

How to File the Complaint: A Model Court Handbook

Acknowledgements

APPENDIX THREE: LESSONS LEARNED AND SUGGESTIONS FOR

Witnesses' Trial Testimony

Kim King

Appendix Four: Common Witnesses Testimony and Considerations

Kim King

Appendix Five: Internet Legal Resources

Kim King

CHAPTER ONE

Moot Court: Commitment and Rewards

Lewis Ringel and Charles Knerr

DO YOU WANT TO BE A "MOOTER?"

Here is the thing: there is a decision to be made and it is yours to make. You are a student justice considering the facts of a court case in an appellate simulation known as moot court. A moot court is an academic exercise in which students "try" a legal case before an appellate court. This is not to be confused with a mock trial. In a mock trial, students try facts before a trial court. To try facts is to judge innocence or guilt or, in a civil matter, to decide if a party, such as a corporation, is liable for an action or if a party, such as a government, exceeded its powers or violated some civil law. There is a prosecution and a defense team, comprised of students, who deliver opening statements, examine and cross-examine witnesses, and deliver closing statements. In a moot court, there is no trial. The trial has already occurred; someone or something has already been found innocent or guilty, someone or something has already had a civil issue settled, or someone or something has already been told that their or its actions violate some section of a constitution. In a moot court, someone or something is protesting the validity of a trial court decision. The issue is not did the trial court misconstrue the facts. Appellate courts do not try facts. The question is did a trial court make any errors in how it interpreted or applied the law. Lawyers argue for some set time period before a panel of judges, which may ask questions before retiring to talk among themselves and render a verdict. This decision may be accompanied by a written opinion that explains the rationale or justi-

fication for the decision and provides some direction for future courts deliberating similar issues.

You have participated in an hour-long question-and-answer session with other students known as oral argument. In this session, two legal teams, comprised of students, presented their argument and answered whatever questions you and your peers asked. Now, you are in a secret conference with your fellow students and your instructor for the purpose of deciding the case and arriving at some common rationale for your decision. The court is deadlocked. You hold the decisive vote. If this were a real decision it would affect the nation; perhaps the world. The issue might be whether to free a man from jail or whether the death penalty is constitutional. The case might require you to judge whether certain words or ideas can be censored. The decision might compel you to define the president's war powers in the case of a terrorist attack or whether some act of Congress intended to promote racial or gender equality compromises states' rights or individual property rights. Want to experience what making such a decision might be like? This is your chance.

Fancy yourself a player? Does being a judge sound too much like being a referee? Perhaps you would prefer to be a moot court litigator, developing an argument and supporting it, answering questions, and rebutting your opponents. Sound good? This is your chance.

Perhaps you like writing and research and thinking up arguments but you do not want to appear before the court to make an argument or answer questions? Do not worry. Few real lawyers are litigators. Moot court needs lawyers to perform research that assists their team to develop their case and anticipate the other side's arguments. Depending on your instructor, you may be able to participate in your group without speaking in oral argument. Sound good? This is your chance.

SO YOU THINK YOU WANT TO BE A "MOOTER?"

If you answered "yes" to any of the questions in Section I of this chapter then chances are you want to be a "mooter." What is a "mooter?" "Mooter" is the non-technical term for devotees of moot court. There is no single form of moot court. Some are in-class simulations that find student lawyers arguing before a student-run court.

Some moot courts involve a tournament. Courts in such tournaments often consist of non-student justices such as lawyers, professors, or members of the state or federal bench. In a tournament, courts may select the *best* team rather than deciding the merits of the case itself. The cases used in moot courts can be fictional or real. The court is usually one of last resort like a state supreme court or the United States Supreme Court. They are called courts of last resort because they are the final arbiter when it comes to issues within their jurisdiction such as questions of state or federal law.¹ Because they have the final word over matters exclusive to their domain, the judges in your moot court cannot pass the buck to a higher court to resolve the issue at a later date.² This fact should add a degree of gravity for the lawyers and judges. Sounds good does it not?

WHAT IS MOOT COURT?

