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WINNING THE MOOT COURT ORAL ARGUMENT: A GUIDE FOR INTRAMURAL AND INTERMURAL MOOT COURT COMPETITORS

GERALD LEBOVITS, DREW GEWUERZ, AND CHRISTOPHER HUNKER*

Chief Justice, Your Honors, and may it please the Court:

We represent all those whose lives were changed by moot court. Chief Justice, we respectfully request two minutes for rebuttal. In our time before the Court, we will argue that competing in moot court can be law school's best experience, especially when the student-advocate's goal is to succeed in competition.

First, moot court hones the most formative skills that law school can impart. Second, moot court gives student-advocates unparalleled opportunities to advance their careers, regardless whether they intend to litigate.[1] Given moot court's benefits to student-advocates, to legal

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[1] MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, ADVANCED LEGAL WRITING AND ORAL ADVOCACY: TRIALS, APPEALS, AND MOOT COURT 469 (2009) (arguing that moot court teaches "important skills in advocacy that will carry on into your practice *regardless of what type of practice you do*."); John T. Gaubatz, *Moot Court in the Modern Law School*, 31 J. LEGAL EDUC. 87, 87 (1981) (explaining that moot court develops persuasion skills that prepare students to argue in any court); Michael V. Hernandez, *In Defense of Moot Court: A Response to "In Praise of Moot Court—Not!,"* 17 REV. LITIG. 69, 79 (1998).

education, and to the profession, we ask this Court to consider our strategies for winning a moot court oral argument.[2]

* * *

For nearly every law student, moot court[3] is a new, exciting, and unforgettable experience[4] rooted firmly in real-world advocacy. Moot court is the genesis of a legal career that, regardless of practice area, requires excellent advocacy. An excellent advocate is knowledgeable about the law, masterful in marshalling facts, skilled in the forensic arts, respectful of decorum, compliant with proper procedure, mindful of due process, fair with adversaries, devoted to the client, helpful to the court, honest with everyone, and above all, persuasive.

The process of becoming an excellent advocate is a career-long journey that begins in law school's first-year legal-writing course. Legal-writing courses, which culminate in writing a brief and conducting a moot court-like oral argument, teach students to think like lawyers—a skill fundamental to the practice of law and a necessary attribute to the good administration of justice. That thought process requires first-year law students to read and write in a new language:[5] the language of the law. Instead of thinking, speaking, and writing in legal jargon, "thinking like a lawyer" involves understanding how asking and answering questions can address and resolve uncertainties and ambiguities.[6] Oral arguments, a highlight of first-year legal-writing courses, teach students advocacy skills to solve legal problems.

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[2] For a discussion in the style of oral argument extolling moot court's virtues, see Darby Dickerson, *In Re Moot Court*, 29 STETSON L. REV. 1217 (2000).

[3] "Moot" as in "moot court" is different from "academic." "Something 'academic' is no longer relevant. Something 'moot' is debatable . . . . Moot Court is offered by academia, and often sponsored by academicians, but Moot Court covers debatable points, not irrelevant ones." Gerald Lebovits, *Problem Words and Pairs in Legal Writing—Part I*, 77 N.Y. ST. B. ASS'N J. 64, 64 (Feb. 2005).

[4] Amy E. Sloan, *Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process*, 35 U. BALT. L. REV. 43, 43 (2005) ("Lawyers may recall their moot court experience with joy and exhilaration, terror and anguish, or anything in between, but no one forgets it.").

[5] Judith Wegner, *Better Writing, Better Thinking: Thinking Like a Lawyer*, 10 LEGAL WRITING: J. LEGAL WRITING INST. 9, 15 (2004).

[6] *Id.* at 14.

Moot court enhances the three most important skills that law schools offer their students: starting an argument with a conclusion, differentiating fact from opinion, and organizing a legal argument by issue rather than by a chronological narrative of the facts. Moot court also teaches students to act professionally and ethically, to apply law to fact, to structure and rank a legal argument by strength, and not to assert losing propositions. By giving law students opportunities to improve their legal research, legal writing, and oral advocacy in a competitive environment, the moot court experience is unlike any other in law school: It prepares students for a competitive world. It is also, perhaps, the law-school activity that most fully develops the skill every lawyer must possess: advocacy. Regardless of practice area, all lawyers must communicate in a way that advances their client's interests, whether in a courtroom or boardroom. Most important, moot court builds character. Every student competitor "will be a better lawyer, and a better person, because of the moot court experience."[7]

This Article discusses the principles of a successful oral argument and offers strategies for success in a moot court competition, which we define as an appellate-advocacy competition.[8] The guidance in this Article is based on what is usually effective in the highly subjective and often unfair world that is competitive moot court. For every five moot court judges, one will disagree with the advice in this Article, and one will not notice the technique or care at all. We believe, however, that three judges will notice, care, and agree. This Article explains how to appeal to the majority of judges by providing step-by-step instruction to winning the oral round, beginning when the moot court problem is released and finishing post-oral argument.

Some professors, practitioners, and moot court experts have observed that teaching appellate advocacy is different from coaching a winning moot court team.[9] To the extent that is correct, this Article advises law students how to win a moot court competition.

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[7] Hernandez, *supra* note 1, at 78.

[8] We exclude as a non-moot court competition a trial, interviewing, counseling, or negotiating competition.

[9] *See, e.g.*, William H. Kenety, *Observations on Teaching Appellate Advocacy*, 45 J. LEGAL EDUC. 582, 582 (1995) ("I have become convinced that what I, and perhaps many others, have been teaching is really not Appellate Advocacy, but rather How to Win Law School Moot Court Competitions."); Michael Vitiello, *Teaching Effective Oral Argument Skills: Forget About the Drama Coach*, 75 MISS. L.J. 869, 882 (2006) ("[T]oo many competitions reward style over substance."); Report & Recommendations of the Comm. on

(*continued*)

I. INTRODUCTION TO MOOT COURT

To win a moot court competition, student-advocates must appreciate the values and detriments of moot court. At most law schools, success in the first-year legal-writing program or in an intramural moot court competition is the gateway to joining the law school's Moot Court Board as a candidate or member, and then being selected to join an intermural moot court team.[10]

Moot court competitions, whether intramural or intermural, are not easy; nor are they intended to be. The hosting law school or bar association designs the competition to challenge the competitors in a number of ways, both obvious and subtle. An obvious challenge for competitors is to submit a timely written brief and deliver an oral argument under pressure. Other obvious challenges are working with teammates and confronting nervousness. But the more subtle challenges are the hardest.

For example, most competition hosts create problems based on imaginary opinions from trial or intermediate appellate courts and do not include a full trial record.[11] These fact patterns, typically much shorter than full records, force advocates to organize an incomplete set of fictional facts into two distinct arguments—one for each speaker because most competitions have two speakers[12] for each side—and often omit the nuanced details available in a full trial record. This limitation, though, is

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Appellate Skills Training Appellate Judges' Conference Judicial Admin. Div. Am. Bar Ass'n, *Appellate Litigation Skills Training: The Role of the Law Schools*, 54 U. CIN. L. REV. 129, 146 (1985) (arguing that moot court does not teach appellate advocacy and recommending that it do so). The solution is simple. Law schools may offer separate courses in appellate advocacy and clinical classes in appellate advocacy without eliminating their involvement in moot court.

[10] *See, e.g.*, *Moot Court Program*, COLUM. L. SCH., http://www.law.columbia.edu/llmgrad_studies/courses/moot_court (last visited Feb. 25, 2013) [hereinafter COLUMBIA] (detailing the Foundation Moot Court requirement in which first-year students prepare an appellate brief and participate in an oral argument in front of a panel of judges); *Moot Court Competitions*, PACE L. SCH., http://www.law.pace.edu/moot-court-competitions (explaining that participation in the 1st Year Moot Court Competition is the first step toward participation in further moot court competitions).

[11] *See, e.g.*, Jeffrey G. Miller, *2011 National Environmental Law Moot Court Competition Problem*, 1 PACE ENVTL. L. REV. ONLINE COMPANION 4 (2011), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1001&context=pelroc.

[12] *E.g.*, COLUMBIA, *supra* note 10; *2012-13 Advocacy Update, Moot Court Board*, GEO. WASH. L. SCH. (Sept. 17, 2012) [hereinafter GEORGE WASHINGTON], http://www.gwlawmootcourt.com/1/post/2012/09/2012-13-advocacy-update.html.

logistically necessary in administering moot court competitions. Moot court judges need short fact patterns because, as busy professors, practitioners, and sitting judges, they have little time to study even the shorter fact patterns and bench briefs the hosts prepare for them,[13] let alone a lengthy trial record containing numerous details irrelevant to the issues before the moot court. Others facing similar time constraints are those who draft the competition problem—students, professors, or practicing attorneys, depending on the competition. This limitation is unique to moot court; practicing appellate attorneys and appellate judges are accustomed to reviewing comprehensive, lengthy, and full trial records. But moot court's unique, even negative, difficulty permits participants to focus closely on the competition's legal issues in formulating their arguments.

Also difficult is that most moot court teams are composed of either two advocates who argue both sides of an issue or of teams of three, in which the "swing" advocate argues both sides.[14] This does not prepare students to argue from both sides of their mouths. Rather, it compels student-advocates to learn the opposing side's case thoroughly, making them better able to defend their positions and structure affirmative points in a way that undercuts their adversary's position.[15] Through this difficult form of devil's advocacy, competitors will see the flaws in their own positions and learn to think objectively, skeptically, and honestly.

Moreover, moot court topics are difficult, often more difficult than some lawyers will ever handle during their careers. But the difficult, issue-laden, and controversial topics seen in moot court require policy discussion along with legal reasoning. That leads to impassioned advocacy and interactive learning.

Despite the benefits of moot court, it has some critics. Critics argue that moot court's rules and scoring methods, which vary among competitions,[16] are sometimes unfair. Critics note that moot court judges

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[13] Hernandez, *supra* note 1, at 84.

[14] *E.g.*, COLUMBIA, *supra* note 10; GEORGE WASHINGTON, *supra* note 12; *Competitor Guide, Duke Law Moot Court Board*, DUKE U. SCH. LAW, *available at* http://www.law.duke.edu/student/act/mootcourt/docs/competitor_guide.doc.

[15] Hernandez, *supra* note 1, at 74.

[16] Not all moot court competitions are created equally, and some are run poorly. The better competitions have (1) three or four preliminary rounds, not merely two, to make scoring more fair and to enhance the competition's educational mission by not sending students home too quickly; (2) head-to-head scoring, not cumulative-point scoring, in which teams advance based on the number of wins and then, in the event of a tie, by win-loss point

(*continued*)

as a group are inconsistent in their scoring; some score on the merits despite rules prohibiting judging on the merits, while other moot court judges are unprepared, disinterested, unskilled, focused on the irrelevant, or overly aggressive in their questioning.[17] Critics argue that moot court

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differential; (3) power ranking for the advanced rounds; (4) a high number of teams going to advanced rounds (e.g., not a twenty-team competition cut to a four-team semi-final round); (5) scoring in which no one judge can skew the results by reversing the majority, an event possible if the entire panel of judges does not agree on a score for each team or if each judge scores each advocate separately and the competition host simply adds up the scores; (6) opportunities for each team to see every brief, not just those against which they are competing; (7) at least three judges in a round; (8) bench briefs written after the authors have read the competition briefs so the competition host will explain the law to its judges accurately and also encourage its judges to ask competitors the right questions and those that the competitors will really argue; (9) prepared and competent bailiffs (sometimes called clerks or timekeepers); and (10) honesty-promoting rules that require the host immediately after the competition to give every team every judges' oral argument and brief scores of every speaker and team. The better competitions (1) do not allow their hosts to compete; (2) remind their judges repeatedly not to score on the merits or to give higher or lower scores to the team with the legal position they perceive as harder; (3) encourage their judges to ask only short and relevant questions; (4) have two distinct and balanced moot court problems, one for each speaker, both arising from a related set of facts and a plausibly realistic procedural posture; and (5) award nice plaques and hardware to several teams and individuals. The better competitions also give their judges good judging guidelines, such as those provided by the Legal Writing Institute's Moot Court Committee. Jim Dimitri & Melissa Greipp, *Model Oral Argument Judging Guidelines*, U. MEMPHIS, *available at* http://memphis.edu/law/newsroom/newspages/kritchevskymodeljudgingguidelines.pdf (last visited Jan. 24, 2013) (offering excellent guidelines for moot court competition judges on preparing for and judging moot court competitions, and for evaluating, scoring, and critiquing moot court students).

[17] *See, e.g.*, Hernandez, *supra* note 1, at 84. Hernandez notes, "I have witnessed a fair amount of substandard, even atrocious, judging. Some judges are completely unprepared and spend the first several minutes of the argument flipping through the problem and bench brief (usually to the detriment of the first advocate's score)." *Id.* Moot court has other critics as well. One critic even noted that moot court judges' critiques, particularly of advocates' clothing and speaking style, may be gender-biased and thus discourage women from litigating. *See* Mairi N. Morrison, *May It Please Whose Court? How Moot Court Perpetuates Gender Bias in the "Real World" of Practice*, 6 UCLA WOMEN'S L.J. 49, 62–64 (1995). Another disfavors teaching moot court during a first-year legal-writing class "because, as the capstone of the first-year writing program, it certainly reinforced a 'litigation bias'" that contradicts alternative dispute resolution. Kate O'Neill, *Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Writing Course*, 50 FLA. L. REV. 709, 714 (1998). On the other hand, getting high-school students involved

(*continued*)

makes individual merit irrelevant because advocates argue in teams; unprepared or ineffective partners hinder well-prepared and effective ones.[18] Critics also argue that membership on a moot court team is an insignificant boost to a resume compared to membership on law review or a journal.[19]

Other skeptics assert that moot court does not prepare students for "real life" appellate advocacy.[20] In his critique of moot court, Ninth Circuit Chief Judge Alex Kozinski contends that requiring moot court judges to evaluate students on their advocacy skills and not the merits of the case "is a drastic departure from the way things happen in real life."[21] Judge Kozinski also notes that because moot court competitors must argue both on- and off-brief,[22] they have no emotional investment in their client's hypothetical case—an important motivator in real appellate advocacy.[23] Judge Kozinski chides moot court programs for not preparing students to deal with "the most important aspect of any case: the record."[24] Many moot court fact patterns, he believes, invite policy arguments rather than arguments based on law.[25]

Some of Judge Kozinski's contentions are valid, but moot court is worth the effort. Moot court will not teach many aspects of appellate advocacy, such as pre- and post-argument appellate motion practice, the sequential (non-simultaneous) submission of briefs, writing reply briefs, and many other things. However, "[m]oot court oral arguments closely

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in competitive moot court is the among the best ways to teach law and engage in community outreach. *See, e.g.*, Maryam Ahranjani, *High School to Law School: Marshall-Brennan and Moot Court*, *in* THE EDUCATION PIPELINE TO THE PROFESSIONS: PROGRAMS THAT WORK TO INCREASE DIVERSITY 145 (Sarah E. Redfield ed., 2012).

[18] *See* Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178, 192 (1997).

[19] *Id.* at 180.

[20] *See, e.g.*, Robert J. Martineau, *Moot Court: Too Much Moot and Not Enough Court*, 67 A.B.A. J. 1294 *passim* (1981), *reprinted in* ROBERT J. MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY 207–14 (1985).

[21] Kozinski, *supra* note 18, at 181.

[22] "On-brief" means that a competitor is arguing an issue from the perspective in the competitor's brief. "Off-brief" means that a competitor is arguing the issue from the perspective opposite from the brief the competitor wrote.

[23] Kozinski, *supra* note 18, at 185–86.

[24] *Id.* at 188.

