Even if you have a strong, dramatic conclusion planned, do not use it if time has already elapsed, even if the court has given you permission to continue. This is the time to move to a one-sentence conclusion, e.g., "Therefore, because Section 1409(a) makes unconstitutional distinctions based on gender stereotypes, this Court should affirm the decision below. Thank you."[27]

13.6 HANDLING QUESTIONS FROM THE BENCH

All of the hard work that you have completed to prepare you for the argument should have one purpose: enabling you to answer the court's questions.[28] Some questions may be answered by your argument itself—that is, you will have anticipated the court's concerns—but many others will come up the old-fashioned way: The court will interrupt your presentation and demand your attention. How you handle these interruptions says everything about your skill as an oral advocate and may even determine whether you win or lose your case.

The first thing you must do is let the court interrupt you. As Justice Ginsburg has noted, some attorneys—foolishly—try to squelch the court's questions by talking louder and more quickly when a judge tries to speak:

> A race the lawyer is bound to lose is the press-straight-on run when a judge attempts to interject a question. More than occasionally, I have repeated a lawyer's name three times before he gives way to my inquiry. Despite his strong desire to continue orating, the lawyer should stop talking when the judge starts.[29]

Remember that your job is not to "get through your stuff." Instead, you are there to find out what the judges are interested in, and so you should stop talking immediately when one of them tries to reveal an area of interest by asking a question. As one judge has noted, "questions are your friends."[30] Judge Williams has suggested that "[q]uestions are not interruptions, they are opportunities. The questions from the bench are the only indication of what issues are bothering the judges[,] and [the questions] may clue you in on what is preventing them from seeing the case your way."[31]

[27] For more information on making your conclusion effective, see Section 14.5.3.

[28] *See* Richard H. Seamon, *Preparing for Oral Argument in the United States Supreme Court*, 50 S.C. L. Rev. 603 (1999), for advice on preparing for oral argument primarily by anticipating and planning answers for the Court's questions.

[29] Ginsburg, *supra* note 1, at 569.

[30] Judge Bruce D. Willis, *Suggestions from the Bench: Things Judges Wish That Appellate Lawyers Would Do Differently*, 35 Wm. Mitchell L. Rev. 1281, 1285 (2009).

[31] Williams, *supra* note 9, at 599.

Thus, maintain eye contact so that you can see any nonverbal signals that one of the judges has a question. Speak slowly enough to allow the judges time to interject. If one of the judges makes the slightest noise or attempts to interrupt, you should stop speaking to give the judge a moment to ask a question. Use every technique possible to let the court know that you welcome its questions.

Do not presume that all questions will be hostile. On multi-judge panels, judges frequently use counsel to advance an argument that they already agree with, in hopes of gathering more votes. Justice Ginsburg has admitted that "[s]ometimes we ask questions with persuasion of our colleagues in mind, in an effort to assist counsel to strengthen a position."[32] Judge Williams has advised that "you may encounter a judge who is in favor of your position and spends time asking you easy questions that lead you to an even stronger version of your position."[33]

Second, you must listen to the question. Do not rush to give an answer. Oral argument is not a quiz show in which you must beat your opponent to the buzzer. Instead, listen carefully to make sure that you understand what the court is trying to do.[34] Some questions ask for a concession. At other times, as noted previously, a judge may try to advance your point of view by asking a question designed to reveal your best arguments. Some questions ask you to identify or explain a policy supporting your thesis or seek information about a case or other authority. Some questions focus on the point you are addressing, while others show that the court has moved on to a new issue. Listen to the question and assess what the court is asking before you try to answer.

If you do not understand the question, you may seek clarification. Ideally, you should try to articulate what you think the court has asked, e.g., "I'm not sure that I understand your question, Judge Lowe. I believe that you are asking whether this Court has ever invalidated an immigration statute." This statement does not demand an answer from a court, but it allows the court to correct you if you are mistaken. Tone is important here; do not emphasize the word "believe" in any way, lest you imply that you are struggling to understand a poorly worded question. Admittedly, the question may have been poorly worded (which is not surprising, since the judge may be figuring out the question while asking it), but you do not want to point this out to the court. After you signal that you may need clarification, pause very briefly to give the court an opportunity to correct you if needed. If no correction comes, simply answer the question as you

[32] Ginsburg, *supra* note 1, at 569.

[33] Williams, *supra* note 9, at 599.