Simulations of appellate court proceedings, also known as "moot court" or "mock Supreme Court," have been a feature of the legal education landscape for hundreds of years, with origins in pre-medieval England. Moot court is widely utilized around the world as an educational tool. Intercollegiate moot court tournaments are currently conducted in a number of European countries including Austria, France, and Germany. Undergraduate tournaments are also

¹ State courts sometimes decide federal issues. State courts share this jurisdiction with federal courts. If a state court's resolution of a federal question is at odds with federal court's, it is the federal judiciary's interpretation that is to be supreme. Federal courts lack any proper jurisdiction to decide questions of state law insofar as interpreting state constitutions or other laws. If a conflict raises both state and federal questions, federal courts can, if they choose, resolve the case on federal grounds. Such a resolution tends to be rare. Under a pair of long-standing doctrines, the doctrine of equitable abstention and the doctrine of independent and adequate state grounds, federal courts, in cases that raise both state and federal questions, will generally allow state courts an opportunity to remedy the situation under state law. In certain exceptional cases, such as *Bush v. Gore*, 531 U.S. 98 (2000), federal courts will resolve federal questions despite the fact that state questions still exist.

² If your instructor has chosen to have your class simulate the United States Supreme Court, the only way your court could be reversed would be if it changed its mind, or through a constitutional amendment. See, for example, the history of the Eleventh Amendment to the United States Constitution.

regularly organized in Australia, Canada, and New Zealand, and in other areas of the world. Moot court is required in the curriculum of all American law schools. Inter-collegiate tournaments are regularly organized concerning a variety of legal issues: communication law, environmental law, the First Amendment, mass media law, and so forth.

Two fundamental forms of American undergraduate moot court coexist: in scholastic moot court students of a single undergraduate class, such as constitutional, international, or business law, or a communications/speech class (among other academic subjects), are required to participate as a condition of successfully completing that class. This may take various forms ranging from simulating the arguments in an actual case to dealing with a hypothetical set of circumstances. Some classroom models will be more sophisticated than others and more true to form of a legal dispute. The second form of undergraduate moot court is the tournament, involving undergraduate students voluntarily competing for trophies or other personal rewards. More than a dozen campuswide, statewide, regional, or national tournaments are regularly organized across the United States. In these tournaments, students play the role of attorneys and argue before actual attorneys and judges as if they were in a court of law. All of the rules and protocols of a regular appellate courtroom are followed in tournament competition. Students must respond to questioning from judges and forcefully advocate for their client. Additionally, in tournament competition, students will argue both sides of a case in order to test their skills and ensure fairness in the process.

Undergraduate Moot Court Tournament Web Sites

American Collegiate Moot Court Association—National Tournament at the University of Texas at Arlington
<http://honors.uta.edu/mootcourt/>

American Mock Trial Association
<http://www.collegemocktrial.org>

California Pre-Law Association Moot Court Tournament
www.ocf.berkeley.edu/~cpla/programs_services.html

Table continued on 1

Undergraduate Moot Court Tournament Web Sites (continued)

Eastern Regional Moot Court Tournament at
Fitchburg State College

http://sourcebook.fsc.edu/polisci/mootcompetition2003/index_mc2003.html

Texas Undergraduate Moot Court Association:
<http://www.psci.unt.edu/mootcourt/>

Stanley Mosk Undergraduate Moot Court Tournament at
California State University at Dominguez Hills

<http://www.uwp.edu/academic/criminal.justice/moothome.htm>

WHAT DOES A "MOOTER" DO?

Because there is no one type or form of moot court there is no single or simple answer to the question "what does a 'mooter' do?" The answer will likely depend on your instructor or facilitator, the type of moot court in which you are engaged (e.g., tournament versus classroom), and/or your assigned role (lawyer or jurist). Having issued that disclaimer, there are certain aspects or attributes that most moot courts will have in common. Much of the work that "mooters" will do will involve legal research. This work may involve reading judicial opinions, legal periodicals, newspapers, statutes, legislative histories, or state constitutions. A good amount of this research can be done online, using a variety of legal search engines or other on-line resources, or in a library where students will find an assortment of books and articles as well as court cases.³ The remainder of this section attempts, in general terms, to give students a greater understanding of what will be expected of them. Again, please note that these

³ Most college libraries will include the publication *U.S. Reports*. In this publication, which is published by volume, one will find the decisions of the U.S. Supreme Court dating to the 1780s. Students without Internet access who seek opinions of lower federal courts or of state courts may need to visit a law library or a state legislative library if one is accessible.

expectations will depend in great part on decisions or assignments that your instructor or facilitator makes. For purposes of organization, we have provided separate discussions with respect to expectations for lawyers and judges. Please note that there are certain basic tasks or expectations that lawyers and judges will share.