[25] *Id.* at 189.

simulate appellate arguments in the real world"[26] and teach the skills required for success at lawyering. Moot court may also be condemned for stressing form over substance—writing and speaking rather than determining which side has the more meritorious case. As one judge noted, "Moot court judges grade advocates. Court of appeals judges decide cases. The difference is vast."[27] But as that same judge conceded, "the skill of an advocate sometimes does determine a decision."[28] Every law school in the United States trains students on those winning skills in the moot court tradition. Not every law school can be wrong.

To the extent that moot court is subjective and unjust, our response is, "Welcome to the real world," a world in which lawyers must strive to improve those things that are good, not to discard them altogether. Despite the difficulties and problems with moot court, many benefits accrue to student competitors, who are essentially the law school's football team carrying the law school's flag onto the field. The perks include traveling to competitions paid for by the law school, networking and scholarship opportunities, awards and other recognition, and accomplishments to list on a résumé for life. Membership in the National Order of Barristers, an honor society for participants in moot court organizations akin to Phi Beta Kappa for undergraduates and the Order of the Coif for high grade-point achievers in law school, is an additional recognition for students who excel in written and oral advocacy.[29]

Legal education also benefits from moot court. Law schools use competitions to show off their institutions to other schools and to their moot court judges. Law schools also promote themselves by highlighting the success achieved by their moot court teams, and moot court successes increase law schools' recruiting and fundraising capabilities. Law schools look with pride on their moot court participants after graduation; they tend to be among the schools' most loyal alumni. Among other things, moot court participants return to their alma maters to coach moot court teams and judge competitions.[30] Although law review is widely regarded as the

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[26] Hernandez, *supra* note 1, at 73.

[27] Alvin B. Rubin, Book Review, *What Appeals to the Court*, 67 TEX. L. REV. 225, 225 (1988) (reviewing MICHAEL E. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE (1987)).

[28] *Id.*

[29] *See National Order of Barristers*, U. TEX. AUSTIN SCH. LAW, http://www.utexas.edu/law/advocacy/barristers/ (last visited Feb. 25, 2013).

[30] One does not often hear of law review or law journal alumni returning for an evening or two each year to help junior editors Bluebook citations.

"best" extracurricular or co-curricular credential, employers know that successful moot court competitors are a "double threat" as effective writers and speakers.[31] Moot court competitors gain experience preparing the types of documents produced by litigation firms and thus, are attractive new hires because their learning curve is not as steep as law graduates who did not participate in moot court.[32]

Moot court also develops students' ability to work collaboratively with teammates and other lawyers. The moot court process requires students to work as a team to formulate legal arguments, an important talent for practicing attorneys. Competitors working in teams should work together to write a cohesive brief, even when teammates write different sections of the brief. Teammates should work together to review, edit, and revise the brief until it is the best piece of writing the team can collectively draft. By teaching that a team is only as good as its weakest link, moot court forces teammates to teach one another, and all participants learn as a result. Moot court participants will then work tirelessly together to develop and practice their arguments.

Despite the inability to replicate real appellate advocacy directly, moot court is a law student's clearest window (other than an appellate-advocacy course or a clinical appellate-advocacy course) into appellate practice. Furthermore, moot court is a chance to argue seminal issues of law before leading academics, practitioners, and judges.[33] The best moot court competitions feature prominent state and federal judges who evaluate advocates' skills and suggest ways to improve those skills. Aside from the substantive experience students gain from practicing oral argument, students receive valuable feedback from those with the most experience in crafting and delivering oral arguments. Toward the end of many competitions, there is also a banquet at which students can network with the attorneys and judges involved in the competition. These networking opportunities can set the foundation for a successful career: getting a good first job. To get the best possible experience from moot court and win a moot court competition in the process, student-advocates must understand these benefits and challenges of the moot court experience.

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[31] Dickerson, *supra* note 2, at 1226.

[32] *Id.*

[33] *E.g.*, *New York Law School Moot Court Association*, N.Y. L. SCH., http://www.nyls.edu/academics/jd_programs/moot_court/ (last visited Feb. 25, 2013) (where past judges have included United States Supreme Court Justices Antonin Scalia and Clarence Thomas, David Boies of Boies, Shiller & Flexner, and Professor and former ACLU President Nadine Strossen).

Winning the competition starts with being familiar with the competition itself. The moot court process begins with the moot court brief. The brief is the moot court competitors' first opportunity to demonstrate their comprehension of the issues presented in a competition. The brief tests the competitors' ability to analyze the legal field's uncertainties and provide thoughtful answers to them. This shows the competition's brief-scoring judges that the competitors can, and do, think like lawyers.

As competitors research and write, they should ask themselves questions like "What elements of the case have been addressed by case law and statutes?" and "What legal theory can be crafted to address both the facts of the case and the relevant authorities?" Competitors should spend considerable time researching and drafting the brief, including multiple iterations and revisions,[34] to ensure that their writing reflects their understanding of the issues presented and that their assertions are comprehensive and coherent. Writing a good brief saves time researching the legal issues during the oral-argument practice phase, and a brief must score well for a team to win. It is a rare competition in which a team with a losing brief ranks first in the competition overall. That is as it should be. One cannot be a moot courter's moot courter without being a good writer and a good speaker, just like one cannot be a lawyer's lawyer without being a good writer and a good speaker.

The second component of the moot court experience, oral argument, is an opportunity for competitors to elaborate on their written submissions and further explain how they worked through the uncertainties of the case to arrive at their conclusions. In this regard, competitors must be prepared to assist the moot court judges, who are themselves working through the uncertainties, by offering succinct and direct responses to the judges' questions. To accomplish this task, competitors must be much more than clever, superficial orators highlighting the key points of their brief and stressing form over substance. Competitors must be responsive, forthcoming, clear, fluid, professional, convincing, and likeable. While respecting the judges and their dominance over the procedure and the courtroom, they must assert control and project confidence about all matters concerning the facts and legal arguments of their cases.

In a typical moot court oral argument, three to seven judges will have

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[34] It is often helpful to take a day or two away from the brief after a revision before returning to it. This helps writers catch mistakes and include additional perspective to the argument.

ten to twenty minutes, depending on the competition and whether the advocate reserves rebuttal time, to get answers to their questions. Advocates do not manage the parameters of the argument—which at its best is really a conversation and dialogue between advocate and judge—as directly as they do in the briefs. Instead, the panel of judges directs the oral argument. Judges might ask prepared and organized questions or ones that are spontaneous and only tangentially relevant to the case.[35] The questions could be friendly, meaning that the judges support the advocate's position and ask questions that are not especially challenging.[36] Conversely, the questions could be confrontational and hostile to the advocate's position.[37] The questions might be similar to questions that real judges would ask, or they might be designed simply to test the advocates' "moot court skills."[38] Excellent advocates must therefore meticulously prepare and rehearse answers to countless questions the moot court may or may not pose.[39]

As with any appellate presentation, excellent advocates must be both well-prepared and persuasive.[40] Several factors affect persuasiveness, including appearance, body language, argument structure, delivery, and responsiveness. To argue persuasively, advocates should argue their positions under the assumption that the moot court will decide the

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[35] *See* Timothy S. Bishop, *Oral Argument in the Roberts Court*, 35 LITIG. 6, 8 (2009) (noting that a court may ask anything it believes could be helpful in deciding the case). At oral argument in Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996), for example, a case about a contractual dispute, Justice Scalia asked the petitioner, "Why do they debeak chickens?" Bishop, *supra*, at 6.

[36] LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 373 (5th ed. 2010).

[37] *Id.*

[38] *See* Barbara Kritchevsky, *Judging: The Missing Piece of the Moot Court Puzzle*, 37 U. MEM. L. REV. 45, 53 (2006). As this Article explains, some skill sets are unique to moot court. Seasoned moot court judges ask questions that test the participants' knowledge of moot court protocol.

[39] Bishop, *supra* note 35, at 8 ("In 30 minutes, the Court may pose 60 to 80 questions, but be ready to answer hundreds more.").

[40] James D. Dimitri, *Stepping Up to the Podium with Confidence: A Primer for Law Students on Preparing and Delivering an Appellate Oral Argument*, 38 STETSON L. REV. 75, 78 (2008) ("The first purpose of oral argument [is] persuasion . . . ."); Gerald Lebovits, *Effective Oral Argument: 15 Points in 15 Minutes*, THE ADVOCATE, Spring/Summer 2008, at 4, *available at* http://works.bepress.com/gerald_lebovits/122/ ("The advocate's goal . . . is to win. To win is to persuade.").

hypothetical case.[41] This assumption should be tempered by the fact that moot court judges cannot, and generally do not, prepare for oral argument in the same way as real appellate judges.[42] Although moot court judges receive materials that guide them through the parties' respective arguments,[43] the judges will not be as educated about the case and the issues as real appellate judges. Well before oral argument, real appellate judges review the parties' briefs, the record below, and their law clerk's bench memorandums.[44] Because of their preparation, real appellate judges ask sophisticated and focused questions. In contrast, the scope of moot court judges' preparation is limited. Moot courts are composed of judges with various levels of knowledge of the moot court problem and understanding of its legal issues.

An advocate's ability to convey points clearly and persuasively to the judges is crucial to a winning oral argument. Persuasive oral argument requires advocates to be attentive to judges' concerns about their legal reasoning. Excellent advocates satisfy doubts that arise in the judges' minds and demonstrate, "by the substance and manner of [their] presentation,"[45] that they are knowledgeable, credible, and candid. Advocates demonstrate this by persuasively framing the legal issues in a strategic yet logical way,[46] thinking on their feet, adapting in the moment, and projecting confidence. Excellent advocates "answer questions clearly

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[41] *See generally* Kritchevsky, *supra* note 38, at 57 (citing Louis J. Sirico, Jr., *Teaching Oral Argument*, 7 PERSP. TEACHING LEGAL RES. & WRITING 17, 18 (1998)) ("We should encourage the moot court judge to role-play the real judge.").

[42] *Id.* at 55 (noting that moot court judges cannot prepare the same way real judges do).

[43] *Id.* at 56 (listing the materials given to moot court judges, such as the problem or record, a bench brief, outlines of the expected arguments, and copies of key statutes and cases).

[44] *See* Albert J. Engel, *Oral Advocacy at the Appellate Level*, 12 U. TOL. L. REV. 463, 465 (1981) (emphasizing that appellate judges read every brief and reply brief); Mark R. Kravitz, *Oral Argument Before the Second Circuit*, 71 CONN B.J. 204, 204 (1997) (stating that before oral argument, the judges will have "read the briefs[,] . . . thought through the issues, and discussed the case with their law clerks . . . ."). *But see* Kritchevsky, *supra* note 38, at 55–56 (noting that moot court judges rarely see the briefs before the oral arguments and receive only a packet containing the record and a bench memo to guide the judges through the oral argument).

[45] *See* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 141 (2008).

[46] *See id.* at 41 ("The most rigorous form of logic, and hence the most persuasive, is the syllogism . . . . [T]he clearer the syllogistic progression, the better."). Syllogism is reasoning from the general to the specific.

and directly, tell the court exactly what it should do," and make the judges like them.[47]

To win a moot court oral argument while learning the most from the experience, advocates must prepare meticulously, sharpen their public speaking skills tirelessly, and alleviate the moot court's concerns by satisfactorily answering questions. Winning moot court advocates compete enthusiastically, follow appellate-advocacy traditions, and comply with moot court protocol. Perhaps most important, winning moot court advocates appreciate that moot court judges score advocates well when the judges not only like the advocates but also believe that the advocates like them. Judges in every court, real and moot, want to be liked. Advocates are persuasive when they are confident in their case and in themselves, yet cordial and deferential to the judges.

II. PREPARATION

A. Knowing the Rules

Preparation for oral argument in a moot court competition starts with studying the particular competition's rules and format for oral argument. Just like practicing attorneys, who must operate within courts' rules, moot court advocates must operate within the competition's rules or risk penalty or disqualification.[48] The advocate must read and comprehend the rules in their entirety the moment they are released. Advocates should discuss the rules with teammates, coaches, and faculty advisors to ensure that the entire team understands the parameters.[49] Among other things, the rules typically provide for an allocation of time for argument, how that allocation may be distributed between or among the advocates, and how much time may be reserved for rebuttal or, in a very few and select competitions, sur-rebuttal.[50] The rules regulate the number of teams that may represent a school, the number of students who may serve on each team, and whether schools with more than one team will argue against one another.[51] The rules also disclose how competitors will be scored

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[47] Kritchevsky, *supra* note 38, at 65.

[48] MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, ADVERSARIAL LEGAL WRITING AND ORAL ARGUMENT 282 (2006).

[49] *Id.*

[50] *E.g.*, NAT'L NATIVE AM. LAW STUDENTS ASS'N, ANNUAL MOOT COURT COMPETITION: OFFICIAL RULES 10 (Sept. 13, 2010) [hereinafter NNALSA OFFICIAL RULES], *available at* http://www2.hawaii.edu/~nalsa/Moot-Court-Rules-2010.pdf.

[51] *E.g.*, *id.* at 6–7.

individually and as a team, the scoring allocation between briefs and oral argument scores,[52] and the procedure for advancing to higher rounds.

The need to learn and follow the rules cannot be understated. Moot court competitions are like any other competition that has a system of points and penalties. The goal, perhaps obviously, is to accumulate the most points to win the competition. Making foolish mistakes by disregarding or overlooking the rules will result in penalties, some severe.[53] In nearly every competition, a team that otherwise might advance past the preliminary rounds will not advance because it fails to follow the rules, either in writing the brief or in conducting oral argument.

The first step in maximizing a team's chance of winning is to comply with the rules. Once advocates are familiar with the procedural rules, they can prepare their substantive arguments, beginning with the brief. The second and more strategic step is to take advantage of the rules. For example, if the rules allow speakers to split their time unevenly, the better advocates on the team should speak a bit longer than the less skilled. By doing this, the team as a whole will score higher. Additionally, if the rules include oral scoring sheets that tell the judges to reward particular skills or aspects of a presentation, such as a conclusion, advocates should emphasize those skills and aspects to earn points, even when doing so contradicts otherwise accepted moot court advice.

B. Building the Argument: Theme and Roadmap

The process of creating arguments begins with writing a brief.[54] Advocates should use the brief to structure their arguments. During the brief-writing phase and before the team submits its brief, advocates should conduct a few oral argument practice rounds. Doing so enables competitors to see and address the strengths and holes in their arguments; they can then adjust the brief accordingly. A strong brief makes preparation for oral argument significantly easier. A winning brief could even enable a team to win a round despite earning losing scores in oral

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[52] For example, the rules might state that a team's overall score is equal to the sum of X% of oral argument scores and X% of brief scores. In most competitions, the brief scores are worth less in the higher rounds and count for nothing in the final round. *E.g.*, NNALSA OFFICIAL RULES, *supra* note 50, at 18–19.

[53] *E.g.*, *Id.* at 9.

[54] *Cf.* Coleen M. Barger, *How to Make the Losing Oral Argument*, 41 ARK. LAW., Summer 2006, at 16, 16 (observing that preparation limited to "a quick skim of your own briefs" is the first step to failure in a moot court argument).

argument—a reversal, in moot court parlance—to advance in the competition.

In many competitions, especially those that are large and highly regarded, the briefs that teams submit are posted on a competition website or mailed to the competitors.[55] Advocates should study these briefs to supplement their arguments and spot weaknesses in their own brief. When preparing to argue off-brief, advocates should study competitor briefs, which can be especially helpful in formulating substantive arguments. Advocates should read every team's brief, identify the best briefs, and incorporate into their own arguments the best teams' strongest arguments and citations.

