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WAR STORIES: ARGUING BEFORE THE SUPREME COURT

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Editors' note: *The Business Law News* is excited to share a new series of articles that detail our reader's "war stories." In an act of extreme bravery, BLN associate editor, David Haberbusch, has submitted the first of what we hope will be an entertaining and educational series. We hope that others will also share stories about career-changing or unforgettable events and lessons. Please e-mail questions and proposed articles to BLN's production coordinator, Megan Lynch, at meganalynch@aol.com.

In June of 2003, I received notice that the United States Supreme Court would review a case in which I represented one of the parties. The journey began three years earlier in a bankruptcy case the Internal Revenue Service filed against my clients for \$400,000.

Oddly enough, acceptance of the case by the United States Supreme Court dealt me a stunning blow. Until then, my clients had prevailed at every stage. We won at trial court, two appeals, and a request for a re-hearing. The acceptance of the petition by the United States Supreme Court was, in effect, our first loss.

Having a case chosen to be heard by the high court is no small matter. More than 7,000 petitions for certiorari (requests to have a case heard) are made to the Supreme Court annually. Of those 7,000 petitions, the court accepts only between 90 and 100 for hearing.

PRE-VISIT

To familiarize myself for the upcoming argument, I decided to visit the court in session before my case was to be heard.

I knew the court heard arguments two weeks a month, three days a week, two cases a day. Ideally, I would sit in on other cases during the same week my case was to be heard. To my surprise, however, I learned that my case was the first one to be heard before the court in 2004. There would be no prior cases that week for me to preview.

I checked the court's calendar and found that due to their long winter break, they were only in session for the first week of December 2003. Needless to say, I dropped everything and hopped a plane to Washington, D.C. for my preview.

On a bright and early Monday morning, December 8, 2003, I paid my first visit to the United States Supreme Court. A line of people stood waiting to watch the court proceedings from the public gallery. A guard told me that attorneys could enter beneath the first floor, which suited me just fine.

Entering the courtroom before the session began, I looked over at the table at which I would sit and noticed pads of white-ruled paper, genuine quill pens, and a small card that noted where each justice sat. I was ushered into the "Bar Section" of the court that is reserved for attorneys. This section is behind the arguing counsel and in front of the gallery where the public is seated. Security guards instructed all present to remain silent and not to get up during the arguments.

Once seated, I absorbed the majesty of the setting. Massive marble pillars encircled the public gallery, the bar, and the bench at which the justices sit. Each justice has his or her own microphone.

A buzzer sounded at 10:00 a.m. sharp. Floor-to-ceiling curtains behind the bench parted and the justices entered the courtroom. They were led by Chief Justice Rehnquist, who was followed by the associate justices in order of seniority, beginning with Justice Stevens and ending with Justice Breyer. As they entered we were called to rise. The justices took their places next to their chairs.

Once in position, the clerk of the court announced the beginning of the session with an "OYE, OYE..." as in the movies, then the justices sat down. The Chief Justice then invited oral motions for the admittance of the newly appointed attorneys as members of the United States Supreme Court Bar. Once these motions were heard, the first case was called. Counsel was expected to be behind their lectern, ready to begin.

I observed three arguments. Each side had 30 minutes to argue their case; not a minute more. Counsel were cautioned not to repeat what they already presented in their briefs and were expected to begin with the traditional words "Mr. Chief Justice" and "may it please the court." Naturally, they all complied. After making this opening salutation, counsel then launched into their arguments. More often than not, the justices waited about a minute before interjecting with questions.

If two or more justices began to ask a question at the same time, the junior justice would defer to the more senior justice. I saw this



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happen twice. Once the questioning began, counsel had little opportunity to “get back on track.” I could already tell this was not going to be a walk in the park.

The Supreme Court was very different than I had expected. I was surprised at the wide-openness of the public gallery that could seat about 300 people, in rows of benches. Everything happened in the open. There was nothing claustrophobic about the courtroom. I was also struck by the mix of formality and informality. While the court is steeped in tradition, and while adherence to that tradition is expected, the arguments, once they began, were conducted in a very casual manner. The justices rocked and swiveled in their chairs, whispering to each other. Most alarming to me was that, when they did ask questions, it was in a very direct manner. Much of the court’s mystery was erased after my pre-visit.

THE BIG DAY

I finished logistical arrangements for my appearance a month early. I completed a form that asked for the phonetic pronunciation of my name. Counsel for each side of the case would be entitled to six guests in the gallery. I planned to bring my wife, my 17-year-old daughter, and my 13-year-old son. This would be better than any government class lesson they could ever attend.

I chose a hotel close to the court to eliminate any worries that traffic or bad weather might delay me. I also studied the “Guide to Counsel,” provided by the court that listed the rules and protocol for anyone appearing.