Lawyers

One thing that moot courts will have in common is that there will be student lawyers divided into legal teams. The size, organizational makeup, and hierarchy (if any) of these teams will vary. Some legal teams may number as few as two or in excess of ten. In some simulations, there will be lead attorneys charged with the task of allocating team resources, deciding on roles, and ensuring that the team does its work. In other instances, there are no official leaders, matters are decided more informally (perhaps even democratically). In some simulations, the legal teams will be assigned specific sides to represent far in advance of moot court. Under a different scenario, the legal teams are not told who they will represent until a short time before oral argument.⁴ Whatever the size or nature, "mooters" who are lawyers can expect to work with others to research, develop, present, and defend a legal argument for the purpose of representing their side as best they can. This teamwork may include producing a legal brief on behalf of the team that lays out and provides for your side's argument.⁵ The purpose of this team brief is ultimately to get your point of view expressed to the court in a forum in which you cannot be interrupted or thrown off track by questions from the justices (those will come in oral argument). A related purpose is to get your team familiar with the legal issues and to spot any potential problems in your argument prior to court. This teamwork may also include working as a group to put on a practice moot court. Using such an exercise, your team can address certain issues or provide tips for the speaker(s) such as eye contact or delivery style or how to answer ex-

⁴ Such a scenario is most common in tournaments in which the teams are assigned to the appellee or appellant by some random drawing. In such instances, the legal teams will need to be prepared to represent either side at a moment's notice.

⁵ A legal brief is a document that communicates a legal party's argument to a court. Legal briefs can vary in length and format.

pected questions. Your team might use this as an occasion to practice rebutting the other side.⁶

Lawyers would do well to expect to be responsible for producing some written work for moot court. The exact work will depend on your instructor or facilitator. Common assignments include writing your own legal brief, producing a majority opinion that you would suggest the court adopt, or researching a specific issue or precedent relevant to the moot court case. These assignments are excellent opportunities for you to hone your writing, legal research, and critical thinking skills.

Judges

In some ways being a moot court judge is similar to being a moot court lawyer. For one, you will be expected to engage in legal research and will likely submit a writing assignment. For another, you will work with a group to prepare for moot court. Lawyers, of course, strive to win on the behalf of their clients. Your client is the nation and its constitution. If your court votes on the cases and produces a written court opinion, your goal might be to compete with opposing blocs within the court (if one exists) in the scramble to form a majority that supports your view and is willing to make it the law of the land. Another similarity is that the court, like the legal teams, may—or may not—have some hierarchy. You may have a chief justice and in some simulations the justices may be ordered by seniority. While a degree of independence will no doubt hold sway, justices may be assigned by the court certain tasks to perform on the group's behalf. This might include providing a balanced brief for the court that summarizes certain key cases, or it may include outlining for your fellow judges the key arguments made by the legal teams.

Judges should expect to be responsible for producing some written work. The exact work will depend on your instructor or facilitator. Popular assignments include writing a majority opinion based on your views, researching a specific issue or case relevant to the moot court case, or learning about a specific Supreme Court justice and emulating his or her views, manners, or tendencies in oral argument

⁶ This can be done by having some team members pretend to represent your opponents.

and in an opinion that he or she might be expected to produce. These assignments are excellent opportunities for you to hone your writing, legal research, and critical thinking skills.

MOOT COURT: KNOWING WHAT IS IN IT FOR YOU AND WHAT IT TAKES

Like most academic assignments you will get out of moot court what you put into it. Put another way, those who work hard and take it seriously, tend to enjoy the experience (and earn a better grade) than those who do not. A chief reason for the correlation between high levels of involvement in moot court and student satisfaction is that moot court is almost entirely student run. Because moot court is such a hands-on experience there is considerable room for you to be involved, more so than in most classroom assignments or projects. Students organize their teams (e.g., divide labor, assign roles, review, and evaluate each other's work); students develop their arguments or their questions; students defend their views or ask questions of one another, and students may determine how the case is ultimately adjudicated. Even those simulations, such as tournaments, which may involve non-students in significant roles rely heavily on student contributions. This level of student involvement means that you may glimpse the fruits of your labor in an uncommon fashion not readily available or possible in academic assignments.

