

***Regulatory Oversight* Podcast — Solicitors General Insights: The Art of Oral Advocacy With Michigan and New Jersey**

Host: Stephen Piepgrass

Guest Host: Jeff Johnson

Guests: Michigan Solicitor General Ann Sherman and New Jersey Solicitor General Jeremy Feigenbaum

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Stephen Piepgrass:

Welcome to another episode of *Regulatory Oversight*, a podcast dedicated to delivering expert analysis on the latest developments shaping the regulatory landscape. I'm one of the hosts of the podcast, Stephen Piepgrass, and I lead our firm's Regulatory Investigation Strategy and Enforcement, or RISE, practice group.

This podcast highlights insights from members of our practice group, including its nationally ranked state attorney's general practice, as well as guest commentary from industry leaders, regulatory specialists, and current and former government officials. Our team is committed to bringing you valuable perspectives, in-depth analysis, and practical advice from some of the foremost authorities in the regulatory field today.

Before we begin, I encourage all of our listeners to visit and subscribe to our blog at [RegulatoryOversight.com](https://www.regulatoryoversight.com) to stay current on the latest regulatory developments.

Today, we continue our special *Regulatory Oversight*, Solicitors General Insights series. As my colleague, Jeff Johnson, is joined by Michigan Solicitor General Ann Sherman and New Jersey Solicitor General Jeremy Feigenbaum. Jeff, Ann, and Jeremy will discuss the strategic and legal considerations that shaped the role of Solicitors General in navigating complex legal landscapes and advocating for state interests on the state and national stage.

As many of you know, if you have been listening to this series, Jeff is a member of our RISE practice group and is the former Missouri Deputy Solicitor General. As Deputy Solicitor General, he advised on consumer protection matters and represented the state in appeals and litigation.

Ann Sherman has served as the Solicitor General for the Michigan Department of Attorney General since 2023. Since joining the department in 2005, Ann has also served as deputy solicitor general and as a litigator in the department's public employment elections and tort division. In 2021, Ann was awarded the National Association of Attorneys General Meritorious Service Award, and over the years, the Michigan Attorney General's department has honored her with the Litigator of the Year Award, as well as several other awards for success in important cases involving the state.

Jeremy Feigenbaum is New Jersey's first Solicitor General, serving in the role since its inception in July 2020. Before taking on the SG role, Jeremy served as counsel in the New Jersey office of the Attorney General, and before joining the AG's office, Jeremy was an associate in private

practice at a law firm in New York. He's also served as an adjunct professor at NYU School of Law.

Ann, Jeremy, and Jeff, I want to thank you for joining me today. I know we're all excited to hear from you.

Jeff Johnson:

Thank you, Stephen, for the kind introductions. As he stated, I'm here today with the Solicitor Generals from Michigan and from New Jersey. Jeremy and Ann, thank you so much for being here.

Before we get into the discussion, I want to provide the standard disclaimer that the views and observations expressed by the guests are their own. So, Ann and Jeremy, you guys have both had Supreme Court oral arguments in the last three months. I believe Jeremy faced off against my former boss' first oral argument as Solicitor General a week or two ago.

So, in addition to being awesome Supreme Court advocates and dealing with the nine justices, what else do you guys do as Solicitor Generals of your respective states? Ann, do you want to start?

Ann Sherman:

Sure. One of the things that we do is monitor all of our appellate litigation. We have a lot of cases that are going on in all of our appellate courts, our state courts, and our federal courts. One of my roles is to make sure that those run smoothly. Any case that's significant, we review the briefing, edit the briefing. We hold moot courts so that our roughly 350 attorneys that are going in and out of court on a regular basis are prepared, and that everything is uniform, has a uniform look, and we are not making inconsistent arguments throughout our office.

