



The Michigan and United States Supreme Courts

| A Comparison By John J. Bursch

This issue of the *Michigan Bar Journal* is dedicated to comparing and contrasting various subject matters related to appellate practice. As current Michigan solicitor general and former Appellate Practice Group chair at Warner Norcross & Judd, I feel uniquely situated to opine on the similarities and differences between the two institutions I have been asked to compare and contrast: the Michigan and United States Supreme Courts. In the last 24 months, I have argued four cases in the United States Supreme Court and 12 cases in the Michigan Supreme Court. Drawing on those experiences, I offer the following thoughts about these two distinguished courts and what these observations mean for parties and private practitioners.

Both Courts Present a Unique Challenge

If you have spent the bulk of your litigation practice in trial courts and intermediate courts of appeal, your first Michigan or United States Supreme Court argument will come as a bit of a shock. To begin, the justices on both courts are extraordinarily well versed in the law and will come to court thoroughly prepared. Invariably, they will have many questions. (The United

States Supreme Court justices often ask in excess of 100 questions during a one-hour argument; thankfully, the Michigan Supreme Court offers advocates a five-minute window without interruption to start their arguments.) This combination can be lethal; even the most seasoned lower-court advocates often walk away from Supreme Court arguments bewildered by the experience.

Second, the number of justices asking questions raises the level of difficulty exponentially. Both Supreme Court benches are physically quite long, sometimes making it difficult to discern the justice from whom a new question is coming. Sometimes multiple justices start speaking at the same time, challenging the advocate's ability to multitask and respectfully respond to every query. And because there are simply so many judges present, it is likely there will be few lulls in the action.

These challenges have obvious implications. If you are a party seeking to take a case to the Michigan or United States Supreme Court, seriously consider hiring an appellate specialist. Just like any other pursuit, practice makes perfect, and you will sleep easier knowing your counsel has been there before.

If you are a practitioner preparing for your first Supreme Court argument, set aside adequate preparation time and be sure



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SCOTUSblog and the One Court of Justice Blog are excellent sources of Supreme Court information.

to moot your case at least once, and more if possible. There are a number of moot-court options for the United States Supreme Court, though the gold standard continues to be Georgetown's Supreme Court Institute in Washington, D.C.¹ The institute conducts its moots in a miniature United States Supreme Court courtroom complete with red curtains and the iconic round clock that hangs above the chief justice.

There are fewer options for a private practitioner seeking to conduct a realistic Michigan Supreme Court moot. One notable program is the Appellate Practice Academy at Warner Norcross &

Judd.² The academy's moot panel members include experienced appellate advocates, learned law school professors, and occasionally a retired judge. Note to in-house counsel: the return on your moot-court investment will be many times the cost.

Typical Rules of Advocacy Still Apply

Despite the imposing nature of the forum, two rules of thumb will serve advocates equally well in a Supreme Court as in a trial court: be concise and tell a story.

Notwithstanding periodic increases and decreases in their dockets, justices are consistently called on to read and digest literally tens of thousands of pages before oral argument. As a result, a justice likes nothing better than to pick up a short brief with a logical flow and easy-to-follow subheadings.³ Trim unnecessary background or backup arguments. Eliminate two-page standards of review and keep footnotes to a minimum.

At the same time, try to be interesting. No less than any other judge, a Supreme Court justice will be swayed by common sense and will appreciate a good read. A great brief draws a picture of an injustice the judge feels compelled to remedy.⁴ Social-science

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research proves the point. Indiana University School of Law Professor Kenneth D. Chestek conducted a study in which he submitted four fictional test briefs—two focused on the story, two on the law and its application—to appellate judges, clerks, and practitioners. Chestek asked the study participants to evaluate the briefs' persuasive value. Of those in practice 25 years or more, nearly 80 percent chose the "story brief," while just under 15 percent chose the "legal brief."⁵ Do not forget to tell a story.

Solemnity

A Michigan Supreme Court argument is very momentous, and the Michigan Hall of Justice is one of the finest venues in which I have ever argued. But nothing tops the experience of attending an argument in the courtroom of the Supreme Court of the United States. The courtroom itself measures 82 by 91 feet with an expansive 44-foot ceiling to accommodate the 24 columns made of Old Convent Quarry Siena marble from Liguria, Italy. There are absolutely no distractions; security screens guarantee that no cell phones make it into the courtroom, and U.S. marshals are everywhere to ensure order and give a firm (but polite) nudge to anyone drifting off during arguments. The setting speaks this country's grand legal history.

The Court's miniscule grant rate (less than 1 percent of the more than 10,000 petitions for certiorari filed annually) makes it unrealistic for an attorney to plan on the opportunity to argue before the United States Supreme Court. But anyone can attend an argument, and I recommend that you do. If so, be sure to first become a member of the Supreme Court bar—an admission requiring only three years of practice, a certificate from the State Bar of Michigan indicating you are a member in good standing, and a nominal fee. Once admitted, you are eligible for the special seating in the courtroom reserved for Supreme Court bar members, right behind counsel tables. It is an unforgettable experience that will remind you why you went to law school.

Number of Justices

The difference in the number of justices on the Michigan and United States Supreme Courts seems trite; how can it possibly matter whether you are arguing before seven or nine justices? But the disparity is bigger than you might imagine. To begin, Justice Cavanagh at the Michigan Supreme Court and Justice Thomas at the United States Supreme Court rarely ask questions at oral argument. Accordingly, the raw increase in the number of justices asking questions at the United States Supreme Court is about 25 percent (six Michigan Supreme Court justices versus eight United States Supreme Court justices). That increase represents a significant difference.