Based on our own observations of "mooters" and the feedback forms that we have our own students complete, we know that for most students moot court is a great experience that many will rank as the best of their academic careers.

Moot court can be a good deal of work and at times even a little frustrating. How much work and how frustrating this experience is may be dependent on other variables. For instance, the case your instructor chooses and the work that he or she assigns will affect your experience. So might your role in the simulation (lawyer or judge), or the court's willingness to consider the arguments your team wishes to make. Your experience may depend upon the dynamics and makeup of your group. Some groups work quite well; others do not. It is not always apparent why some groups function better or smoother than others. This text, and your instructor, can offer advice

for how to have a good group, but there is no magic solution to the issues groups face. As we said, you will likely get out of moot court what you put into it. So, even if your group does not always function to your liking, do your best to benefit from this unique experience.

At this stage you might ask, what are the benefits to which we have alluded? There are several. Of course, no one can guarantee exactly what course your moot court experience will take. That said, there are considerable pluses associated with moot court that we believe far exceed any costs or frustrations that some might experience.

Based on moot court feedback forms, discussions with past students, and our own experiences either as student "mooters" or as coordinators of numerous moot courts, we would summarize the main benefits students experience into the following categories:

- Obtain good preparation for graduate study
- Learn about yourself and your interests or your abilities
- Experience leadership
- Learn about the law and the judicial process
- Experience being a judge or a lawyer
- Experience the thrill or rush of competition
- Improve your self-confidence or self-esteem
- Improve your critical or analytical thinking
- Overcome shyness/improve your public speaking
- Work with a team for a common goal
- Get to know your fellow students

will not be able to do much right if they bring a student who has never had a real job or been involved in anything other than a classroom environment. This goes to the issue of what kind of students you will recruit. If you want to feed your program with a mix of students who have had a variety of experiences, then you might try to bring in students from a range of backgrounds. For example, you could look for students who have worked in the service industry, or students who have worked in retail, or students who have worked in office environments. You could also look for students who have worked in construction or agriculture, or students who have worked in manufacturing or production. You could also look for students who have worked in the service industry, or students who have worked in retail, or students who have worked in office environments. You could also look for students who have worked in construction or agriculture, or students who have worked in manufacturing or production.



CHAPTER TWO

Understanding Legal Research

Kimi King

At first, the legal research can be overwhelming, but keep in mind that lawyers have devised common systems and structures to help find materials quickly and easily so they can bill their clients for hours of research! Once you begin to see the pattern in which legal materials are accessed, finding the law becomes almost routine. Learning the different sources available and how to use each one most effectively is the most difficult part. After that, it is a process of going on treasure hunts to find the clues you need to solve your own particular legal puzzle.

This chapter helps you conduct legal research for your moot court argument, and it contains two components to help you hone your research skills. The first section presents an introduction to law and the structure of the legal process. It includes the principal sources of law widely used by those in the legal profession, as well as information about how sources of law relate to the legal process. The second section introduces you to finding and searching legal sources and also provides you with information to access both text-based and electronic materials. Here we include suggestions about how to conduct research through online data bases that require paid subscriptions such as LexisNexis Academic Universe and Westlaw (these may be free through your library). We also provide information on free websites such as <http://www.findlaw.com>, the Cornell Law School Legal Information Institute, and government websites. The goal of this chapter is to provide you with materials that you consult when you are doing research.

FINDING “THE LAW”

Sources of “the law” abound, and one fundamental error students make is to assume that the law is a static or monolithic concept. Multiple sources of law exist, and legal professionals call upon numerous sources to mount their arguments that are subject to different interpretations, depending upon the context in which it is used. Whenever you are making a legal argument, always remember to come back to the underlying source of law that you use for forming the basis of your premise or supposition.

What Is the Law?

It is important to distinguish between the law and the interpretation of the law. Generally, the law is any set of rules enacted by public officials in a legitimate manner that has the authority of the government. There is no one source of law, and rules are constantly in flux as they are amended, implemented, and interpreted. Laws can also be in conflict with one another or may be interpreted differently by various parties. This leads to many of the disputes that you encounter.

