ADVOCACY IN THE MICHIGAN SUPREME COURT

By Bridget Brown Powers

Recently, I had the honor of meeting with each of the seven Michigan Supreme Court Justices for an article I was writing for the *Michigan Bar Journal*. With the 2,500-word count limit, there was so much more about which I wanted to write! Thus came the inspiration for this article, one that I hope appellate practitioners find both interesting and helpful.

We all know that attorneys – and appellate attorneys are no exception – have a duty to zealously represent their clients' interests. That said, when an application for leave to appeal is presented to Michigan's highest court, counsel must not only advocate on behalf of his or her client, but also advocate for the Court's application of a certain rule of law bearing significance to the jurisprudence of Michigan. The Court is not micro-focused on the case before it, but rather macro-focused on the statewide jurisprudential value that resolution of the case will prospectively serve, i.e., the resultant law that will be applied to all future litigants similarly situated. Courts of last resort are unique in this respect, which explains why fewer cases are heard at that level.

M.C.R. 7.305(B) requires that an application for leave to appeal be grounded by an issue that (1)"involves a substantial question about the validity of a legislative act;" (2) an issue that has "significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;" and/or (3) an issue involving "a legal principle of major significance to the state's jurisprudence."

If an appeal is sought prior to a decision of the Michigan Court of Appeals, the application must show that (a) "delay in final adjudication is likely to cause substantial harm, or (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid[.]" And, an application seeking to appeal a Court of Appeals decision must show that "(a) the decision is clearly erroneous and will cause material injustice, or (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals[.]" Finally, if the application seeks an appeal from a decision of the Attorney Discipline Board, then the application must show that "the decision is clearly erroneous and will cause material injustice."

Thus, unlike cases at the trial court and Court of Appeals levels, appellate counsel must not only zealously advocate for their clients' best interests, but also must demonstrate why resolution of the issue or issues presented in a given case has the requisite jurisprudential significance. Chief Justice Robert P. Young, Jr., has observed that "[m]any appellate attorneys

are so focused on achieving a positive result for their clients that they neglect to think through the implications of the relief that they seek or why they should be entitled to particular relief."[1] And, inasmuch as the Court only grants about two percent of the approximate 2,000 applications it receives each year,[2] it would appear that, from the Court's perspective, appellate counsel's demonstration of jurisprudential significance far outweighs the significance of the individual client(s) whose interests counsel must also zealously advocate. "As a clue to understanding what issues interest the Court, a good appellate advocate will peruse the Court's prior related decisions as well as orders granting leave to appeal, which often include specific issues that the Court requests the parties to brief."[3]

You might think that, after an application for leave to appeal is granted, the importance of continued demonstration of jurisprudential significance in the appeal brief and at oral argument would lessen or become moot entirely, because the Court was already persuaded as evidenced by its grant of leave. In fact, nothing could be further from the truth. Arguing that your case presents an area of law significantly affecting the state's jurisprudence, or *juris prudentia*, should be an essential part of your argument at each stage of appellate advocacy in the Supreme Court.

Just as it was necessary (in fact obligatory under MCR 7.305(B)) to provide grounds in the application, it is equally important for counsel to address the big-picture, statewide jurisprudential significance in the appeal brief *and* at oral argument. What rule of law are you asking the Court to apply? Aside from your case, how would application of that rule of law significantly contribute to Michigan's jurisprudence? Indeed, many of the questions coming from the bench during oral argument likely will be focused on the rule of law that the Court must apply, often because counsel failed to adequately address this point in his or her brief. In the words of Justice Young:

> I know you and your client want to win *your* case, but the Supreme Court's job is to interpret an *area* of the law, not one particular case. Your job is to present a rule of law not just for *your* case, but for the *next hundred cases* like it. Thus, we are thinking about how your case affects other cases, *past and future*.
>
> Many appellate practitioners do not understand that, particularly at the Supreme Court level, the Court cannot resolve the case at hand without addressing broader ambient legal doctrines in which the case arises. Consequently, such appellants tend to argue that their case should be decided on its unique characteristics, oblivious to the fact that, if the case had *no* broader doctrinal implications, it is unlikely the Court would have granted leave in the first instance.[4] (Emphasis in original.)

Justice Stephen Markman, who sat on the Michigan Court of Appeals prior to his appointment to the Supreme Court in 1999, noted that "we need to know how the case ought to

be resolved, not just for purpose of resolving the dispute in that case, but also in order to resolve the next 200 similar and related disputes that the Court's decision will affect. One of our responsibilities is to develop the law in Michigan."[5] In his view, it is also important for counsel to inform the Court -- in both their written and oral presentations – why, as a court of last resort in our state, it should focus its time and limited resources on the particular matter at issue in that case.[6]

Similarly, Justice Brian K. Zahra, who previously sat on the Court of Appeals and the Wayne County Circuit Court, explained that the cases before the Supreme Court are not about the appellate attorneys' clients, but rather the jurisprudence of the state. Accordingly, he believes counsel should articulate the rule of law that ought to be applied and explain how its application is beneficial to the jurisprudence of the State of Michigan.[7]

Justice Bridget McCormack, who previously served as a law professor and dean at the University of Michigan Law School prior to joining the Court in 2013, offered similar advice: You "have the opportunity to tell us why this case matters beyond your case."[8] The Court, she explained, is trying to establish the rule of law "for the next 1,000 cases."[9]

Justice David Viviano, having had previously for many years the trial-judge perspective, as former Chief Judge of the Macomb County Circuit Court, told me that, at the Supreme Court level, "the game changes."[10] In accord with the views expressed by his colleagues, Justice Viviano believes that the Court is trying to figure out what the rule of law is throughout Michigan, not just in the specific case before it. As he explains it, the question changes from one about how it impacts the case at bar to one about how it impacts Michigan jurisprudence statewide.[11]

So, you might wonder why so many paragraphs in this article were devoted to this point. The answer might surprise you: After asking many of the justices about the "dos and don'ts" of appellate advocacy, I was stunned to hear that many attorneys appearing before the Court fail to adequately address the jurisprudential significance of their cases, *if at all*. And, I learned something else. Out of the four days that I had met with the justices and Court staff, I decided that I would spend most of one of those days sitting in the courtroom to watch the presentation of oral arguments. Initially, I decided to do this to observe the interaction among the justices, because, the last time I appeared before the Court, the atmosphere was not one dominated by congeniality as it clearly is today.