Jeremy Feigenbaum:

Hard to do better than Ann's summary, but this is Jeremy Feigenbaum from the great state of New Jersey. Thank you again for having us. And let me just say a bit about how I understand what the Solicitor General does. So, I've been our State Solicitor General since July 2020, and that's relevant in New Jersey because I was our first. So, I was tasked with figuring out how to create a Solicitor General's office. What I did is I interviewed some 20 to 30 other state SG's that already had the role to ask them what they did and how they structured their office. And there are differences across states. Some states do 100% of appellate work for their attorney general's offices. Some do more targeted subsets of the appellate work. New Jersey falls in the latter bucket, but almost every state SG at least has heavy involvement as New Jersey does in the U.S. Supreme Court, in your respective federal court of appeals, which for New Jersey is the Third Circuit, and in your state Supreme Court. And those are the three courts in which New Jersey OSG practices most.

So, we oversee the briefing, we participate in oral argument, we oversee the moot court program, and also at the end of the day, help set positions and help set strategy for the overall

appellate litigation of the state. I have to approve any appeal that anyone in our department wants to take at any level, state or federal, and ultimately get involved in things like certiorari at the U.S. Supreme Court and certification at the New Jersey Supreme Court to make sure we're weighing in not just on what we say in cases, but on which cases should be moving forward in the appellate posture.

Jeff Johnson:

Jeremy, if I can break in a little bit for you, you just noted that you have a similar approval process that, like for example, the Solicitor General in the United States has to approve all appeals of the Federal Courts of Appeals and seeking certiorari to the U.S. Supreme Court. Can you describe a little bit of how that process works in your office? And one other note for viewers is that sometimes parties can get involved in, we're going to say educating the Solicitor General of the United States or DOJ more generally about why a decision is good to remain, why it's not terrible, and why like the Solicitor General's office may decide not to move forward with the case. So, if you can give us a little more insight into how that process works for your office, and also whether or not you welcome outside litigants sending you a memo or a note or something like that.

Jeremy Feigenbaum:

That's a great question, Jeff. So, we have three different kinds you might be thinking about, whether we want to take a case ourselves, whether we've been invited to weigh in on a particular case, and whether we just want to participate as amicus in order to support a particular cert application, whether in the U.S. or in the New Jersey Supreme Court. And for us at least, the process internally starts the same way, but then can vary a little bit.

So, it always starts with someone from one of our divisions. We have a civil and a criminal division, like the U.S. does, that are principally responsible for the vast majority of our cases, and they will send a memo to the Solicitor General's office, and it will go to me, and I will share it with the relevant deputy, whether it's the one who oversees our criminal work, our civil defensive work, or our civil affirmative work, and ask them to take a look and make a recommendation based on what the division has set up about whether we should be approving that appeal.

I end up approving most of the appeal recommendations that come to me, because the career folks in our department are quite discerning about when they make a recommendation and know the rigorous standards that we bring to this. But the standards are pretty rigorous, and the state very much doesn't appeal something just because they think it's wrong. The state will only appeal if we think it broadly affects our institutional interests. You invalidated a statute, you misinterpreted a recurring agency policy question, and so on and so forth.

We very much do take meetings with outside counsel, whether for the party on the other side or for lawyers who represent interested where they might want us to get involved as amicus. We in OSG do not, unlike the United States, affirmatively set up those meetings ourselves. In the usual case, we wait to see if the parties come to us and say they have something they want us to learn about. If a party does, we don't have a one-sided conversation. We take that meeting, and then we invite the parties on the other side to meet with us and share their perspective as well, but we never turn down those meetings. We actually really welcome them. We think that

the parties, whether you represent a private company, or whether you represent a nonprofit group, or you represent our adversaries in a criminal case in the public defender's office. Have something useful for us to know, whether it's about the law, or just about facts in the case, you think we might not appreciate. And we love those meetings and take them regularly.

Jeff Johnson:

Thanks for that. Ann, do you have a similar analogous process or your office that you can describe for us?

Ann Sherman:

One of the strengths of an attorney general's office, I think, is that we have specialists in certain areas. We have lots of divisions. They know their stuff. And for the most part, whether we're talking about taking an appeal or we're talking about participating in or leading or co-leading multi-state amicus brief, we try to begin with our experts in the area. I want to hear from them. I want to know what they think. A lot of times, they can flag problems with involvement or unforeseen problems with taking an appeal. There are sometimes reasons why a client doesn't want to appeal or doesn't want to pursue something at the appellate level. And I take that input very seriously.

