MAY IT PLEASE THE COURT

Christine Hogan

Christine Hogan is executive director of the State Bar Association of North Dakota. She was formerly a partner with Zuger Kirmis & Smith in Bismarck, North Dakota. A previous version of this article appeared in For the Defense and is printed by permission of the Defense Research Institute.

Some people think bird-watching is fun. I have always been a court-watcher. Some people find their inspiration in sports heroes like Mantle or Jordan. For me, John Marshall, Oliver Wendell Holmes, and Earl Warren are the names that stir my soul.

My fascination with the U.S. Supreme Court began in high school, when I read Fred Rodell's classic book with the astonishingly politically incorrect title *Nine Men*. But it was in law school that I really got hooked. Those were heady years, when the Court decided some monster cases that incited many a late-night debate over coffee at the University of North Dakota Student Union: *Furman v. Georgia, Roe v. Wade, Frontiero v. Richardson*, and *United States v. Nixon*. By graduation, I was a Supreme Court junkie. I became a lifetime member of the Supreme Court Historical Society. But I knew I was obsessed when I cheerfully shelled out 100 bucks a few years ago for a set of audiotapes of oral arguments in landmark cases, which the Supreme Court had been recording since 1955. Then I happily played and replayed my favorite argument tapes the way a Beatles fan might play *Abbey Road*, all the while wondering what it would be like to stand at the lectern before the Supreme Court of the United States.

So my excitement level on the day I received the call from the office of the Clerk of the Supreme Court informing me that certiorari had been granted in *Weisgram v. Marley*, 169 F.3d 514 (8th Cir. 1999), ranks right up there with my wedding day and the births of my children. I was stunned. After all, relying on the odds — the Court grants only about 90 out of 9,000 cert petitions each year — I had confidently advised our client that the chances of the Court's accepting our opponent's petition were "vanishingly small." Plato once observed that "arguments derived from probabilities are idle." Plato was a very smart man.

Working on a Supreme Court brief takes on a life of its own. Unfortunately, the life it took on was mine. Right away, I learned a lot. The first thing I learned was that the elite appellate lawyers in Washington, D.C., have one heck of a pipeline and absolutely no shame. Within hours of the Court's order granting cert, several prestigious D.C. firms started calling on our client to peddle their services. My partner, Jim Hill, and I were elated and eternally grateful when our client's general counsel told us he had decided to stick with the same team that had ridden this case from the day the original lawsuit was filed. This was a once-in-a-lifetime opportunity that I only had dreamed would happen to me. I decided to make the most of it. For months, I would dedicate my life to it.

From the beginning, my biggest fear was fear itself — the dark, cold kind of dread that clutches the heart and makes lawyers lie awake at night and whimper. I was afraid I would be nervous — that most counterproductive of all the afflictions that bedevil lawyers. But even in the depths of my anxiety, I knew I possessed the power to overcome it, the same way attorneys have always overcome fear, by preparation. Everything I ever had read about appellate

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advocacy told me that the best, indeed the only, antidote to fear is preparation. In the end, all the lists of all the rules in all the books on appellate advocacy can be distilled into one word: preparation.

So, out of fear, I prepared. I reread the trial record, cover to cover. I did my own legal research. Sweating blood and bullets, I wrote the briefs. Aside from the increased stress level that accompanied the writing, I cannot say that the briefing process itself was all that different from preparing a brief for the North Dakota Supreme Court or for the Eighth Circuit. But then, come to think of it, writing those briefs is stressful, too.

One of the most helpful components of my preparation came from an unexpected source. I found out that once a new case hits the Supreme Court's docket, new friends start to come out of the woodwork — friends of the court, that is. Lawyers for potential amici curiae call you up and volunteer to write a brief. Two amicus groups ended up writing briefs on our side of the case. Working with the counsel for the amici turned out to be a great experience. One of the amici was represented by the legendary appellate attorney Stephen Shapiro, co-author of the premier treatise on Supreme Court advocacy, *Supreme Court Practice*. Stern, Gressman, Shapiro & Geller (7th ed. 1993). See also J. Cole, *An Interview with Steve Shapiro*, Vol. 23, No. 2 LITIGATION 19 (Winter 1997). It turned out that Shapiro, in addition to being brilliant, is one of the kindest and most generous individuals one ever could hope to meet. His insight and expertise were a wonderful resource, and working with him was our great good fortune.

One of the things Shapiro recommends in his treatise is for arguing counsel to talk about the issues in the case with anyone who will listen and, if possible, to participate in a moot court session. I felt strongly that I would benefit from such a session, and Shapiro offered to arrange it at his Chicago law firm. Although the prospect of being interrogated by a roomful of brilliant and experienced appellate lawyers intimidated me more than the thought of actually appearing before the Supreme Court, I readily agreed. The exercise Shapiro devised for me was the best possible preparation for oral argument that a lawyer could have had.

