AVOIDING MISSTEPS IN THE SUPREME COURT: A GUIDE TO RESOURCES FOR COUNSEL

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I. INTRODUCTION

An argument in the Supreme Court is an extraordinary thing. That is literally so for most lawyers: With the Court granting review in only eighty or so cases a year, a Supreme Court argument is likely to be a once-in-a-lifetime event even for most experienced appellate advocates. The rarity of Supreme Court appearances, of course, makes them a sought-after commodity. But because Supreme Court practice is in some significant senses unique—and uniquely challenging—the Court's decision to grant review may be more than gratifying; it also presents a difficult set of problems for lawyers who suddenly find themselves handling their first appearance in the Court.

Lack of familiarity with the Court and its idiosyncrasies can be intimidating. And sometimes it is worse: It can lead to missteps that are embarrassing at best and harmful to a case at worst. The Justices themselves have complained about lawyers who are not ready to function as the "resource" they are looking for, and who are unable to help members of the Court "clarify their own thinking."[1] They have warned against forensic techniques that may play well in other courts but that prompt the Justices to wince, like "table-pounding and other hortatory

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1. Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. St. Bar J. 346, 383 (Oct. 1982).

mannerisms."[2] Indeed, Chief Justice Burger grumbled that "[t]he Supreme Court is no place for inexperienced or ill-prepared advocates; such advocates provide little help to the Court; they do a disservice to their clients—and to themselves."[3]

Fortunately, there are a variety of resources available to assist lawyers with cases in the Supreme Court. Many of these resources, such as the institutions that stage moot courts, are called upon even by the most experienced repeat players in the Court. And these sources of information and advice can prove invaluable for lawyers who are appearing in the Court for the first time. What follows, then, is a brief account of some of the ways in which Supreme Court practice is distinctive, followed by a description of the places lawyers can turn for assistance in preparing for an appearance in the Court—and that can help those with limited Supreme Court experience avoid the kind of argument that produces "an infamous faux pas in the courtroom."[4]

II. UNIQUE ASPECTS OF SUPREME COURT PRACTICE

In the broadest sense, handling a case in the Supreme Court is no different from litigating in any other appellate tribunal. Opening, responsive, and reply briefs are filed. The Court then hears oral argument, in which the advocates follow the same pattern by presenting an opening, response, and reply, and where the Justices have the opportunity to ask questions. The lawyers' goal is to persuade their audience by making convincing arguments and addressing the Justices' concerns, just as they would in any other court.

The familiar forms of the argument, though, should not obscure the ways—some obvious and some subtle—in which an appearance in the Supreme Court is exceptional. Consider, as I have in the discussion that follows, those things that will strike a lawyer handling his or her first case in the Court.

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2. William H. Rehnquist, *The Supreme Court* 248 (new ed., Alfred A. Knopf 2001).

3. Warren E. Burger, *Opening Remarks, Conference on Supreme Court Advocacy*, 33 Cath. U.L. Rev. 525, 525 (1984).

4. David C. Frederick, *Supreme Court and Appellate Advocacy* 221 (West 2002). The reference is to a notorious episode in which a disastrous oral argument in the Supreme Court led to a malpractice action against arguing counsel. *See id.*

A. Psychological Intimidation

Justice Brennan has been quoted as remarking that "[s]omething about our courtroom scares lawyers to death. Some fellows have fainted."[5] To be sure, actual loss of consciousness by attorneys who have come to argue is rare. But one lawyer preparing for her initial appearance in the Court described herself as "[h]yperventilating and weak in the knees" when she first visited the Supreme Court's courtroom, and that is not an extraordinary reaction.[6] An appearance in the Supreme Court is calculated to induce nervousness.

For one thing, the Supreme Court probably has the most imposing courthouse in the country; it was designed to look like a marble temple, situated directly opposite the U.S. Capitol. The courtroom itself is large and ornate, and typically is filled with tourists, reporters, and casual spectators for even the driest arguments. Relatives, friends, and clients of the lawyers presenting argument usually come to watch—and to wince at any error. And the Justices are situated surprisingly close to arguing counsel, although elevated above then to achieve maximum intimidation. In combination, these considerations may give even ordinarily confident lawyers an unexpected set of the shakes when they step to the Supreme Court podium.