I was drawn to but not surprised by the light-hearted banter that was exchanged among the justices, but I *was* completely taken aback by how counsel could not or would not answer questions *specifically asking* what the jurisprudential value the respective case presented if the Court were to adopt a certain rule of law. In one instance, it appeared as though the attorney presenting oral argument was openly annoyed by the Court's questions, and, in another, it appeared to me that the question completely threw counsel off his argument that he appeared to

have been reading from the podium, notwithstanding the fact that he completely ignored the question, even after it was thrice asked! But, to be fair, I had the luxury of sitting back and observing "nerve free," as I was not there awaiting my turn to present argument. It's amazing how much better one can hear and see when not under the influence of stress!

In addition, I also learned some other enlightening and helpful words of advice from the justices. Although it should go without saying, make sure you are "over-prepared" to the extent that, like in the law school moot court days, you could present your opponent's argument if you had to do so. In fact, Chief Justice Young recommends that appellate attorneys practice their arguments "moot court" style ahead of time. You should know the facts and the law of your case without having to read them from your notes; the Court does not want to hear a recital.[12]

When I met with Chief Justice Young, I was again surprised by his response to one of my questions on this topic. He said: "I am stunned at how ill prepared are so many counsel who appear before the Court. They come to give a recital, not to educate the court. Many are offended by the Court's questioning of their position and respond poorly. This kind of performance may not hurt their client's cause but it rarely advances it either."[13]

As appellate practitioners, we all know that the first five minutes of oral argument at the Supreme Court constitute the "cease-fire" or "question-free" period. Often, however, by the time counsel recites the facts of the case, or clarifies the facts of the case, not much time is left for the real "guts" of the case. Have you ever felt that, after the roller coaster of questions started, when your time expired, you did not get through the main points of your entire argument? Well, here is some advice that might surprise some practitioners.

By the time oral arguments are heard, the justices have read all the briefs. As such, unless the facts of your case are pivotal or complex, many of the justices told me that you might be wasting your argument time by reciting facts of which they are already aware. Of course, not every case is alike, and the appellate practitioner must employ his or her own judgement when deciding whether or not to waive this "free" time. However, I am told that, if the facts are straightforward, the justices would appreciate not having to hear them repeated.

Although the "cease-fire" period was not discussed with all seven justices, those with whom I did discuss the topic thought that, if counsel were to waive the question-free period, a more productive argument might result. I have to admit that, had I not watched several arguments prior to being told this, I probably would have looked like someone just suggested that I go bungy jumping off a bridge! But, ironically, during my argument-observation day, one of the attorneys whom I observed presenting argument stood up, introduced himself, and waived his five minutes and very eloquently invited the Court to ask him questions, so that he could address the issues on which the Court was most focused. By the time he concluded, I was so amazed by his commanding and confident, yet deferential and respectful performance. He appeared to know the facts and the law cold, and he answered every question posed, with an air of one who genuinely appreciated the opportunity to participate in a substantive colloquy with the Court for his entire argument time. And, while I observed the exchange between counsel and

the justices, it was evident to me that the justices were very responsive and much engaged by that approach.

Additionally, many justices told me that often times counsel fail to *listen* to the questions being asked. Although nerves play a role, the justices have said that, on occasion, when a question is asked, it is clear that counsel failed to *stop and listen*, resulting in no answer at all or a nonresponsive answer, often followed by counsel's scrambling to resume his or her place in the pre-memorized or –written argument. Many justices commented that it is extremely important to listen and answer the *specific* question being posed, not just as a showing of respect and proper decorum, but also because, after having read the briefs and appendices, the questions raised by the Court should demonstrate to counsel on what the Court is actually focused and/or with what it is struggling.

So, how important is oral argument to the Court? Justice Markman told me that, to him, it is "extremely important."[14] Because the Court grants leave on so few cases, argument is necessarily important on those cases; if it were not, leave to appeal would not presumably have been granted in the first place.[15] For Justice Markman, effective oral advocacy by counsel persuades him to decide a case differently than he was inclined to do prior to hearing argument "all the time."[16] He attributes this to the fact that leave-granted cases are the most difficult or troublesome.[17]

"I often ask devil's advocate questions," said Justice Markman.[18] He explained to me that, although counsel might assume that, by the nature of the questions being posed, he might be inclined to agree with the opposing argument, his rationale for the question is to require counsel to "respond to [what Justice Markman views as] the opposition's most difficult questions." These responses might assist, for example, with writing the eventual opinion, thus seeking out the assistance of counsel in that endeavor.[19]

Chief Justice Young has written the following regarding to what extent oral arguments impact his decision-making process:

> In my experience, the honest answer is that few oral arguments actually cause a Justice to radically alter his view of a case. However, effective oral arguments – on the margins – can cause a judge to rethink his views of the case.
>
> I think the more important point is that oral arguments provide a judge with an opportunity to *challenge* his thinking about the legal questions at issue. Thus, for me, whether an oral argument – even a very effective one – causes me fundamentally to change my views is not as important as the opportunity it presents for me to work through the issues in a thorough fashion.
>
> Surely, an effective oral argument can provide a margin of success in a close case. But it would be hard to imagine how even the most brilliantly conceived oral argument could overcome serious substantive

> legal weakness in a case. It is important for you as practitioners to understand that the converse is not true: poor advocacy, including oral advocacy, *can* sunder a case of real merit.[20]

Finally, many of the justices advised that the questions posed to counsel by their colleagues during oral argument are often helpful and influential, as are the "robust" and "productive" discussions the justices have during their weekly conferences. And, just as the justices believe it to be very important for counsel to listen to the questions being asked of them, it was also said that it was equally important for the justices to listen to one another.