Ultimately, the buck will stop with me. We have a small team and we sift through those recommendations, but that involvement with our hundreds of qualified, wonderful civil servants, our assistant attorneys general, is really key.

Jeremy Feigenbaum:

Just to build one thing off of that, because I think it's such a good point, it's super important in any state SG's office to hear from the folks who really know the subject matter, think of a tax appeal, think of an environmental appeal. You have to know from your experts the law and the facts that are going to bear on the case, but we also will bring in what we always call our client agency. So, we will bring in the Department of Environmental Protection. We will bring in the tax experts at Treasury as well. And so, we make sure, at all opportunities, to be talking to the client agency.

So, if you are an outside party who has a recurring relationship with the client agency, we're probably going to talk to them. If it's about litigation, we're going to want you to talk to us because they're a represented party, but we are going to talk to the client with whom you have that recurring relationship.

Jeff Johnson:

Right. Obviously, talking with your client agency is important when you're representing the government. Just out of curiosity, does anyone have any funny stories about agencies wanting to appeal? For example, in Missouri, I had one where the issue was largely

going to become whether or not we should appeal a case to impose a \$10,000 fine on a citizen of Missouri over a \$2.57 tax deficiency. I was wondering whether or not I was going to be arguing the next *Timbs v. Indiana*.

Jeremy Feigenbaum:

That's great. I have one that's a little different, but I think is relevant, Jeff. I have one where an outside group came in to take this meeting, and I've had really good experiences with these sorts of meetings. People bring substantive thoughts. They talk about our institutional interest. That's what I want to hear. But I had a meeting where the higher thrust of the presentation to the SG's office was, it would be better for the politics of your governor and your cabinet official if you do or don't appeal this case. And it was all about the politics. And we asked substantive question after substantive question. And it was clear this was not the attorney who had litigated the case. This was the attorney who they thought knew the politics of the case.

I would say that didn't really land, because in SG's office, I think it's a misunderstanding, even if some of the work ends up having an ideological valence. It's a misunderstanding when you're meeting with an SG's office to think they want to hear about the politics of the case. They want to know who's right or wrong, and they want to know how it's going to affect you institutionally. And so, I was sort of amused and gave them a very nice, very gentle talking to at the end about how these meetings might be more useful in the future. Very gentle.

Jeff Johnson:

Ann, you brought up a good point that a state attorney general's office looked pretty different from Washington to Indiana to Iowa to Michigan to Texas. And then you have different levels of expertise within the office, and you also have different levels of staffing. Would you mind describing the unit that you lead, and I guess how many sort of full-time specialists you have, and how you sort of see the purpose and strategy for your unit?

Ann Sherman:

We have a small but mighty unit. There are five of us: myself, as solicitor, a deputy solicitor general, two assistant solicitors general, and a fantastic support person. Together, we help our line attorneys strategize about appeals, including any procedural questions that arise. We consider amicus briefs; we review appellate briefs; and we hold moot courts in our more significant cases. We also do our own substantive work. In terms of whether to take an appeal, the ultimate decision rests with me as Solicitor General, in consultation with our Attorney General, Dana Nessel, when necessary. So, we tell our attorneys, "Don't promise our clients an appeal. We're going to talk about it, consider client input, and make the best decision for the People of the State of Michigan."

Some states have larger Solicitor General teams, and we just haven't been able to have the funding to increase our team at this point. But one of the things that we implemented a year ago was an appellate specialist program. So, within our departments, especially those departments that generate a lot of appeals, we've created now an appellate specialist in that subject area. One of the things they do is interface with us with all appellate matters, with even reviewing briefs, so that we're consistent across the office. But they also are key figures in being

connected to, for example, litigation in their area, whether it's environmental or tax. They can be a part of trials and some of the really great preservation issues that we get into when you have somebody that isn't thinking about appellate work down the road. So now, our appellate specialists are kind of a liaison between our divisions, our specialized divisions, and our SG unit, and that has worked really well so far. We hope to continue to expand that.

Jeff Johnson:

That's interesting. And how goes New Jersey?