In terms of preparing the substantive argument, moot court advocates should view oral argument as an opportunity to discuss with the moot court judges the resolution of difficult legal issues.[56] The goal of the presentation is to persuade the moot court judges to resolve the issues in the advocate's favor[57]—and to score better than the other team. To help persuade the judges to rule in their favor, advocates should prepare and develop a theme for their side of the case. A good theme will persuade a moot court that an advocate's position is correct.[58] The theme should be as simple as possible (preferably one sentence) and summarize an advocate's position without being outrageous or inflammatory.[59] It should be based on favorable law and fact, and it should appeal to common-sense notions of fairness and justice.[60] The theme should condense the issue before the

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[55] *E.g.*, *National Juvenile Law Moot Court Competition*, WHITTIER L. SCH., http://www.law.whittier.edu/index/centers-programs/ccr/national-juvenile-law-moot-court-competition/#pwb (last visited Feb. 27, 2013).

[56] *See* Kritchevsky, *supra* note 38, at 73.

[57] Dimitri, *supra* note 40, at 78 ("This role [as an advocate] requires you to attempt to convince the court that your client should win the appeal.").

[58] *Id.* at 80–81 (stating that identifying a theme and conveying it to the court fulfills an advocate's obligation to persuade the court that the client's position is the correct one); Stephanie A. Vaughan, *Persuasion is an Art . . . But it is Also an Invaluable Tool in Advocacy*, 61 BAYLOR L. REV. 635, 648–49 (2009) ("A theme has a great effect in persuading the tribunal to side with the advocate . . . . That sort of theme gives the tribunal a reason to apply the law in the advocate's favor.").

[59] Vaughan, *supra* note 58, at 649 ("A theme should not be outrageous or inflammatory but should be anchored in common sense [and] reason . . . .").

[60] *See* BRADLEY G. CLARY ET AL., ADVOCACY ON APPEAL 60–61 (3d ed. 2008) (discussing the importance of a legally sound theme).

court into a "right-wrong question" that begs a decision.[61] This question should reflect the key facts of the case but ought not include detail about the relevant law or statutory interpretations. That information is meaningless unless the advocate first provides context and a framework. The theme, which should be understandable to a smart high-school student, should suggest that "justice would suffer" if the judge does not rule for the advocate on at least some issues[62] and that the court can fix an injustice committed against the client.

The type of theme chosen depends on the relief the advocate is seeking and which side the advocate is arguing. If the appellant (or petitioner) seeks substantive relief, the theme could be rooted in the notion of "equity," arguing that the trial court's ruling harmed the client. By contrast, an appellee (or respondent) whose case rests on precedent might choose "legal stability" as the theme.[63] Advocates should imagine themselves in the position of their client, the trial lawyer, the trial court, and the appellate court when formulating a theme for their argument.[64]

Adopting the client's perspective allows advocates to access the emotional dimension of the case and perhaps construct a theme of "fair substance," which articulates to the court how the law has wronged the client.[65] If the trial attorney encountered problems admitting or excluding evidence, the appellant could focus on the theme of "fair process."[66] Advocates who represent the appellees should consider the trial court's position and the discretionary rulings it made. Discretionary rulings result from the leeway that must be accorded to a trial court so that it can function effectively.[67] The harmless-error doctrine prevents frivolous appeals by requiring the appealing litigants to prove that that their substantial rights at the trial level were harmed before an appellate court may reverse or modify the judgment below.[68] The theme for that argument might be "protect[ing] the viability of the judicial process."[69] Appellate courts always consider how decisions affect public policy and future

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[61] JOHN T. GAUBATZ & TAYLOR MATTIS, THE MOOT COURT BOOK: A STUDENT GUIDE TO APPELLATE ADVOCACY 86 (3d ed. 1994).

[62] *Id.* at 35.

[63] *Id.*

[64] *Id.* at 36.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] FED. R. CIV. P. 61.

[69] GAUBATZ & MATTIS, *supra* note 61, at 36.

cases.[70] Therefore, a winning theme addresses the positive policy implications of a ruling in the advocate's favor.

In addition to being a persuasive tool, themes help advocates remember key points and respond to questions, particularly when advocates are unsure of the answer.[71] Advocates who return to the theme of the argument will give themselves direction and moot court judges a sense of the big picture.

Because the theme is crucial to a successful oral argument, it is important to develop the theme while still writing the brief. The theme will affect what arguments are included or excluded in the brief and how much weight and emphasis to give those that are included.[72] The overriding theme should flow throughout the brief, such that the reader will never forget the point of the argument. Although appellate courts frown on oral arguments not grounded in the brief, judges in most moot court competitions are not given the briefs (or, if they are, few judges read them in their entirety before the oral argument). Instead, the judges typically rely on a bench memorandum prepared by the moot court board or bar association hosting the competition. Once an advocate identifies a theme and its supportive facts and legal arguments, the advocate should outline the argument in a way that fits within the theme.

Advocates should focus the moot court on the two or three reasons they should win and relate those reasons to their theme.[73] Advocates should identify which issues are necessary to vindicate their argument, which issues were included in their briefs merely as canned reasons the judges should rule in their favor, and which issues are simple red herrings—or even mistakes in the fact pattern. For purposes of oral argument, advocates should choose two or three of the former and discard the latter.[74] More than two or three reasons will dilute the argument, diffuse the panel's attention, make the advocate run out of time, and cause the advocate to argue nonmeritorious claims. These two or three reasons will constitute the roadmap, or outline, of the argument and must be stated

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[70] *See* Stroehmann Bakeries, Inc., v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1441 (3d Cir. 1992) (stating that courts are not allowed to enforce contracts that run counter to public policy).

[71] *See* Lebovits, *supra* note 40, at 5 ("If you have a theme of your case, you will never get stuck answering a question.").

[72] GAUBATZ & MATTIS, *supra* note 61, at 88.

[73] Dimitri, *supra* note 40, at 81 (noting that advocates have a short amount of time to present their case and should concentrate on two or three points).

[74] GAUBATZ & MATTIS, *supra* note 61, at 88.

within the first forty-five to sixty seconds of the oral presentation. Providing a roadmap helps advocates structure the argument and immediately introduces judges to the issues the advocate will address. The roadmap also allows the advocate to outline the major, relevant reasons to support the argument. Each prong of the roadmap should function as a heading that crystallizes the reasoning into a single persuasive sentence. The reasons outlined in the roadmap should be organized by importance, with threshold procedural or substantive issues, such as standing or statute of limitations, preceding issues on the merits.

C. Accounting for Standards of Review

As in real appellate advocacy, competitors must know the standards of review applicable to their arguments. Skillful organization of the substantive issues and an impressive oral delivery are not enough to win relief for a client. Many real-life appellate courts require advocates to note in the written brief what standard applies to the issues at hand.[75] The standard of review can significantly impact what arguments are included in the brief.[76] For most appellate judges, the standard of review is a key concern as the court prepares to hear a case.[77] Advocates must know the extent of deference, if any, that an appellate court will give to the initial decision-maker.[78]

Appellate courts decide questions of law de novo—as if the issue were being decided for the first time on appeal.[79] On issues of fact, however, trial courts are accorded significant deference.[80] Only rarely are appellate courts bothered enough by trial courts' factual findings to reverse decisions on that basis; a trial court's findings, under the federal standard of review, must be clearly erroneous for the appellate court to reject them.[81] A clearly erroneous factual finding should stand out in the record or fact pattern; if advocates believe they have identified an error of fact, they should check the law of their jurisdiction to see whether the courts have previously

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[75] URSULA BENTELE ET AL., APPELLATE ADVOCACY: PRINCIPLES AND PRACTICE 109 (5th ed. 2012).

[76] *Id.*

[77] ALAN L. DWORSKY, THE LITTLE BOOK ON ORAL ARGUMENT 48 (1991).

[78] BENTELE ET AL., *supra* note 75, at 109.

[79] *E.g.*, First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 947–48 (1995).

[80] *See id.* Further, while appellate courts review questions of law de novo, appellate courts review questions of fact under a "clear error" standard and review discretionary matters for an abuse of discretion. Pierce v. Underwood, 487 U.S. 552, 558 (1988).

[81] BENTELE ET AL., *supra* note 75, at 110.

identified the error as one warranting reversal.[82] The difficulty for even the experienced advocate is that many issues are not either purely questions of law or purely questions of fact, but are a mixture of both.[83] Furthermore, the language some courts use to set the standard of review is ambiguous and inconsistent.[84] Fortunately for competitors, most moot court competitions focus on issues of law to be decided de novo; rarely will a moot court advocate have to challenge a trial court's findings of fact.

The question of the applicable standard should not be skirted. In some cases, the standard is an advocate's most compelling argument. Even when it is not compelling, advocates must know the standard because many moot court judges inquire to test the advocates' knowledge of legal method or because they do not know what else to ask.

In competitions that address administrative law, advocates must know the standards of review for particular issues of administrative law and regulation. This includes the standard of review that courts use to evaluate the decisions of administrative tribunals, whose decisions are accorded substantial deference. In considering the constitutionality of administrative regulations under federal law, courts apply the *Chevron* standard.[85] Both the substantial-deference standard and the *Chevron* standard recognize the significant role administrative tribunals and agencies play in shaping the law. Administrative agencies spend considerable time implementing and enforcing their own statutes and thus, have more experience than appellate courts in interpreting the statutes.[86] Federal judges, who "have no constituency" to whom they must answer,[87] should not resolve the public-policy concerns inherent in administrative statutes.

Motion standards of review and doctrines concerning error preservation also influence the outcome of appeals. Motion standards of review vary with the type of motion, but one of the most common in moot

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[82] MURRAY & DESANCTIS, *supra* note 48, at 291.

[83] BENTELE ET AL., *supra* note 75, at 110.

[84] *Id.* at 109.

[85] An appellate court that reviews an agency's construction of a statute first investigates whether Congress has weighed in on the issue at hand. If Congress has not spoken on an agency's interpretation of a statute it administers, an appellate court cannot impose its own interpretation of the statute. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Instead, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

[86] Bradley Lipton, *Accountability, Deference, and the* Skidmore *Doctrine*, 119 YALE L.J. 2096, 2121 (2010).

[87] *See Chevron*, 467 U.S. at 866; *accord* Lipton, *supra* note 86, at 2122.

court fact patterns is an appeal from a trial court's decision on a motion to dismiss for failure to state a claim.[88] When judges consider a motion to dismiss, they assume that all the facts in the complaint are true.[89] Similarly, when considering a motion for summary judgment—another typical platform for moot court competitions—"the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."[90] Summary judgment must be denied, however, if a dispute arises over a "*genuine* issue of *material* fact."[91] Advocates must also understand the harmless-error doctrine, which prevents appellate courts from becoming clogged with appeals in which the trial court erred but the result would not change even if the trial court had ruled correctly. At the federal level, "the court must disregard all errors and defects [at trial] that do not affect any party's substantial rights."[92]

Advocates should also consider the preservation doctrine. With some notable exceptions of which advocates must be aware, legal issues raised on appeal must first have been presented to the trial court.[93] This way, the trial court can consider the objection, the opposing party can respond, and the error can be corrected without wasting judicial resources on an appeal.[94] If the moot court fact pattern contains enough material for advocates to determine whether the issues were preserved, advocates should cite the fact pattern to prove that the issues they are arguing were indeed raised before the trial court.[95] Some moot court fact patterns, however, will explicitly note that "[t]his issue was properly raised at trial and preserved for appeal."[96] When the fact pattern does not provide enough facts for advocates to determine whether an issue was preserved,

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[88] *See* FED. R. CIV. P. 12(b)(6).

[89] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

[90] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986).

[91] *Id.* at 248.

[92] FED. R. CIV. P. 61; *accord* FED. R. CRIM. P. 52(a). The degree to which a trial error affected a party's substantial rights depends on a variety of factors. For instance, an error that affected a defendant's constitutional rights might be more harmful than an error that impacted rights guaranteed by statute or common law. *See* BENTELE ET AL., *supra* note 75, at 224.

[93] BENTELE ET AL., *supra* note 75, at 60.

[94] *Id.* at 61.

[95] MURRAY & DESANCTIS, *supra* note 48, at 291.

[96] *Id.*

they should assume that, for the purposes of moot court, the issue was properly preserved.[97]

D. Studying the Record

Advocates should have a good familiarity with the record from writing the brief. At oral argument, however, they must know the record and procedural history of the case intimately. Even though the moot court may know the record well, advocates should have the best knowledge of the case and be able to cite particular facts on demand.[98] If judges question advocates on a fact, advocates should be prepared to cite the page on which the fact appears. This includes memorizing the facts that support the strengths and weaknesses of an advocate's case, the facts that advance their interests, and the facts that threaten their case.[99] Intimate knowledge of the record combined with substantial legal authority to support the argument and a cohesive theme enables advocates to answer almost any question during oral argument. It also allows advocates to showcase their knowledge of the facts and law; doing so will impress the judges and lead to high scores. One of the most important goals in oral advocacy is to make the judges aware of facts they might have forgotten or missed when they initially read the brief, the fact pattern, or the bench memorandum.[100] Advocates who can correctly and confidently refer the judges to the location of specific facts in the record show that they are well-prepared and knowledgeable about the case.

Advocates must also be aware of the legal authorities on which their own cases and their adversaries' cases rest. They must be able to explain in detail the cases that support their position and distinguish cases harmful to their argument. It is critical that an advocate review the adversary's brief to identify cases that might be used against the advocate. Relying exclusively on their own written briefs as preparation for oral argument will not sufficiently familiarize advocates with the case, nor will it allow

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[97] *Id.*

[98] Vaughan, *supra* note 58, at 668–69 ("Even if the tribunal knows the law well, it is the advocate who has the most in-depth knowledge of the case.").

[99] *Id.* at 643 (recommending that advocates use the "SWOT analysis" when reviewing the record: identifying the strengths of a party's case, the weaknesses of a party's case, the opportunities to advance a party's interests, and the threats to a party's case).

[100] BENTELE ET AL., *supra* note 75, at 356.

advocates to synthesize the facts with the relevant case law including what an adversary used.[101]

E. Preparing Notes for the Argument

Advocates should expound in an outline each issue laid out in the roadmap. Arguments supporting each issue should cite legal authority and facts from the record. Although the outline's level of detail is up to the advocate, the outline should be short, concise, and uncomplicated.[102] In addition to stating the issues and supporting arguments, it should objectively list favorable and unfavorable facts. Within the main outline should be mini-outlines of the principal cases relied on by the advocates, their opponents in their briefs, and the lower court(s) in the record by listing the cases' holdings, reasoning, and key facts. In outlining their argument, advocates should avoid exhaustive discussion of precedents. Advocates may explain what the holdings are, but they should not elaborate on them unless the bench has questions.[103] Advocates should be prepared not just to recite the facts to the court but to organize them in a way that supports their case. Advocates should articulate the point they believe the facts illustrate and not assume that the judges will infer the same meaning as the advocate.[104] The temptation to lecture on academic issues of law must be avoided,[105] and the advocates should not dwell on well-established principles or detail the history of a legal proposition unless doing so is necessary to make a concise, comprehensible argument or to show a split in the courts on a legal question. As they prepare their arguments, advocates should not lose sight of their theme, the crucial facts of the case, and the relief sought.

In drafting the outline, advocates should evaluate the importance and merits of the arguments supporting their key issues. Advocates need to identify which supporting arguments are required to win an issue. Advocates should also identify each issue's weakest arguments—about

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[101] BD. OF STUDENT ADVISERS OF HARVARD LAW SCH., INTRODUCTION TO ADVOCACY: RESEARCH, WRITING, AND ARGUMENT 70 (7th ed. 2002).