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[1] Young, *Effective Supreme Court Advocacy: Advice from the Chief Justice*, 1-7, in *38th Annual Labor and Employment Law Institute* (ICLE seminar held April 4-5, 2013), and Interview with Chief Justice Robert P. Young, Jr., Lansing, Michigan (November 6).

[2] Michigan Supreme Court 2014 Quantitative Report, p 3, and interview with Chief Clerk Larry Royster, Lansing, Michigan (November 5-6, 2015).

[3] Young, *Effective Supreme Court Advocacy: Advice from the Chief Justice*, 1-7, in *38th Annual Labor and Employment Law Institute* (ICLE seminar held April 4-5, 2013).

[4] *Id*. at 1-14.

[5] Interview with Justice Stephen Markman, Lansing, Michigan (November 6, 2015).

[6] *Id*.

[7] Interview with Justice Brian Zahra, Lansing, Michigan (November 18, 2015).

[8] Interview with Justice Bridget McCormack, Lansing, Michigan (November 18, 2015).

[9] *Id*.

[10] Interview with Justice David Viviano, Detroit, Michigan (November 10, 2015).

[11] *Id*.

[12] Interview with Chief Justice Robert P. Young, Jr., Lansing, Michigan (November 6, 2015). *See also* Young, *Effective Supreme Court Advocacy: Advice from the Chief Justice*, 1-13, in *38th Annual Labor and Employment Law Institute* (ICLE seminar held April 4-5, 2013).

[13] *Id*.

[14] Interview with Justice Stephen Markman, Lansing Michigan (November 6, 2015).

[15] *Id*.

[16] *Id*.

[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] Young, Young, *Effective Supreme Court Advocacy: Advice from the Chief Justice*, 1-9, in *38th Annual Labor and Employment Law Institute* (ICLE seminar held April 4-5, 2013).

From the Chair
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you, the Section. Please never take your collegiality for granted. Many of us in private practice compete at some level for business. And those of us not in private practice find ourselves regularly butting heads on issues and even policy with the same attorneys time and again—think of the prosecutors and defense attorneys in the criminal bar. Despite having sufficient reason to disassociate, I doubt I will ever see a body of professionals that works together better for the common good of the practice, and perhaps more importantly, for the administration of justice. I am not the first to make this remark, nor will I be the last, because in the truest sense of the word, your collegiality is remarkable. It has been my tremendous honor to lead such a civil and truly collegial professional body.

A Michigan Perspective on the Art of Oral Argument

By Joanne Swanson

Most appellate practitioners would agree that oral argument before the appellate courts is more of an art than a science. While the ultimate goal is to persuade, the manner of achievement varies by practice area, subject matter, issue, audience, and of course, the personality of the practitioner.

No two lawyers are alike. What works for one lawyer might be difficult or nonproductive for another. Styles of advocacy can be as different as night and day, with the full spectrum on display during a typical case call. Some practitioners come to the podium laden with red-rope files, court rules, and alphabetized cases. Others carry a collated binder, a couple of pages of notes, or nothing at all. Some lawyers are breezy and casual. Others are serious and formal. Some converse. Others lecture. Some just talk. Others talk *and* listen.

What cannot be as easily discerned upon initial observation is what matters most – how well does the lawyer know the facts, the issues, and the law. If left to nothing but his or her cranial devices, how well might the case be argued? Recall that many times the "best laid plans of mice and men"[1] are derailed by a barrage of questions. Knowing your case is key to a successful presentation.

There is always something to be learned about oral argument. On a national scale, advice on the subject is prolific. But what do Michigan practitioners have to say about this pinnacle event in the life of an ap-

Richard Kraus
Civil and Agency Appeals

Valerie Newman
Criminal Appeals

Rob Kamenec
Civil Appeals

Liisa Speaker
Family Law, Child Welfare and Probate Appeals

Mary Massaron
Civil Appeals

peal? How do they prepare and does the approach vary depending upon the court? What do they set out to accomplish? What works and what doesn't? Does argument make a difference in the outcome of the case? I asked five experienced Michigan appellate practitioners to share their thoughts. Excerpts of our interviews are presented below.

Richard Kraus, Civil and Agency Appeals

Preparation

Q When you receive notice of argument, what do you do to prepare, when do you start preparing, and what is the product of your preparation?

A When I receive the case call notice, the first thing I do is take the primary cases and shepardize them to see if there is any supplemental authority to file. Then, and it depends a lot on the case and how voluminous the record is, I read the briefs again and the key cases and statutes, and look at the primary parts of the trial court record, the sections that I think will be important for the argument. Depending on the case I'll start preparing a fairly simple case about a week ahead of time. On a more complicated case, 2-3 weeks ahead, partly because I like to break it up and not do it all in one solid block.

Q Is that so you can think about it in between?