Jeremy Feigenbaum:

New Jersey's going. We're five years in on this experiment of creating an

SG's office. And look, we had wonderful folks, still have wonderful folks in our division of law, which is what New Jersey calls its civil division, and our division of criminal justice, which is what New Jersey calls its criminal division. We work in close partnership with them. We are a larger SG's office now. We're over 10 attorneys at this point, in addition then to having an assistant and a paralegal who work with us. It means that we've been able to expand our footprint quite a bit. So, I think like in a law firm, we've become something of an issues and appeals practice as well, because we now have 10 attorneys doing this work, we can review some dispositive motions in the District of New Jersey for certain issues we know are heading on a rocket to the Third Circuit. We can review some particularly important recurring issues in our intermediate appellate court, the Appellate Division, before that goes up to the New Jersey Supreme Court.

So, it's helped us really get a little more expertise in a range of courts that we appear in front of, and also know the case even better by the time it gets to the Third Circuit or the U.S. Supreme Court or the New Jersey Supreme Court. It's a luxury. We're very lucky. I have been very lucky that our governor's office and our legislature and our attorney general have been willing to fund this kind of work. But still, 10 is nothing compared to the actual volume of appellate cases that a state faces. New Jersey faces well over 1,000 just on the civil side appeals each year because there are so many appeals from agency decisions that happen day in and day out. So, it's a drop in the bucket.

So, anytime anyone's interacting with an SG's office, you have to know they might be the tip of the spear on some of the most important recurring issues that an office faces. But there are going to be experts and appellate specialists within the divisions as well, that they're going to be working with.

Jeff Johnson:

Thanks. I think that's super helpful for those of us who are practicing in this space to know. I would be remiss if I didn't ask each of you something that I've asked everyone thus far, which is what's the best part of your job?

Ann Sherman:

I think for me, the best part of the job is feeling like I am a quintessential public servant. Most people would be very surprised to learn the breadth of what attorney general offices do. We do everything from criminal to civil litigation that we initiate, for example, in the environmental area, to litigation that comes to us if our client agencies get sued. And one of the luxuries we have, too, with our, we call them our general funds, those are our funds that come from the legislature. Those funds allow us to carry out our mission. And every attorney general with those general funds has some amount of discretion in how those funds are used, so they can decide, "Hey, we're going to have these environmental initiatives, these criminal initiatives, these consumer protection initiatives." And the Solicitor General just has a role in every one of those areas of litigation and important initiatives, and I feel proud to do that.

Many times, I've had the opportunity to go into private practice, but there is nothing like feeling every day like you're serving the people. And the cases and the issues that confront us in an Attorney General office are just the best. For anybody who's really just loves law, these are issues that move and shape the law itself, that affect the people every day, and I'm proud to do that work.

Jeremy Feigenbaum:

I'm going to say too, but I'll be really short, the breadth and the people. I completely agree with Ann about the breadth of the work. I can't think of another place where I get to do civil and criminal, plaintiff and defendant, constitutional and administrative law and contract law, and what have you, and tax and environment, and the First Amendment and the Second Amendment, and the Fourth Amendment and the Tenth Amendment, and so on and so forth. The breadth is really quite remarkable in a state, and different entities and different law firms that interact with states are seeing us on all of these different dimensions in any particular context.

Then the other thing is the people.

Everyone in an SG's office really chose to be there. My whole team took obvious pay cuts to come to the work that they're doing here. And it was just because they loved the other people they worked with. They were really passionate about public service. They were really passionate about the kinds of cases we get to do. And so the hours might be exceptionally long, but they're really quite exciting. The cases, it's not that 100% of every case is interesting, but the broader project, the vast majority of cases are interesting. The camaraderie is really good, and I think it's hard to beat in an SG's office. Not that I'm using this podcast to try to recruit all your folks to SG's offices, but the water's warm, it's great. Really fun people, really great work.

Jeff Johnson:

Excellent. Speaking of the breadth of things that the Attorney General's offices do, although it seems like the federal government grabs lots of the headlines these days, either the administration or the independent agencies or just the various rules that are coming out that are affecting every part of life these days, would you share some recent developments that are going on in the state of Michigan?

Ann Sherman:

We have litigation currently against one of the largest drug manufacturing companies in the nation with respect to drug pricing. It's wonderful to be involved in a case like this because we're helping people who need help the most, people who need assistance with a life-saving drug, in this case, insulin.