In Anglo-American jurisprudence, developments in the law prior to the nineteenth century were founded primarily on *common law*—or the interpretation of decisions on a case-by-case basis. Lawyers and judges combed over prior court decisions to determine the legal precedent of previous cases and to ascertain how a conflict should be decided. As such, judges were the primary source of interpretation—they not only modified the law, they were also instrumental in creating it. By the late nineteenth century, this reliance on common law began to change dramatically as democratic legislatures initiated changes to codify rules into statutes.

The codification of law into formal rules and regulations expanded greatly during the New Deal in the U.S. as government played a more prominent role in society. *Codification* is the formal statement of the law transcribed into the legal structure. Rather than relying on a case-by-case interpretation of the law, codification standardizes the law into written form. Along with increased emphasis on formal legislation, the growth of the bureaucracy at all government levels (federal, state, and local) expanded the sources of law available. While writing laws down helps de-

crease uncertainties about its proper meaning, it is still judges who must interpret those rules and who can change the meaning of the law.

Sources & Types of Law

Type of Source	Type of Law
Primary	Constitutions
Primary	Statutes, codes, and session laws
Primary	Court decisions and cases
Primary	Regulations, administrative codes, and administrative agency hearing decisions
Secondary	Encyclopedias, treatises, and hornbooks
Secondary	Law reviews, American law reports, journal articles

Sources of Law

The principal sources of law are constitutions, statutes, case law, administrative regulations, and procedural rules.

1. Constitutional Law

In the hierarchy of legal structure, constitutional law can be thought of as where the buck stops. Constitutions are authoritative texts that have legal force and that prescribe principles of government. The root of the word comes from different sources including the Roman and medieval times where *constitutio* or *constitutiones* meant "enactments, decrees or regulations by the sovereign." It can also be derived from Latin meaning *constituere* or "to cause to stand" or "to fix, set, or make" a thing.

Constitutions are generally rather broad in their scope, designed to be overarching frameworks that can be interpreted by judges. The U.S. Constitution is rather concise, encompassing slightly more than 4,400 words and 27 amendments, and yet it has survived over two centuries of political turmoil and stands as the oldest democratic constitution in the world. Keep in mind that some constitutions can be very specific. For ex-

ample the Texas state constitution comprises over 106 pages with over 82,800 words and over 430 amendments regulating everything from freedom of speech to requirements that the constitution must be amended every time a county office is abolished! While England is often said to have a constitution, the reality is that its constitutional framework is really a series of decisions handed down by the courts, as well as Acts of Parliament that have occurred over time.

Both federal and state constitutions operate side by side, and when a state or federal law interferes with the U.S. Constitution the courts determine whether the law is *unconstitutional*. Beware of simply asserting that some law or action is unconstitutional, since such a statement is general and does not indicate what specific constitutional provisions are at issue. Think to yourself, what part of the law being questioned interferes with a specific part of the Constitution? How do prior judicial opinions support or oppose the law under inquiry? Generally speaking, a law is declared unconstitutional when it interferes with a fundamental principle embodied by one of the articles or amendments to the constitution. Additionally, a law may be constitutional on its face, but the implementation of that law *as applied* (e.g. actions taken by public officials) may violate the Constitution.

Most founders (the persons responsible for authoring the federal and state constitutions) debated the purposes of each of the individual provisions. As such, there are historical records relating to the *framers' intent*. Judges examine what the persons responsible for these documents thought about to be sure that they are interpreting the materials as intended. These explanations can differ from one judge to the next, so you may want to find the original materials yourself to help understand what was meant.

The primary source for constitutional law comes from the written constitutions themselves, but most interpretations of constitutions come from case decisions that increase our understanding about constitutional inquiry. Through these interpretations, judges are able to spell out whether some specific action or law violates a constitutional provision.

2. *Statutory Law*

Statutes are laws enacted by federal or state legislatures, and they are codified for judges to interpret and apply. Whenever a law is passed by

the federal legislature it is assigned a Public Law number which indicates the congressional term and chronological placement of the bill during that legislative session. All of the federal statutes found today are contained in the *United States Code (U.S.C.)* or the *United States Code Annotated (U.S.C.A.)* which came into existence in 1926. Federal laws are also codified in the *Statutes at Large (Stat.)*. You will probably want to use the U.S.C.A. citations because they provide the legislative statute, along with all of the federal and state cases that have been decided using an interpretation of that federal law. Remember, in certain instances a state court can interpret federal law, so there may be state cases associated with the citation of the federal statute. Thus, when you use the U.S.C.A., you can not only find the text of the actual statute, you also find a list of cases that are useful for interpreting it.