A Yes. I get my best ideas in the middle of the night. Once I've gone through those materials, I tend to take my brief and take the headings, take the key points, the citations and prepare an outline of the brief so that I have all of the key points and the key cites in one shorter document that's available for reference during oral argument. This is so I don't have to dig into the brief in case a question comes up and I don't have the answer in my head. It's sort of a summary version of the brief just so that if I have to quickly pull something, I can get to it without thumbing through the brief.

For the actual argument outline I just tend to have a list of the key points that I want to make and a few key words. I don't write out the argument in any way and generally maybe one sheet for each key argument and usually those sheets are only half full - just an outline with bulleted points, key words, language of a statute, the key things. That's generally what I use when I go to the podium.

Q And that was going to be my next question, what do you take with you when you go to the podium?

A I'll take the summary of the brief. I put everything in a small binder and the binder will have the case call notice. I have a table of contents for my brief, the statement of questions presented, the summary and if there's a key statute or something, I'll have that in there. And then in addition to the small binder, I'll have the four or five sheets that just have the key points and a few word reminders of my argument.

Goals of oral argument

Q And what usually do you set out as your goal? What are you trying to accomplish in oral argument, given that the panel will tell us "we've read your briefs, we understand the facts"?

A It's different, whether appellant or appellee.

Q Good point. Start with appellant.

A As appellant, there are always two things you have to persuade the court of. One is that the trial court erred and the second is that the error is enough for the court to grant relief on appeal.

I tend to focus more on the second aspect of that because explaining why the trial court erred is usually covered in detail in the brief. So my goal is to get to the points that will show the Court of Appeals why it should take some action and grant relief to my client.

In addition, going through the briefs and working through the arguments in almost all cases, I come up with some insight or some analysis that may not come through as clearly as I had hoped in the briefs. Or it may just be the same argument but with a different twist or shade to it. So I always try to come up with something that isn't doing what the court tells you not to do, repeating what's in your brief.

And to some extent it's almost that the way to make an argument in writing is different than the way to make it orally. Sometimes standing up and talking about it, whether it's less formal or more direct, the same argument can just come across differently.

Q What about when you're the appellee, what is your approach?

A As appellee, the one thing that I always look for is whether there is anything in the reply brief that I need to address. And to some extent it's the same thing, picking out the few key points that I know I'm likely going to have to make in response to what they argue.

Q Is your argument or what you're going to say when you get up as appellee crystalized after you hear the appellant's argument?

A I generally have my points mapped out and then as the appellant is arguing, I'll scribble notes into the outline that I have prepared. As appellee, I try to stick to the approach I want to take rather than just follow the appellant's outline or stream of argument.

Heading off the opponent's argument

Q When you're the appellant and you know or believe that there will be some issues the other side has hit upon, will you address those issues in your opening presentation with the idea that maybe you'll take the wind out of their sails or do you wait until rebuttal to see if they bring them up?

A I almost always address them in my opening argument. I never consciously save anything for rebuttal. I figure if it's a point that I should be making, it's better to just do it up front and I think that's what oral argument is especially good for - to take on the other side's issues straight up.

Left-field questions

Q What do you do if you are totally unprepared for a left field question that doesn't really pertain to any issue that was briefed? Have you ever had that happen and how do you usually respond?

A I've had it happen, probably less so now than when I started doing appeals. I think to some extent it's like any other question. You listen to it and try to answer it as best as you can and politely explain why the answer to the question doesn't affect the outcome, if that's the case.

I was at the Sixth Circuit and Judge Merritt started the argument by saying "well the Supreme Court issued this decision yesterday, how do you think it applies." I said it's a red herring. He said "well I think it's dispositive." And it went downhill from there. So, obviously the judge thinks the question is worth asking. You have to deal with it that way.

And I've had a couple of occasions where I've just said I don't know the answer but I can file a supplemental letter by the end of the day.

Rebuttal

Q If you're the appellant and you recognize from the questions to the appellee that your argument is well understood, do you forego your rebuttal time?

A I probably pass on rebuttal half the time. And when I do rebuttal, it's almost always limited to a question that one of the judges asked the appellee and I want to address the question. And I'll say "you know judge you asked this question, I want to add this to that." And sometimes I'll use it to respond to an argument or a statement that the appellee made. I don't have any notes for rebuttal. I don't save things for rebuttal.

Valerie Newman, Criminal Appeals

Reviewing the record

Q How intimately do you go back and familiarize yourself with the record when preparing for oral argument?

A In the criminal defense context, we have to know the record. Our issues are rarely a purely procedural or purely legal analysis. So I would say in this arena in the majority of cases, you do have to go back to familiarize yourself with the record. If the record's short and it's important, sometimes I reread the record. It just depends on the case and how important intimate knowledge of the record is to the legal issues presented. I tend to do a pretty comprehensive statement of facts.

Occasionally when I go back and look at the record again with fresh eyes, I see things a little differently and so it sometimes causes me to focus on a fact that wasn't emphasized in the brief.

Q So as you're going through the process, is it a note taking process or are you just filing it in your memory?

A I generally don't take notes in preparing for oral argument and I don't take anything up to the podium when I argue.

The fluidity of oral argument

A The thing for me with oral argument and oral argument preparation is that you have to be fluid. I think rigidity kills a good oral argument.

Q And tell me how you would define rigidity?

A I think people who write out their entire oral argument and sort of have a script, that's just not helpful. Or people who have 25 bullet points and they've got to hit every single one. So it's not written out but they're going to make sure no matter what question is asked, they're going to find a way to steer it toward one of their bullet points. And it becomes awkward and it becomes clear to the Court that the person's not listening to the question and responding directly to the question.