To get a feel for arguing in front of both courts (whether for fun or as additional preparation for your own argument), there are numerous invaluable online resources available. The Michigan Supreme Court videotapes its arguments, and the most recent videos are available on the State Bar of Michigan's website.⁶ The United States Supreme Court does not allow cameras in its courtroom, but does release written transcripts (typically the same day or next day) and audio recordings (after a few business days) following argument. They are available on the United States Supreme Court's website⁷ or the popular Oyez website,⁸ which provides the audio synced with the transcript.



CVSG Order

A procedural mechanism unique to the United States Supreme Court is a so-called CVSG order, or Calls for the Views of the U.S. Solicitor General. The U.S. solicitor general, often referred to as the “tenth justice,” enjoys a special status with the Court—so special, in fact, that when the U.S. solicitor general files a petition for certiorari or recommends that another party’s petition be granted, the Court does so an astonishing 60 percent of the time. (Unfortunately for private practitioners, the U.S. solicitor general rarely files a brief in support of another party’s petition unless the Court issues a CVSG order.) When the Court issues a CVSG order, the U.S. solicitor general submits an amicus brief recommending whether a petition for certiorari should be denied or granted and, if granted, which party should prevail and why. The U.S. solicitor general’s opinion is important because the Office of the Solicitor General can coordinate with all three branches of the federal government, relaying to the Court how a particular issue impacts federal governmental interests.

The Michigan Supreme Court does not have a similar procedure in place for seeking the views of the Michigan solicitor general. But given the comparable position the Michigan solicitor general has within Michigan’s three branches of government, it may make sense for the Court to implement a similar protocol.

Personal Relationships

Another significant difference between the courts is the accessibility of the justices. Particularly for practitioners who live in Michigan, it is difficult to find informal opportunities to talk with the United States Supreme Court justices, much less one-on-one time. Not so in Michigan. I have found Michigan’s Supreme Court justices to be extremely accessible, appearing regularly at bar gatherings, CLE meetings, investitures, and many other events. Each justice is amicable and interesting. And while you are prohibited from discussing a pending case, developing personal relationships with the justices will inevitably help you feel more at ease when you appear for oral argument. Take advantage of these opportunities and be sure to join the Supreme Court Advocates Guild, an organization created by the Michigan Supreme Court Historical Society.⁹

Court Tracking

Keeping up to date on recent Michigan and United States Supreme Court opinions and orders is important for any attorney and indispensable for one with a significant appellate practice. In the similarity department, there is an excellent blog for tracking each of the courts.

For following the United States Supreme Court, I recommend SCOTUSblog¹⁰ sponsored by Bloomberg Law. The blog reports on every United States Supreme Court opinion and order as well

as additional content regarding the justices and trends in United States Supreme Court law.

To stay current with the Michigan Supreme Court, I recommend the One Court of Justice Blog¹¹ sponsored by Warner Norcross & Judd.¹² To my knowledge, it is the only blog that reports on every Michigan Supreme Court opinion and order. It also links to important news stories about the Michigan Supreme Court and provides occasional statistics and other tidbits.

Conclusion

There are many more similarities than differences between the Michigan and United States Supreme Courts, including this final observation: regardless of how you get there, you’ll want to keep going back. ■



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FOOTNOTES

1. See Georgetown Law, *Supreme Court Institute* <<http://www.law.georgetown.edu/academics/centers-institutes/supreme-court-institute/index.cfm>>. All websites cited in this article were accessed January 13, 2013.
2. The Appellate Practice Academy is run by Warner Norcross & Judd partner Matt Nelson, one of a very few private practitioners in Michigan with a United States Supreme Court argument to his credit.
3. See generally Bursch, *Appealing to Judicial Snap Judgments*, *Certworthy* 18 (Winter 2005), available at <<http://www.wnj.com/Publications/Appealing-to-Judicial-Snap-Judgments>>.
4. See generally Bursch, *Storytelling in Brief Writing*, 46 *For the Defense* 42 (April 2004), available at <http://www.wnj.com/files/Publication/5e7c0a6a-bf08-4a23-862f-07d0dd20b431/Presentation/PublicationAttachment/01ddf9a0-8c8d-4ace-9a84-1a0ccc501b21/storytelling_in_brief_writing_ijb.pdf>.
5. Chestek, *Judging by the numbers: An empirical study of the power of story*, 7 *LC&R* 1 (2010), available at <<http://www.alwd.org/LC&R/CurrentIssues/2010/pdfs/chestek.pdf>>.
6. State Bar of Michigan, *Virtual Court* <<http://www.michbar.org/courts/virtualcourt.cfm>>.
7. Supreme Court of the United States, *Argument Audio* <http://www.supremecourt.gov/oral_arguments/argument_audio.aspx>.
8. Oyez <<http://www.oyez.org/>>.
9. Michigan Supreme Court Historical Society, *Advocates Guild* <<http://www.micourthistory.org/advocate.php>>.
10. SCOTUSblog <<http://www.scotusblog.com/>>.
11. One Court of Justice Blog <<http://www.ocjblog.com/>>.
12. Disclaimer: I cofounded the One Court of Justice Blog with Matt Nelson several years ago. The name comes from Article 6, § 1 of Michigan’s Constitution: “The judicial power of the state is vested exclusively in one court of justice”