[102] *See* Dimitri, *supra* note 40, at 85 (suggesting a short and concise outline with bullet points, buzz phrases, or key words to describe points). *But see* Vaughan, *supra* note 58, at 669 (suggesting that advocates need not be concerned with an argument's length at this stage).

[103] SCALIA & GARNER, *supra* note 45, at 171.

[104] UCLA MOOT COURT HONORS PROGRAM, HANDBOOK OF APPELLATE ADVOCACY 30 (Lawrence Brennan et al. eds., 3d ed. 1993).

[105] GAUBATZ & MATTIS, *supra* note 61, at 91.

which the court is likely to have questions—and develop responses in advance. As they did when constructing the theme, advocates need to think about public-policy considerations that could affect the court's acceptance or rejection of a particular argument. Advocates should be aware of how the argument relates to current trends in the law and how the argument would affect the real-world legal landscape.[106] Advocates must take their adversaries' arguments seriously, recognizing that the court will likely question them in reference to those points.[107] The shrewd advocate will be prepared not only to defend the weak points of an argument but also to concede an argument or adverse case when necessary. At times, conceding is a better use of time than defending a dead argument not crucial to victory,[108] and conceding can often enhance the advocate's credibility with the judges. Conceding may be appropriate, for example, on a threshold issue such as standing or jurisdiction. But advocates should never concede an argument required to win,[109] even when the judges seem to want that concession and even when the advocate has exhausted all alternative points. If that happens, the advocate should transition quickly to a new point, without ever conceding.

Although there is no single way to prepare for oral argument, there are ways that advocates can sabotage their own arguments. Some experts suggest that advocates write out the entire argument in its totality during the preparation stage,[110] but oral argument is supposed to be a conversation between the advocate and judges. Appellate and moot courts frown on the reading of a prepared text during oral argument. Doing so is one of the most serious mistakes an advocate can make. Attorneys and moot court alumni who advise writing the full argument (while knowing that it cannot be read to the bench) believe that doing so reveals to the advocates what they do and do not know.[111] It is also a way to identify awkward transitions between issues and to help advocates structure their arguments effectively.[112] However, most moot court veterans fear that an advocate will memorize a written argument and be unable to respond to unexpected

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[106] BD. OF STUDENT ADVISERS OF HARVARD LAW SCH., *supra* note 101, at 72.

[107] *Id.*

[108] *Id.*

[109] MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 258 (3d ed. 2010).

[110] CAROLE C. BERRY, EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT 166 (4th. ed. 2009).

[111] *Id.*

[112] *Id.*

questions smoothly, comprehensively, and conversationally, even if the advocate avoids the mistake of reciting it to the bench.[113] For these reasons, a detailed outline of arguments rather than a prepared narrative is an advocate's best option during the preparation phase. Many advocates find it useful to memorize only their introduction and roadmap. Doing so reduces nervousness by opening on a confident note and allows the advocate to make eye contact with the judges from the argument's onset.

Because each bench is different, advocates should prepare two different outlines. Advocates must be prepared to speak to a cold bench, which asks very few questions, and to a hot bench, which constantly interrupts with questions and comments.[114] Both versions should be identical through the roadmap, but once the roadmap ends, the versions should differ in detail, transitions, and case discussions. When dealing with a hot bench, it is likely that the bench's questions will force advocates to address points out of order and with the level of detail the questions elicit. Judges on a hot bench are likely well-versed with the record and the law, and will ask probing questions related to the policy implications of what the advocate is urging.[115] When dealing with a cold bench, it will be up to the advocate to determine how much time to spend on each point and how to make natural transitions between points. Sometimes a bench is cold because it is unfamiliar with the bench memo or brief. In this case, the advocate must develop the facts thoroughly so that the court has a foundation on which to consider the issues.

At oral argument, advocates may approach the lectern or podium with notes, although they should use them sparingly, and if they are skilled enough, not at all. As one moot court coach explains, "In competitions, judges often seem to give credit to teams [that] do not use notes, so our teams usually work without notes."[116] If advocates do use notes, the notes should not include so much detail as to tempt the advocates to read from them or even rely on them. Outlines should not be in complete sentences;

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[113] *Id.*

[114] *See* SCALIA & GARNER, *supra* note 45, at 154.

[115] BD. OF STUDENT ADVISERS OF HARVARD LAW SCH., *supra* note 101, at 83.

[116] Ronald J. Rychlak, *Effective Appellate Advocacy: Tips from the Teams*, 66 MISS. L.J. 527, 537 (1997). Advocates who speak without notes should brag about it. They should approach the lectern or podium in a way that even obtuse judges will see their lack of notes. They should make the judges see that they are holding nothing by slowly pushing in their chairs with both hands, buttoning their jackets with both hands, beginning their opening making strong eye-contact (which shows that the speaker is not reading), and showing the judges the palms of their hands.

bullet points and headings work well. Outlines can also include words or phrases that remind the advocate of the nature of the case, key facts, and roadmap of the issues with important supporting cases and statutes.[117] By the time of delivery, most information, including the cases' holdings and the courts' reasoning, will be second nature to the advocates. However, it is useful to have phrases, particularly if the cases use well-known, recognizable phrases, to jog the memory if the advocate becomes nervous. Notes should be large enough to read without straining the eyes. They should be typed onto paper and taped to the inside pages of a file folder cut to fit on any small podium or lectern. A file folder that spills over a podium or lectern creates a bad impression.

Advocates should anticipate questions the moot court judges may ask—such as policy questions that both sides of the problem raise and hypotheticals that test the consequences of the desired holding—and include point-form responses to them in the outline.[118] Answering questions from the bench without diverging from the major points an advocate intends to make is one of moot court's most demanding challenges.[119] The advocate should view questions as an opportunity to engage the panel and alleviate any concerns a judge has about the advocate's argument. Early in the preparation phase, advocates should begin imagining every possible judicial question. While reading the briefs, advocates should be attuned to factual inconsistencies, loose interpretations of the law, and adverse rulings in similar cases.[120] For national moot court competitions in which the judges may be prominent state and federal judges known to the competitors in advance, advocates should, if feasible, research the judges' rulings on similar issues. Practicing appellate advocates almost always research the opinions of the judges before whom they will appear.[121] Moot court competitors should, as well.

Without attempting to memorize canned responses to questions, and in a way that will not lead to a robotic delivery, advocates should consider

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[117] EDWARD D. RE & JOSEPH R. RE, BRIEF WRITING AND ORAL ARGUMENT 152 (9th ed. 2005).

[118] *See* Henry D. Gabriel, *Preparation and Delivery of Oral Argument in Appellate Courts*, 22 AM. J. TRIAL. ADVOC. 571, 578 (1999) (explaining that advocates should anticipate questions like, "State the rule of law as you would have us make it."); Kritchevsky, *supra* note 38, at 57 (encouraging moot court judges to prepare policy questions and hypotheticals to test the arguments).

[119] BD. OF STUDENT ADVISERS OF HARVARD LAW SCH., *supra* note 101, at 81.

[120] UCLA MOOT COURT HONORS PROGRAM, *supra* note 104, at 19.

[121] BENTELE ET AL., *supra* note 75, at 358.

how to make their responses fit into the thrust of the overall argument. Once the theme is identified and the argument is outlined, advocates are ready to begin developing and practicing the full argument. By creating an outline in this manner and then studying it, advocates are ready to practice their oral arguments.

III. PRACTICE

The most valuable part of preparing for oral argument, either real or moot, is completing practice rounds.[122] This process is called mooting, although some call the entire process, including the real round, mooting.[123] Practice connects the initial stages of preparation—developing a theme and creating an outline—with delivering a cohesive, smooth, and fluid argument. Ideally, the mooting process should begin before the brief is submitted. Doing so will (1) improve the quality of the written arguments by helping advocates identify where they must clarify the presentation of their issues and sharpen their arguments and (2) jump-start advocates' oral-advocacy skills.

Whether before or after the brief is submitted, advocates should moot as early, as often, and with as many different judges as possible. Constant mooting allows advocates to master the substance of their arguments and become comfortable delivering their points. Arguing in front of different people with various levels of knowledge and experience enables advocates to anticipate the questions that judges might ask during the competition,[124] discover issues that have not occurred to them, and see the flaws in their responses to issues of which they are aware.[125] Ideally, practice rounds should include not only teammates, student and alumni coaches, faculty advisors, and members of the moot court organization at the advocate's law school, but also judges, professors, practitioners, and anyone else who might have some insight on the substantive law or proper style for delivering a moot court oral argument. Attorneys are often better moot court judges during practice rounds than real judges. Attorneys are less

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[122] SCALIA & GARNER, *supra* note 45, at 158 ("No preparation for oral argument is as valuable as a moot court . . . .").

[123] *See, e.g.*, JOHN SNAPE & GARY WATT, HOW TO MOOT: A STUDENT GUIDE TO MOOTING 5 (2d ed. 2010) (stating that it is fair to use the word "mooting" to "describe everything that an individual does, throughout the whole process of preparing and performing his or her presentation").

[124] *See* Vitiello, *supra* note 9, at 890 (noting that "through preparation counsel should be able to anticipate most questions and have thoughtful answers" during the competition).

[125] *See* SCALIA & GARNER, *supra* note 45, at 158.

willing than judges to listen and more likely to press advocates with hard questions.[126] Advocates should argue before a variety of people to ensure they hear every potential question. If possible, advocates should arrange for a high school student, friend, or family member—anyone unfamiliar with the law—to hear a practice round. If they understand the arguments, so will the judges in a moot court round.

When a moot court team practices, the student coach and faculty advisor should write down the questions to enable the advocates to further research them after the practice round. Coaches should encourage moot court competitors to look at videotaped final rounds from past competitions. Depending on the competition, the videos might be available online or available for purchase. Coaches should also encourage advocates to videotape their practice rounds and use the footage to identify weaknesses in their delivery and distracting posture and body language.[127] For substantive issues, advocates should have their coaches and faculty advisors contact expert law professors and practitioners in the field through alumni networks.[128] Advocates should try to find practice-round judges who are unsympathetic to their positions and who will encourage them to develop challenging hypotheticals and questions.[129] Many practicing litigators are hostile, combative, and aggressive—and that is exactly what the advocate needs at this phase. An advocate who can survive a tough practice round will survive a moot court competition round. The coach should give the practice-round judges the best competition briefs of

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[126] MURRAY & DESANCTIS, *supra* note 48, at 263–64; John G. Roberts, Jr., *Thoughts on Presenting an Effective Oral Argument*, SCH. L. REVIEW 7-1 (1997), http://www.nsba.org/site/docs/36400/36316.pdf ("Be particularly skeptical of advice on how to argue an appeal from appellate judges . . . . Judges have no interest in the court['s] reaching a 'wrong' result, but fifty percent of clients do."). *Contra* Randall T. Shepard, *The Special Professional Challenges of Appellate Judging*, 35 IND. L. REV. 381, 391 (2002) (arguing that real judges are often more aggressive in moot court than in actual oral argument).

[127] Noting that "[v]ideotapes are ruthlessly honest," three authors recommend "videotaping a practice argument" to get speakers to stop "fiddling with hair; waving glasses around; sucking on the bow of one's glasses; rubbing the back of one's neck or one's chin[; and] . . . put[ting] their hands in their pockets and jingl[ing] their change or keys." CLARY ET AL., *supra* note 60, at 127.

[128] If the competition has a criminal-law issue, for example, the advocate should consider asking an assistant district attorney or criminal-defense lawyer to do practice rounds. It might even help to ask law-enforcement officials to do practice rounds to provide a perspective on how the substantive issues might arise in the real world.

[129] SCALIA & GARNER, *supra* note 45, at 158.

another team to use as aids during questioning. The judge can use an appellant brief to question appellee and vice versa. Advocates should also argue their adversaries' positions during practice to identify weak arguments that could be exploited.[130] This is done as a matter of course in moot court competitions, in which advocates must argue off-brief.[131]

Practice rounds should be as real as possible. Advocates should follow court decorum, stay in character and role, wait until the round ends to ask the judges questions about their performance and how to answer questions, and speak to the mock judges as if they are real moot court judges. Practicing in the room where the oral arguments will take place could be a confidence boost to the advocate, although this might not be feasible if a competition is out-of-town. At an out-of-town competition, advocates should try to visit the moot court room where they will argue, test the acoustics, and make sure their notes fit on the podium or lectern, if there is one at the competition.

Advocates who are nervous should jog in place during their practice deliveries to accustom themselves to a high heart rate. Lowering a heart rate by running in place will not work for everyone, but it will work better than taking a shot of vodka before a round, a crutch of which we wholly disapprove. Although many law students are too afraid of public speaking to succeed at moot court, nervousness for the rest of the students should decrease with practice and with the confidence of knowing that the advocate will know more about the facts and law of the case than the judges by the time the competition starts.

Wherever advocates practice, they should practice with both hot and cold benches to prepare for hot and cold rounds. Advocates should practice standing close to and far from the judges to practice projecting their voices. It is important to practice within a competition's time limits, but it is also beneficial to hold some untimed practice rounds. Untimed practices allow advocates to hear as many questions as a bench has, to be questioned on every part of their argument, and to receive feedback on their entire argument. Essential to the process, too, is for advocates to practice without notes to prevent over-reliance on them. As advocates practice and refine their arguments, their points and responses will become clean, clear, and precise. In an early practice round, it might take several minutes of speaking and responding to questions before advocates convey

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[130] GAUBATZ & MATTIS, *supra* note 61, at 108.

[131] *See* Kozinski, *supra* note 18, at 185.

the holding they want. After additional practice rounds, advocates will be able to state the desired holding clearly, without hesitation, and quickly.

Advocates can also improve their ability to ask for relief succinctly by serving as judges in their colleagues' practice rounds; by doing this, advocates come to appreciate what a judge wants and can structure their responses to questions accordingly.[132] Advocates need to listen carefully to the feedback they receive from practice-round judges. Frequently, advocates hear the same critiques, which enable advocates to rectify the persistent problems in their presentations. By the final practice, advocates should be able to answer questions and hypotheticals concisely, defend their answers confidently and without evasion, and transition back to their points efficiently. Advocates who have completed practice rounds are more likely to be in the moment during the competition and to avoid the flustered forgetfulness sometimes seen in competitors who forget for a few seconds even which side they represent.

IV. DELIVERY

Thus far, advocates have been preparing to deliver a persuasive argument to the moot court on substantive legal issues. After weeks of writing and oral argument practice, advocates are well-versed on the legal issues and the record and are ready to deliver a persuasive legal argument in competition. Because a moot court tournament is a competition in which advocates are graded on both the substance of the arguments they make and on the presentations of their arguments, advocates are under a microscope from the moment the moot court judges enter the room. Every movement and word has the potential to make a positive or negative impression on the moot court judges.

To deliver a winning oral argument, advocates must strive to connect with their judges positively. In other words, the judges must like the advocates. Although there is no formula to being liked by a judge, the best practice is to behave and speak in a way that shows that the advocate likes the judge. If the advocate succeeds in doing so, the judge in return will like the advocate and will show it with a high score. Such is human nature: You like people if they like you. To make a judge like an advocate, the advocate should dress appropriately, act professionally, use good

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[132] GAUBATZ & MATTIS, *supra* note 61, at 108–09.

manners,[133] make eye contact, be passionate about the case, speak confidently and not quickly, smile charismatically from time to time, and carry on respectful yet engaging conversation with the judges.

