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My Supreme Court Debut: 2 Moots And A Sweet Celebration

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As the end of the year draws near, all eyes are turning to the U.S. Supreme Court and the decisions it will issue during its October 2017 term. 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.


Ginger Anders

My first oral argument at the U.S. Supreme Court took place about eight months after I had begun working in the Office of the Solicitor General in the U.S. Department of Justice as an assistant to the solicitor general. The solicitor general's office is responsible for representing the United States government before the Supreme Court, as well as for supervising the government's appellate litigation in all courts. The government participates in about 75 percent of the court's cases each term, either as a party (for instance, in criminal or immigration cases) or as an amicus curiae when the government is not a party but the case implicates government interests. That translates to approximately 60 to 70 cases a term. The responsibility for arguing those cases is shared among the office's 21 attorneys. The arguments are handed out roughly by seniority. The solicitor general argues the most important or politically charged cases; the four deputy solicitors general each argue four cases a term; and assistants receive between one and three arguments based on their seniority.

For an assistant's first argument, the senior attorneys in the office generally attempt to choose a fairly straightforward case, ideally one in which the outcome — win or lose — is clear. The idea is that if the outcome of the case seems clear from the briefs alone, the assistant will feel less pressure going into the argument. Luckily for me, my case, Reed Elsevier v. Muchnick, fell in the clear winner category. The case concerned whether the Copyright Act's requirement that a copyright holder register her copyright before filing suit was a jurisdictional requirement — in other words, whether the court lacked jurisdiction to hear cases concerning unregistered copyrights. Because the government was not already a party to the case, it was participating as an amicus in order to express the views of the Copyright Office and other interested agencies. The government therefore had the luxury of choosing a position that seemed the most consistent with the statutory text and with the government interests underlying copyright registration. It seemed likely that the court would agree at least with the broad outlines of our position. Because the government was an amicus, we asked the party whose position we supported to give us 10 minutes of their 30 minutes of argument time. They agreed — private parties almost always

do, because of the evident advantages of having the government argue on one's side — and so I prepared to have 10 minutes of argument.

I felt lucky to be preparing for my first argument in an office in which every other attorney had argued many Supreme Court cases, and in which there were strong traditions about how to prepare for argument. Each attorney has two moot courts in the week before the argument, attended by deputy solicitor general on the case, three other assistants who read the briefs and act as the "justices," and attorneys from the interested agencies and other Department of Justice offices. The office's moots are famously demanding, with rapid-fire questioning for an hour by attorneys who have read the briefs carefully, looking for any weak spots in the arguments. The amount of preparation that every attorney in the office does in order to serve on his or her colleague's moot courts is one of the great traditions of the office, reflecting its collegiality and its commitment to the highest possible standards. I found the moots for my first argument intimidating because of my lack of experience. I continued to find them challenging over the course of my next eight years in the office and 17 additional arguments. But that's the point — ideally, the moots will seem more challenging than the actual argument, because by the time of the argument, one is far more prepared than in the moots.

The moots taught me what was perhaps the most important lesson in my first argument: While an oral argument can seem like a solitary endeavor, one attorney standing up before nine justices, it is truly a collaborative project. In my first argument and each one thereafter, I stood up only after having been intensively questioned by my colleagues and having received their insights, advice and reactions. Almost always, every question that I received in the argument itself had already been asked in a moot court. And so I invariably had the opportunity to consider each question from all angles and to learn which answers would stand up best, and which were most persuasive.

In the argument itself, the thing I found most surprising was the number — and pace – of the questions. With eight justices who are active questioners, the argument feels quite different than most court of appeals arguments, in which there are only three judges to ask questions. Each justice may have his or her own concerns about the case, so there may be many different lines of inquiry to handle, more so than in a court of appeals argument. Over the course of my first few arguments, I learned that it was quite important to strategize about how to get a point out very quickly. It is generally not possible (or advisable) to try to preface an answer with background statements or context. Your main point should be in the first sentence of an answer, and ideally within the first 20 seconds or so. If it is not, another justice may well interrupt before you have a chance to make your point. And if there is a point or an analogy that you want to make sure you get out, it is best to put it in your opening statement.

More broadly, in the face of such active questioning, it is critical to have a strategy for expressing your affirmative case over the course of the argument. It can be easy to get carried along by the questioning, attempting to answer each question in turn, until suddenly the time is up. If that happens, you may sit down having spent all of your time talking about the weakest points in your case, without having made your best points. I learned to have a concrete agenda going into the argument: three or four main themes that I would, one way or another, make sure I returned to over the course of the argument. In thinking about how to answer the hardest questions, I would make sure that each answer tied back to one of my affirmative themes, or at least would allow me to pivot to one of those themes. By the end of argument preparation, right before the argument, the case should be boiled down into a few main points, and every subsidiary issue should relate in some way to those points.

In my first argument, though, I wasn't yet seasoned, and I was simply happy to know how to answer the questions and to sit down without having embarrassed myself. Once the argument was over, another

tradition of the office took place — this one much more fun than moot courts. One of the other, more senior, assistants would bake a treat for the office in honor of each new assistant's first argument. I chose coffee chocolate chip ice cream, so that afternoon we had an office party with homemade ice cream. I still don't know any better way to celebrate an argument.

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