For realism, there would be a podium, a bench, and nine justices. I would be given a chance to run through my argument with no interruptions, so the group could hear my prepared points and let me know if I was stepping on any land mines. Then Shapiro would give a short argument from the appellant's point of view. Finally, I would argue again "under the clock" and under questioning from hostile justices intent on exposing any fallacies in my argument. It was not pretty, but I got through it. Having the chance to practice answering questions under fire was without a doubt the single most important part of my preparation. My interrogators turned out to be a lot friendlier than I had anticipated. One of the mock-justices provided a bit of constructive criticism that would change my entire approach to the oral argument. He gently pointed out that I had a tendency to make unnecessary concessions — to waffle when I ought to stand firm. "The Court needs to know how strong your position is — and how strongly you believe in it. When you know you are right," he counseled, "don't be afraid to stick to your guns." It was smart advice, and it had a familiar ring. I sheepishly thought about the countless times I had pleaded with witnesses not to waffle on key testimony in deposition and trial.

Slowly, slowly, the fear subsided. Confidence returned.

My preparation plan also included a preview of the Supreme Court itself. After surviving Chicago, my partner and I flew to D.C. to watch a couple of arguments. It was a good thing we did. When I walked into that courtroom for the first time, it took my breath away. Justice William J. Brennan, Jr., once aptly remarked: "Something about our courtroom scares lawyers to death. Some fellows have fainted." What an awesome place it is. How very humbling it was to have the chance, on some tiny, subatomic level, to be a part of the history of this majestic building. Hyperventilating and weak in the knees, I was most thankful to have a week before the argument to collect my wits. One of the arguments Jim and I observed was the "grandparents v. parents" visitation case, *Troxel v. Granville*. The lawyer for the parents, Catherine Wright Smith, gave an exceptional argument. She was relaxed, self-assured, and very effective. Smith handled the intense give-and-take with the justices as casually as though she were sitting down to a boisterous family dinner. It was clear that the key to Smith's persuasiveness was the conviction with which she spoke. She stuck to her guns like Annie Oakley. Smith was the ideal role model for me. If she could do it, then, by golly, so could I. I resolved to be like her.

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Tuesday, January 18, 2000. Early morning. This is the day. Butterflies are rampant in the tummy, but other than that, as I keep telling my husband, I am okay. A snappy little black suit purchased for the occasion. Perfect. A few bites of breakfast. Definitely no on the coffee. Time to go. My partner Jim and I, along with our client and my husband, walk the three blocks from the hotel to the Supreme Court. Because Steve Shapiro is unable to be there, he kindly arranged to have a partner from his Washington office meet us at the Supreme Court to show us where to go. To my everlasting astonishment, the lawyer Shapiro sends to meet us is Kenneth S. Geller, a titan of the Supreme Court bar. Geller accompanies Jim and me to the lawyer's lounge, while our guests find the Marshal's office for their reserved seating.

Acutely conscious of the seconds ticking by, we sit for a while in the well-appointed, mahogany-paneled lawyers' lounge with the other arguing counsel. We greet our opposing counsel, then we all listen nervously to the last-minute-briefing given by the Clerk of the Court, William Suter. The Court maintains an extraordinary level of formality and tradition. The Clerk and the Marshal wear long, grey morning coats.

Suter explains the drill. We are to address the Chief Justice as "Mr. Chief Justice." We are to address the other justices by name, e.g., "Justice O'Connor." If we forget the name, "Your Honor" is okay. But under no circumstances are we to call one of them "Judge." Heaven forbid. Suter also explains that the second case will follow the first without a break, so be ready to move smartly. More butterflies. Oh, and the justices really hate it when the lawyers look at the clock. Gimme a break.

It is 9:50 a.m. Jim and I stride into the courtroom. This time I am ready. This time it is just a courtroom. Breathing is steady. Knees don't wobble. I smile at our group in the gallery to let them know I am fine, and then I don't even look around. This is it. I unpack my briefcase. A single black binder containing my typed outline, with key points tabbed. Copies of the printed briefs. A black pen. Reading glasses. That is all.

At precisely 10 a.m., the bailiff, also in tails, announces the Court: "Oyez, Oyez, the Honorable, the Chief Justice and the

Associate Justices of the Supreme Court of the United States. All rise!" We all do. The judges — uh, sorry — justices emerge in single file from behind a heavy, crimson velvet curtain. The Chief Justice wears the robe with the gold stripes in the sleeves that he wore in the Clinton impeachment hearings. I would not have thought it would be his everyday robe. These guys are really into ceremony. Good for them. They do look grand.