A. First Impressions

Because the judges will see the advocates before they hear them, advocates should make strong first impressions by appearing ready for an intellectual and friendly conversation. This is done by dressing well:[134] wear dark, conservative colors and avoid fancy, heavy, or loose jewelry and other accoutrements that could distract the court or clang on the lectern or podium. Advocates should wear their hair short,[135] be neatly groomed, and carry themselves in a way that conveys dignity and respect for the court. When the judges enter the room, regardless whether the clerk or bailiff begins with knocks on the door and an oyez, advocates should rise from their respective counsel tables with jackets buttoned[136] and remain standing until the chief justice, judge, clerk, or bailiff indicates that the advocates may be seated. When the bailiff calls the case, the bailiff or judges might ask whether the advocates are ready to proceed. All team members should stand and reply together in the affirmative.[137] If the court addresses the advocates in some other fashion or by some other inquiry, either individually or as a team, advocates should always stand when the court addresses them.

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[133] Vaughan, *supra* note 58, at 669 (citing GAUBATZ & MATTIS, *supra* note 61, at 101–03) (discussing the importance of treating the proceedings, panel, and opposing counsel with respect).

[134] The advocate's attire can directly affect success in a moot court round. *See, e.g.*, Barger, *supra* note 54, at 16 (arguing that clothing and jewelry that attract the court's attention is unhelpful in winning a moot court round); Dimitri, *supra* note 40, at 102 (stating that advocates should err on the side of caution by dressing in a dark, conservative business clothes and avoiding "provocative ties, shirts, blouses, and shoes"). Conservative dress is ideal. It reflects a reverence for the court and will not distract the judges during the argument.

[135] Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 U. KAN. L. REV. 631, 660 (2009) ("[A]ttorneys should be mindful that that speakers with short hair, regardless of gender, are generally perceived as more credible."). Professor Higdon's article is a must-read for all who care about oral advocacy.

[136] Suit jackets should always be buttoned when standing.

[137] Advocates are assessed not only on what they say but also on how they say it. They should avoid informality ("yeah") and dialect ("ain't"). SCALIA & GARNER, *supra* note 45, at 144.

If advocating for the appellant, the first advocate to speak should immediately approach the podium or lectern as the others take their seats. If advocating for the appellee, the advocate should proceed to the podium as the second speaker for the appellant approaches his or her seat. Advocates must approach the podium or lectern in "a brisk but unhurried manner."[138] If necessary, advocates should adjust the lectern or microphone, if there is one, before they begin to speak. They should stand erect with both feet on the ground approximately shoulder length apart. If their height allows them to do so comfortably, they should rest their hands on the lectern or podium. Advocates should not place their hands in their pockets. Once at the lectern or podium, the advocate should await the chief justice's or judge's instructions, or at least a nod, to begin the argument.[139] After getting the signal to begin, the advocate should pause briefly, and while pausing, make eye contact with each judge. Then, with a warm smile, the advocate should begin.

B. Professional Behavior and Good Manners

Moot court advocates are judged not only on how they address the court and how they present themselves, but also on how they respond to opposing counsel. Good advocates treat the bench and their adversaries with respect and dignity. Advocates must remain professional during oral argument, even when the argument does not go as anticipated. They should not raise controversy unnecessarily by including frivolous arguments. Advocates will lose points if they personally attack or embarrass their moot court adversaries or even personalize the argument by referring to their adversaries by name, even if done using a title. Advocates should refer to the opposing party rather than their counsel (e.g., "respondent" rather than "respondent's counsel" or worse, "my opponent"), although one commonly hears expressions like "my learned friend" in Commonwealth competitions and "my friend in argument" in international-law competitions. Advocates should maintain a dignified and respectful appearance while sitting, keeping still and silent while their co-counsel and adversaries speak. They should not distract the bench or opposing counsel by excessively passing notes, reacting negatively to opposing counsel's argument (e.g., shaking head, rolling eyes, smiling

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[138] *Id.* at 164.

[139] Advocates might be expressly told to begin, or they might get something as simple as a head nod or a smile to indicate they should begin.

derisively), or sorting through papers.[140] While their adversary is speaking, opposing counsel should sit upright and listen attentively to the argument, looking only at the speaker or the bench[141] and never at the audience, lest anyone think that they are seeking a clue from someone in the audience about whether to rebut. Advocates' hands should be folded on the table or in their lap. During the adversaries' argument, advocates should write notes only to the extent necessary to prepare for a rebuttal.

Advocates should hydrate before they step up to the lectern or podium, but they may bring water if they think they will get thirsty or need hydration to relieve a parched mouth. Speakers should take a drink only when they are asked a question so as not to interrupt the flow of their argument. Nervous advocates should avoid water altogether while they argue, lest they spill it during the round.

When the round has concluded and the judges have completed their decision, evaluation, and comments,[142] advocates should congratulate their adversaries on their performance and shake their hands. Advocates should then greet the judges, shake hands with them, and thank them for serving as moot court judges. Advocates should not tell the judges which school they are from unless they are overwhelmingly certain—a rare occurrence until after the final round—that it is permissible and honest to do so. Although these post-argument pleasantries will not affect the scoring, they show professionalism and courtesy. In many competitions, judges return from year-to-year and even judge later rounds in the same competition. It is important that the judges remember advocates as professional and courteous. Advocates should respond even to scathing critiques from judges with attentiveness and openness. Professionalism reflects not only on the advocate but also on the school the advocate represents.

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[140] *See* SCALIA & GARNER, *supra* note 45, at 162 ("[T]his is no time to joke or horse around with co-counsel. Sit erect, eyes fixed on the court, with the closest you can manage to an expression of sober anticipation.").

[141] *See* Brian Wice, *Oral Argument in Criminal Cases: 10 Tips for Winning the Moot Court Round*, 69 TEX. B.J. 224, 227 (2006) ("It is also considered intemperate to engage in any whispering at counsel table while your opponent is arguing or to display any facial expressions calculated to show your contempt for or disbelief of your opponent's remarks or the court's questions.").

[142] Once the round is over, advocates should feel free to ask the judges questions in response to their comments, but they should limit their questions to those that will elicit constructive criticism. Advocates should not make a judge feel defensive or argue with a judge's comments or criticisms.

C. Style

Another element of persuasion is style. Style involves body language, facial gestures, speech inflections, pace, and eye contact. The effect of style on an advocate's persuasiveness begins before the formal argument. For example, after the advocates have taken their seats at their respective tables[143] and the bailiff has called the court to order with the standard moot court oyez opening, the appellant should stand up, push in the chair, and button the suit jacket while confidently approaching the lectern or podium. Although the advocate has not yet spoken, the judges have likely begun their evaluation of the advocate, and by implication the advocate's argument, based on the advocate's nonverbal conduct.

At the lectern or podium, advocates should have straight posture. While speaking or resting their weight on the podium, advocates must not move their feet, sway, or shimmy. Advocates should stand with both feet straight and on the ground. Their feet should be even with their shoulders. Advocates whose bodies sway, however, should place their feet a few inches wider than their shoulders. From their hands to their feet, advocates must be completely attuned to their body movement.

Advocates who talk with their hands must learn to keep hand gestures to a minimum to ensure the judges' focus is on the advocate's argument. A rare, small, and natural hand, eyebrow, or shoulder gesture can help an argument, however, particularly when an advocate is trying to make an important point.[144] For instance, raising a hand to emphasize a point is effective, as is holding out each hand in succession to indicate two aspects of a point.[145] On the other hand, movements such as palms-down and

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[143] When facing the bench, the appellant sits at the table on the left, and the appellee sits at the table on the right. The first speaker on each team—Appellant 1 and Appellee 1—sits closest to the podium. The correct style, although one not calculated to keep the arguments and counter-arguments simple, is for the entire appellant team to speak before the appellee team speaks. The logical, but incorrect, style is for the advocates to speak in the order of the moot court issue, with Appellant 1 going first; then Appellee 1; then Appellant 2; and finally Appellee 2. Although that is the default format, advocates should do what the host or judges want them to do and, as in all forms of successful advocacy, be flexible.

[144] Kritchevsky, *supra* note 38, at 70 (citing DWORSKY, *supra* note 77, at 40); Rychlak, *supra* note 116, at 535).

[145] MICHAEL R. FONTHAM, WRITTEN AND ORAL ADVOCACY 190 (1985).

steepling—placing fingertips together to form a church steeple—show respectful confidence.[146]

When used, hand gestures should be at chest level or lower, and should be consistent with what the advocate is saying. Overused gesturing, gesturing that is inconsistent or out-of-sync with a statement, or inadvertent tapping on the lectern or podium will deflect the judges' focus from the substance of the argument.[147] Further, advocates should never show hostility or disapproval by pointing, crossing their arms, or putting their hands on their hips.

Unless multiple judges ask successive questions, advocates should not take notes, or even hold a pen, while at the podium. If successive questions are asked, however, advocates may find it helpful to take brief notes about each judge's question to ensure that all the questions are answered, with the advocate scanning the entire panel and stating something like "To answer Judge Smith's question first . . . ." or "To answer the questions in the order received . . . ." Failure to answer all the questions will result in a reduction of points from the judges who feel slighted because their question went unanswered.

Throughout the oral argument, advocates should aim for a tone of respectful equality in their conversation with the judges.[148] Being overly obsequious reflects a lack of confidence that raises red flags to the judges about the merit of the advocate's argument. For example, an overly obsequious tick is saying "Your Honor" too often; four or five times a round is enough. Being overly confident is also unlikely to score points with the judges. The judges will think that an advocate who smirks is trying to be smarter than them.

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[146] *Id.* at 647. See also Harold Hongju Koh, *Ten Lessons About Appellate Oral Argument*, 71 CONN. B.J. 218, 222 (1997), which explains how to project correctly a respectful tone during an appellate argument:

> What they tell you: be respectful. What does this actually mean? Not pandering, not overly formal. The best description I've heard is: use the tone that you would use when you're initiating conversation with an elderly relative from whom you seek a large bequest. It is very important to make your presentation informal and conversational—like a seminar, not a lecture.

Id.

[147] Higdon, *supra* note 135, at 646.

[148] PHILIP A. LACAVORA ET AL., FEDERAL APPELLATE PRACTICE 458 (Philip A. Lacavora ed., 2008).

Despite its name, an oral argument is not supposed to be an argument or an oral recitation of the brief.[149] Rather, it should be a deferential conversation between the advocate and the bench. Although advocates may bring notes with them to the podium, they should not read from them. Reading suggests that the advocate is unprepared, and reading can cause nervousness or make speakers talk too fast. Reading also reduces eye contact with the bench, which stifles the conversation and prevents advocates from recognizing when a judge wants to ask a question. Maintaining eye contact with the entire bench is essential because it enhances credibility, encourages the judges to pay attention to the speaker, and makes the judges believe that you like them—all factors that improve a moot court score. Eye contact is also important because the judges' expressions can indicate whether they understand the argument and whether they like or dislike what the advocate is saying. Advocates should maintain eye contact even with those judges who ask relatively few questions; even those judges score. Occasionally, addressing the judge by title and surname (e.g., "Justice Smith") is a fine technique, but advocates should not do this too frequently and must be certain to pronounce names correctly. Using judges' names shows that the advocate is engaged in the moment and establishes endearment in a judge: A person's favorite word, after all, is his or her name.

During the conversation, advocates should be formal yet relaxed; speak clearly and in plain, simple Anglo-Saxon English; eliminate hesitant speech; and show enthusiasm and passion for their case without being aggressive or defensive. Advocates should not shout, but they should speak with moderate loudness, project from the diaphragm, and lower the range of their pitch. Advocates must work on any problematic speech pattern, including slowing themselves down if they talk too quickly (moderate speed is preferred), avoiding a Staccato-style effect of long pauses between quickly-spoken words,[150] and not speaking with their voices going up at the end of a sentence as if they are asking questions. Advocates must strive to speak so the judges can focus on their words instead of their speaking style.[151] When nervous advocates begin a thought other than the one they intended, their nervousness will be made obvious if

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[149] *See* Kritchevsky, *supra* note 38, at 67 (citing SUP. CT. R. 28(1), which provides that "[o]ral argument read from a prepared text is not favored").

[150] MURRAY & DESANCTIS, *supra* note 48, at 265.

[151] Karen J. Williams, *Help Us Help You: A Fourth Circuit Primer on Effective Appellate Oral Arguments*, 50 S.C. L. REV. 591, 598 (1999).

they correct themselves mid-sentence; it is less distracting to the judge if the advocate finishes the thought a bit clumsily instead of starting over or self-editing.[152] Further, on the principle that it is more important to be liked than to be right, judges will award a higher score to an advocate who errs but then smiles than the advocate who self-corrects, is defensive, or looks mean or disgruntled after making a mistake.

Advocates should aim for a natural tone. A friendly person should be a friendly advocate, and a serious person should be a serious advocate without scowling, staring, or glaring at anyone, especially the judges. Advocates should vary their tone, speed, inflection, and volume to keep the judges alert and emphasize an important argument.[153] Advocates should not speak in a monotone.[154] Although spontaneous humor at an advocate's own expense is acceptable, advocates should avoid planned jokes or complicated metaphors. If a judge makes a joke, advocates should politely laugh if they can do so without laughing too hard or seeming stiff or obsequious. Advocates should not change their personalities just because they are arguing a case before a bench. "Be yourself" is simplistic, but important, advice; many individuals tend toward distracting gestures, facial expressions, and voice modulations when speaking in public, especially if they are nervous. Whatever their weakness, advocates should be aware of it and try to correct it through practice. Advocates must strive to be "more polished version[s]" of themselves.[155] Whatever the style, advocates should be articulate, comfortable, and respectful.

Regardless of personality type, advocates must speak with conviction to portray that they believe what they are saying, even if they do not.[156] Advocates convey conviction by making direct assertions rather than metadiscursive ones such as "I am arguing that . . . ," "I believe that . . . ," "I feel that . . . ," "I think that . . . ," and "Petitioner contends that . . . ."[157] The goal is to forget the wind-up and just deliver the punch. Further, these empty, introductory, and nonaffirmative phrases distance the advocate

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[152] Gerald Lebovits, *Winning Oral Argument: Do's and Don'ts*, 72 QUEENS B. BULL., Nov. 20, 2008, at 1, 13, *available at* http://works.bepress.com/gerald_lebovits/134/.

[153] HELENE S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW 491 (5th ed. 2008).

[154] Rychlak, *supra* note 116, at 537 ("Closely associated with the problem of speaking too fast is the problem of being monotone. Good speakers vary tempo as well as the volume of their voice.").

[155] DWORSKY, *supra* note 77, at 24.

[156] Vaughan, *supra* note 58, at 675.

[157] SCALIA & GARNER, *supra* note 45, at 184.

from the client.[158] Advocates should also avoid adverbial excesses like "clearly," "certainly," and "obviously," which both insult the listener's intelligence[159] and raise the burden of proof or standard of review. A litigant who should be happy simply being right need not try to be clearly right.

Advocates should avoid prefatory comments. These comments include reminders such as "as I said before" and "as I mentioned previously." They suggest either that the judge was not listening to the advocate[160] or that the judge is ignorant. Either implication is undesirable. Advocates should not repeat questions; doing so highlights nervousness. Additionally, advocates should eliminate filler words and expressions such as "uh," "um," "you know," and "like."[161] One way to avoid fillers is to stand before a mirror and say the word or expression 100 times. Advocates should also eliminate cowardly qualifiers such as "usually," typically," and "generally" unless they want to give both the rule and then the exception. It is worse to be cowardly than to be wrong. A cowardly qualifier might lead to a deduction in points because moot court advocates may not equivocate in answering a question. Alternatively, the judges might not notice a small mistake or might even believe that the mistaken point is the correct one, especially if the advocate says it with enough confidence.

When answering a question or trying to resume their argument after getting off-track, advocates should pause briefly and reflect silently on what they want to say instead of stumbling through a sentence filled with

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[158] CLARY ET AL., *supra* note 60, at 123 ("Not only are such phrases inartful and wasteful of the precious minutes you are allotted, they have the effect of making it appear as if you may not really be standing behind your client's position—that you merely are paying lip-service to arguments your client has instructed you to make.").

