

YOUR 15 (OR 30)
MINUTES OF FAME:
DOES ORAL
ARGUMENT REALLY
MATTER?

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Idaho Supreme Court Opinions 2016 (published)

Unanimous	49 (including special concurrence and 4-0)	92%
4-1	4	7%
3-2	1	<1%

Affirmed	33	61%
Reversed	11	20%
Mixed	10	19%

U.S. Supreme Court 2015-2016 Term

Affirmed	30	43%
Reversed	36	52%
Mixed or Other	3	<1%

9-0	6	9%
8-1	4	6%
8-0	24	35%
7-1	6	9%
6-3	3	4%
6-2	12	17%
4-4	4	4%
4-3	2	3%
5-3	7	10%
5-2	1	1%

U.S. Supreme Court Justice Robert H. Jackson

“I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations. Most of them form at least a tentative conclusion from it in a large percentage of these cases.”

1951

Time for Oral Argument Decreases

- Daniel Webster: Dartmouth v. Woodward: Oral argument lasted THREE DAYS
- In 1849, U.S. Supreme Court limited oral argument to 2 hours per attorney
- In 1858, limited to 8 hours per case
- In 1870, to 2 hours per side
- In 1911, 90 minutes per side
- In 1984, 1 hour total, one attorney per side
- **Other courts:** 30 minutes per side (Idaho Supreme Court) or 10-20 (rarely 30) minutes per side (9th Circuit)

Number of opportunities for oral argument decreases

1973 study of supreme courts in 43 states:

- 25 states, oral argument held in over 90% of cases
- Only 6 states heard oral argument in less than 50% of the cases

U.S. Circuit Courts-2014

Cases Terminated on the Merits	After Oral Argument	Submission on Briefs
DC Circuit	49.9	50.1
First Circuit	28.5	71.5
Second Circuit	29.2	70.8
Third Circuit	9.9	90.1
Fourth Circuit	9.7	90.3
Fifth Circuit	18.9	81.1
Sixth Circuit	14.8	85.2
Seventh Circuit	39.2	60.8
Eighth Circuit	18.2	81.8
Ninth Circuit	21.2	78.8
Tenth Circuit	27.9	72.1
Eleventh Circuit	11.7	88.3

Justice Rehnquist, 2001

Lawyers often ask me whether oral argument “really makes a difference.” ...Speaking for myself, I think it does make a difference: in a significant minority of the cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came on the bench. The change is seldom a full one-hundred-and-eighty-degree swing, and I find that it is most likely to occur in cases involving areas of law with which I am least familiar.

1980s: Judge Myron Bright: 8th Circuit

- Studied three judges' proclivities
- Tentative conclusions prior to oral argument
- Conference vote after oral argument
- Percentage of change:
 - ▣ Judge Bright: 31%
 - ▣ Judge Two: 17%
 - ▣ Judge Three: 13%

Myron H. Bright, The Power of the Spoken Word: In Defense of Oral Argument, 72 Iowa L.Rev. 35 (1986)

Effective Use of Oral Argument: Preliminary Conference?

All of us on the bench [are] working on the case, trying to decide it...They (counsel) think we are there just to learn about the case. Well, we are learning, but we are trying to decide it, too. It is then that **all of the Justices are working on the case together**, having read the briefs and anticipating that they will have to vote very soon, and **attempting to clarify their own thinking and perhaps that of their colleagues**. Consequently, we treat lawyers as a **resource** rather than as **orators** who should be heard out according to their own desires.

Supreme Court Justice Byron R. White, 1989

Justice Antonin Scalia

It isn't just an interchange between counsel and each of the individual Justices. What is going on is also to some extent an exchange of information among the Justices themselves. You hear the questions of the others and see how their minds are working, and that stimulates your own thinking.

Justice Antonin Scalia



What happens not at all rarely, but with some frequency, is that it's a very close case. You go in on the knife's edge. You haven't made up your mind...And the answer is, sometimes the case is so close, that persuasive counselor, their oral argument, can make the difference.