[34] *See* Gersten, *supra* note 11, at 28 (noting that one of the two most common oral argument mistakes is "not listening to the judges' questions and the tenor of the discourse"); *see also* Dwyer, Feldman & Nylander, *supra* note 4, at 348-51 (identifying common categories of questions and describing how to deal with them effectively).

have stated it. Few judges will take offense at an attempt for clarification, as long as counsel does so in a respectful way.

Third, you should answer the question directly. Judge Williams has recommended that advocates "[r]espond immediately to a question with a 'yes,' 'no,' 'it depends,' or 'I don't know.'"[35] Some advocates, perhaps fearful that a direct answer will reveal a weakness in the case, try to launch into an explanation of the significance of the answer before they give the answer itself.[36] This tactic is a mistake because the court doesn't hear the explanation; it hears only that counsel has refused to answer a direct question with a direct answer.[37] Furthermore, you risk forgetting to answer the question directly or, more commonly, being interrupted before you can do so. The court will be much better able to listen to your explanation if you first satisfy the court's need for an answer to its question. Of course, it is very important that you *give* the explanation. Many attorneys refer to this kind of exchange as a "yes, but" answer. You must agree with the fact or legal rule that the court has laid before you, but you disagree as to its significance. It is perfectly appropriate to make a concession and then explain why that concession does not affect your argument.

Fourth, you should tie your answer to your argument. Judge Williams has advised, "Follow your short answer with a concise explanation and citation to the record or precedent as necessary."[38] This technique is just as important with friendly questions as it is with more challenging questions. If a judge asks you a question that advances your argument, you should use the opportunity to advance that point to its end. If you must answer a difficult question with a "yes, but" answer, you should answer a friendly question with a "yes, and" answer, as in "yes, and here's why." The judge who asks you a friendly question may well be disappointed if you do not do so. As one judge has noted, "a judge might ask you whether there is sufficient evidence in the record to support a jury's finding[.] [S]he is not asking because she thinks the evidence is insufficient, but because she wants you to describe that evidence in detail for the benefit of the other judges."[39]

After you have finished answering the question and explaining your answer, it is time to move back to your argument. Do not wait to be told to go on. If the court is not asking you a question, you have the floor, and you set the agenda. At this juncture, you must decide whether to return to the point you were making, or continue on to another point.

[35] Williams, *supra* note 9, at 599.

[36] *See also* Gersten, *supra* note 11, at 29 ("Answer the question honestly, even if you are afraid this might hurt your case. There is nothing worse than losing credibility with the court.").

[37] *See also id.* ("If you do not answer the question directly, or if you become evasive, the judge will find it difficult to listen to your argument because he or she will still be thinking about the unanswered question.").

[38] Williams, *supra* note 9, at 599.

[39] Dwyer, Feldman & Nylander, *supra* note 4, at 350.

If the court has asked a question that moves you to your second issue while you were still addressing your first, for example, you may be wise to continue with other support for that second point. The court may have been signaling you that it is not interested in the first issue, either because it already agrees with you or because there is no way that it will ever agree with you. In either circumstance, time is better spent on an issue in which the court has shown its interest.

If the court has asked you about an issue that you believe is irrelevant to the case, you must still answer the question, if you are able. You may let the court know that you think the question is irrelevant by respectfully pointing out the fact, legal rule, or other information that shows that the resolution of your case does not require resolution of the issue that it asked about, e.g., "Yes, your honor, that is true. However, in this case, Officer O'Donnell testified that he had no reason to believe that Ms. Restrepo was violating any laws when he conducted the search."

Similarly, do not dismiss hypothetical questions without an answer. Justice Ginsburg has expressed dismay over advocates' repeated dismissals of hypothetical questions with the pat answer, "That is not this case, your honor": "[The judge] knows, of course, that her hypothetical is not this case, but she also knows the opinion she writes generally will affect more than this case. The precedent set may reach her hypothetical."[40] When judges pose hypotheticals, they are testing the boundaries of the rule you suggest. The good advocate knows the boundaries of the rule he or she recommends, and so is able to explain how the proposed rule would govern the hypotheticals posed by the court.

13.7 REBUTTAL

Counsel for the petitioner or moving party should not reserve important *arguments* for rebuttal. Supreme Court Rule 28.5 provides that "counsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal." In many courts, including the United States Supreme Court, counsel may not set aside time for rebuttal; counsel can preserve time for rebuttal only by stemming the tide of the justices' questions before his or her allotted time has elapsed. You may wish to reserve time strategically, depending on local custom. For example, some courts allow counsel to reserve time for rebuttal, and give counsel only the time reserved. Other courts, in contrast, give counsel the reserved time along with any argument time that was unused.

[40] Ginsburg, *supra* note 1, at 569-70.