[159] Most good moot court problems present questions of law for which there is a relatively equal split in authority. For example, two circuits might be on one side of an issue while another three circuits are on the other. Asserting that the issue is "clearly" or "obviously" one way or the other conveys disrespect toward the courts. The circuit splits, moreover, are themselves evidence that the issue is not so clear. The advocate who uses the "clearly" can expect the moot court judge to comment, "If the answer were clear, why are you here?" *See* Dimitri, *supra* note 40, at 105.

[160] *Id.* at 104 (noting that "As I said before" or "As I said earlier" can be interpreted as "Why weren't you listening to me before?").

[161] MURRAY & DESANCTIS, *supra* note 1, at 453 ("These phrases are distracting and can make the judge tune you out. Worse yet, the judge might start a score card with how many 'uhhh's' and 'ummm's' you say in your argument; take it from us—that judge is not paying proper attention to the substance of your argument any more.").

"ums" and "uhs." Not only do short, though minimal, silent pauses remove the need to use filler words, pauses might even score points with the judge who asked the question. By pausing, advocates give the impression that they appreciate the question and are preparing a thoughtful answer or argument in response.[162] However, advocates should not pause after answering a question or ask the judge whether they sufficiently answered a question. Doing so is impolite and portrays lack of confidence; that invites additional questions.

Scrupulous honesty is also important. In oral advocacy, honesty means understatement, which is an essential attribute to persuasion. The opposite of understatement is exaggeration. Advocates must never exaggerate facts or legal authority.[163] If the fastest way to lose at moot court is to violate a competition rule, the second fastest is to misstate or misrepresent a fact or the law.

One way to show honesty, especially in response to a judge's questions, is to address properly matters not in the record. It often happens that a judge will ask about things not in the moot court fact pattern. The advocate should respond to the judge with a statement such as, "The record is silent on that, Your Honor, but a fair inference from the record is that . . . ."

If an advocate does not know an answer to a question, some moot court experts suggest offering to submit a supplemental memorandum.[164] This is a practical solution in a real, ongoing case in which submitting a supplemental brief is common. In a moot court competition, however, it is merely a canned response that highlights the advocate's lack of knowledge regarding the facts or the law. A better strategy is to return to the theme to find the answer, or if all else fails, to admit ignorance, smile, and move on quickly.

V. ARGUMENT STRUCTURE AND ADVOCATING THROUGH IT

As done in the brief, advocates should strategically structure their oral argument so that it is clear, organized, and fluid. Although advocates should not read their arguments or recite a memorized speech, they should

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[162] Dimitri, *supra* note 40, at 96 ("Some judges may even be flattered that you are displaying some thoughtfulness about their questions by pausing before you answer them.").

[163] MYRON MOSKOVITZ, WINNING AN APPEAL 74 (4th ed. 2007).

[164] *See, e.g.*, LACAVORA, *supra* note 148, at 462.

memorize their introduction and roadmap so that they can establish eye contact the moment they start speaking.[165]

Because advocates have the court's maximum attention at the start, they should begin with information that facilitates the conversation and effectively states their position. In a standard moot court introduction, an advocate introduces himself or herself and co-counsel and identifies the party represented. The introduction may proceed along these lines: "Chief Justice, Your Honors, and may it please the Court.[166] My name is Robert Jones and together with Brittany Scott (*counsel offers a hand gesture in co-counsel's direction while co-counsel stands as introduced and then sits down*), I represent the appellant, Gary Hoover." The appellant then asks the court to reserve time for rebuttal: "Chief Justice, appellant respectfully requests [or reserves] two minutes for rebuttal."

Advocates must avoid appeals to emotion. Some advocates begin by saying, "This case is about . . . ," but such a beginning invites questioning and excites controversy too early in the argument, a time when the advocate must try to get through the roadmap without a judge's hostile interruption. Saying "this case is about" might cause a tough judge to say "No. Isn't this case really about your adversary's point that . . . ?" Further, unlike juries, judges are concerned with the rule of law and the ramifications of the rule.[167] Judges do not want to be pigeonholed into an either/or debate.

After requesting rebuttal time, the advocate should use one conclusory and argumentative sentence to describe the issue that co-counsel will address (e.g., "Co-counsel will argue that the trial court erred by . . . ."), followed by the issue that the advocate will address ("While I will argue that . . . ."). It is a lost opportunity to begin neutrally by saying, "My co-counsel will argue the first issue [or the First Amendment issue], while I will argue the second issue [or the Fourth Amendment issue]."

Next, the advocate should devote one to three short sentences to providing procedure or facts that help the argument. The facts must be determinative, meaning that they are the most essential and favorable facts to obtaining the relief sought and not merely opinions. These facts provide context, help any judge unfamiliar with the case, and offer a winning

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[165] One way to memorize a script is to write it out a few times by hand and then to practice it until the speaker recalls by heart every syllable in the script.

[166] *See* MURRAY & DESANCTIS, *supra* note 1, at 442 (noting that if a speaker bucks the "may it please the court" convention, the judge might "view [the speaker's] free-spirited thinking as rebellion").

[167] *See* SCALIA & GARNER, *supra* note 45, at 32.

platform from the start. For example, the speaker could state the following:

> [Fact], [fact], and [fact]. Despite those facts, the trial court decided that [trial court's decision]. We therefore ask this court to reverse the trial court's decision and remand for a new trial. First, ...

Only a novice—or someone with a novice for a coach—will ask the judges: "Would Your Honors like a brief recitation of the facts?" Advocates should avoid embarrassing moot court judges by asking them questions.[168] Asking the judges whether they want to hear the facts, moreover, might be a losing proposition. If the judges say no, they might do so in a way that will embarrass the speaker, such as by harshly saying, "We are familiar with the facts, counselor. Move on." Alternatively, if the judge says that the panel would like to hear the facts, it is to pacify the speaker, not because the judges want to hear the facts. Then, after the advocate wastes a precious minute or two meandering through the facts, the tired judges will inevitably still interrupt the advocate with a harsh "We're familiar with the facts, counselor. Please move on."

Immediately after giving the determinative facts, the advocate should state the relief the client seeks—to affirm, modify, or reverse the judgment. For example, the speaker could state the following: "Therefore, this Court should affirm [or modify or remand] the decision of the Court of Appeals for the Second Circuit." Advocates should not use "lower court" when arguing before the Supreme Court of the United States or a state supreme court.[169] Unless the court to which the argument is being made is a court of intermediate appellate jurisdiction, there will be two "lower courts," and the judges will not know to which the advocate is referring. Precision is important.

Next, the advocate must give two to three reasons the moot court should grant the requested relief, without stating "for two reasons." The reasons must be emphatically short and outcome-determinative.

At this point, the advocate has finished the roadmap—the table of contents that tells the court how it should rule, why it should rule that way, and how the discussion should progress. It provides structure and clarity to

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[168] ALAN D. HORNSTEIN, APPELLATE ADVOCACY IN A NUTSHELL § 8-2, at 242 (2d ed. 1998) ("[Q]uestions initiated by the advocate to the court are simply inappropriate.").

[169] *See, e.g.*, LAWRENCE BRENNAN ET AL., HANDBOOK OF APPELLATE ADVOCACY 97 (3d ed. 1993) (showing an example of an appellate argument to a court of last resort identifying the "district court" and "court of appeals" versus the "lower courts").

the argument and assists the judges in understanding the main points. It will take immense practice to nail down a perfect roadmap—one that lasts not a fraction longer than sixty seconds—but the effort is worth it.

Some judges decline to give advocates the luxury of presenting a roadmap. If a judge interrupts with a question during the roadmap, the advocate should answer it quickly, but adequately, and return to the roadmap. If too much time has passed, the advocate should instead continue with the argument and abandon the roadmap.

Once the first advocate on the appellant team has finished, the second advocate should introduce himself or herself along similar lines ("Chief Justice, Your Honors, and may it please the court. My name is Brittany Scott and I also represent the Appellant, Gary Hoover). The second advocate should then quickly give the facts, state the relief requested, and give the two or three reasons why the client should win, just as the first advocate did.

Advocates should begin with their strongest point, even if this point did not surface first in the brief or the roadmap. If the court proceeds to question advocates intensely, advocates will have at least already made their best argument.[170] Advocates who are appellees should pay close attention not only to their adversaries' arguments but also to the questions the court asks of the appellants; those questions will indicate which aspects of the appellant's case are problematic to the court.[171] If the court seems to be looking at the appellant's arguments unfavorably, the appellees can move quickly into their own arguments without undermining their adversaries' arguments further.[172] If the appellant has raised issues of jurisdiction, however, the appellees should address those immediately, before presenting their own substantive arguments.[173]

Advocates must use their time wisely to stress the most important reasons the court should rule in their favor. To do so, advocates should be mindful of the time cards without being distracted by them.[174] Although the judges' concerns are important, advocates should not neglect major arguments for the sake of answering questions. The judges ask the questions, but the advocate must retain control or risk losing a dramatic number of points. The same judge who asks questions and makes

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[170] BRYAN A. GARNER, THE WINNING ORAL ARGUMENT 133 (2009).

[171] SHAPO ET AL., *supra* note 153, at 488.

[172] SCALIA & GARNER, *supra* note 45, at 170.

[173] *Id.* at 171.

[174] In a typical fifteen-minute presentation, the clerk or bailiff will raise the time card at *10*, *5*, *3*, *1*, and *Time*.

comments with the intent to seize control from the advocate will deduct points when the advocate loses control. Some moot court judges use rapid-fire questioning to test whether advocates can maintain control of their arguments. Other judges do so because they would prefer to hear their own voices than hear from the students. Advocates will earn points if they remain composed and continue to move through their arguments. This balancing act requires the advocates to keep track of how much time they spend on each point and how much time is left to address remaining points. Generally, by the five-minute-remaining mark, advocates should be on their last point. If they have not covered an important point by this time, they should move the conversation to that point.

Advocates should avoid lengthy quotations; spoken block quotations are as distracting to a listener as they are to a reader. A short quotation from a case or from the fact pattern may, however, be a useful reference to amplify support for the argument.

Advocates should cite cases in support of the argument, but only when they know the facts of the cases they cite. It is one thing not to know the facts of a case about which a judge asks. It is another not to know the facts of a case the advocate raised, as the judges often ask about the facts of a case. Sometimes moot court judges ask about the facts to show that the advocate's citation is inapposite. Sometimes they ask about the facts because they do not know what else to ask.

When moving between points, advocates should clearly indicate that they are doing so. For example, after finishing a discussion on their first point, advocates should transition explicitly to their second point—perhaps by saying, "This brings me to my second point."

It is also important when going through an argument that each advocate addresses the other side's contentions. The appellant does this to lay a minefield for the appellee. The goal is to have the judges repeat its point to the appellee. The appellee's goal is to throw the bombs right back at the appellant and perhaps even get a judge to use the appellee's point to question an appellant during any possible rebuttal.

VI. ANSWERING QUESTIONS

"A question is an invitation to persuade."[175] Advocates should encourage questions and use them to engage the bench and clarify

[175] Wice, *supra* note 141, at 228 (quoting Justice Robert Jackson); Vitiello, *supra* note 9, at 890 (arguing that questions from the bench give counsel the opportunity to persuade the court).

concerns the bench might have about a particular issue. It is an opportunity to persuade the court to adopt a client's viewpoint. In a typical competition round, judges repeatedly interrupt advocates with questions.[176] Questions in preliminary rounds of moot court competitions tend to focus on the facts, while later rounds with more seasoned moot court judges tend to be more law- and policy-driven. Advocates should welcome a conversation with the bench.[177] Questions from judges give advocates a chance to persuade by supporting answers with information that helps the court understand the argument and rule in the advocate's favor.[178] Questions also allow for personal interaction and enable the advocate to persuade the judges not only to believe the argument but also to like the advocate.

With one exception explained later in this Article, the moment a judge asks a question (or even hints verbally or by facial expression at a desire to ask a question), the advocate must immediately cease speaking, even in mid-syllable and even if the judge is being rude. Speaking over a judge is one of the worst mistakes an advocate can make, both in a moot court competition and in any judge's courtroom. The judges are the masters of the room. Giving deference to them is mandatory. Further, an advocate who speaks over a judge signals that the advocate does not like the judge, who will in turn dislike the advocate, resulting in a poor score, both for ignoring accepted norms of courtroom decorum and for being impolite.

How an advocate answers questions determines, more than any other factor, whether the team will win or lose. Advocates must listen carefully to the questions,[179] understand them, and address them directly. Advocates must warmly welcome questions and never show annoyance or frustration. Advocates may not resist a question or evade an answer. Every yes-or-no

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[176] Dimitri, *supra* note 40, at 95 ("Rarely is an oral argument uninterrupted by questions from the bench."); Vaughan, *supra* note 58, at 670 ("It is normal for an oral advocate to be interrupted by questions.").

[177] *See* Wice, *supra* note 141, at 228. To welcome a question is never to get defensive in response to a question. *See, e.g.*, Lawrence W. Pierce, *Appellate Advocacy: Some Reflections from the Bench*, 61 FORDHAM L. REV. 829, 840 (1993) ("One of the serious mistakes counsel can make while arguing an appeal is becoming defensive . . . .").

[178] Vaughan, *supra* note 58, at 676; Vitiello, *supra* note 9, at 891 ("[E]ngaging the court in a dialogue during which counsel effectively addresses the court's concerns is the primary tool of the successful oral advocate.").

[179] William H. Rehnquist, *Oral Advocacy*, 27 S. TEX. L. REV. 289, 302 (1986) ("If you are going to be able to intelligently answer a question, you must first *listen* to the question.").

question must begin with a "yes" or "no" answer,[180] followed by the reason, which may include supportive facts from the fact pattern and a citation to the law. Advocates must answer not only succinctly and concisely, but also fully and completely.[181]

Some questions are intended to serve as "devil's advocate" to see whether the advocate can defend the position asserted.[182] These questions, while the most difficult of all, present some of the best opportunities for the advocate to score points. The advocate should answer the question in a conciliatory way when the judge is right and offer a fact, statutory provision, or case to support the judge's point but then segue back to the original argument. The advocate's goal is to use a judge's question to the advocate's advantage.

Advocates must recognize when a judge is trying to assist them by using a question to direct to a stronger argument.[183] The judge may also be attempting to make a point to colleagues on the bench indirectly through an advocate's answer. Advocates should not assume that a softball question is a trap,[184] but must know the difference between a softball and a hand grenade.

Advocates should also be prepared to handle unclear, irrelevant, or rapid-fire questioning. Advocates who do not understand the question may politely ask the judge to clarify. However, advocates should err on the side of not asking for clarification because they risk embarrassing a nervous

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[180] *See* Vitiello, *supra* note 9, at 889–90 (asserting that the proper response to a "yes" or "no" question from the bench is "a direct 'yes' or 'no' answer."); Williams, *supra* note 151, at 599 ("Respond immediately to a question with a 'yes,' 'no,' 'it depends,' or 'I don't know.' Follow the short answer with a concise explanation and citation to the record or precedent as necessary."). As one Moot Court Board tells the students who compete in its intramural competition, "Don't stack laws before answering a question—first answer the question, then cite authority to support the proposition." N.Y. Law Sch. Moot Court Ass'n, 2012 Charles W. Froessel Intramural Competition, *Tips for a Successful Oral Argument* 2, http://www.nyls.edu/user_files/1/3/4/184/1293/Moot%20Camp%202012%20Packet-2.pdf [hereinafter New York Law School Tips].

[181] MURRAY & DESANCTIS, *supra* note 1, at 459 ("Complete answers are better than quick answers.").