We also have some really fantastic initiatives that we've started in the past couple years. Our department has what we call a force team, and it's the first-in-the-nation partnership between prosecutors and law enforcement that's focused on dismantling organized crime rings. Other states are now modeling their programs after our force team model. We've charged over 85 defendants in 42 major cases. We've recovered over 10 million in stolen merchandise, millions more in cash and cryptocurrency. These kinds of things are important to consumers because organized retail crime costs businesses and consumers about \$2 billion every year, just in state of Michigan alone.

So, it's one of our initiatives we're very proud of. We have shut down auto theft rings, retail merchandise theft, the conversion of thousands of food stamp recipients benefits into energy drinks that have been then resold. These are all things that we have tackled in a very aggressive way. Our office is one of the first in the nation to tackle a group of foreign nationals for the problem of tampering with gift cards. They tamper with them, put them back on the display, and then an unwitting resident of Michigan buys the gift card, gives it to their little granny for a birthday present, and there's nothing on the card. At that point, there's nothing they can do. So, it's just a really, really important area for the people in Michigan.

Jeff Johnson:

Excellent. And Jeremy, what sort of office priorities or sort of directives has Attorney General Platkin sort of laid out in recent weeks and months?

Jeremy Feigenbaum:

Yes, there've been three main ones in recent months. I want to highlight here, coming from the New Jersey Attorney General, Matt Platkin. First, going after public corruption. This is both civil and criminal, but this has been a big part of Attorney General Platkin's criminal side priorities. So, taking on officials who accept bribes, New Jersey has something of a reputation we understand, and AG Platkin has spent a fair bit of time trying to tackle that reputation and root out corruption where we see it.

Second, gun safety has been a big priority for this attorney general, and that shows up in our civil enforcement work. It also shows up in our defensive work. We are currently on the defensive side of multiple Second Amendment lawsuits, with oral argument over the constitutionality of our assault weapons law coming up in just a couple of weeks.

And then third, AG Platkin is on the enforcement side that's covered a range of issues from consumer protection, to environmental justice, to civil rights, and so on. But I want to highlight here that he's also made a particular focus of some of the big tech work, which is some of the

work that very much continues to span ideological lines, and you continue to see coalitions of 40 to 50 AGs coming together in litigations against some tech companies, whether the theory is consumer protection, whether the theory is antitrust, and AG Platkin's been quite involved in spearheading that work right here in New Jersey.

Jeff Johnson:

For the record, I have never sent gold bars as payment or received gold bars.

Jeremy Feigenbaum:

You and me both, Jeff. You and me both.

Jeff Johnson:

Just being open on the podcast. Jeremy, you also mentioned that there are areas where we see large bipartisan coalitions and the sort of break across ideological lines for attorney generals offices and like big tech, there are also user consumer protection, and of course, everyone's always on board with tobacco litigation, right?

Jeremy Feigenbaum:

Yes, there's a couple other big ones that really exist. So, sometimes it's because there are shared policy values across attorneys general. So, issues around veterans, for example, are a particularly good one where AGs across ideological spectrum are happy to come together and work together. Then there's also ones that are just institutionally very important. So, you might get a case that's about sovereign immunity when the states can get sued in other courts, and that often still will span across the ideological spectrum. I think every AG thinks it's good that we continue to have this kind of work together.

I was down in Louisiana at a Fifth Circuit argument with the Texas Solicitor General on the other side. And at the end of that argument, which was a more hot-button kind of argument, we actually talked to each other about how we'd love to find an amicus brief to do together. And just a couple of weeks ago, the Texas SG oversaw the filing of a brief supporting New Jersey Transit and its claim of sovereign immunity.

So, you actually find that whether it's an annual SG conference or whether it's seeing each other at oral arguments, we find opportunities to try to do this cross-ideological work, whether it's immunity, whether it's veterans, whether consumer protection, whether it's antitrust, whether it's about protecting states' rights from federal preemption blocking us from experimenting with our own policies the way we want to do so.

