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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

My Supreme Court Debut: The Flip Of A Coin

By **Elaine Goldenberg** (January 30, 2018, 11:35 AM EST)

As the U.S. Supreme Court continues its current term, all eyes are on the justices and the important decisions they will issue in 2018. In this Expert Analysis series, attorneys that have argued before the high court — from veterans to recent first-time arguers — reflect on their very first time standing before the justices.


Elaine Goldenberg

In the Supreme Court, only one lawyer can argue for the parties on each side (except in unusual cases). The petitioners in my first case at the court, which involved a statute granting public health officials immunity from suit, were two individuals. I represented one of them, and a different lawyer from a different firm represented the other. We each wrote our own merits briefs. When it came time to figure out which of us would argue, we had trouble coming up with a mutually agreeable panel of judges for a "moot off," and so we settled on the other selection method commonly used in such circumstances: a coin flip. A fair flipping process was complicated to arrange, because the other lawyer was in Los Angeles and I was in Washington, D.C. Eventually we worked it out — he would bring a coin to the offices of a third party, who would do the flipping, and I would listen in over the phone and call heads or tails.

As a meticulous preparer, I spent a not insignificant amount of time researching whether there was any advantage to calling one or the other. But my research indicated that a key factor was whether heads or tails was face up on the flipper's thumb before the flip — something that I couldn't see from thousands of miles away. When the time came, then, I just went with my usual call (tails, for any readers with whom I might be involved in a coin flip in the future). The next thing that I heard over the phone was the flipper saying "congratulations," without any indication of which of us he was congratulating. Happily, it turned out to be me.

At that point, I threw all of my energy into preparing for the argument, following essentially the same process that I have followed for each of my arguments since. I thought of every possible question I could and wrote bullet-point responses. I practiced my answers out loud while pacing around my office, and in my head during every spare moment. I made a list of key points and worked on explaining them in a variety of different configurations, to help me move smoothly from point to point and to ensure that I could pivot easily to my most important affirmative arguments. And I underwent multiple moot courts, during which I was able to see how my answers played out and to get a sense of which areas of the case

were most troubling to smart lawyers coming fresh to the issues. Among those moot courts was one organized and hosted by the Georgetown Supreme Court Institute, which provides a tremendous service to the bar and the court each term by arranging extraordinarily high-quality, helpful moots in virtually every case that the Supreme Court hears.

Finally, near the end of my preparations, I labored over the first two pages of my argument notebook — the pages, facing each other, that would be open in front of me at the podium. In my subsequent tenure at the U.S. Solicitor General's Office, I took a lot of ribbing for my practice of hand-writing those pages in the tiniest print possible so as to fit as much information as I could in the limited space. My colleagues teased me that there was no possible way that I could ever read what I had written. For me, though, it is not really important to be able to refer to the pages during the argument itself, which I have rarely done. It is the act of making the pages, just before the argument, that is critical — a final way of synthesizing and organizing all of my most important affirmative and responsive points, and of recording any facts, dates or citations on which I might want to rely. The creation of those pages serves as one last check that all of the necessary information is in my head, ready to be spilled out not only in writing but also in my answers to questions at the argument.

When the day of my first argument arrived, I felt calmer than expected. I was very conscious of my responsibility to my client, a person who did not know much about the court system but felt keenly how much he had at stake. I was also very conscious of my responsibility to the court, which was depending on me to give knowledgeable and candid answers. But I was certain that — with the help of my mooters and my colleagues — I was an expert on the case, the statute at issue and the area of law we would be discussing, and that there was nothing more that I could have done to be ready for my task.

Once it began, the argument was exhilarating. One of the reasons I love to argue in court is that, when all goes well, I feel that I enter a form of what psychologists call a "flow" state. In that state, everything drops away except for the completely absorbing and fascinating conversation that I am having about the law, and I lose awareness of the whole rest of the world — of the watching audience, of whether the room is cold, of whether I am hungry or tired. At that first argument, the questions were the ones I had anticipated, the court gave me ample room to spin out my answers and to move the discussion to my best affirmative arguments, and an easy conversational flow was established. When I sat down — at which point I felt cold, hungry and tired, all at once — it seemed to me that I had managed to get across everything that I wanted to say.

My first argument at the Supreme Court was nearly a decade ago, and I have repeated the experience, and argued in other courts, many times since. Later, during my time in the Solicitor General's Office, I was fortunate enough to watch and learn from some of the very best advocates in the business. But my first Supreme Court argument, which was also my first victory as an advocate at the court, will always be an especially satisfying and meaningful one — and I will always feel lucky that, at the flip of a coin, I was given the opportunity to do it.

Elaine J. Goldenberg is a complex litigation and appellate partner at Munger Tolles & Olson LLP in Washington, D.C. She has argued 12 cases before the U.S. Supreme Court.

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