B. The Active Bench

The disconcerting atmosphere in the Court is compounded by the aggressive approach taken by the Justices. Certainly, Justices of the Supreme Court are not unique among judges in asking questions of the advocates who appear before them. But the Court is remarkable in the volume and persistence of questions it directs at the lawyers. In most courts, one or two (or, on a really "hot bench," three) judges may be active questioners. On the Supreme Court, eight of the nine Justices regularly ask

5. Christine Hogan, *May it Please the Court*, 27 Litig. 8, 9 (Summer 2001), also available at http://www.appellate.net/articles/default.asp.

6. *Id.*

questions, and they ask a lot of them.[7] Justices sometimes begin posing questions before the lawyer begins his or her presentation. By the time a half-hour argument is done, it is not unusual for the Court to have tossed out fifty or more questions; those queries often cut off the lawyers' answers or interrupt the other Justices' remarks. And Justices sometimes address each other directly, leaving lawyers who haven't prepared for that eventuality gazing from the sidelines.

The Justices have explained why oral argument in their Court is such a free-for-all. As Justice Scalia put it, the oral presentation

> [i]sn'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. I use it to give counsel his or her best shot at meeting my major difficulty with that side of the case. "Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me."[8]

Or, as Justice White explained, "we treat lawyers as a resource rather than as orators who should be heard out according to their own desires."[9] Lawyers who are determined to stick to their prepared remarks, or who are unprepared to adapt to the Court's concept of oral argument, are likely to have a very unsatisfactory experience. They also will accomplish little for their clients.

C. The Court's Traditions

All courts have their peculiarities, but the Supreme Court is especially insistent and punctilious in adhering to its traditional procedures. This is emphasized by the Clerk, who gives a formal

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7. The exception is Justice Thomas. Chief Justice Roberts has proved to be an active questioner. (At the time of writing, the Senate has not yet voted on the nomination of Judge Alito.)

8. Stephen M. Shapiro, *Questions, Answers, and Prepared Remarks*, available at http://www.appellate.net/articles/questions.asp (accessed Jan. 4, 2006; copy on file with Journal of Appellate Practice and Process) (citing *This Honorable Court* (PBS Video & WETA 1988) (TV broadcast) (quoting Scalia, J.)).

9. White, *supra* n. 1, at 383.

presentation to all arguing counsel in the Court's lawyers' lounge before the arguments begin. (He also offers aspirin, cough drops, and a sewing kit to any attorneys in need of last-minute repairs.) Lawyers must begin their argument with the time-honored "Mr. Chief Justice, and may it please the Court"; they may not introduce themselves or their colleagues. They must be careful to call the members of the Court "Justice" and not "judge," and to use the honorific "Chief" when addressing Chief Justice Roberts. They must stop speaking promptly when the red light on the podium flashes. If they refer to specific pages of their briefs or appendices, they should be prepared for the Justices to take time looking for them. And they should refrain from giggling when representatives of the Solicitor General's office arrive to argue wearing the traditional morning suit, complete with cutaway jacket and striped pants. In prior years, Chief Justice Rehnquist would scold lawyers who departed from the standard practices, or who were too forward or familiar, which could be very disconcerting and sometimes threw lawyers off stride. It remains to be seen whether Chief Justice Roberts will follow the same strict course.

D. The Written Briefs

Oral argument is the most visible and public part of Supreme Court practice. But the written briefs are the most important element of the lawyers' presentation to the Justices. And, although this article is not the place for a detailed treatment of effective written advocacy, it does bear emphasis that the briefing process in the Supreme Court may require quite a different focus than does the preparation of briefs for other courts. Because the Supreme Court may avoid (or overrule) its decisions, it is especially interested in the practical consequences and policy implications of the rule it is asked to endorse; it wants to know that its holding will make sense. In contrast, the Court is strikingly uninterested in the decisions of other courts. For this reason, there must be more to an effective Supreme Court brief than analysis of precedent. And much more than in other courts, encouragement and coordination of amicus briefs, which are well suited for making policy arguments and

supplying empirical information, can be an important supplement to the party's argument.

III. RESOURCES FOR SUPREME COURT COUNSEL

Having a first case in the Supreme Court accordingly can present a set of novel problems. To help lawyers cope—and to improve the quality of Supreme Court advocacy—a small industry has grown up that is dedicated to providing support and guidance to counsel who are not entirely comfortable with Supreme Court practice. It is possible to find institutions that will help lawyers in fashioning briefs, in preparing for argument, and in familiarizing themselves with the Court's rules and procedures. Some of these entities provide only limited forms of assistance (e.g., staging moot courts); others will provide help only in particular types of cases or to attorneys representing certain categories of party; most will offer help free of charge. Depending upon their level of experience and comfort with Supreme Court practice, lawyers with cases in the Court would do well to take advantage of these resources.

