SUPREME EXPERIENCE
ARGUING BEFORE THE SUPREME COURT OF THE UNITED STATES FOR THE FIRST TIME

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The process for seeking review of a case by the Court begins with a petition for a writ of certiorari. It is a unique task that is unlike most other pleadings litigators encounter in their practice. To draft a successful petition, the author should carefully consider the reader. Over 8,000 petitions for certiorari are filed each term, of which only about 75 are granted. After taking into account criminal and constitutional cases, the number of available slots shrinks considerably. The Court has a well-developed system for reviewing cert petitions, which rests largely with the Justices’ law clerks who have a very limited amount of time to consider each petition. A petition should therefore be as concise and persuasive as possible. The Court will also consider briefs from amicus curiae in support of a cert petition, which may tilt the scales in favor of granting review. Both the RadLAX and Hall cases involved a split among the circuit courts, which is one of the main reasons why the Court will grant review.

After the petition and brief in opposition are filed with the Court, they are distributed to the clerks for review. A conference is then scheduled where the nine Justices formally consider the petition. The Court’s website lists when the petition is scheduled to be discussed at conference. Based largely on the recommendations of the clerks who reviewed the petitions, the Justices create a short list of potentially certworthy petitions to discuss during the conference. The conferences typically occur on a Friday and the order either granting or denying cert is released the following Monday morning. In some cases, the Court may hold a petition over and revisit it for consideration at one or more additional conferences for the purpose of discussing the petition further or provide more time to convince additional Justices to vote in favor of granting review (four votes are needed). Indeed, this is what happened to the petition in the RadLAX case, which was held over and considered at three consecutive conferences, much to the consternation of petitioners’ counsel. Seeing the order pop up on your computer screen with the word “GRANTED” is exhilarating. But that feeling doesn’t last long, as you quickly realize the work that lies ahead.

### PREPARING THE BRIEFS AND ORAL ARGUMENT

Preparing a Supreme Court brief is a daunting task. Unlike appeals in any other court, there is very little authority that the Court considers binding or even persuasive other than its own precedent. Accordingly, a careful review of prior Supreme Court cases is critical. Just as important is a careful analysis of the policy and practical consequences of the legal issues in your case, since the Court is rarely resolving a discrete dispute in one case, but rather creating or modifying a rule for an entire area of law. Solicitation of amicus support is also critical, as briefs in support of your position from outside industry groups or academic experts can influence the Court’s decision. So too, is soliciting the support of the Solicitor General, which represents the interests of the United States before the Court and is often referred to as the “tenth Justice” because of its influence with the Court. The Solicitor General’s Office will often invite the parties involved in the appeal to Washington, D.C., to present their arguments before it decides whether to file an amicus brief in the case. Those meetings can be intense affairs, with lawyers and representatives from various branches of the federal government probing each side’s arguments to determine if the federal government has a sufficient interest in the case. Finally, receiving assistance from Supreme Court specialists and former Supreme Court clerks is invaluable in crafting and presenting an argument before the Court. Supreme Court practice involves a surprising amount of “inside baseball.”

Understanding all of the traditions and nuances of presenting an argument before the Court is vital for a first-time advocate. Preparing for and presenting oral argument before the Court is an extraordinary experience. Many lawyers can only vaguely recall a moot court or oral advocacy class from law school, while others may have presented an appellate argument before state appellate courts or circuit courts of appeals. Presenting an oral argument before the Supreme Court, however, elevates that experience to an entirely different level. In almost all cases, each side is granted 30 minutes for the oral argument. If the Solicitor General files an amicus brief, it is often permitted to share a portion of the time for oral argument that is allocated to the side it supports. Moot court practice is essential to presenting an effective oral argument. The Supreme Court Institute (SCI) at Georgetown Law offers a very high-level moot court experience for every case that is heard by the Court each term. The moot is attended by former Supreme Court clerks, law professors and other specialists in the particular area of law. The moot lasts approximately an hour, and a thorough feedback session is videotaped so you can review your argument and presentation style. Another helpful exercise is to attend an argument that is presented to the Court in the week prior to your argument. Although many lawyers have enjoyed the experience of being sworn in at the Court or attending an argument, the experience is entirely different when you are attending an argument to prepare for your own time before the Court.

The process is only beginning when you attend an argument. There is a lot of legal and oral advocacy work that is performed in the days and weeks before the oral argument. That work includes reviewing the entire record of the case, crafting and perfecting the argument and briefing, and participating in the oral argument preparation process. The Justices, their law clerks, and advocates in the case spend a lot of time preparing for oral argument, and the Justices expect you to be prepared. You must know your position thoroughly and be able to communicate that position in a clear, concise, and persuasive manner. You must also be able to anticipate and respond to questions from the Justices. The Justices are not shy about asking tough questions, and their questions can be very insightful. The Justices are not just looking for an answer, but they are also looking for a well-reasoned argument that persuades them of the correctness of your position.