[182] *See* Wice, *supra* note 141, at 229.

[183] *See* Barger, *supra* note 54, at 17 (observing that advocates who "[t]reat every question as a hostile one" are unlikely to win a moot court round); Wice, *supra* note 141, at 229 ("The worst mistake you can make is to fail to detect a softball question and hit it out of the park.").

[184] LACAVORA, *supra* note 148, at 466.

judge who asked a clumsy, inarticulate question. The embarrassed judge and the judge's friends on the panel might punish the advocate with a poor score. To avoid questioning a judge directly, a courteous way to invite clarification is to preface an answer to an unclear question with "If Your Honor is asking whether . . . , then . . . ."[185] An advocate should never confront a judge by suggesting that a question is irrelevant; rather, the advocate should answer briefly and return the court's focus to the main issues, assuming that other judges will pursue the question if there is hidden relevance.[186]

Questions should be answered directly and concisely but in a manner that supports the case. Advocates should not fawn over a judge's question (e.g., "That's a brilliant question, Your Honor!").[187] If pressed and questioned on the facts, advocates should give page numbers from the record. Advocates who give page numbers during their main argument, however, look like showoffs. Advocates should not give a more complicated answer than necessary. Doing so could potentially invite more questions.[188] When giving citations to the court, advocates need to give only the court's name and the date of the decision; not the full citation. The "v." in case citations should be stated as "versus," not "vee." If a judge asks hypotheticals—a parade of horribles or worse-case-scenario questions—or policy-oriented questions that lead down a slippery slope, advocates should still answer with a "yes" or "no," and then distinguish the premises of their own case from those of the hypothetical, if necessary.[189] The advocate should not fight the hypothetical by saying, "But that is not this case, Your Honor." If the rule a team is proposing in its case applies to a judge's hypothetical, advocates should acknowledge this to remain credible and then demonstrate that applying the rule even to the hypothetical facts will not lead to an absurd or unjust result.[190]

Advocates should answer the judges' questions immediately and never tell a judge, "I will get to that later." Doing so is inappropriate and

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[185] *Id.* at 462.

[186] *Id.* at 467.

[187] SCALIA & GARNER, *supra* note 45, at 194.

[188] NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., LEGAL WRITING AND OTHER LAWYERING SKILLS 316 (5th ed. 2010).

[189] LACAVORA, *supra* note 148, at 465.

[190] MOSKOVITZ, *supra* note 163, at 76.

disrespectful.[191] Instead, the advocate should answer the question right away, even if the question relates to a different part of the argument and even if the judge asked it because the judge was not advertently following the order of the argument, or because the judge was confused. After answering the question, the advocate can then return to the argument. It is also inappropriate to show frustration, annoyance, or hostility, such as by stating, "With all due respect."[192] Advocates should never follow-up their answers by asking whether they answered a judge's question.[193] The advocate should simply move on and hope for the best.

Sometimes judges ask about a teammate's argument. That may happen if the teammates' issues are related, if the first speaker for each team did not did not give a clear roadmap dividing the issues, or if the judge is confused or unprepared. The advocates must answer the question based on the teammate's issue. It is possible that the teammate will be bombarded with other issues leaving the initial judge's question unresolved. Many judges dislike being told, "My teammate will address that issue." The advocate should be familiar enough with a teammate's issues to offer at least a cursory answer.[194] The advocate can close that cursory answer by noting, "as Ms. Scott, my co-counsel, will address in detail in a few moments." That will put an end to the judge's questioning. The judge will realize that the advocate was asked about the teammate's issue, the judge will be impressed that the advocate knew the teammate's issue well enough to answer a question on it, and the judge will not be embarrassed by being told, by inference, "You idiot. You're asking about my teammate's issue."

When agreeing with a judge, advocates should explain why the judge is correct. When a judge makes a point that contradicts what an advocate said, the advocate should still explain why the judge is correct and then add a "but" statement to recover.

Advocates should not fear disagreeing with a judge or conceding a weakness in their case when conceding means merely acknowledging the

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[191] Kravitz, *supra* note 44, at 212 ("Never say, 'I'll get to that later.' The judge wants to explore the issue now, not when you get to page 10 of your outline . . . . The Court will likely lose patience if you try to postpone your response to the judges' questions.").

[192] New York Law School Tips, *supra* note 180, at 2 ("[S]ay[ing] 'with all due respect' . . . is another way to tell the judge he is an absolute moron.").

[193] GARNER, *supra* note 170, at 194 ("Never ask whether you've adequately answered a question . . . .").

[194] RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 419 n.1 (6th ed. 2009).

weakness. If conceding is appropriate, meaning that it will not affect the ultimate outcome of the case or substantially weaken the advocate's argument, the concession will probably increase the advocate's credibility with the court.[195] Not conceding in the same situation, however, might cause advocates to appear unreasonable and to lose credibility.[196] Yet, advocates should be aware of questions from judges that specifically invite concessions (e.g., "Counsel, do you agree that . . . ?).[197] Judges use facts or points conceded to rule against a position; advocates should be wary of contributing to their own demise.[198] When answering all types of questions, advocates should focus on the judge who asked the question but still maintain eye contact with the entire bench.[199]

Advocates must be prepared for the standard moot court questions. Like questions about the standard of review, discussed earlier, other questions commonly arise. One moot court standard is, "Counselor, if we rule against you on this point, do you lose?" The advocate must then say "No, because in the alternative . . . ." or "Yes, we will lose," and then pause briefly and say, "but we ask you instead to find *X* because . . . ." Other standard questions include: "What rule should we adopt," "What relief are you seeking," and "Are you asking for a bright-line rule that . . . ?" Advocates must prepare and diligently practice good answers to these standard questions.

Advocates should remain calm when dealing with an overly aggressive bench that asks long questions and continually cuts off advocates. Although that situation is frustrating, it is important to keep in mind that winning an oral argument in a moot court competition does not mean winning on the merits. Because moot court competitions grade performance, giving full, descriptive answers is less important than how advocates handle being accosted by a rogue judge or bench. Advocates should keep their emotions in check and not abandon their deferential attitude toward the bench. Yet, if an aggressive judge is preventing an advocate from answering almost every question, it is preferable to speak over the judge than to remain silent. The advocate might lose points from that judge, but an advocate who says nothing and cannot make a case will

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[195] Dimitri, *supra* note 40, at 98.

[196] *Id.*

[197] SCALIA & GARNER, *supra* note 45, at 199.

[198] LACAVORA, *supra* note 148, at 463.

[199] Vaughan, *supra* note 58, at 676 (noting the persuasive value of maintaining eye contact with each judge, even the ones not asking a question).

most definitely lose. The advocate might even get extra points from the other judges for keeping a loudmouth judge in check.

A volley of hostile questions might result when two judges have a "tennis match" with each other—approaching a legal point with different perspectives and using the advocate as the ball to make their points.[200] The advocate should still answer the questions as honestly and courteously as possible, keeping in mind that oral argument is not just a conversation between advocate and judge, but also a conversation among the judges themselves.[201]

The most difficult hurdle an advocate faces when answering questions is transitioning from the answer to an affirmative point.[202] Advocates should not wait for judges to let them return to their main argument.[203] Finding a way to relate the answer to one of the points that an advocate intends to make can be accomplished by thinking of probable questions at the preparation stage and practicing forming answers that bring the discussion back to a favorable point. At a minimum, advocates should strive to relate their answer to their theme and to use the theme to transition back to their argument.

Advocates must listen carefully to the questions the judges ask and the comments the judges make when others ahead of them are speaking.[204] When it is the advocate's turn, the advocate can, perhaps in response to a question, reference the point or question the judge made earlier. The judges will note how attentive and extemporaneous the advocate was to pick up on the judge's earlier words, and the judge will be flattered by the advocate's reference.[205] The advocate should not, however, turn a judge's prior question into a statement, such as by saying "As Judge Smith argued

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[200] LACAVORA, *supra* note 148, at 465.

[201] *Id.*

[202] *See* Bishop, *supra* note 35, at 10 ("One of your greatest challenges at oral argument is making a transition from a difficult or an unfavorable line of questioning back to your own affirmative points."); Dimitri, *supra* note 40, at 97.

[203] EDWARDS, *supra* note 36, at 374.

[204] Advocates must also maintain a good poker face during opposing counsels' presentation: "If your opponent makes a great point, do not blanch and furiously start looking up things in your materials in a panic." MURRAY & DESANCTIS, *supra* note 1, at 468.

[205] Alfonso M. Saldana, *Beyond the Appellate Brief: A Guide to Preparing and Delivering the Oral Argument*, 69 FLA. B.J. 28, 32 (May 1995) (noting that advocates transition effectively when they "pick up on a line of the court's discussion which was unfavorable to appellant but is favorable to appellee").

earlier" when that judge merely asked a question. Judges do not argue. It is impolite to suggest that a judge, even a moot court judge, is biased or has a predetermined position before hearing the entire argument.

VII. CONCLUSION OF ARGUMENT

The typical moot court conclusion flows from the end of the argument and conjures up the original theme. It includes the advocate's major points as justification for the position and ends with the relief sought. Given a few moments after the advocate sees the one-minute time card go up, it is succinct and concise, lasting no longer than ten to fifteen seconds. The typical moot court conclusion is canned, repetitive, and boring. Even when done well, the judges do not listen to them. Conclusions will not harm the argument, but they will not contribute to high scores either. The exception is when the competition score sheet tells the judges to score a conclusion. In that case, advocates should always conclude, even if it is repetitive or boring and the judges are sure to tune out.

At moot court competitions, excellent oral rounds often end not when an advocate proffers a conclusion but when the advocate runs out of time answering a question. Advocates should not be upset if their team does not have time to make the typical canned conclusion.

Advocates should feel comfortable concluding the argument naturally, even if additional time remains. A frequent mistake in moot court oral argument is to use all the allotted time, even when the advocate has exhausted the universe of points relevant to the argument.[206] Even worse is trying to squeeze in one more big point in the final seconds of the argument.[207] Advocates should not finish unless they are inside the two-minute remaining mark; a judge might believe that an advocate who ends too early is unprepared. Within the two-minute mark, however, advocates should stop if they end the argument on a high note, with a strong statement that supports their position. This can be accomplished with a strong answer to a question or with emphasis on the strongest point of their argument. Advocates who end early should state, "If there are no further questions . . . ," smile, and return to their seats. An even better high point occurs when a judge says something clever that causes everyone to laugh within the two-minute mark. The judges will like and score well the

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[206] The judges will be happy if you end a bit early. John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 898 (1940) ("[W]hen you round out your argument and sit down before your time has expired, a benevolent smile overspreads the faces on the bench . . . .").

[207] MURRAY & DESANCTIS, *supra* note 1, at 453 ("A rushed end to the argument will leave a bad taste in the judges' mouths.").

advocate who defers to the judge and sits down without trying to get the last word in.

Should the time run out, the advocate should immediately stop (unless the advocate has only four or five words remaining) and ask the chief justice or judge for permission briefly to finish answering a question or thought by stating: "Chief Justice/Judge, I see that my time is up [or has expired]. May I finish my thought [or answer the question]?" After the time has expired, advocates should not request extra time to make a new point or to deliver a prepared, canned conclusion—to which the judges will not listen. When the time card goes up, the advocate is on the judges' time. The judges will not want to hear a canned conclusion when the competition host may have told them to be mindful of the time. Once the argument ends, advocates should thank the bench with a simple "thank you"[208] or a nod, and then calmly and deliberately return to counsel table to take their seat.[209]

VIII. REBUTTAL

The best rebuttals are concise and direct. At the beginning of the argument (when the first appellant begins the presentation), the advocate should ask the chief justice or judge to reserve time for rebuttal. Requesting the court's permission for rebuttal time is essential even if rebuttal time is reserved with the bailiff before the round begins. Otherwise, the judges might not know that appellant's counsel will be rebutting. When given, rebuttal may proceed along the lines of "Chief Justice/Judge: Two quick points on rebuttal. First, appellee argues on the [first] issue [objective statement of issue] that . . . . But, ... Second, appellee argues on the [second] issue [objective statement of issue] that . . . . But, ... Thank you." Advocates should move through rebuttal quickly so that judges will not bombard the advocates with new questions. Effective advocates will attempt to complete their rebuttal in thirty seconds.

Appellants should reserve no more than three minutes for rebuttal, and ideally, should reserve only two. When the appellee has completed the presentation, the appellant's counsel delivering the rebuttal should immediately go to the lectern or podium and wait there until the chief

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[208] GARNER, *supra* note 170, at 154 ("If time permits, close by saying 'Thank you.' Then pause briefly. Don't rush from the lectern.").

[209] Kritchevsky, *supra* note 38, at 69 ("It is also important that student advocates recognize that they do not have to use all their allotted time . . . [and] should sit down when they have said what they need to say . . . .").

justice or judge indicates that the panel is ready. Once the panel is ready, the appellant's counsel should give two brief points, one point on each issue. Each point should emphasize a winning point in the appellant's argument or attack a glaring weakness in the appellee's arguments, without making bold or controversial statements that would provoke questions from the bench.

In real appellate cases, the rebutting counsel should point out an undisputed fact that the appellee overlooked or misrepresented, or a legal authority or fact that contradicts the appellee's arguments.[210] In moot court, rebuttals simply remind the judges who the advocates for the appellant are.[211] In real appellate advocacy, broad, sweeping statements should be avoided.[212] In moot court, the best rebuttals are all about broad, sweeping statements. In real cases, rebuttal is not an opportunity to restate an argument.[213] In moot court, an advocate should use a rebuttal precisely to restate a point, especially if their adversaries undermined the point's validity. In real appellate advocacy, rebuttal is an opportunity to point out the glaring errors and omissions in the other side's argument.[214] In moot court, judges might chide advocates as bombastic if they use a rebuttal to point out minor errors or inconsistencies in their adversaries' arguments.[215] In real cases, advocates may use notes on rebuttal. In moot court, advocates must deliver their rebuttals from memory. Rebutting advocates should briefly place their hands on the lectern or podium before they begin to show the judges that they have no notes. In real appellate advocacy, the

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[210] *See, e.g.*, Wice, *supra* note 141, at 229–30 (advising rebutting counsel to point out opposing counsel's misstatements of law or facts and the inability to answer a question satisfactorily).

[211] NOAMAN AZHAR, UNDERSTANDING MOOT COURT 15 (n.d.), http://www.ttubob.org/wp-content/uploads/2012/08/Understanding-Moot-Court.pdf (noting that only the petitioners have the opportunity for rebuttal in moot court).

[212] SCALIA & GARNER, *supra* note 45, at 24 (cautioning against presentation of points in a "confused or needlessly expansive manner.").

[213] Wice, *supra* note 141, at 230.

[214] *Id.* at 229–30 ("If your opponent has misstated the law or the facts or has been unable to answer a question or has done so incorrectly, bring this fact to the court's attention immediately.").

[215] *Cf.* Stephen J. Dwyer et al., *Effective Oral Argument: Six Pitches, Five Do's, and Five Don'ts from One Judge and Two Lawyers*, 33 SEATTLE U. L. REV. 347, 356 (2010) ("If you want to be an excellent advocate for your clients, stick to the facts and the law, and don't try to stick it to opposing counsel.").

best rebuttals are long remembered. The best moot court rebuttals are those the judges forget within ten seconds of ending.[216]

The moot court rebuttal should be as short and punchy as possible; a quick rebuttal might prevent judges from asking questions. Questions during a rebuttal are bad—they lead to a protracted colloquy that might result in a mistake that can be fatal because it is the last memory the court has of the advocates. A moot court round is never won, but is sometimes lost, on rebuttal.