I always tell my students when I teach that oral argument is a complete misnomer. You don't argue with judges and a good oral argument should be like dinner table conversation. It should be fluid. You should be able to respond to people's questions intelligently and respond in a way that brings people over to your position as much as possible. So, for example I was in the Court of Appeals this morning and the judges, the person who was arguing ahead of me, the judges got really mad at him.

Q Really? Why?

A Because he was saying black letter law states this and the judge looked at him and said "we know the black letter law. You don't need to tell us the black letter law. I asked you already once, tell me why you win." And so that judge wants to know why you win, as do many judges. To me that's an example of rigidity. You sort of have a rote way of approaching things instead of responding to what the judges really want to know; the judges are telling the lawyer what they want to hear and the lawyer is not listening carefully enough to pick up on that cue, give the judges that information in an impactful manner and then stop. That's the other thing I see lawyers have a problem doing.

Q What?

A Knowing when to stop. Sometimes panels are very polite and they'll let you talk to them but they're not listening. And you're not accomplishing anything. If they're not interacting with you, I don't think that you're furthering your goal of trying to prevail.

The purpose of oral argument

Q I think it's hard for a lawyer not to take the stage when you have it and try to pound in every single last little minute that you have. But tell me what your philosophy is on that.

A Oral argument is for judges and I think if we could get across one thing in this article to lawyers that would be the most important thing. Oral argument is not for you and it's not for your client. While we might have clients in the courtroom and you might do more than you know is necessary for the sake of the client, then you tell the Court. Today I had a client's family in the courtroom. I didn't need a lot of time to argue. If my client's family wasn't there, it would have been a quick oral argument. But my client's family was there and I

wanted to do more than a few minutes and I had a panel that I knew would get impatient. So I let them know, "My client's family is here, they've been extremely supportive of him," and they let me argue; they were extremely polite. But I didn't abuse it. I didn't talk for the whole 15 minutes just to put on a show. I don't want to try their patience and their goodwill.

Q That's a very good way of saying, when you don't have that appreciation, you may be trying their patience and goodwill.

A If there are ten double endorsed cases, you know it's going to be a long docket. And so then the judges get irritated with you and you get this reputation of someone who just talks for the sake of talking. I think what people really, really need to understand is that in the long run, you are hurting your reputation. Because if they know that you're the kind of lawyer that's going to get up, say what needs to be said, and say it succinctly, and you're going to be prepared, you're able to answer questions and you don't talk just for the sake of talking, the judges will listen. And they'll engage because they know that you can engage back.

Lawyer instinct

A I think that's the hardest part about teaching people oral argument or writing about oral argument. I think everything is so driven by your case, your opponent, your opponent's brief. There are things that are out of your control that you then have to determine whether or not you think it's worthy of your time to respond to or necessary.

Q Would you say a lot of it is instinctual for you? Some of these decisions are what your instinct tells you?

A Yes, absolutely. For me, I'm a very instinctual lawyer. But I'm also very, very strategic. So I think about things a lot. I said I'll prepare in an hour for an oral argument, that's true in terms of looking at the brief, looking at the opponent's briefs, updating research and figuring out what I want to do. But I think about the argument for days. You have to think about your argument. You have to be mulling it over in your head.

Rob Kamenec, Civil Appeals

Preparation

Q When you're going through this process of appeal, preparing for your argument, are you reviewing everything in the file?

A No. I always start with my brief, whether I'm the appellee or the appellant. My first pass is to figure out where the judge and opposing attorney are going to go. I read through my brief with that perspective. Sometimes that takes less than an hour. I think the most important thing you can do is figure out where the Court's going to go. You don't always get it right but after a while, with significant experience, you get a pretty good handle on where the Court's going to go in the case. It's not just intellectual analysis; experience factors into the equation.

I'll make some quick notes and the notes will usually go into my binder. I'll pick up the opposition's brief and go through that as well, with the same analysis: where are they going to come after me and where don't I have to be as concerned. And then, when I'm done with that, I just start writing.

Q So you're not necessarily coming up with new things that you haven't already argued at this point or are you?

A I think that when you're in the process of writing the briefs, you're down to the weeds or I use the metaphor in the rice patties, and you've got to cover it all, you're laboring away. I'm very comprehensive in my briefing. For that very reason, when I come up for air later on while prepping for the argument, I want to make sure that I'm considering different slants. I'm narrowing down what I need to go through. I want to make sure that I'm considering the perspective of the case from three people or seven people who do not have the same knowledge base about the case that I do.

I want to put myself in the judges' shoes when I'm going through that process or in their stead and say okay, what is it that's going to get the attention of this Court besides what I've got in the brief. What's going to be their perspective? How do I seal the deal at oral argument or if I've got an uphill battle, what do I throw at the Court that's going to make them think twice about ruling against me? And that's where a lot of the oral argument preparation goes.

Q You're not outlining the brief?

A No.

Q Basically you're putting all this information back in your brain and then you're kind of mixing it up and thinking about it and the results of your thoughts, is that what goes into your outline?

A Yes.

Exercising judgment

Q What is your view on preparing with respect to every detail of a transcript or the factual nuances of particular cases?

A My view is that in most cases I'm not going to know everything about every case. It doesn't mean I'm not prepared, I want to make that clear. There have been times I've argued over the facts of cases. There have been times I've been asked something and I don't know and I tell them I don't know. I don't like that, but I'll do it because I have found that the cost benefit analysis of putting my time into other areas is worth it.

Q That's part of the experience, knowing what to devote your time to.