Every state legislature passing a law also gives it a numerical code designation, although each state may not follow the same structure as the U.S.C. There are as many ways to assign codes as there are names of the codes themselves. All of the 50 states have on-line access to their state legislative histories and codes, discussed in the section for finding the law.

Frequently judges want to examine the legislative history and debates surrounding the enactment of a statute to understand what the legislature intended when it passed the law. Judges and their law clerks examine this *legislative intent* to argue why a law should be construed a certain way. Needless to say, these interpretations are subject to controversy about what the legislature truly intended when it passed the law. Occasionally you will see references to these hearings—either to the Senate or House—and pay close attention to the name of the committee or subcommittee that held the hearings. You may need this information to track down the hearings and the debates.

Sometimes hearings are held and new statutes are passed in direct response to a court decision through the process of *statutory reversal* (the reversal of a court opinion by passing a new law to counteract the court's decision). You want to be sure you know the history surrounding the passage of such statutes. Of course these new laws may also be overturned by the courts in subsequent cases, although it may be more difficult for judges to do so. It is not impossible, however, as the case of *Texas v. Johnson*, 109 S.Ct. 2533 (1989) illustrates. There the Supreme Court struck down a Texas statute that prohibited flag burning. Congress responded by passing a federal statute to overturn the decision, but when

that law was challenged, the Supreme Court responded by saying the federal law also abridged free speech (*U.S. v. Eichman*, 496 U.S. 310 (1990)).

3. Case Law

Case law or judge-made law is the result of judicial interpretation about laws, including constitutions, statutes, other cases that have been decided, procedural rules, or administrative regulations. Case law is essentially common law and is relied upon whenever some other source of law is not available or needs interpretation. It is from these opinions that we have the doctrine of *precedent*—or *stare decisis* (“let the decision stand”). Precedent mandates that judges follow rules consistent with prior cases and apply them to the current dispute when making a decision. Judges establish this law on a case-by-case basis through issuing opinions. No two cases look exactly alike, and therefore judges take different facets from prior cases to arrive at the appropriate rule of law. Nor is the law static—just because prior precedent exists does not mean that the courts do not reverse themselves. For example, between 1790 and 2001, the U.S. Supreme Court reversed itself at least 223 times (approximately 1.04 times per term).

At the trial court level, usually only one judge decides the case. Such cases may, or may not, involve a jury depending on: the substance of the litigation, whether it is available under the law at issue, and if the parties are required to agree to it. Judges make a number of decisions every day, but these do not always mean an opinion is issued. When a trial court judge does hand down an opinion, she or he may not necessarily issue a written opinion but may make a *bench ruling*. Therefore, there will be no record of the decision.

At the appellate level, the federal system and 40 state court systems have an *intermediate appellate court* (IAC) that hears cases before they proceed to the highest court levels. These IACs typically have judges that sit in three-judge panels to review lower court appeals, and some states, such as Alabama, New York, Pennsylvania, and Tennessee, have multiple IACs depending on the jurisdiction granted by state law. All states have a “court of last resort”—usually referred to as the “supreme court” at the federal level and in most state court systems. In general, supreme courts are courts of *general jurisdiction* meaning that the judges hear cases

concerning a wide variety of legal issues, and they are not restricted to certain substantive areas, such as family law, torts, etc. While 48 states have only one highest court with general jurisdiction, Texas and Oklahoma have divided their supreme courts into two institutions—the supreme court hears civil cases and the court of criminal appeals hears criminal cases.

4. Administrative Regulations and Law

Administrative law is difficult to grasp, but it is critical to understanding the immense body of law in the U.S. legal system that has emerged since the New Deal. In essence, it is a subsidiary of statutory law and has the same authority as other laws even though it is *quasi-legislative* or *quasi-judicial* in nature. Federal regulations developed substantially in the 1930s and continued to grow with the passage of the Administrative Procedures Act (1946). Today it governs over 55 different agencies at the federal level.

