce Clause?" The Solicitor General responded with two: 1) No "forced purchases of commodities for the purpose of stimulating demand" (no broccoli), and 2) No forced purchases of insurance "in situations in which insurance doesn't serve as the [primary] method of payment for service." Subsequent argument then focused on whether these were distinctions without a difference, or whether they were meaningful tests that the Court could rely upon in setting a standard. Viewed in that light, the oral arguments became a collective effort to address that problem — still adversarial of course, but useful to the decision makers because it focused on solutions.

In this dispute, Justice Kennedy may be in the uniquely important place of being the least predictable vote on the court. But every judge is unique. The presumed neutrality of the law may lead us to think that it is just a matter of finding and presenting the right argument. But communication has always been about analyzing the audience, and judicial argument is no different.



Hypotheticals: Don't let your judge reduce you to absurdity.

Justice Scalia strongly believes that you should not be forced to buy broccoli. When the U.S. Supreme Court addressed the legality of the Affordable Care Act, the second day's oral arguments focused on whether an individual mandate to buy health insurance is consistent with the Constitution's Commerce Clause.

Defending the law, Donald Verrilli argued that Congress is regulating the interstate market for healthcare, and since everyone needs healthcare sooner or later, and insurance is the main method of paying for it, congress can require individual insurance coverage. "It may well be that everybody needs healthcare sooner or later," Justice Scalia fired back, "but... everybody has to buy food sooner or later, so you define the market as food, therefore, everybody is in the market; therefore, you can make people buy broccoli."

It is a favored method of judicial counterargument, termed *reductio ad absurdum*, the Latin phrase referring to disproof by showing that the argument leads to absurd conclusions. The second day's oral argument focused to a large extent on this style of argument with, for example, Chief Justice Roberts talking about required cell phone purchase and Justice Alito talking about requirements to finance burial services. There is a formula for addressing this common style of argument. Whether it will end up being successful or not remains to be seen, but the response was on full display in [Tuesday's arguments](#). This section will take a closer look at the logic of the argument style and its response, as a guide to all lawyers who want to prevent your judge from taking the argument from where you built it to an absurd place.

I. Think on your feet, but know the formula.

Arguing before the Supreme Court is clearly the Super Bowl for appellate lawyers. In this setting, the ability to nimbly respond and reframe the challenge is obviously critical: It demonstrates the defensibility of your argument to supportive judges, and may even play a role in changing the minds of less supportive judges. While few observers of this case expect Scalia, Roberts, Alito or the silent Thomas to come around to support the law (and even swing voter [Kennedy is looking a little iffy](#)), a good response to the broccoli argument and its kin was needed in order to shore up and possibly expand the law's supporters.

Thinking on your feet and coming up with a quick response is a skill that is useful in front of any judge. The ability to take note of the species of argument and to know some simple formula for response can be very helpful. Various response formulas and approaches

can be applied to a number of styles of argument, but let's take the *reductio ad absurdum* as an example, and take a look at the structure of Verrilli's response.

2. The form of the response:

In the broccoli and related examples, Scalia and the other justices applied the *reductio ad absurdum* approach of refuting a theory by showing the absurd implications of that theory. The technique is prominent in Plato's dialogues, making it part of the Socratic Method revered in law schools and judicial practice. The structure is to say:

- If your argument is valid, then a parallel argument must also be valid;
- The parallel argument has absurd or indefensible implications;
- Thus, your argument isn't valid

One of my favorite argumentation textbooks, John Reinard's [Foundations of Argument](#), notes that it is a form of argument by analogy, just one that tries to refute rather than prove. "It is possible to respond to *reductio ad absurdum* attack," Reinard writes, "by showing that the two lines of argument are not similar enough to warrant a legitimate comparison." That is exactly what advocates tend to do with the argument: say that the situations truly are not parallel. But to take it a step further, I think that there is a formula for answering *reductio ad absurdum* that was followed to a large extent by Verrilli in answering the broccoli attack. I think there are four steps:

- **Differentiate**
(The example doesn't apply.)
- **Assert**
(This is what I'm saying.)
- **Deny**
(And this is what I'm not saying.)
- **Reclaim**
(Here is how your example would need to be different in order to apply.)

In order to be responsive, it begins and ends with the absurd example, but in the middle it returns to the main principle that you are defending, separating it from what you are not defending.

3. The Government's response:

Scalia's initial claim was that the government's stance on commerce regulation could be taken to the absurd conclusion that the government could force everyone to buy broccoli. While continuous interruptions from eight of the judges drew the response out a bit, Verrilli did get through most of these steps.

• **Differentiate** (The example doesn't apply.) Here is where Verrilli is immediate and surprisingly specific in separating the food market from the healthcare market:

That's quite different. The food market, while it shares that trait that everybody's in it, [1] *it is not a market in which your participation is often unpredictable and often involuntary, [2] It is not a market in which you often don't know before you go in and get what you need, and [3] It is not a market in which, if you go in and -- and seek to obtain a product or service, you will get it even if you can't pay for it.*

Later, Justice Ginsburg helpfully adds:

[4] *It is not a market where there is a cost that I am forcing on other people if I don't buy the product sooner rather than later.*

That differentiation, however, isn't the end of the response. In order to avoid just bickering over the example, you need to return to the principle.

• **Assert** (This is what I'm saying.) After throwing out the broccoli, Verrilli emphasizes,

The test, as this Court has articulated it, is: Is Congress regulating economic activity with a substantial effect on interstate commerce?