A Correct. I think it's one of the hardest things to impart to people that are less experienced or newer associates who do appellate work. The tendency is to want to know it all and to some extent getting tangled up with knowing it all rather than knowing and really emphasizing what you need to know to win the case. I was just in front of Judge Mark Cavanaugh the other day. He has picked up this moniker that we've had for years, tell me why you win the case. But to do that, often times you have to narrow down what you're going to talk about. Narrow down what you know about. Maybe there's going to be the casualty that you don't know some ancillary fact but so be it. That's the judgment of counsel and that is certainly my attitude.

Being comfortable conversing

Q You mentioned feeling comfortable when you're up there. What do you do and what is your approach to feeling comfortable and confident that you can just have a conversation with the judges?

A At the end of the day I'm not in competition with counsel that much even though it's an adversarial system. I want to win the case but I am having a conversation with the Court. In the course of that conversation, you're an advocate and you are telling the Court why you win or why your opponent shouldn't win. I don't have any difficulty with that. But it is a conversation and I think the judges open up a lot when they think it's a conversation.

I'm not talking about the misplaced joke or the attempt to be humorous where it just doesn't work because that's a disaster. But I am talking about the notion of listening and responding and if you had a question back, asking it. I have no difficulty saying, "Your Honor, this is what I think you asked me. If I'm wrong, let me know. I'm going to answer that and please if that's not enough, ask me again."

It's always going to be the King's English and it's not always going to be the King's prototype of oral arguments that you'd have in the United States Supreme Court. It's not that setting in most cases of an appeal. It always humors me somewhat to have people suggest that all oral arguments and in fact all judges are the same because they simply aren't. Depending on the nature of the case, depending on what court you're in, depending on how well you know the judges and to some extent, depending on your opposition, there are different approaches with different courts.

Four goals

Q To sum up, if you had three rules of thumb that you keep in mind regarding what you want to accomplish in the Court of Appeals, what would they be?

A Tell them why you're there is the first one. Two, I try to be clear. I want to make sure that the Court understands my position. If they rule against me but they understand it, then so be it. If they rule against me and they don't understand it, that's my job. I've got to get them there and there are different approaches to doing that. And the third thing we've already talked about, be comfortable. Have a conversation. I'll add a fourth one too. They hear four, five, six, seven, eight, ten arguments a day. What makes you think they're going to remember your argument more than anyone else's? I'm not about to light off fireworks in the courtroom to

make sure they understand it but I do want to leave them with something that they're going to remember. I want to make sure I get my two, three or four most important points hammered home.

Q What about in the Supreme Court? How does your approach change when you are preparing to argue in the Michigan Supreme Court?

A It changes in this regard. The four things that I identified earlier still apply. I still want to be comfortable, I still want to tell them how I win. I want to narrow down the arguments. I want to do a lot of things like that. But the difference is this. That Court often times is concerned with the policy of the law more than the Court of Appeals. I believe that Court of Appeals judges should, and most do, treat their role as error correcting. No better example of that than Judge Christopher Murray in the Michigan Court of Appeals, who tells you that. That's not per se the only or limited role of the Michigan Supreme Court. I've got to be able to intertwine policy of the law to the extent it's relevant, public policy, the extension of how an opinion in my favor will affect other cases acting as precedent. I've got to have all of that in hand while I argue the case. More so on a calendar case up in the Supreme Court than the shortened arguments on application but nonetheless even on those.

I would say two thirds of the questions from the Supreme Court have to deal with those issues. The policies of the law, how a decision here would play out, consistency with precedent that's already out there, where you're asking for precedent to be altered or how you can justify that.

Liisa Speaker, Family Law, Child Welfare and Probate Appeals

Preparation

Q What do you do to prepare for oral argument?

A Well I start off by reading the briefs and as I'm reading the briefs, I'm creating an oral argument outline of some of the points I am thinking of making at argument.

I try to keep it to two pages, or three if the case is complex or convoluted. I staple the outline to a manila folder and sometimes I have to turn it into a trifold.

Q Does your outline just include the key points of what you want to say?

A No, sometimes I go into factual details. It has record cites and case cites. Sometimes the outline starts off as five pages and I have to whittle it down. I'm trying to make it so that it's usable when I'm at argument. A five-page outline is not going to be very helpful for me when I'm up at the podium. I really want it to be on two pages or at most a trifold that can be right in front of me all at the same time.

And so part of the preparing process is becoming more and more comfortable with the material so I can start deleting and abbreviating more things because I'm comfortable with the material and I don't think I have to have something on the outline to know that I need to bring it up.

Q So when you go up to the podium, you just take your manila folder?

A Yes. Sometimes with more complex cases I have my manila folder and then I'll make a chronology of complex procedure or facts or background, and slip it underneath that second page of my outline.

Q So your chronology would be more factual?

A Facts and procedure. In a lot of my cases, the procedure is really important because the courts are not following the procedure which is why there is an appeal in the first place. So especially in child welfare cases, the procedure is what the case is all about. The dates of when things happened, when people received notice, and when an attorney was appointed -- I want all of that right there with me.

Q As part of your preparation I would imagine anticipating what you are going to be asked, questions that are more reflective of weaknesses in your position.

A I definitely think about what questions they are going to ask, directly for the Supreme Court, maybe it's more indirect at the Court of Appeals. I think about my panel and sometimes I do panel research. I used to always do panel research but now I know some of these judges so much better that sometimes it's just more knowing their personalities.

Practicing the argument

Q What about the difference between your presentation to the Court of Appeals versus the Supreme Court?

A It's really different. For the Supreme Court, I spend a lot more time thinking about what questions they are going to have and why they are looking at this case. I always do a practice round.

Q How do you do that?

A I gather volunteers, send them the brief, and schedule a time. They come to my office or I'll actually stand at a podium and they will ask me questions. We do a break out session afterwards. It's really helpful.

Q So do your anticipated questions probably go beyond the specific impact on your case?