I arrived in Washington, D.C. three days early. Each day J. Barry Feinberg, A. Lamar Taylor, and Charles Rosen, my co-counsel, posed questions the justices might ask. We also studied the most important issues and themes I would emphasize during my oral argument based on my countless hours of preparation and research. At Sunday night dinner, I met another attorney who was appearing before the court the next day. I mentioned I was also making an appearance. We shared mutual fears and concerns. I was afraid I would lose my voice the moment my case was called. His concern was more practical. He worried that he would have to go to the bathroom in the middle of his argument. I was relieved to speak with one of my colleagues.

On the big day I got up early and reviewed my notes one last time. I was careful not to drink too much coffee at breakfast. We left the hotel at 8:30 a.m. We passed through the metal detector and were escorted to the first floor. It reminded me more of a museum than a courthouse. Walls were covered with photographs and descriptions of court history. I passed cases with furniture and other Supreme Court memorabilia. There was even a gift shop!

Co-counsel and I were directed to the attorney’s lounge. The chief clerk of the court gave me my access pass to the courtroom and a full-color booklet that described the court and its history. They also told us that if there was anything we needed we shouldn’t hesitate to ask. Throat lozenges, aspirins, band-aids, and sewing kits were some of the many things that were available. We were instructed not to address the justices as “judge” but instead as “Justice Scalia” or else “your honor.” We were told that the proper salutation when addressing the Chief Justice is “Mr. Chief Justice,” not “Justice Rehnquist.”

Even though I had my preview of the courtroom, I was simply unprepared for this experience. Only a lectern in the center of a single table separated opposing attorneys. Each counsel had little table space. I was isolated from my co-counsel. They sat at a table adjacent to the arguing counsel’s table. We could pass notes to one another, but we couldn’t confer. I felt very alone.

We arrived 45 minutes before the court session was to begin; opposing counsel arrived 20 minutes before the session was to begin. He introduced himself. He was an attorney with the Solicitor General’s Office and had argued cases before the Supreme Court on prior occasions. In keeping with Supreme Court tradition, he wore a grey morning coat. I wore a charcoal suit.

As I noticed on my pre-visit, the justices entered the Courtroom at 10:00 a.m. sharp. The motions for admissions of attorneys were made and argument for my case began. The government spoke first. The questions the justices posed my opposing counsel extended far beyond the specific issues of our case. He stopped speaking after 25 minutes so he could reserve his remaining time for rebuttal.

Now it was my turn to address the court. I was startled to see that I was eye level with the justices and so close to them. The Chief Justice addressed me by name. I said, “Mr. Chief Justice,” “may it please the court,” and one more sentence, before Justice Breyer asked a question. I felt unprepared for the questions posed. Nevertheless, I tried to answer each question precisely. At the same time I tried to direct discussion back to the argument for which I had so carefully prepared. Each time I made a point, the justices bombarded me with questions on unrelated issues. Clearly, it seemed, the justices were not interested in my arguments, but in other issues that had captured their attention.

After only a few questions, I felt that I had been there for most of my allotted time. I glanced up at the clock above Justice Rehnquist’s head and saw to my horror that I had been arguing for only ten minutes! I had no idea how I would get through my allotted

time. I had been told that the half-hour would pass very quickly and that I would have a hard time presenting all that I had intended to present. I took a deep breath and continued to present my prepared argument. To my relief I became more relaxed as the questions from the bench continued.

A couple of times, as I responded to a question, I would hear a justice pose another question, but not know who asked it. Their microphones are wired to a general sound system. When I heard a voice I had to scan the bench to figure out who was talking! Although I was unnerved at being at eye level with the

justices, I found the dialogue with the justices to be spirited and lively, a true intellectual challenge.

After 25 minutes, the podium light came on. I had five minutes left! Only then did I realize that I was going to make it. A few minutes later, I completed my argument and took my seat. Done, I did it! Upon conclusion of argument, my co-counsel and I gathered the quill pens (our gifts from the court), retired to the second set of counsel tables and, out of courtesy to the court, observed the next argument. As we expected, the government's counsel did not hang around for the next argument.

As we stood in line to retrieve our belongings, I could not help but notice that several of the people in line recognized me from the courtroom and pointed at me. Whatever the outcome, I felt I had held my ground, even though I thought there were several questions that I could have answered better. I sensed that some justices favored our side. Justice Ginsberg repeatedly nodded her head as I spoke and this bolstered my confidence. I remembered at least one occasion when I had connected with the whole court. As I spoke the justices leaned back in their chairs. Normally, when they asked questions or challenged a point, I saw them lean forward.

Afterwards, I reflected on the experience. First, I realized I had actually carried on conversations with eight of the nine justices (Clarence Thomas, I am told, rarely participates in the oral arguments). Second, not only had I stood in the same place where the 2000 Presidential election was decided, but also where some of our Nation's most important decisions (such as, *Roe v. Wade* and *Brown v. The Board of Education*) were handed down.

Many people told me it was a great honor to appear before the United States Supreme Court. I thought of it as more a great privilege. I felt that I handled myself well in the presence of these great legal minds. It will be an experience I will always remember. ■