When legislators pass laws, they may not have well-defined ideas about how the law should be applied in practice, nor may they know how best to implement the goals set down in the legislative enactments. As such, they delegate *rule-making authority* to administrative agencies and their personnel who are responsible for the daily operation of implementing the law. The administrative agency responsible adopts rules and regulations to further clarify the laws. This quasi-legislative power has the force of law, but is not passed by the legislature. Agencies announce in the *Federal Register* that they are considering a new rule and during a "notice and comment" period, individuals and groups can provide feedback. The agency may or may not hold public hearings depending on the substantive nature of the rule. After the rule has been established, it is "final" and must be published in the *Federal Register* and the *Code of Federal Regulations*. Today most agencies also publish this material on their websites.

Similarly, legislators may believe it is important to have some legal control over a substantive area but because of the number of issues associated with the regulation may feel a need to keep conflicts about the rule out of the courts. The U.S. Congress can also delegate *dispute resolution authority* to administrative agencies. The administrative agency with substantive jurisdiction levies specific charges (whether it is revoking a

license or holding a hearing about a violation) and deliberates to reach a final decision. This quasi-judicial power has the force of law, even though the case is not heard by a federal or state judge. All agency actions can be appealed to the courts (to one of the circuit courts of appeal in federal cases). The standard on review is whether the agency's actions were "arbitrary and capricious," and the courts tend to defer to the findings of the administrative law judge. These agency decisions are typically published on-line.

5. Procedural Rules

Both federal and state courts have procedural rules that govern the administration of the courts in hearing cases. These rules have the force of law, and authority for them is codified in a statute provided for by the legislature in the statutes or codes. These procedural rules apply to a variety of cases, and essentially they provide guidelines that are followed in filing lawsuits, instituting criminal actions, or deciding cases based on procedural restrictions. These are rules that judges and attorneys use in their proceedings before the courts. The U.S. Supreme Court has an extensive list of rules that are amended and updated almost every year. For example, Rule 38 of the Supreme Court specifies that there is a \$300 filing fee for docketing and hearing a case pursuant to a writ of certiorari or an appeal, but the authority to set these fees is provided for at 28 U.S.C. §1911.

Each of the state courts, as well as all of the federal courts (both circuit and district), has its own procedural rules that must be followed in filing motions, briefs, and other legal documents. While most of these rules are similar across jurisdictions, there are variations. Such rules govern everything from the procedures for judges to follow while on the bench to ethical standards for attorneys to follow. In addition to these rules, there are a variety of rules that are organized according to the issue area governing criminal, civil, or evidentiary matters for both federal and state court systems. The common cites in federal cases are to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence. These rules are not used frequently for most substantive research, but if you are focusing on procedural aspects of a case, you may need to refer to them. State courts also have similar procedures that you may need to know.

RESEARCH

Now that you know the sources of law, it is time to go about finding it. In today's legal world there are multiple ways that you may access legal sources, and you want to be sure that you have the most current and up-to-date materials.

Text-based or Electronic-based Searches?

The logic for finding statutes, cases, and law review articles is similar, and almost all of the information is in a comparable format. You simply need to find the right sources and know the following critical information. In addition to the *primary sources* of law that were discussed earlier, there are also *secondary sources* that can assist you with your research journey. Primary sources are the actual laws themselves, but secondary sources summarize, synthesize, and clarify those laws. Secondary sources can be rather helpful for assisting you in better understanding the impact or interpretation of some laws. As such, you will almost always use secondary research in conjunction with your primary sources. Make no mistake: secondary sources *never* have the same weight of authority as the actual laws themselves. No matter what type of source you use, you need to allocate your time accordingly so that you still have time to carry out the research for both types of sources. Plan a research schedule so you can be efficient in your research.

Conducting legal research today is far different than it was even ten years ago. The advent of the Internet and the wide dissemination of electronic legal resources and databases such as LexisNexis Academic Universe, Westlaw, and <http://www.findlaw.com> have radically changed how you access information. Law students these days are almost overwhelmed with the number of sources available, and you should begin to find what methods work best for you given what materials are accessible to you. While electronic searches have become the most popular way for doing research, all law schools still teach the old-fashioned way to find text-based materials. Therefore, as we go through each resource we provide you with both manual and electronic searching skills.

