

# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

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## SUPREME COURT ADVOCACY: ACQUIRING THE NECESSARY EXPERTISE

### PREFACE

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Advocacy before the Supreme Court of the United States is not for the faint-hearted. The issues are difficult, the cases momentous, the briefing a challenge, and the oral arguments a test of the first order. The Court's decision—whether a unanimous victory, a unanimous loss, or something in between—can feel like an anticlimax after the lawyer has lived through the push leading up to the oral argument, and then survived the argument itself.

The challenges are especially daunting to the first-time or infrequent advocate, who can put heart and soul into a case but still not have a clear idea of how best to present it. Supreme Court advocacy, like most other professional endeavors, gets easier with experience. But the novice can acquire the necessary experience only derivatively, through consultations with lawyers who have appeared before the Court in other cases.

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That's where the resources described in this section come into play, for as Justice White used to tell his law clerks, "Two minds are better than one."<sup>1</sup> And it is the rare advocate who can think of everything necessary to win a case. (Indeed, I am still looking forward to meeting the lawyer who can win at the Supreme Court without consulting anyone else.) Talking through the case with a colleague, working collaboratively on the brief, and gauging an audience's reaction to different versions of the oral presentation can be invaluable.

As the first article in this section suggests, the advent of Stanford's Supreme Court Litigation Clinic has been a boon to advocates whose cases pose important issues but do not involve amounts sufficient to warrant the retention of high-priced appellate counsel. The Clinic offers those advocates pro bono help with briefwriting, exposes the enrolled students to Supreme Court practice, and creates argument opportunities for the instructors. By any measure, this yields a win for all involved. The clients get the benefit of excellent advocacy, the students get a valuable learning experience, and the instructors (each a lawyer with Supreme Court experience) get frequent chances to burnish their skills. Substantively, the Clinic has been highly successful at identifying cert-worthy cases and putting together successful petitions. Thus, although the Clinic presents a resource for only one type of client—non-governmental persons and entities for whom pro bono representation is appropriate—lawyers representing clients of this sort may find its expertise irreplaceable.

A good brief is an obvious prerequisite to a successful appearance in the Supreme Court. But the part of the advocacy experience that quite rightly inspires the most fear is the oral argument. The justices can and will ask the hardest questions, and they will expect succinct, direct, and well-crafted statements in reply—all in the first sentence of every response. The compression of time in a Supreme Court argument, along with the personalities on the present-day Court, add an element of

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1. David C. Frederick, *Justice White and the Virtues of Modesty*, 55 Stan. L. Rev. 21, 22 (2002).

urgency to the experience that lawyers are unlikely to encounter in any other appellate tribunal.<sup>2</sup>

The moot courts offered at Georgetown's Supreme Court Institute are in consequence a resource of broader applicability than is the assistance offered by the Stanford Clinic. As the second article in this section demonstrates, anyone can benefit from its help, and the Institute will provide a moot court to any Supreme Court advocate who is the first lawyer associated with a particular case to request one. For cases in which the Solicitor General will appear—approximately two-thirds of those argued today—that assistance can be especially valuable, because the SG's Office typically conducts moot courts for its lawyers before they argue cases in the Supreme Court. In my view, the Georgetown Institute provides the closest simulation of the moot court experience in the SG's Office, and for that matter, the closest analogue to arguments in the Supreme Court itself. Although the panelists are not compensated, they are carefully chosen and absolutely ready to respond to the lawyer's arguments—something that clients often find surprising, given how much time it takes to be fully prepared to participate in such a session.<sup>3</sup>

Valuable though the resources available at Stanford and Georgetown are, they are by no means the advocate's only options. The last article in this section succinctly describes some of the other gems that can help an attorney prepare, from web-based materials to readings that enrich the advocate's understanding of Supreme Court practice to sources of possible amicus support.

One of the loneliest places a lawyer can stand is at the podium in front of the Supreme Court. Yet precisely because so much turns on the advocate's individual effort, few feelings are more exhilarating than walking out of the Supreme Court after an argument has gone well; the lawyer can, for example, savor a

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2. See generally David C. Frederick, *Supreme Court and Appellate Advocacy: Mastering Oral Argument* (West 2003).

3. On more than one occasion after a Supreme Court argument that I had mooted at Georgetown, clients have commented to me, "We heard all the questions the justices asked today at last week's moot court." That's the idea. By hearing the questions in advance, an advocate can test-drive answers and hone them so that the very best responses can be made in the heat of the actual argument.

moment of triumph if the justices' questions reflected a sophisticated understanding of a technical argument. But an attorney can also see everything unravel if one of the justices shreds a carefully crafted argument with a couple of well-placed questions; few feelings are more dispiriting than leaving the courtroom after the justices did not seem either persuaded or persuadable.

A lawyer arguing before the Supreme Court is more likely to have a good experience there after thorough preparation. And as the articles in this section demonstrate, any Supreme Court advocate can now get sophisticated assistance with that preparation, assistance that was not available as recently as a decade ago. Taking advantage of these resources will both enrich the advocate's experience in litigating the case and assist the Court in deciding it.

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