• **Deny** (And this is what I'm not saying.) That basic principle needs to be differentiated from the misperception that leads to the absurd example in the first place. As Verrilli clarifies,

The rationale under the Commerce Clause that we're advocating here would not justify forced purchases of commodities for the purpose of stimulating demand.

So, a belief that folks just need to eat more broccoli would not fit the government's rationale.

• **Reclaim** (Here is how your example would need to be different in order to apply.) Verrilli did not get to this step before being pushed into other issues, but a nice way to end the response is to bring it back to the example, turning the *reductio ad absurdum* on its head. Here is how I would put it:

So, if most everyone eventually needed broccoli at some point in their lives, and if most everyone would end up getting that broccoli in some form or other, whether they could pay for it or not, and if those who could pay ended up subsidizing those who couldn't or chose not to pay for broccoli, then in that case, yes, Congress could rely on the Commerce Clause to require people to have a way to pay for their broccoli. None of that applies to broccoli, but all of it applies to healthcare.

Of course, there are a number of different approaches, and with someone like Scalia bearing down on you, few people will hit every note correctly. But in that context, and all contexts involving judicial, magistrate, or arbitration arguments, remembering some useful steps and formula can help guide your response. The moral of the story is this: If you are served broccoli from the bench, send it back. It is a delicious superfood, but in this case it is a bad argument.

Closing thought: When faced with a hot bench, keep your cool.

Pulling all of this together, there is a way to approach your own preparation that keeps you organized and able to nimbly adapt to the judges' involvement employing what I'll call a "break apart structure," attorneys can simultaneously stick to a plan while addressing the judge's thoughts as they occur.

So what is a "break apart structure?" Just like it sounds, it is a plan that is designed to be broken apart: A series of independent points that can be introduced and developed in any order. While you begin with a default sequence, nothing is lost in the event that the judge's participation causes you to revise your order. Think of it as a speech on index cards (Remember when speakers used index cards?). In this case, you might start off with your "cards" in a specific order, but you are always ready to switch



the order up depending on where your judge's attention happens to fall. For this approach to work, four things need to happen:

1. Focus on independent points.

Attorneys are used to developing a progression of arguments – main point two builds on and extends point one, or points three, four, and five are reasons for point six, etc. That pyramidal structure may work well in the written persuasion of briefs, but can easily crumble in the face of a "hot bench." The active judge is simply not permitting you to develop a complex structure. Instead of being frustrated by that, capitalize on the chance to emphasize separate and distinct points: e.g., seven independent reasons why the court's decision should be reversed, and they can be delivered one through seven, or in any other order.

2. Make sure your notes cooperate.

The notion of independent points is simple enough, but do your notes reflect that? If they are in the form of multiple pages that are structured three or more levels deep, then probably not. Instead, follow the rule of *one page, one point*. Instead of thinking in terms of numbers, structure, and substructure, think flatter: bullets. Just as with the main points, if your bullets are independent as well, then so much the better. Because you'll never know how many you can get in before the judge interjects, each bullet should stand on its own.

3. Think on your feet.

The execution of this approach occurs during oral argument, not before it. Instead of plowing through a planned outline of arguments, you need to make moment-to-moment reactions to what the judge is saying. This means that you have to anticipate the judge's concerns as fully as possible before the argument; and then listen carefully to the judge's comments and questions, always with an eye to the independent point that you plan to bridge to in your answer.

4. Practice what you predict.

It always surprises me that attorneys who predict that the judge will interject at every opportunity, will nonetheless practice as if they will have uninterrupted floor time. If it isn't realistic, then it isn't practice. When you have a "hot bench," practice for that by asking a colleague to pepper your practice runs with realistic questions and interposed arguments. What matters isn't that your colleague get all the interruptions just right, but that you become used to adapting your break apart structure on the fly.

Ultimately, you should welcome participation from the bench. As Sacramento County Superior Court Judge Loren McMaster wrote, "Questioning from the Court generally gives you a good idea what the judge considers important. It may disrupt what you had planned to say, but you should immediately turn to the question and answer it. Do not say, "I will get to it later." That is not helpful, since the judge is 'there' now. The potential persuasive advantage in the "hot bench" cannot be overstated. What better way is there to know what your target audience is thinking, than to hear their objections and concerns straight from them? What could be more conducive to persuasion than the ability to know exactly what obstacles are occurring as they occur? As immigration lawyer, Raymond Fasano noted about Supreme Court Justice Sotomayor, "When a judge asks a lot of questions, that means she's read the record, she knows the issues and she has concerns that she wants resolved. And that's the judge's job."

Research Resources

www.judgepedia.org

www.therobbingroom.com

www.robeprobe.com

www.justia.com

www.oyez.org

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To have a more detailed conversation about how these findings may affect your litigation strategy, please contact Ken Broda-Bahm at KBrodabahm@persuasionstrategies.com or 303-295-8294.



Dr. Ken Broda-Bahm has provided research and strategic advice on several hundred cases across the country for the past 16 years, applying a doctorate in communication emphasizing the areas of legal persuasion and rhetoric. As a tenured Associate Professor of Communication Studies, Dr. Broda-Bahm has taught courses including legal communication, argumentation, persuasion, and research methods. He has trained and consulted in 19 countries around the world and is a past President of the American Society of Trial Consultants. Ken is a lover of new ideas, exotic places, innovative gadgets, and good arguments. He is married to the other Dr. Broda-Bahm (wife, Chris), and is the proud dad of 5-year-old Sadie. Learn more about Dr. Broda-Bahm at www.persuasionstrategies.com.