A Oh yes, absolutely. No matter how many questions we come up with the Supreme Court always asks you something you are not expecting and that no one has asked you before.

A silent bench

Q What about the situation where you're at the podium and no one is asking you any questions. I've had one judge suggest that they don't need to hear anything more and you should sit down. What is your view of that?

A My thinking always is that the argument is not for me to recite everything about my case. It's to answer their questions. If they don't have questions I am not going to waste their time but I do want to get a couple of key points for them to think about, even if they don't have a single question. But it's not going to take me that long to get to those key points.

Waiving oral argument

A I don't like when people just get up there and say that we stand on our brief unless the Court has any questions. If I feel like I can stand on my brief and the argument is not going to make a difference, I waive argument but I don't waive until I know who my panel is. I just don't see the point of going there just to stand on your brief. You have to drive to court, things to do to get ready, and what if the panel has questions?

Q What about your opponent?

A I never waive unless they agree to waive also or have already waived. My opponent is not going to be there without me being there to respond, never. But I've had times where I have called the other side and said "I'll waive argument if you do too" and they agree to do that.

Goals of oral argument

Q If you were to give me two bullet point goals of oral argument, what would they be?

A Answer the judges' questions and hit home two to three key points that you want the Court to take away from your case.

Listening to preceding cases

A My time to go to court and sit through other people's arguments is really meditative. I can sit and listen and see what kind of mood the judges are in, what questions they are asking other people, what their mindset is. I recall that once, Judge Murray kept asking people throughout the day "what does the statute say" and it reminded me that I needed to hone in on the statute. So as I was sitting there waiting for my turn, I tweaked the argument based on what the statute said and why the trial court's ruling didn't follow the statute.

Mary Massaron, Civil Appeals

Preparation

Q What do you do when you are preparing for oral argument, how soon do you begin in advance of the argument, and what is the product that comes out of your review?

A How far in advance depends on the complexity of the case and whether it's a case in which I have a client that is going to be doing a moot court. If we are doing a moot court I would try to do the moot court about two weeks before the argument so that there would be plenty of time to revise and refine the argument, but not so far ahead that I would have forgotten it all by the time I get to court. If there is not a moot court then, depending again on the complexity of the case, I am going to be starting a couple of weeks ahead. And what I typically start with is an excerpt of the records, my

own sort of appendix that I like to mark up to help me remember things.

Q Is that something you generally do when you are preparing the brief?

A I generate it early in the case when I'm first reviewing the lower court record in evaluating the appeal which I do typically long before I do the brief. Then I use it when I am doing the brief and I use it again at the point of preparation for oral argument. And ordinarily I would review again the opinion and some of the major portions of the record. Then I go through the brief, read the argument, look up all the record cites, read all the cases and make notes. That can really help, at least from my perspective, to see what the strong arguments are and what the questions are likely to be from the judges. I keep an oral argument notebook that I prepare simultaneously with reading the record.

Q Is it a spiral bound notebook?

A I actually have two spiral bound leather notebooks that I have used for years with dividers and a log at the front. At the very front of the notebook, I keep a short form outline with my very short intro, and then key points with record and case cites. I try to get the whole argument (using key words, abbreviations, and phrases) onto two pages facing each other. This can be kept open so that I don't have to search or flip pages but have everything visible.

Then, I have organized in the rest of the notebook the more extended notes, the lower court opinion, copies of key cases and statutes, and copies of other especially important documents or portions of the record that I may need to refer to during the argument. I use numbered dividers with a table of contents that tells me where everything is so I can find it quickly.

I generally include in my binder a part that recites the best facts for the other side and I include a part that sets forth the other side's best law and how I will respond to it. I really try to think about which case is best for them, the closest for them, and then force myself to think "what is my best answer." It's easy to think you can gloss over those points or hope you can gloss over those points. In the briefing process, you may not have dealt with them in depth. But an active panel can force you to answer questions about them at oral argument. And the failure to have a persuasive answer can completely derail an argument.

So it's very important in preparation to figure out what points may be a stumbling block to your position, where the other side is going to score major points in their oral presentation, and how you are going to regroup or respond. I try to find out whether any of the judges on my panel sat on any of the critical cases and how they approached the issue in those cases.

Moot court

Q You mentioned moot court. When would you have a moot court and when wouldn't you? And when you do have a moot court practice session, how does that come about and who do you use for you panelists?

A I think moot courts are great. I really like to have moot court particularly if it's a big case, a large money judgment, a complicated case, or if it's in the court of last resort. I try to get the client to agree to have moot court and to pay for it. Sometimes they are willing to do that, sometimes not. If they're not I try to informally moot my argument with colleagues in my office. But if the client is willing, I try to hire former judges to sit on the moot court panel or people that I think will have a feel for the kinds of questions that will be posed. I try not to have the panel be all people who are experts in the area of law that the case involves. It's nice to maybe have one person who is an expert on the law or one person who might have been involved in the case (if it's a complicated case) but the judges come at it cold and as generalists, so I think it's important to have people who are going to take that kind of view of the case on your moot. They often focus on different things.

Q What do you usually gain from the moot court?

A I think at its best it helps you to anticipate questions that you might not have seen, points that seem to be clear but that one or another of the moot court judges see as unclear. It also helps you estimate the amount of time it might take to address a certain point in the face of a series of ques-

tions so that you can better gauge how much time you have and how to manage that time during the course of the argument. And I think it helps you refine the language. The English language is incredibly rich and is capable of incredible precision but when we're speaking off the cuff it's very easy to say something that you think is conveying a certain point in a nuanced way and through your word choice, you're conveying something just slightly different but different enough to create problems for your argument. I think those kinds of problems can often be identified in the course of a moot court. And then you can correct and refine how you are going to talk about that point.