A. Law firms

One source of assistance is the law firms, principally based in Washington, D.C., that have practices specializing in Supreme Court practice.[10] Twenty-five years ago there were virtually no such firms; at that time, approximately eighty percent of the lawyers presenting oral argument in the Court (excluding those from the Solicitor General's office) were first-timers.[11] But beginning in the mid-1980's, a handful of firms created Supreme Court and appellate specialties, staffed in large part with alumni of the Solicitor General's office, which have proven to be tremendously successful. As a consequence, by 2002 barely half the oral advocates in the Court were first-timers.[12] To some extent, this phenomenon is a throwback to the early days of the Supreme Court, when lawyers like Daniel

10. In the interest of full disclosure, I should note that my firm is one of these.

11. Michael Grunwald, *Roberts Cultivated an Audience with Justices for Years*, Wash. Post A1 (Sept. 11, 2005).

12. *Id.*

Webster and William Pinckney delivered dozens—or hundreds—of arguments, and the Supreme Court bar "was a club-like group of local counsel who handled cases in the Court upon referral from counsel elsewhere."[13]

These firms, of course, will be more than happy to take over a Supreme Court case from soup to nuts, and sometimes it is wise for attorneys who find themselves in the Court—and who have limited time, resources, or appellate expertise—to take advantage of that option. But firms specializing in Supreme Court practice also will provide more limited forms of assistance when asked to do so. They will offer advice on approaches to a case, or will edit and revise drafts of briefs. They also will provide coaching on oral argument, will stage moot courts, and will help refine the oral presentation. Using experienced Supreme Court practitioners as a backstop in this way can both strengthen a case substantively and provide reassurance that counsel who have not previously appeared in the Court are checking all the requisite boxes.

B. Georgetown Supreme Court Institute

The work of the Supreme Court Institute is addressed in detail elsewhere in this issue. But for present purposes, the success of the Institute points up an important truth: Oral presentation of a case in the Court will be greatly strengthened by participating in moot courts and discussing the Justices' likely questions with lawyers who understand the Court's approach to its docket. Even the most seasoned advocates run themselves through moot courts conducted by panelists who themselves have experience in the Court; Chief Justice John Roberts, a leading Supreme Court advocate in private practice before his appointment to the federal bench, typically staged three moot courts before an argument.[14] Such practice runs are helpful for everyone and are absolutely essential for lawyers who are novices in the Court.

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13. Stephen M. Shapiro, *Oral Argument in the Supreme Court: The Felt Necessities of Time*, Y.B., S. Ct. Historical Socy. 22, 23 (1985), also available at http://www.appellate.net /articles/oralarg799.asp.

14. Grunwald, *supra* n. 11.

C. National Association of Attorneys General (NAAG) and the State and Local Legal Center

In the late 1970s, several Justices complained about the inconsistent quality of representation provided to states and local governments with cases in the Court.[15] These Justices noted that the United States was represented by the full-time appellate advocates in the Solicitor General's office; civil rights litigants were represented or supported by repeat players in the Court like the ACLU and the NAACP Legal Defense Fund; businesses were able to hire experienced Supreme Court counsel. Representation in the Court for state and local governments, by contrast, was considerably more mixed; some states had superb appellate counsel on staff—but others did not.

In the intervening decades, that gap in experience has been filled by NAAG and the State and Local Legal Center. NAAG's Supreme Court project conducts thirty or so moot courts each year for lawyers from state attorneys general's offices who have cases in the Court, recruiting "judges" from the Solicitor General's office and elsewhere in the Justice Department, academia, and private practice. NAAG also assists state lawyers by editing dozens of briefs each year and by providing advice on the Court's rules.[16] The State and Local Legal Center, while principally dedicated to producing its own amicus briefs in support of state and local governments with cases in the Court, offers similar assistance when called upon by lawyers representing local governments.

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15. Linda Greenhouse, *A Savvy New Friend for Local Governments*, 132 N.Y. Times A10 (July 29, 1983) (indicating that State and Local Legal Center was established in early 1983 because "it has been an open secret at the Supreme Court that state and local governments often start out several giant steps behind the opposition when it comes to defending their most vital legal interests," and that "[c]ities and states typically appear before the High Court outlawyered, outmaneuvered and, in about two cases out of three, on the losing side," and noting that Center was founded "to take on the considerable challenge of redressing that balance"); Paul Marcotte, *Dress Rehearsal: Polish High Court Arguments*, 72 ABA J. 26, 26 (Feb. 1986) (reporting that "criticism by Supreme Court justices and others that the oral arguments given by state and local government lawyers often were inadequate" prompted founding of NAAG's Supreme Court project).