Ann Sherman:

I completely agree with Jeremy, and I tend to think that particularly when the states can have bipartisan issues, that is where we are the most effective, particularly in front of the United States Supreme Court. Increasingly, there are more and more amicus briefs filed that multi-state

briefs. But when those briefs are 13 red states and 13 blue states on the other side, I think the court sort of is in the middle, saying, “Oh, okay, we got voices on both sides.” I think where the states are strongest is where we can come together with bipartisan issues. Like Jeremy said, the sovereign immunity issues are so important that balance between federal power and the state's ability to have a voice, to have that delicate balance be met. And there are issues like robocalls that all states can agree. Robocalls hurt our citizens. The citizens don't want them. We can all get together, and those have been very successful issues, I think. I think that's where the states have had the most impact in the multi-state work, especially in the U.S. Supreme Court, but also in the courts of appeals as well.

Jeff Johnson:

That gives us a good lead into what we're going to subsequently discuss, which is oral advocacy in the appellate courts, especially before the Supreme Court of the United States. We're privileged here to have both of you here, who have had multiple arguments. As we know, Jeremy had one three weeks ago, in its *Trump v. New Jersey*, I believe, in the United States Supreme Court. And then, of course, Ann also had one, I think it's the end of February, early March, in the *Perttu v. Richards* case.

So, one of the things that may be appellate blogs that other people have sort of been talking about is that before COVID, the Supreme Court had sort of a very strict oral argument style, and you would get roughly 30 minutes per side, and then you'd move on. COVID sort of loosened everything up, and now we have oral arguments that are stretching two and a half, four hours. So, if I can have some of your perspective, we'll start with Jeremy on both what's it like, arguing before the court, and what you think of the old versus new style?

Jeremy Feigenbaum:

I'm going to say I love both. I really enjoyed getting an opportunity to argue at the U.S. Supreme Court a couple weeks ago in the birthright citizenship case. I also love the current style in the way that the U.S. Supreme Court is handling arguments where they do this sort of brief opening statement, scrum period, where nine justices are asking you questions for as long as you can handle, and then the seriatim period, one by one by one, each justice asking you an order of seniority.

I think it's great. They're not asking me, but I think it's great, and I really like the style in part because I've seen it at the U.S. Supreme Court. I've also seen it affect federal circuits as well, the federal courts of appeals. Now, I think we see more often arguments running over time than they used to, sort of taking their cues from some of the changes they're seeing from the Supreme Court. And I think it's good if you're an advocate, maybe not if you're a justice and it's time for lunch. But if you're an advocate, you know you have longer opportunities to get some of your points out. And I think that that's really valuable.

So, if you look at the length of answers that are coming up at the U.S. Supreme Court, and from some of the best advocates, they're getting longer and longer. I'm from New Jersey, and I'm kind of long-winded. So obviously, I appreciate the opportunity to give longer answers. But I generally think for advocates, you know that you're going to have an opportunity, not to say everything that might possibly help you in your case, but the most important points you want to

make. And if you haven't gotten through them in that first bit of time with everyone, you're going to be able to get through them as long as you get at least one or two justices asking you these "seriatim questions." So, I just think that's great. I really appreciate it.

The last thing I'll say, it used to be that the number one piece of advice you would give a Supreme Court advocate is you need to kind of make all your points in your first sentence in response to the answer. That first sentence better have everything in there because you're not going to get a second sentence. And I don't think that advice is particularly good advice anymore. I think that the way they structure arguments now, where all of the justices really want to hear what the advocates have to say across these two portions of argument, they're going to want to hear, even if it's in the second sentence, what your answer ultimately is.

Jeff Johnson:

Yes. I'm going to interrupt briefly on this one. You're right, because it used to be a feeding frenzy before the court where the Chief Justice was very much acting as traffic cop between the more senior justices and the more junior justices because, as listeners may or may not know, the tradition of the court is that you let the more senior justice and by that I mean the person who has been on the Supreme Court bench longer ask all their questions first and then the junior justice can go. It's caused some tension in some years and in some arguments because everyone felt like they only had 30 minutes to ask every single question that they possibly want.

