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LEARNING (AND TEACHING) FROM DOING

Edward B. Foley*

I. A MENTORING OPPORTUNITY

Even more special than the opportunity to argue at the Supreme Court is the opportunity to serve as a mentor to junior attorneys while doing so. My background as a law professor sensitized me to the possibility of playing this mentoring role, but the opportunity was made concrete by the litigation team we assembled to prepare for the oral argument.

Serving as State Solicitor of Ohio while on leave from the University, I was fortunate to have the help of two Assistant Solicitors, David Gormley and Stephen Carney. But these were two experienced appellate litigators, who needed no mentoring and who, indeed, could teach me a thing or two. Their duties on the case were at a higher level. Having had the hands-on responsibility for drafting the briefs, their role in argument prep was mostly strategic and conceptual: what sort of questions we might expect from the Court and how best to handle them.

The task of tracking down answers to a myriad of research questions fell to two first-year attorneys in our office, Dave Patton and Andy Bowers, who had just finished law school at Ohio State, where I was a professor. Naturally, then, I felt a special affinity for these eager young lawyers, especially as they exhibited a model can-do attitude, willing to share my philosophy of “no stone should be left unturned” as we prepared for argument. The bond we developed quickly felt similar to the bond that sometimes develops between research

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assistants and a professor, and so I began to see our shared preparation experience as a kind of teaching opportunity.

II. A LESSON ABOUT THE VALUE OF HARD WORK

In getting ready for the argument, there was a surprising amount of research for Dave and Andy to do. Surprising, especially to them as junior attorneys, because our team had already sent four briefs to the Supreme Court (petition, petition-stage reply, merits brief, and merits-stage reply), not to mention all our office's briefing of the case in the district court and court of appeals. What more basic legal research could there possibly be left to do, simply to get ready for an oral argument?

Habeas cases generally are procedurally complex, and ours was particularly so. A number of procedural wrinkles we had been able to confine to footnotes in our briefs. But now they loomed large, as potentially unanswered issues or obstacles, should the Court be interested in exploring them at oral argument. We were even concerned that the Court might choose to "DIG" the case (i.e., Dismiss it as Improvidently Granted), if it found some of the procedural problems intractable. As we were preparing for oral argument, we felt like we were tiptoeing through a procedural minefield, with each twist and turn presenting a new research question for Dave or Andy to address.

Indeed, in his own article about this experience (written for an Ohio State alumni publication), Dave wrote: "The most striking aspect of the whole experience was the staggering amount of preparation."¹ While our need for additional research at this late stage of the process might have been unusually large, the fact that argument preparation generally takes substantial time and effort even after completion of briefing is a common phenomenon in my experience. As David Frederick has commented in his superb new book, *Supreme Court and Appellate Advocacy*:

An advocate should spend time conducting legal research between the filing of briefs and the oral argument. Sometimes that research runs to ground issues intentionally

1. David Villar Patton, *New Attorneys Get First Glimpse of Argument Before the U.S. Supreme Court*, in Ohio St. Univ. L. Record 38 (Summer/Fall 2000).

left open in the brief; sometimes to close holes that did not seem so wide or significant when writing the brief but now seem much more significant.²

Thus, in my role as mentor to Dave and Andy, my first order of business was to have them experience the reality of what General William Suter, the Clerk of the Court, has advised: “[T]here are three secrets for arguing well in the Supreme Court: preparation, preparation, and still more preparation.”³ Given Dave’s observation to his fellow alums about the “staggering” amount of preparation that we undertook, I would say: “Lesson learned.”

III. A LESSON ABOUT REFINING THE ARGUMENT

I confess that even I was surprised how unprepared I truly was when I stepped to the podium for my first moot court. Even if there were some procedural loose ends to pin down, I still thought that I knew the essence of my case. Oh, was I wrong.

Fortunately, serving as one of the justices at my first moot was Jeffrey Sutton, my predecessor as State Solicitor, a graduate of Ohio State’s law school, and now a well-deserved nominee to the Sixth Circuit. His first question at the moot was very simple, but it exposed the big weakness in my preparation up to that point. “What’s the big deal here?” he asked, meaning why—in terms of basic equity—should the State win its argument that the habeas petitioner should be denied the right to bring his constitutional claim in federal court when his lawyer missed a state-court deadline?

I didn’t have a good answer, even though I had worked really hard on framing the question presented for the cert petition, getting it precisely worded (both in terms of the national importance of the issue and the conflict among the circuits). We even revisited the wording of our question (although we decided to keep it) when, in his merits-stage brief, Respondent challenged whether the question was properly

2. David C. Frederick, *Supreme Court and Appellate Advocacy: Mastering Oral Argument* 243 (West 2002); see also *id.* at 53 (noting that “a brief writer can ‘write around’ problems that simply cannot be avoided in answering questions at oral argument”).

3. See *id.* at 52.

presented after all. Consequently, when I stepped to the podium for my first moot, I thought I had properly framed the core issue before the Court in the case and, further, thought I knew why we should win on that core issue.