Left-field questions

Q Once you are out there, you've done all your preparation, you've anticipated everything you possibly could with respect to questions that might be of interest to the judges and you get a question totally out of left field that you really weren't prepared for. Would you try to answer it off the top of your head? Would you say "I hadn't thought of that"? What would you do?

A It happens. I've had questions, for example, about a particular case that for some reason or another I'm not remembering the details of and I'll say to the court "Your Honor, I don't remember the details of that. If you can enlighten me I could perhaps respond." And ordinarily they will say "oh yeah, this was a case involving x, y and z and the court held whatever, why isn't that controlling" and then you can try to distinguish it or whatever. Or they will ask a question that you simply haven't anticipated. Sometimes it's a question that you have anticipated but it's worded in a different way. It takes a minute or two to figure out what exactly they are getting at. And I don't have any magic bullet for that. I try my best to respond. If it's an entirely new question, an argument or an issue that wasn't raised or briefed by the parties, then I would say to the Court, "Your Honor that wasn't part of the briefing, nobody has raised that point." If I have an answer, I give it but I also may say, "I would very much like to submit a supplemental brief, a letter brief to the court to better address that point."

Arguing in a court of last resort

Q What would you say with respect to how your approach to argument might change if you were in the Michigan Court of Appeals versus the Michigan Supreme Court versus the Sixth Circuit or even the U.S. Supreme Court?

A In a court of last resort, the court has a huge amount of flexibility in how it defines the issue, refines the issue, and deals with past precedent. At that level, the courts are really looking at what the documents say about the Constitution, the statute, the contract they are looking at, the policies of the law, the policies of the common law, or policy factors as to how the decision might play out in the real world. Some judges look at these points more heavily than others and you have to know your court to know how they are going to approach it. When you are in a court of last resort, this has to be a lot of your thinking and presentation.

In the intermediate courts, most of the time the judges are looking for a case that has a principle or a ruling that's either binding or very closely analogous so they can rely on that case and get to the outcome and not be overturned. So the focus of your argument has to be much more on the binding precedent and why the other side's asserted precedent doesn't control your case. That distinction is really fundamental and I've seen occasions in courts of last resort where the advocate hasn't made that mental shift and the justices become very frustrated because they are approaching the case in a particular kind of way and if they thought it was governed completely by solid prior precedent they probably would not have taken the case.

Effect of oral argument

Q How much of a difference do you think oral argument makes in the outcome of the case?

A I think it can make a big difference in some cases. In many cases the judges come into oral argument and they are pretty comfortable with where they are going to be at the end of the oral argument and probably in more arguments than not nothing happens that shifts them from that view. I think that's particularly true because both the Michigan Court of Appeals and the Sixth Circuit and many, many other intermediate courts begin opinion writing

before the argument. In my view that's a pernicious practice but it's well accepted by many, many courts. I think it's pernicious because it encourages judges to prepare somewhat less for your oral argument than the judge with opinion writing assignment. And what that means is that you're not getting as full and rich a consideration of the case by three separate judges coming at it independently.

MOAA versus a calendar case

Q What would you say about the difference in the Michigan Supreme Court between mini oral argument on the application and a calendar case argument?

A Well I would think two things. My understanding of the impetus for allowing for mini oral arguments was the Court's longtime practice of issuing preemptory reversals on a vote of five justices, and what the Court did, as I understand it, was to decide that four justices could do a preemptory reversal but that there would be an oral argument first as a check. That change was made some years ago. But recently the Court has been using this procedure even for matters of first impression. And I think that is not good for the system because all too often the Court takes an important case but then simply denies leave without issuing a full opinion. Or it issues a per curiam which may not be as carefully considered as an authored opinion would be. Also, because the Court shortens oral argument and accepts only a supplemental brief (rather than a main, response, and reply brief), the briefs end up talking past each other. The parties don't have the opportunity to thoughtfully respond to the other side's arguments. I see this as a disservice to the Court, and to the development of the law.

So I think that if a mini oral argument were to be ordered, I would be very concerned that a preemptory reversal was going to follow and I would have one of two strategies. One would be to explain why my position on the ruling was correct. But a second is to explain why the law in the area was more complex than the Court might have appreciated on the basis of the original papers and therefore, why either this case is a poor candidate for them to revisit the law or why they should have a full blown merits hearing so that there is more time for amicus briefs and for the Court to consider the issues. I would be thinking about strategies like that.

Q Is your view that when the Court is considering a peremptory reversal, it is because the law is settled and it is not going to be making any change in the law or advancing development?

A Usually yes. The principal function of the Supreme Court, like most courts of last resort, is to say what the law is and it typically does that in cases where the laws aren't settled or maybe the world has dramatically changed in the area so whatever the law was in the past, it needs to be revisited. They typically don't accept leave to appeal even when there might have been an error if it looks like it's not a horribly egregious error and if it's settled law. But the Court has always maintained some limited amount of error correcting in its handling of the cases that it takes and it's often done that by way of peremptory reversal. So if the Court has announced a new principle of law or interpreted a statute in a particular way and the lower court misapplies it, if the Supreme Court thinks it's an important enough case to correct error even though the law is settled then it would issue a peremptory reversal.

Endnote

1 Adapted from "To a Mouse" by Robert Burns, who in 1785 wrote "The best laid schemes o' mice an' men / Gang aft a-gley," after unintentionally upsetting the nest a mouse had built for winter survival while plowing in the field (or so legend reports). The English version is "The best laid schemes of mice and men/Go often askew." See Wikipedia, To a Mouse at https://en.wikipedia.org/wiki/To_a_Mouse