Chief Justice John Roberts (2005)

Oral argument matters, but not just because of what the lawyers have to say. It is the organizing point for the entire judicial process. ...The voting conference is held right after the oral argument...And without disputing in any way the dominance of the briefing in the decisional process, with the voting coming so closely on the heels of the oral argument that the discussion at conference is going to focus on what took place at argument.

Justice Anthony Kennedy (2005)

[W]hat is happening is the court is having a conversation with itself through the intermediary of the attorney...Does oral argument make a difference? Of course it makes a difference...It has to make a difference.

Justice Roger Burdick

- Oral argument is important, not enough to rely on judge's reading of the briefs
- "I've seen cases turn around on oral argument...It's vitally important."

Justice Gerald Schroeder

- Ten to fifteen percent of cases: oral argument decisive
- Significance cannot be ignored
- Pride and professionalism dictate best effort possible
- Eloquence seldom overcomes bad facts

Justice Gerald Schroeder

- Weight of oral argument: No predictable measurement
- Many cases: Facts, precedents, policy dictates result regardless of brilliance of oral argument
- Some where borderline: oral argument decisive
 - ▣ Undeveloped body of law
 - ▣ Interpretation of body of law might need updating

Seventh Circuit Judge Easterbrook

“...Lawyers should just relax. They need to understand the difference between an oral argument and a brief. The brief is their opportunity for a monologue. They talk to the court. If the court talks back, it’s only in ink in the margin. But all the things that the judges have found intriguing about the case are saved up for oral argument. And when the oral argument comes, it’s time to have a conversation.The interruptions, the questions, are the whole point.”

Suggestions from Appellate Judges

- Watch the court, get to know their style
- Make simple but not simplistic arguments
- Don't feel like you must use all of your time, get a sense of the court before using rebuttal
- Don't be defensive or dismissive, tough questions are opportunities

Suggestions from Appellate Judges

- Anticipate questions, prepare answers, prepare transitions
- Anticipate the other side
- Distill the complex to the simple, hit the highlights

Final thought

**Prepare for oral argument
as though your case was
one of those where the
argument will be decisive**

Resources

- *The verdict on Burdick*, Idaho State Journal, March 25, 2010
- Schroeder, Hon. Gerald F. *Effective Appellate Argument*, <https://isb.idaho.gov/pdf/sections/apl/aplclemats141009.pdf>
- Sullivan & Canty. *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958-60 and 2010-12*, 2015 Utah L. Rev. 1005 (2015)
- Hargrove, Syrena. *What to Bring to an Appellate Oral Argument, and Why*, **The Advocate**, August 2015, pp. 31-33.
- *Interviews with United States Court of Appeals Judges: Judge Frank H. Easterbrook*, 15 Scribes J. Legal Writing (2013)
- Phillips & Carter. *Source of Information or “Dog and Pony Show”? Judicial Information Seeking During U.S. Supreme Court Oral Argument, 1963-1965 & 2004-2009*. 50 Santa Clara L. Rev. 79 (2010)

Resources

- Johnson, Spriggs & Wahlbeck. *Oral Advocacy Before the United States Supreme Court: Does it Affect the Justices' Decisions?* 85 Wash. U. L. Rev. 457 (2007)
- Duvall. *When is Oral Argument Important? A Judicial Clerk's View of the Debate*, 9 J. App. Prac. & Process 121 (2007)
- Hatchett & Telfer. *Appellate Advocacy Symposium, Part II: The Importance of Appellate Oral Argument*. 33 Stetson L. Rev. 139 (2003)
- Wolfson, *Oral Argument: Does It Matter?* 35 Ind. L. Rev. 451 (2002)
- Martineau. *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1 (1986)
- Capparella, Farrar, *Tips for Becoming a Better Appellate Advocate-Oral Argument*, <http://www.dodsonparker.com/publicationsfldr/Tips%20for%20Becoming%20a%20Better%20Appellate%20Advocate-%20The%20Oral%20Argument.pdf>