As it turns out, however, there is the right way to frame a legal question in a brief, and the right way to frame the same legal issue at oral argument, *and the two ways of putting are not necessarily the same*, even though it is the same legal issue. The opening of one's oral argument—and thus its essential theme—often needs to be much less technical and legalistic than the question presented in the cert petition or merits-stage brief. In open court, one must speak to the justices in human terms, explaining to the justices what the issue—the big deal—is in easily accessible language, and then explain why one should win on that point in terms of basic equity or fairness.

Of course, this lay-oriented phrasing of the legal issue cannot be condescending to the justices, or imprecise, or otherwise inconsistent with a fully accurate understanding of the technical legal question. Nor can one's effort to persuade the justices at the level of basic equity be abstract and theoretical, untethered from the specific facts of the case. Instead, especially with the current Court, the narrower and more fact-specific one makes this equity-based argument, the better. But the key point here is that, by the time the moots are over and one goes to the podium for the real thing, one's two-minute opening (especially as petitioner) must be directly accessible and intuitively persuasive to the justices, as ordinary human beings, based on their understanding of the competing interests at stake on the specific facts of the case.

This process of refinement—taking the essence of the issue and argument presented in the brief—and distilling it even further, to get at its most directly accessible and intuitively appealing formulation, is one that has occurred in each appellate argument that I've done.⁴ Each time, I think I've gotten to the essence of the issue and argument during the brief-writing process, and each time the process of preparing for oral argument—and especially the process of successive moots—has

4. Frederick makes the same point. *See id.* at 243 (“An advocate’s understanding of a case deepens with each increment of significant time spent thinking about it. That is true even when the attorney has filed a reply brief and is preparing to argue the case.”).

caused me to achieve a newer, clearer understanding of the issue and has caused me to express my argument in simpler, more accessible and intuitively appealing terms.

From a mentoring perspective, it is fortunate that Dave and Andy were able to witness first-hand the transformation from a diffuse and stumbling effort in the first moot—where Sutton quickly exposed the fact that we hadn't yet reduced our animating principle to a readily accessible and persuasive point—to a more polished presentation in subsequent moots, and finally to a “yes, at last we've got it” just in time for the real event.⁵ As Dave described it in his account of the experience, “Ned reached that point [of finally being ready] at around 9:30 Sunday night,” with the result that the next morning's argument seemed like a good day at a bowling alley: “In short, the Court was setting them up, and Ned was knocking them down.”⁶

IV. A LESSON ABOUT BEING A GENERALIST

Related to this refinement process is the important truth that one need not be a specialist in any particular area of law to argue effectively in the Supreme Court. In fact, it helps to be a generalist (or perhaps an “institutional specialist,” with special expertise on the Court itself), because the justices themselves are generalists and approach their cases as such.

Consequently, I did not consider it a detriment, but rather an asset, that I was not an expert in habeas procedure. To be sure, I had to read large doses of a leading treatise, which I considered to be my “habeas bible.”⁷ I was fortunate, furthermore, that I could call upon lawyers in the Solicitor's office who were habeas experts. But I knew my function was to translate an arcane and technical proposition of habeas

5. Here's what we came up with: (1) The state itself wants the opportunity to correct any constitutional defect in its own court proceedings, so (2) it has provided a specific mechanism for re-opening proceedings claimed to be defective because of faulty lawyering, and (3) when a criminal defendant fails to invoke this specific mechanism, the state is entitled to know why before permitting that defendant to seek redress in a separate federal proceeding.

6. Patton, *supra* n. 1, at 38-39.

7. James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* (3d ed., LEXIS Law Pub. 1998).

procedure into a straightforward, non-technical point that a generalist judge would easily understand and sympathize with.

As a mentor, moreover, I wanted Dave and Andy to appreciate the importance of being a good generalist lawyer. I wanted to instill in them the confidence that, if they are good generalists, then they never need to feel deficient because they lack a specific expertise. I wanted them especially to realize that, in order to communicate “on the same wavelength” as the justices, it's actually better to be a good generalist (or, again, an institutional specialist), because you can better appreciate where they are coming from.

I think they got this message when Justice Stevens asked me a question about the relationship between our case and the one that was argued first-up that same morning. Luckily, I had prepared for this kind of question. In fact, I had asked Dave to track down the briefs in that other case, explaining that it is important to know what else is on the Court's calendar at the same time, in order to know what's on the Justices' minds when they're thinking about your own case. As part of the mentoring process, I remember telling Dave and Andy that, in general, I think it is just as important to consider the relationship of one's case to other cases on the Court's docket at the same time as it is to know the relationship of one's case to the Court's prior precedents. But I didn't realize how prescient this piece of advice would be.

V. A CHANCE TO TEACH WHAT I NOW KNOW

Since returning to the faculty at Ohio State, I have endeavored to incorporate into my teaching the lessons learned from arguing this habeas case. In essence, I try to replicate with current law students some of the same mentoring that Dave and Andy received in their on-the-job training.

