Supreme Court
Thoughts and Muses

The Hon. Donald W. Lemons
The Hon. Samuel Bernard Goodwyn
The Hon. William C. Mims
Supreme Court of Virginia
Jeffrey A. Breit, moderator
When an appellee stands up at oral argument what is the first thing he or she should do?

You have a well thought-out outline with point-by-point issue rebuttal and legal reasoning fine-tuned for persuasive dissecting of the appellant’s argument. Each page numbered, each issue redlined and each case highlighted with special highlighting for any case written by a sitting justice. You have a beginning, a middle and a perfect ending.

Now push that aside, clear your head and give the Justices what they want, not what you want to give them. The first thing an appellee should do is address every question asked of the appellant, point by point, Justice by Justice and clear up any loose ends from the appellant’s argument that may have been addressed by the Justices. Yes I know, your perfect outline, weeks of preparation, and all of that wonderful highlighting, organized just the way you want it. That doesn’t matter now.

You may have thought you won in the court below, but the Justices granted the appellant a writ to address something. In some cases, we may never know exactly what may be bothering them. When you stand up as an appellee, you haven’t won anything because everyone stands on equal footing and you had better address the question and answers of the appellant. Yes, the Court gives the appellee some benefits and presumptions, but they wanted to hear this case for a reason and that reason may not be to your liking.

The Supreme Court addresses issues that are presented before them in each appeal. The questions and the issues are the very issues that the Supreme Court has granted a writ to the appellant. You may have other wonderful points to argue and you may have suffered from many other injustices at the hands of the trial court, but if the issues presented on appeal aren’t encompassed in your argument, then more than likely, the Supreme Court will not address it and will not save you.

Most appellants spend their time just trying to get a writ. “Please, Court, save me from this trial judge, reverse the legal errors and give me a new trial.” What most of us forget, and what most of us should now focus on, are the very important “questions presented,” because those are what the Supreme Court will address. There may be other things of great interest in the case but if they are not a part of the “questions presented” for appeal, this Court will not be able to address them.
How do you carve out the issues and the questions that you want the Supreme Court to address?

First, start with a story – a persuasive story. If your story doesn’t grab them, it is doubtful that your claims of injustice has a chance. The story is more than your statement of facts, the story is how your client was mistreated, prejudiced or wrongfully denied the right to present the full story. The facts must be compelling, they must be accurate and they must be concise. It’s much like the feeling you hope a jury has at the end of the plaintiff’s opening statement. If the jury can’t give you complete justice at the end of the plaintiff’s opening then you are doomed. Your case will never get better and you have no chance. When writing your statement of facts the story must leave the reader with the feeling that an injustice has occurred. Now you have their attention, now show them the law and the error in the trial court’s ways. I would love, just once, for a justice to say “you had me at hello.”

After your brilliant and scintillating statement of facts, you must focus on the issues that you want the Court to address. Most lawyers question whether the kitchen sink approach is best. There are stories where the Supreme Court has granted a writ on an issue that most felt was tangential, or at worse, irrelevant, so why not throw every issue at the Court and see which one works? I would suggest that this approach is shortsighted and is more likely to leave your diamond in the rough, in the rough. I would suggest that you pick the important issues, issues that affected the result and weave your story and legal arguments around them. I am not suggesting that you ignore other important issues, but I would not want the justices to think that you whine too much and see the miscarriage of justice at every turn. Time is important and focus is even more important than the shotgun/kitchen sink approach.

The Supreme Court Justices read the cases. That means don’t misquote an opinion and don’t represent that a case stands for a proposition when it does not. That means not taking quotes out of context, not adding a long string cite where one or 2 of those cases don’t backup your position, and don’t pander or take any justice as a fool. They will see right through you and the strength of your case will disintegrate faster than you can say “affirmed.” The Court likes valid precedent and is unlikely to chart new courses based on new thinking or changed perceptions. The law should be predictable, and the Justices believe in an incremental change, if any, not striking new visions. The court is not averse to change, but the speed of the change may not satisfy all of you. Don’t expect, and don’t ask, for the Court to overrule standing precedent. It is unlikely. However, if there are incremental changes, nuanced interpretations, or subtle redirections then you stand a better chance of a receptive court. What’s the saying? Pigs get fat, and hogs get slaughtered – hardly a legal maxim, but one that might save your bacon.

The opening paragraph of a brief, I believe, is critical. In just a few sentences, the reader must know the theme of your argument, the content of your argument and the outcome you seek. What were the inequities that should be addressed by this Court? Clearly separate your issues for the Court without confusing them or mixing them.

Lawyers are not famous listeners, we all talk too much. Justices do not come to oral argument with a blank slate. They all have their own personal cheat sheets with ideas, questions, points of inquiry and even questions to help persuade a colleague. Before the war (I am not sure which
war), Justices rarely knew what another Justice thought before addressing the case for the first time. Now with emails, telephones and collegiality there is a sense, a feeling, where some of the Justices may be leaning. All of the Justices can count. Four beats three every time, and you only need four to win. Sometimes there are questions asked for the sole purpose to help persuade one of the seven. It would be nice if you could ask “is that a friendly question?” but we don’t have that luxury. Listening helps, but it is not a perfect art. Each question asked by a Justice has a purpose. The Court is not there to hear themselves, they are looking for answers to help them decide which way to vote. All of the Justices will tell you that they have changed their mind during oral argument, they have changed their mind in conference after oral argument and that they keep an open mind to hear something that may solidify their positions. A sloppy brief puts you at a great disadvantage. A brilliant brief does not necessarily win the legal argument of the day. This is not a competition where the best writer always wins or the best oral advocate always wins. However, you can be sure that a poor brief or in unprepared oral advocate has at least one strike against them.