16. *See NAAG Projects—Supreme Court*, http://www.naag.org/issues/issue-supreme_court.php (accessed Jan. 4, 2006; copy on file with Journal of Appellate Practice and Process) (providing information about NAAG services available to states' attorneys preparing cases in the Supreme Court).

D. Public Citizen

The same sorts of aid are provided on the other side of many cases by Public Citizen's Supreme Court Assistance Project. Public Citizen typically becomes involved in support of small firm or legal services attorneys in cases involving allegations of government misconduct, or on the plaintiffs' side in tort, civil rights, and employment litigation. Although Public Citizen provides help at the pre-certiorari stage, it also offers assistance in staging moot courts and writing briefs. It is involved in fifteen to twenty cases each term.[17]

E. U.S. Chamber of Commerce

Public Citizen's frequent opponent is the U.S. Chamber of Commerce's National Chamber Litigation Center. The Chamber is itself a frequent litigant in both the Supreme Court and lower courts, and it often files Supreme Court briefs on its own behalf in support of businesses. But the Chamber also stages moot courts for lawyers representing business interests in the Court.[18]

F. Law Schools

Stanford Law School's Supreme Court Litigation Clinic is described elsewhere in these pages. Although Stanford's was the first such clinic, it will not long be unique; other law schools are beginning to develop similar programs that will become active in the coming years. The creation of such programs is, in itself, a reflection of the distinctive character of Supreme Court litigation. And it is probable that these clinics will provide support for lawyers with limited resources who find themselves handling cases in the Court.

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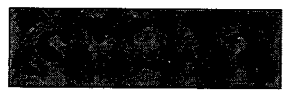
17. *See The Alan Morrison Supreme Court Assistance Project*, http://www.citizen.org/litigation/court_assist/articles.cfm?ID=5818 (accessed Jan. 4, 2006; copy on file with Journal of Appellate Practice and Process) (describing assistance available from Public Citizen to lawyers whose cases are pending in the Supreme Court).

18. *See About NCLC*, http://www.uschamber.com/nclc/about/default (accessed Jan. 4, 2006; copy on file with Journal of Appellate Practice and Process) (describing services provided by National Chamber Litigation Center, including its moot-court program).

G. Written and Web-Based Materials

Finally, a useful supplement for the sort of hands-on help described above can be found in the substantial body of written and Internet materials that cast light on the Supreme Court. Everyone with a case in the Court should consult *Supreme Court Practice*,[19] the Supreme Court practitioner's Bible; it offers comprehensive guidance on the Court's rules and myriad tips on the practicalities of handling a case in the Court. Other publications offer more focused strategic and practical advice on oral argument preparation.[20] And several sites offer links to recordings of Supreme Court arguments, which can provide a very useful flavor of the experience for lawyers who are able to listen from the comfort of their offices.[21]

But in preparing for an appearance in the Court, there is no substitute for the experience provided by moot courts and the personalized attention to draft briefs offered by veteran Supreme Court practitioners. Lawyers handling a first case in the Court would do well to canvass the range of resources available and to take advantage of those that are most suitable.



19. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* (8th ed., BNA 2002).

20. David Frederick's *Supreme Court and Appellate Advocacy*, for example, offers a step-by-step guide to argument preparation, accompanied by useful and sometimes horrifying excerpts from argument transcripts. *See e.g.* Frederick, *supra* n. 4. Other practical guides, available on the Internet, include Stephen M. Shapiro, *Oral Argument in the Supreme Court of the United States*, http://www.appellate.net/articles/oralargsc.asp (reprint of article appearing at 33 Cath. U. L. Rev. 529 (1984)) (accessed Jan. 4, 2006; copy on file with Journal of Appellate Practice and Process), and Andrew L. Frey, *Preparing and Delivering Oral Argument*, http://www.appellate.net.articles/prepdel799.asp (accessed Jan. 4, 2006; copy on file with Journal of Appellate Practice and Process).

21. The most comprehensive source for argument recordings is the Oyez Project, which can be accessed at http://www.oyez.org/oyez/frontpage.