This year I've been teaching some courses on appellate advocacy and litigation strategies. At first, I was reluctant to use my own experience to illustrate effective advocacy techniques. Instead, drawing heavily on Frederick's fine book, I have used examples involving well-regarded practitioners before the Supreme Court bar.

But lately I've had a change of heart. My students are unlikely to be repeat players at the highest Court in the land, and even their trips to the courts of appeal, or to their state supreme courts, may be fairly limited. There is something to be said for showing that, with enough preparation and foresight (which itself comes from thoughtful preparation), they can get it right the first (and maybe only) time.

Thus, I show my current students the same process of refinement that Dave and Andy saw first-hand. Having taped my moots, I show the students these tapes, and they can see me fumble Sutton's "What's the big deal here?" question in that first one. With the actual argument tape available on www.oyez.org, the students can compare the moots with the real thing. (I thought it would be painful to go back and listen to the actual argument on tape, but I gritted my teeth and went ahead for the sake of my students. In fact, however, I was pleasantly surprised: While I appear, understandably, to be a little nervous at the very beginning, my opening was substantively strong, and once I got going, I was focused, on message, and responsive to the Court's questions.)

Specifically, to illustrate Frederick's crucial point about the importance of having a mantra that is repeated in different ways throughout the argument,⁸ I show the students how, at four different points in the argument (in the opening, at a lull in the questioning, right before sitting down the first time, and finally on rebuttal), I specifically identified the State's interest in the case in easily understandable terms. To illustrate the equally important point about the need to answer the Court's questions directly, I point out that three times my first word in answering a question from Justice Breyer was a simple "No," followed with an explanation. In one instance, the explanation came straight from one of the Court's own prior decisions, and while it was not a decision that Justice Breyer was comfortable with, my ability to rely on precedent for this particular point was likely to satisfy at least five other members of the Court. Pointing the students to this particular colloquy with Justice Breyer is useful, therefore, in teaching them two more important principles of Supreme Court advocacy: First, you need to know when you can

8. Frederick, *supra* n. 2, at 228-33.

(and cannot) rely on black-letter law to prevail on a point; and second, you need to know how to convert a hostile question from an unsympathetic justice into the opportunity to persuade enough others to win.⁹

Similarly, I am able to show students places in the argument where I explicitly indicate the narrow grounds upon which we were seeking to prevail, as well as places where I call to the Court's attention the possibility that a habeas petitioner might well prevail on facts different from those in my case. Affirmatively volunteering these limiting principles, rather than offering them up while on a hasty retreat under a barrage of questions, as I tell my students, tends to show the reasonableness of one's position and simultaneously enhances one's credibility as an advocate. The result in our case was that, during the other side's argument, Justice Breyer characterized my answers to his earlier questions as "not bad" and specifically asked opposing counsel for a response.¹⁰ While Justice Breyer (and also Justice Stevens) ultimately rejected our position, his public acknowledgement of the reasonableness of our view certainly helped make it easier for other members of the Court (including Justices Souter and Ginsberg) to see the case our way.

I make these points in class, not to toot my own horn, but to show students the happy consequences of hard work. In our case, the hard work was team work, with Dave and Andy bearing the brunt of it. But, as Dave himself recognized in his magazine article, that hard work put us in a position to be effective at the podium: effective in articulating our mantra at the outset, effective in answering questions, and effective in returning to our mantra when questioning subsided, in closing, and on rebuttal. I want all my students to see the same benefits from hard work: to appreciate the difference between an unrefined early moot and a polished final product, and to know that their own first actual appellate argument can undergo this same refinement process if they put in the necessary thought and effort.

9. *See id.* at 243, 255.

10. *See* 2000 U.S. Trans LEXIS at 31.

VI. A COMMITMENT TO PREACHING ABOUT PRACTICE

This last observation brings me to a larger point about law schools and the educational objectives of their curricula. While I am a believer in a “big tent” philosophy regarding our current upper-class offerings—from doctrinal survey courses in such specialties as Environmental Law, Securities Law, and so forth; to theory courses like Jurisprudence, Feminist Legal Thought, and the like; to interdisciplinary perspectives like Law and Economics, Statistics and the Law, and so forth—I now believe that there is little more valuable than having students understand and appreciate the difference between knowing a case the way a good brief-writer does and *really* knowing a case the way a good oral advocate does.

If they can see the gap between these two levels of knowledge, and can know the distance (and effort) it takes to traverse this gap, then they will have scaled the summit of that analytic craft we purport to teach: thinking like a lawyer. Having seen what it takes to reach this apex of insight, they will be prepared for whatever analytic challenges their practice requires of them.

I can think of no more important contribution I might make to the future of this state, now that I have returned to the Ohio State faculty after serving as State Solicitor, than to share with my students the insight I obtained as a result of my own on-the-job training.