A moot court rebuttal is not always necessary. In a head-to-head round, if the opponent has done poorly and the team is convinced that the panel has selected it as the winner of the round (based on brief and oral argument scores), the team should waive rebuttal, even if the team has much to say.[217] There is no reason to continue the argument if the team has won the round. At that point, rebuttal will not help the team win the round, but it might cause them to lose it. Waiving rebuttal should be done from the counsel table rather than the podium. The judges will be let down if the advocate goes to the podium only to waive rebuttal—an exercise that was a waste of time. If cumulative point scoring is the standard, however, advocates should always rebut—even if they believe they have already won the round—because they could further increase their point total. To waive rebuttal, the advocate should state: "Chief Justice/Judge, petitioner respectfully waives rebuttal."

IX. REFLECTION

It is customary for moot court judges to comment after each round. Whether the comments are supportive or critical, general or specific, the comments often do not reflect the judges' scores. Judges might say that each advocate did a great job (e.g., "Best round ever" or "I wish lawyers before me in court were this prepared") when in fact, the judges scored the advocates poorly. Judges might single out advocates who got low scores and commend them yet say nothing about the advocates who received the highest scores. Because a judge's comments are not indicative of the scores given to the advocates, advocates should not become too pleased or upset by them, or reflexively change what they are doing pursuant to them.

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[216] Moot court differs from real life in many ways. Lebovits, *supra* note 152, at 1 ("In real life, all that counts [are] the merits. Real judges do not decide which litigant wins on the basis of which side has the better lawyer.").

[217] *See* Wice, *supra* note 141, at 230 ("If your opponent has totally self-destructed, consider waiving rebuttal altogether or keep your rebuttal to a bare minimum.").

Notwithstanding, advocates should not be dismissive of the comments, either. Advocates must learn from each round.

Although the atmosphere is more relaxed during a critique than during the moot court round, advocates are expected to continue acting professionally and courteously. This includes refraining from talking back to judges who have negative criticism. Until the judges leave the room, the advocate must be professional.

X. DEBRIEFING

If time remains after the comments have concluded, advocates should meet with their coach or teammates to debrief the round. This includes identifying the mistakes the advocates made and the successes the advocates realized during the round. Criticism is healthy because it allows advocates to implement improvements. The mistakes will be fresh in the advocates' memory for the next argument. Coaches share in the joy and in the defeat of their team members, but they should also spur advocates to prepare and adjust for the next round.

A debriefing period also allows advocates to identify the strengths and weaknesses of their opponents' arguments, which is important because the advocates may argue the opposing side in a future round. Advocates should use the time between rounds to identify the opponents' substantive arguments and gauge the judges' reactions to their presentation. This will serve as a sneak peak, of sorts, of the opposing team's future presentations.

XI. THE COACH'S ROLE

Behind every successful moot court team is a dedicated shadow team,[218] student coach, faculty advisor, or alumni advisor—or all four in an effective moot court program—who provide vital support at various points of preparation, practice rounds, and competition. As moot court competitors prepare for a competition, an effective coach or advisor is proactive to ensure that a team is intellectually and logistically prepared. Coaches should ensure that team members submit their briefs on time and complete practice rounds. Coaches should accompany their teams to competitions and help them throughout the process. They should also protest in the event of rule violations, help participants with last-minute refinements to arguments, and make sure that partners are splitting the work appropriately. When competitions so permit, coaches should be

[218] Shadow teams write bench briefs, moot the student-advocates, and compete in the competition the following year.

listed as team members so that they may work on the brief and sit at the counsel table. Coaches should keep the law school's moot court board informed of the team's progress and attempt to earn the competitors academic credit for their efforts. Coaches should also take photos and video for the competitors, the Moot Court Board, and the law school to keep after the competition is over.

The coaches should ensure that the law school, not a student, keeps any trophy that the team receives and that it is put in a prominent place inside the school. However, good coaches might arrange for the school to pay for a duplicate so that team members have something to show for their efforts.

Faculty advisors must coach with a light touch, as if they are cheerleaders from the sidelines offering encouragement and suggestions.[219] The cheerleading role is required, not merely by competition rules, which allow only limited faculty assistance, but also by common sense.[220] Faculty advisors ought not to dictate how students argue, which students should argue, or in which competitions students should participate; these jobs belong to a student-run moot court board. Doing so interferes with student independence and is counterproductive because the students, not the teachers, write the briefs, deliver the oral argument, and put in the time and effort preparing for and participating in the competition. The professors may be judged on their coaching skills, but only the students should be judged on their advocacy skills.

For a faculty advisor, winning is not the only thing.[221] Although teaching and winning are not always mutually exclusive, when the two collide, teaching is paramount: teaching is more important than winning. To teach, the advisor must emphasize the positive, offer opportunities to learn, and give students real and heartfelt encouragement.

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[219] *Contra* Sanford N. Greenberg, *Appellate Advocacy Competitions: Let's Loosen Some Restrictions on Faculty Assistance*, 49 J. LEGAL EDUC. 545, 548, 554 (1999). A survey respondent indicated that most schools simply ignore these rules. *Id.* at 548. Additionally, it is argued that unlimited assistance better accomplishes the pedagogical purpose of moot court than limited assistance. *Id.* at 554.

[220] *Id.* at 545.

[221] *See generally* Nancy L. Schultz, *Lessons from Positive Psychology for Developing Advocacy Skills* 3 (Chapman Univ. Sch. of Law Legal Studies Research Series Paper No. 12-8), *available at* http://ssrn.com/abstract=2007212 (stating that the experience should be primarily about learning, with winning being secondary).

XII. CONCLUSION

This Article has attempted to provide moot court competitors with a perspective on the benefits of participating in moot court and a guide to follow in preparing for and winning a moot court competition. Some would-be competitors will advance in competition if they are charismatic and speak well in public, but even they must work hard, practice endlessly, and learn the substantive law and the ropes of moot court. In other words, "Those of us without talent for oratory can certainly be effective oral advocates; those who are gifted speakers cannot get by on their gift alone."[222]

Moot court competitors should remember that a good oral argument in a moot court competition is like a conversation in which an advocate's goal is to convince the court to rule in the team's favor. To accomplish this goal, advocates should prepare a well-organized argument explaining how the court should decide the hypothetical case and why legal authority, policy, and common sense support the proposed ruling. Advocates should view questions from the judges not as interruptions but as insights into concerns that could preclude the judges from ruling in the advocates' favor. Even the best argument can be lost on the listener when presented with distracting body language and gestures, rapid pace, and unprofessional behavior. When a well-structured argument is delivered with appropriate speed, emphasis, and eye contact, and both parties listen and respond courteously to what the other says, the listener becomes more receptive to the speaker, and the speaker's argument becomes more persuasive. The result is an excellent oral argument in which the judge likes the speaker and forgives the speaker's minor mistakes. That increases the student-advocate's chances of winning the competition.

Moot court competitors should not underestimate the importance of wanting to win. Following the guidelines outlined in this Article demands substantial time and energy, but the effort will pay great dividends to the determined advocate. It will help the determined advocate become a moot court champion, return to the law school with some hardware, and develop important skills that will lead to a successful career as an attorney.

The odds are that the advocate will not win. It is simple math: a dozen or even dozens of teams, but only one winner. Even in the event of a loss, we hope that the advocate will recall the moot court experience with fondness, having had fun and having learned a lot about legal writing and

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[222] Timothy A. Baughman, *Effective Appellate Oral Advocacy: "Beauty is Truth, Truth Beauty,"* 77 MICH. B.J., Jan. 1988, at 38, 38.

oral advocacy. We hope that the moot court exhilaration will lead the student to enter another moot court competition, coach a moot court team, and judge moot court upon graduation.

Note to readers: Given the preceding, the authors respectfully waive rebuttal.

APPENDIX

A WINNING MOOT COURT ORAL-ARGUMENT CHECKLIST

Here are the key guidelines that moot court oral advocates should heed closely.[223]

- To increase your chances of winning a moot court competition, attend a law school that has an independent moot court board. The board should have the final say, consistent with its bylaws and the school's budgetary considerations, on who will join the board, who will be officers of the board, in which competitions the team will compete, who will compete in them, and who will argue which issues. To win competitions, the law school must offer an appellate-advocacy or skills course that its moot court students can take that is taught by a faculty member committed to moot court. The school must support its moot court board and its teams with student shadow teams, student coaches, alumni advisors, and faculty advisors. The law school must also (1) award academic credit and writing-requirement satisfaction for competing and coaching; (2) erect trophy-display cases and then display the trophies and plaques prominently; and (3) confer plenty of moot court awards, including Order of Barristers membership, at commencement. If your law school does not do all these things, fight for them.
- During your time on the moot court board, support your team. Conduct practice rounds for other board members and attend their competitions. You will learn and develop camaraderie as part of a winning team. When it is your turn to compete, your friends will help you.

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[223] For a fun list of moot court oral-argument do's and don'ts in the Philip C. Jessup International Law Moot Court Competition context, see *Jessup Moot Court Competition—21 Tips from 21 Judges*, INSIDE JUSTICE (Apr. 1, 2009), http://www.insidejustice.com/law/index.php/intl/2009/04/01/jessup_advice_oralists (list of do's); *Top 21 Reverse Tips for Moot Court Oral Arguments (with commentary)*, INSIDE JUSTICE (MAR. 11, 2010), http://www.insidejustice.com/law/index.php/intl/2010/03/11/p243 (list of don'ts).

- Once chosen to compete in a particular competition, read and study the fact pattern immediately upon its release. Next, choose a theme that an intelligent nonlawyer will understand. The theme unifies the issues with the essence of the case and suggests that justice will suffer if the court rules against the advocate.
- Practice oral argument with your teammates before finishing the brief. Practice with nonteammates, too, if the rules do not forbid doing so.
- After the brief is submitted, practice tirelessly before the competition with a variety of judges using a variety of questioning styles—especially tough, aggressive questions.
- Give the practice-round judges good briefs written by your shadow team or by opposing competitors who wrote for the side against which you are arguing.
- Pay attention to the questions asked in practice and further research their answers after the practice round.
- Comply with the competition rules and take advantage of them to earn the maximum score.
- Study the judges' scoring sheet and alter your argument style accordingly.
- Study opposing competition briefs and continue researching until the competition is over.
- Teach your teammates to be great speakers. You are only as good as your weakest teammates. The more you coach your teammates, the more you will learn about what a moot court judge appreciates in a moot court advocate.
- Videotape yourself and be ruthlessly self-critical.
- Scope out the moot court room before the argument.
- Stand when the judges enter the room and when they address you—both individually and as a team—during the competition.
- Quietly push in your chair, go to the podium, and await the chief's signal (either verbal instructions or a nod of the head) before beginning.

- Start with a strong and short (sixty-second maximum) introduction and roadmap. You should introduce yourself and co-counsel, ask for rebuttal time, state in one argumentative sentence what co-counsel will argue (not the neutral "my co-counsel will argue the [first] issue") and then what you will argue, offer one to three short sentences giving the determinative facts (not opinions or conclusions) or procedural posture (if relevant), state the relief sought, and give two or three reasons that your team should win on the issue you are arguing.
- Never ask the court whether it wants to hear a brief recitation of the facts or whether it is happy with your answer to a question.
- Never begin with "This case is about . . . ." Although doing so articulates your theme up front, that beginning leads too often to a judge's ruining your roadmap with a hostile question or comment articulating your adversary's theme.
- Speak in simple, plain English, as if talking to a smart high-school student.
- Stay in the moment and focus so not to forget anything important or lose train of thought.
- Speak slowly and conversationally, lower your speaking pitch, and project from the diaphragm.
- Make eye contact with every judge during the entire argument. Look nowhere except at the judges, or quickly, the clerk or bailiff's time card.
- Do not use adverbial excesses like "clearly" and "obviously."
- Do not compliment a judge by saying "That is an excellent question." However, it is acceptable to give a judge a respectful nod to recognize an excellent question.
- Do not say, "As I argued previously" or "With all due respect."
- Smile occasionally. If you cannot smile, at least do not look dour.
- Do not move about. Keep your feet planted in one place, flat on the ground.

- Do not distract with hand gestures, except to use practiced, theatrical, and very occasional hand gestures like steepling or palms-down movements, always at chest level or below, that are consistent with what you are saying. Never point at anyone or tap on the lectern or podium.
- If the record does not address something, tell the judges that the record is silent, but then, if possible, explain why a fair inference from the record supports your point.
- Never, ever read. If you use notes, make them short and in bullet-point form on the inside of a manila file folder cut down to fit on a small lectern or podium. However, winning teams avoid using notes. If you do not use notes, make it obvious to the judges that you are not using notes—such as by slowly buttoning a jacket, slowly pushing in the chair, and slowly walking to the podium while making sure that the judges see hands that are holding nothing.
- Stop immediately to answer a judge's question. Never speak over a judge, except when, over a series of questions, a judge will not let you speak.
- Answer every question, beginning with a "yes" or "no" whenever possible. Then give the reasoning behind the answer and one or two citations to support your answer. If a judge makes a point that contradicts your position, explain why the judge is correct and add a "but" statement.
- Answer multiple questions in some logical order, such as the order in which they were asked.
- Do not repeat a judge's question. Just answer it.
- Welcome questions. Never get defensive.
- Answer questions immediately. Do not tell a judge, "I'll get to it later."
- Know thoroughly the procedural history, the facts of the case, and the applicable appellate standard of review and trial or motion burden of proof.
- Address the other side's contentions, both as the appellant and as the appellee. Seize the nettle as the appellant by addressing the appellee's arguments in advance.

- One good way as the appellee to rebut the appellant's arguments is to note a judge's question to counsel for the appellant and explain why you disagree with the appellant.
- Cover all major arguments. Addressing the judges' concerns is important but should not be done at the expense of omitting arguments necessary to win.
- Once you answer a question, segue to the next point. There are many ways to transition, including saying something like, "And that brings me to my next point."
- Concede fact, law, and argument when doing so does not matter much or when you can argue that you win regardless of the concession. Never concede something important.
- Do not pause after answering a question.
- Avoid lengthy or numerous quotations.
- Do not give the full citation to a case, but simply the name of the court and date of the decision.
- Do not cite a case unless you know the facts. You must know the details of the cases supporting your most important arguments and your adversary's most important arguments.
- Avoid planned jokes and overblown metaphors. Spontaneous humor at your own expense is acceptable, as is laughing gently at a judge's joke.
- Do not talk or fidget when a team member, an adversary, or a judge is speaking.
- Drink water before approaching the lectern or podium, but if parched, drink while a judge asks a question.
- Remember that oral argument is less about debating than about having a conversation with the judges and addressing their questions so they can rule in your favor.
- Never personally attack or embarrass a moot court adversary. Do not comment on an adversary's minor mistake. Always refer to the opposing party, not the opposing party's counsel.
- Respect the time card. When time is up, thank the panel and sit down or say, "I see that my time is up [or has expired]" (unless the advocate has only half a short sentence left) and

ask the panel for permission to answer the question or finish the thought. Advocates should not give a canned conclusion during the argument, especially after the time card goes up.

- End on a high note, even with a minute or two left, but first say, "And if there are no further questions, thank you."
- Rebut using a moot court approach, not a real-life appellate-advocacy approach.
- Waive rebuttal (from counsel table, not the lectern or podium) if you won a head-to-head round, but always rebut in a competition involving cumulative scoring.
- Do not slow down or take anything for granted until you win the competition.
- Wholeheartedly want to win. The idea of losing should be mentally and physically painful.
- When you are done competing, coach a team.
- Buy silver polish to show off your winning trophies.
- Return as an alumnus to support your alma mater's moot court program. While at your school in the years following graduation, pause at the moot court trophy display case to glance at your trophy and to recall your moot court days: the best part of your law-school experience.