The first case is a tax case. It will take exactly one hour. I block it out so that I can concentrate my thoughts. I can feel all the good vibrations and prayers that I know are hurtling through the universe like tiny meteors toward me at this exact moment from my family and friends back home. As always in times of stress, I take a moment to remember my father and recall his calm strength. A sense of serenity surrounds me. I think positive thoughts about the task ahead and reflect on how grateful I am for the chance to be here in this hallowed place. For a second I can feel the planets line up, and that is when I know I will get up and do what I need to do. Surreptitiously, I peek up at the clock that hangs over the Chief's head. Five minutes have gone by. It is going to be a long hour.

I use the time to study the justices. They are seated by seniority on the raised, mahogany beach. The Chief Justice occupies the center chair; the senior Associate Justice, John Paul Stevens, sits to his right; the second senior Sandra Day O'Connor, to his left; and so on, alternating right and left by seniority. The justices are all just extraordinary. Extremely intelligent, articulate, witty, cool. They are also prepared, knowledgeable about the cases, and engaged in the arguments. No lawyer gets to give his or her prepared presentation; no one escapes unscathed. The justices are constantly interrupting, asking sharp questions, moving on to the next topic. Sometimes the lawyers get left behind. I notice how clear-eyed and pretty Justice O'Connor looks. David Souter, Anthony Kennedy, and Stephen Breyer ask short, pithy questions that cut to the heart of the matter. Chief Justice Rehnquist likes to ask long, tricky hypotheticals. They all play hardball, albeit with considerable style. I am deeply impressed by all of them.

We are lawyers for the second case. We sit at tables right behind the lawyers for the first case. As soon as the first case is over, the second group is to jump up and sprint to the first row. The Clerk told us that the Court would remain in session and the Chief would call the second case within 60 seconds. I am ready. I move binder, briefs, pen, and glasses in record time — five seconds flat, I think. I am pretty sure the Court is impressed.

The Chief calls our case. Counsel for the appellant moves to the lectern. The setting is surprisingly intimate. The lectern and first row of tables are literally right in front of the bench. We are only a few feet from the justices and slightly below them. If I were to reach out, I might touch the Chief Justice. "Mr. Chief Justice, and may it please the Court." That is the traditional opening line. That is about all my colleague gets to say when several justices pounce on him with their questions. It is a free-for-all. The Court's take-no-prisoners interrogation style has not received enough attention in the treatises, I think. In past, apparently more polite, times, Justice Robert Jackson described oral argument as the "stately process of building a cathedral." Not anymore. Steve Shapiro correctly described the experience as "more akin to an intense athletic contest, hedged by rigid time restrictions and potentially fatal fumbles and missteps." S. Shapiro, "Oral Argument in the Supreme Court of the United States," 33

Cath. U. L. Rev. 529 (1984). Realizing I will have to take my lumps, too, I breathe deeply and tell myself: *Stay loose*.

Every lawyer gets to argue for precisely 30 minutes. The Clerk told us that when the red light on the podium goes on, you stop — and you sit down. Opposing counsel's light goes on. He stops and, reeling only slightly, he sits down. I feel myself stand up and step (with alacrity) to the lectern. I remember Robert Bork's famous admonition to appellate counsel: "Stand up straight, speak clearly, and try to sound intelligent." I open the black binder. The Chief Justice acknowledges me. I hear myself say the words I have dreamed of saying since law school: "Thank you, Mr. Chief Justice, and may it please the Court."

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What can I say? It was a thrill. Even in the midst of it, I felt grateful for the experience. It was what I had prepared for. I was not nervous. No time for that. There were no butterflies. Not a flutter. There was no waffling as the justices forced me to defend my ground. At one point, when I was engaged in dialogue with Justice Breyer, I happened to glance at the glasses in my right hand. I was gesturing with them. I noticed that there was a tiny tremor in the glasses. I recall thinking (for a nanosecond), "That's odd, why are my glasses shaking when I am so calm?" I think it was the time of my life.

They bombarded me, blasted me with questions. I never did get to use my outline and never even needed to put my glasses on — the interrogation was that intense. When my red light came on, the Chief said, "Thank you, Ms. Hogan," and I said, "Thank you." It was all over. The justices disappeared behind the red curtain. I turned to my partner, and he gave me a bear hug. We shook hands with our opposing counsel. Almost numb with relief, I packed my case, remembering to take the white quill pens that the bailiff places on the counsel tables each day for the lawyers to take home as mementos.

We all walked outside together through the huge bronze doors and under the famous architrave inscribed with the words "Equal Justice Under Law." It was snowing. I spent a moment savoring the elation of feeling no fear.

On February 22, 2000, in a unanimous decision authored by Justice Ginsburg, the U.S. Supreme Court held that the Eighth Circuit Court of Appeals properly directed entry of judgment as a matter of law for my client, the defendant manufacturer, after striking plaintiff's expert testimony as untrustworthy and concluding that, without it, the remaining evidence was insufficient to support the jury's verdict. *Weisgram v. Marley Co*., 120 S. Ct. 1011 (2000).