Jeremy Feigenbaum:

That's exactly right. Justice Scalia pioneered the modern oral argument, but Justice Scalia, who was very senior when I was clerking for the court, Justice Scalia would take a bunch of the time and other justices would end up asking questions that tried to work their way in and advocates would be fighting for their life to try to be able to answer all of the questions and what you have today, which I really appreciate from the court, and I loved Justice Scalia's questions too.

What I really appreciate today is that the vast majority of questions you're going to get often reflect what's actually bothering the justice in your particular case. This is, I think, true in the Federal Courts of Appeals as well, but more and more judges and justices are asking you the thing that's bothering them, and you have the time to answer and try to join issue on what's bothering them and tell them.

So, it used to be this sort of duck and weave from the questions, because you only had 30 minutes and you had some things you had to say. But if you do that in the modern Supreme Court, you're not answering the questions you're getting asked, and those are the questions that the justices who you need to win over really want answers to.

Jeff Johnson:

Ann, how about for you? What was your experience like for the Perttu argument?

Ann Sherman:

It was fantastic. I think the most stressful part of it was just the preparation leading up to my argument. Unlike Jeremy's last argument, which was on an emergency basis, I had three months to worry and ponder, and re-research. But what I found, and it's true, I have a background as a classical flutist, and I found that in performing, it was always the preparation that got me ready to stand up there, and it's true in the law, too.

My comfort level is when I'm prepared 100%. I feel like I know that case as well as the justices, I hope. I thought that I might be nervous getting up there. On the day of, I felt very calm. When I stood up there, I said to myself, "I know this. I have given three months of my life to this case." And there was a great peace and actually joy in arguing and answering those questions. I agree with Jeremy. I love the seriatim style. I think that when you have the initial questioning that's kind of free fire from everyone, because the Justices know they are going to have their time to ask their particular questions, it feels less frenetic and I've observed that even before I argued before the court just listening to oral arguments, I think that there is a certain amount of calm now with that free fire because the justices know, the Chief Justice will circle back to them and they will answer those important questions and they're not vying for that space or stepping over each other in a way that can be awkward for the advocate.

Jeff Johnson:

I definitely agree. So, I listened to, I think, like 300-plus oral arguments back in my day. And that was under the old style of machine gun-style questions. When you listen to oral arguments now, at a minimum, you're right. There is a better sense of calm and like ever in being a little more centered when they're responding to the questions that the justices are asking.

If you could contrast, maybe, or maybe it's the same. Your experience in your own state supreme courts, do you guys have hot benches in Michigan?

Ann Sherman:

Yes, we do. We have very hot benches. One of the most difficult things to handle as an advocate, though, is a cold bench, and it's hard to predict when you're going to get a hot bench or you're going to get a cold bench. It's much easier to prepare someone for a hot bench. When we do moot courts, we come up with lists of questions, things we think are going to be bothering the justices or the judges in our appellate courts, but it's very hard to prepare an advocate for a bench that doesn't ask anything and to help them understand there's a time to just stop talking and sit down.

Sometimes in law school, we're trained to try to control every argument and the path of every argument. And I think one of the things you learn over time as an advocate is it is not about you controlling the argument. It's about you addressing what is on the mind of the court, what is bothering the court. And if nothing is bothering the court, enough for them to ask particular questions of you, it might be time to sit down, before there's an awkward sort of deer-in-the-headlights moment.

Jeff Johnson:

Yes, Jeremy, and what about the New Jersey Supreme Court? They've broadcast their oral arguments for at least a decade now. So, people can go online and watch them, but is it a hot bench, cold bench? Are you stepping into the Supreme Court pre- the new argument system or afterwards?

Jeremy Feigenbaum:

Yes, I really appreciate. I actually think both at the New Jersey Supreme Court and the Third Circuit, in the vast majority of cases, you're going to be able to expect a hot bench, especially at the New Jersey Supreme Court. They granted the case. They think there's something they need to ask about. It's possible on rare occasions, the case will feel so one-sided to them that one side won't get a lot of questions, but that's really quite rare at the New Jersey Supreme Court. You can expect a hot bench from our seven justices across every side. And the other thing to note about the New Jersey Supreme Court, a great opportunity for up-and-coming associates is that amicus almost always get oral argument time, which is very unusual and not like the federal system.

