THE SUPREMES

BY GERALD F. UELMEN

Getting Ready for the Face-Off

Preparing to face a grilling by the U.S. Supreme Court or the California Supreme Court can be intimidating, even for the most experienced appellate advocates. Most lawyers find *mooting*—practicing an oral argument before a panel of critics—to be invaluable preparation in exposing potential weaknesses and anticipating the toughest questions. Prior to my first argument before the U.S. Supreme Court, I did five moots and happily found that every question the justices posed had previously been asked in a moot.

Some lawyers recommend mooting a case even before writing the brief. James C. Martin, who just completed a term as president of the California Academy of Appellate Lawyers, suggests that many of the most important tactical choices are made long before oral argument, and it's valuable to get outside perspectives early. Many California lawyers use retired supreme court or court of appeal justices as consultants, both in preparing briefs and in mooting arguments. Retired judges can argue cases themselves, so there is no ethical problem with their helping other lawyers, but sitting judges must be wary of discussing pending cases, even with their former colleagues. The U.S. Supreme Court requires former clerks to wait two years before participating in cases pending before the Court. Retired California judges face no such constraint, but many hesitate to participate when their inside knowledge of the proclivities of former colleagues is the premium.

If your client can't afford to hire former justices at up to $700 per hour, there are lots of other opportunities for mooting. An in-house moot, with other lawyers acting as judges, is routine practice in many firms. And many law schools are willing to organize moots with professors as judges, provided their students are allowed to watch. At Santa Clara University School of Law we regularly moot four or five cases headed for the U.S. Supreme Court every year, along with a couple of California Supreme Court cases, through the Heafey Center for Trial and Appellate Advocacy. The briefs are on reserve in the library, and students are encouraged to read them before watching the moot. Faculty with expertise in the area of law affected are recruited to serve as judges.

Georgetown University Law Center operates the best program in the country, which currently moots 60 percent of the cases the U.S. Supreme Court hears. Mooting panels there frequently include former Supreme Court clerks and former deputies from the solicitor general's office. Many professional organizations and advocacy groups also organize moots for cases in which they have an interest, using lawyers who prepared amicus briefs and are intimately familiar with the issues. Surprisingly, the best input often comes from lawyers who are only casually acquainted with the issues but who bring fresh and imaginative perspectives.

Some experienced advocates, however, question the value of moots. Vicki De Goff, another past president of the California Academy of Appellate Lawyers, suggests that mooting judges may not share the actual concerns of judges who decide a case, so an advocate might come away feeling undermined and demoralized. She says informal brainstorming with knowledgeable experts may be more helpful than a formal moot. Her comments resonate with a recent observation by Justice Anthony Kennedy of the U.S. Supreme Court that oral argument is really the first conversation the justices have with one other about a pending case, and the most effective oral advocates are those who can join the conversation.

The "dean" of California appellate practice, Ellis Horvitz, never moots his cases, claiming he finds his own style of preparation more useful. However, he admits to being a minority of one in a firm of 33 appellate practitioners. The firm's lawyers routinely organize moots, and Horvitz says the feedback that counsel are looking for includes the message or theme they should deliver, the toughest questions to anticipate, and the questions particular justices are likely to ask.

Even routine questions can sometimes lead to embarrassment for counsel. Justice Oliver Wendell Holmes regularly began an oral argument in the U.S. Supreme Court by inquiring what jurisdiction the Court had over the case. Rather than ask about each of the statutory alternatives, he simply inquired, "How did you get here?" On one occasion a young lawyer from Ohio responded, "By the B. & O. Railroad, Your Honor."

But the embarrassment most lawyers seek to avoid is the stumbling response to an unanticipated question—and mooting can help eliminate that. CL

Gerald F. Uelmen is a professor of law at Santa Clara University School of Law.