Justices want lawyers to clarify the issues. They want help isolating the issues they must decide and what counsel really is seeking from the Court. Justices often want the lawyers to focus on the important facts and details in the record and clear up ambiguities. Justices try to avoid unintended consequences, so therefore, they are interested in the precedential value or import of a ruling that may help you. Hypothetical questions are often directed at the potential precedent and what effect the law may have if they rule in a particular way. Justices often are interested, although it may not be explicit, in what burdens may be created by a ruling and whether it may produce impractical results. Justices like to test the logical order of your arguments by using analogies or challenging your analogies. Be prepared. They don’t want you to read from your brief, hedge the facts, or hear your best jury argument. Emotional appeals usually fall on deaf ears. When the Justices ask questions, they want immediate, clear answers. Give direct, simple, and comprehensible answers and give yes or no answers when a Justice asks for one. Please don’t ask the Justices questions.

Should you ever concede anything?

Lawyers are afraid to admit or concede anything. We are afraid sometimes of admitting the obvious. I love it when defendants argue for contributory negligence, the home run defense win, when there is a 99% chance that liability is clear. Credibility goes out the window and their good argument on my questionable damages goes out the window with them. I believe that a good appellant or appellee brief and/or oral advocate should concede not only the obvious but also points where the record seems clear. The risk is that the Justices believe your legal argument is based on a flimsy factual basis and then you risk of losing it all.

Remember, you were looking for a specific result and the foundation to reach that result must be based on solid evidence that is in the record, and solid legal arguments from cases with sound precedential value. There is a logical progression that leads to the desired result from the Supreme Court. There were certain facts in this case that were before the court or jury, the law suggests that with of those facts the court should do certain things or instruct the jury in a certain way and if that had happened in this case, this would have been the result. The train went off the
tracks because the trial court did one thing instead of another and we are asking you, the Justices of the Supreme Court, to order the trial court to do it the right way. If it’s logical and supported by the law, then you may get the results you want. If there are cracks in your foundation, particularly cracks that you created by misstating the facts or the law, then you can assume the Justices will be reluctant to provide you the relief you seek.

If you ever plan on appearing before the court more than once remember the Justices have memories just like trial judges. Bad first impressions (such as misstating the record or the law) can last a lifetime.

**Are Justices products of their past experiences?**

Surely they are. Some have been legislators; some have been defense lawyers; some have been plaintiff lawyers; some have been both; some have been involved with administrative or regulatory law; some have many children and some have none. Does it affect their decision-making? They are all new umpires, calling balls and strikes. But they all see things from a different perspective. Same facts and same law, yet different results. That might explain the numerous 4-3 opinions of the Court, but it does not necessarily help you contemplate how to address each of them. Each of the Justices takes to the bench their life experiences which have molded their decision-making and their perspectives. Whether a former trial lawyer, Circuit Court Judge, or an academic, their experiences have a way of focusing their interpretation of what happened at trial and whether the law was properly applied in your fact situation. It won’t hurt you to learn a little bit about each of them, read what they have written so that you can reach them, help them understand you and make them want to see your side of the case.

**How do you win an appeal?**

Leave nothing for the other side to appeal. Over the years, I have spoken to many lawyers who complain that the Supreme Court doesn’t like them or doesn’t like their type of cases. I have taken the time to read the transcripts and the rulings as my way of trying to help educate other lawyers, or at least help them avoid mistakes. Don’t push a trial judge to do something that you’ll regret on appeal. Do you really need to win nine out of nine points for the jury to decide in your favor? Remember, you’re there to win the war, not every battle, and sometimes asking the judge to do something which is not critical to your case may become the undoing of the wonderful verdict later for foolish reasons. My favorite case is one in which I have agreed with all of the other side’s jury instructions. Jury instructions have a way of screwing up a great verdict on appeal. That doesn’t mean giving in to every point, it means being reasonable in what you need. The Supreme Court loves to say that a trial judge should not have taken that issue away from the jury. You’re absolutely certain that your client could not be guilty of contributory negligence based on the facts of this case. You are absolutely certain that no juror or judge could ever find contributory negligence. So you insisted that the court refuse that contributory instruction offered by the defense. You get a nice verdict and 13 months later, you are back in the same courthouse trying your case a second time. The jury never would have found contributory negligence, you were certain of that, and you also knew that if the other side tried to
argue it, they would lose credibility. Yet you insisted that the instruction be refused. It would not have mattered and you should have let it go, held your nose and buried your pride.

Know the record. Know the record inside out. Absolutely know every case issued by the Supreme Court on the issues involved in your case. That also means looking at the cases over the last 12 to 24 months to see if the Court has addressed these issues recently in a way that may affect your case. Trust me, I have seen lawyers stand and be asked their opinions on cases directly on point and they are clueless. It does not go over well. If there are cases against you, trust me the Court knows which ones they are. Be prepared to address them straight on, don’t pretend they don’t exist, and give a reason why your case is different. Justices love to ask hypotheticals where the facts of your case are changed ever so slightly. The wrong answer is “those aren’t the facts of this case.” They know that. They want to know what you think those facts would do to your argument and the law applicable to those facts. Remember, there is a reason for every question and you should be able to answer a hypothetical in a way that applies the law to help your case. Listen, listen and be nimble and flexible.