So, oral arguments will be long at the New Jersey Supreme Court because you'll have the party and then the amicus supporting them, and then the other party and the amicus supporting them. And so, the court will very much be willing to spend hours on particular oral arguments with a hot bench kind of the whole time across a range of advocates.

The Third Circuit, too, is increasingly a hot bench, very active judges. Although they won't hold you strictly to time limits in most of the cases that I've argued, obviously, you can't just completely blow by them. But unlike some courts, more like the Second Circuit, where time limits can be really held in some cases in the Third Circuit, if the advocates making a point that they continue to find helpful and interesting, they'll continue to let you make it.

There's no seriatim time in the New Jersey Supreme Court or in the Third Circuit, but there is still an ability for advocates to continue making the core points in their case in both of those courts.

Jeff Johnson:

You mentioned earlier that you thought it was interesting how the Supreme Court sort of helps, I guess, lead the way for what people expect in the oral arguments, especially at the Court of Appeals, and not as much in front of district courts. But I happen to agree with you that with the new seriatim system, I think it has spilled down into the Courts of Appeal because most of the time when you're in argument, you see courts where the presiding judge oftentimes is always checking to make sure that their colleagues get a chance to ask what they want to know.

Jeremy Feigenbaum:

I totally agree. I think in all of the courts in which I regularly practice, there's very much a sense when you're the Chief Justice of the New Jersey Supreme Court or the presiding judge of the

Third Circuit or any other circuit at this point, you want to make sure your colleague got to ask their questions because there is now a set tone, I think is a very good one, which is the point of oral argument is for the judges to have their questions answered and it doesn't work very well if the judges don't get to have their questions answered.

Ann Sherman:

One of the things that has been a very exciting development for us with our Michigan Supreme Court is that they, in recent years, have reached out more and more to ask for the views of our office in a particular case. It might not be one that our office was involved in, but the court will say, "We invite the views of the Michigan Attorney General." And I think that speaks to the respect that the court has for the work that our office does and the role that we play.

Jeff Johnson:

Excellent. Now, to close, if you'd be so kind as to offer your best piece of advice for new lawyers in front of appellate courts that you've received and that you go by.

Ann Sherman:

The best piece of advice I would give any attorney at any level, but especially an appellate attorney, is to be humble, to always keep learning. I'm the Solicitor General, but I don't feel like I've arrived in my legal thinking and my legal development. I learn from my colleagues all the time, and it's that openness to reconsidering things you thought you understood, taking a hard look at cases, listening to colleagues that might differ from me. I think that's the best way to hone appellate skills.

Jeremy Feigenbaum:

And on oral arguments in particular, I'd say three things, each one sentence. One, try to be the best version of yourself. Don't try to be the best version of someone else. It doesn't work to transpose someone else's style if it's not natural and authentic to you. I will always sound like I'm from New Jersey when I'm at the podium. And so, I don't need to pretend that I have a different sort of style than that.

Second, I love listening to oral arguments, and I think I've learned a ton from listening to oral arguments and would really commend that to anyone who's interested in learning more about the appellate craft and, in particular, the appellate oral argument craft.

And then third, go to moot courts, do moot courts when it's time for your argument, participate as judges on moot court panels. They are the best way to get incredible minds together who know nothing about the case and show you what it's like to come up with the hardest questions, ask the hardest questions, and answer the hardest questions.

So, if you try to be your best self, if you watch how everyone else is doing it, and if you participate in moot courts by the first time you step to the podium for an oral argument, I think

you'll be nine-tenths of the way there. Even though it ends right, you'll always keep learning how to get to that final tenth.

Jeff Johnson:

Thank you guys so much for spending time with us today. We appreciate your work, and we appreciate you being here with us.

Stephen Piepgrass:

Ann, Jeremy, and Jeff, I want to thank you again for joining me today. I've appreciated your insights into the role and your respective offices. I hope our listeners enjoyed this episode as well.

Thank you to our listeners for tuning in. Remember to subscribe to this podcast. Use the Apple Podcasts, Google Play, Stitcher, or whatever platform you choose. We look forward to having you join us again next time.

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