1. Text-based Searches

The typical image of an attorney is looking through piles of law books and stacks of papers to find what she needs for her client. Text-based materials tend to be much less expensive than subscription-based services (discussed next). Text-based searches are still the way in which smaller law firms and public interest law organizations do their research. Law schools emphasize learning these skills because you never know what resources your future employers may or may not have. In every instance, check with your college library to find out what is available to you.

Text-based sources tend to be viewed as more reliable (over free electronic sources), but less efficient to access. Most text materials tend to be archived so you can go back to earlier periods in time. Because of the exponential increase of information, many electronic materials are not archived as well as text-based sources, and some students may be frustrated to find a resource one day only to check back later and find it has "disappeared." You may also find that legal reference sources such as dictionaries or words and phrases *indicia* are easier to use in text format because you can visually scan the table of contents or *indicia* to help you find key words and phrases that you may need to begin doing research on your topic.

2. Electronic-based Searches

Attorneys, judges, and law students increasingly use these resources, especially those free sources available on the Internet. Access to *subscription-based* materials (sources where a monthly fee is paid to search a legal database) is costly, and many law firms cannot afford such sources. Most university and college libraries have at least one subscription service that they provide to their students. We focus in this chapter on two of the most commonly used subscription service sources, LexisNexis Academic Universe and Westlaw, although there are other options. Both have been available since the 1970s, and a majority of schools have access to one or both. We have also included a summary of other electronic resources (see Major Electronic Publishers appendix) to help you find some of the more useful electronic sources. Some are paid services, but we have concentrated on free services.

Some people experience "technophobia" at the thought of using computer-based sources. Even if you have never before used a computer, you can conduct legal research. Have no fear! You cannot break the machine; the computer will not blow up, and you cannot be arrested if you make a mistake. In fact, after using the materials on a regular basis, you can become addicted to having information at your fingertips. BE CAREFUL! The only danger in learning to use electronic data sources is that you can become overwhelmed because of *too much* information. Learning when to stop doing research is just as important as learning to do the research in the first place.

3. Search Possibilities

Regardless of what type of sources you search, you need to know the different techniques and possibilities that exist for conducting searches, and these methods vary depending on whether you are using text- or electronic-based materials. The techniques can apply for searching on the wide range of primary and secondary materials discussed next. Essentially when searching for materials where you do not have a specific citation, you have the following options: key words or controlled language; Boolean search logic; and natural language.

a. Key Words or Controlled Language

Using key words or controlled language means that you are dependent on the linguistic structure that the publisher uses for cataloging the material. It is what is used exclusively in text-based and CD-ROM searching (such as InfoTrac or LegalTrac) where you have words or phrases *indicia*. These phrases are designed to be critical expressions that are commonly used. The advantages to using key words or controlled language are that you can browse the topics to peruse different search words that may be useful and find relevant terms for your research. Moreover, all libraries rely on some form of this type of search in one or more of their materials, and the materials cover broad concepts so that if you are just beginning your search, you can gather ideas about how your information may be organized. The disadvantage is that you are dependent on the publisher's topics and these may not be consistent across sources. It

can also be time-consuming, especially if you already have an idea about the information you are trying to find.

Westlaw has a unique feature known as KeySearch which is a comprehensive catalogue of topic areas divided into categories of substantive legal issues. Each topic and category has a unique key number associated with it so you can identify the terms and key numbers most relevant to your legal issue. Once you have identified those, Westlaw, in essence, creates a query for you to find the areas that you are the most interested in searching. You can also scan the list of topics and subtopics and then specify whether you want to search cases, law reviews, etc. for those key numbers.

b. Boolean Search Logic

LexisNexis Academic Universe, Westlaw, and almost all electronic research on-line operate on the Boolean search string system named after George Boole, who developed a process used in algebraic calculations. You should think of it as a way to solve a puzzle by searching through materials and specifying the criteria you need for your subject. It operates on the same principle as when you use a word processor to find a phrase you used somewhere in your paper but just cannot seem to remember where it is. Essentially you are stringing together words with terms and connectors much like an algebraic equation only you are building a word formula to be solved. You are telling the computer to find only those documents that fit the equation you have given.

Use Boolean searches when you need to get comprehensive results, to be sure that each of your key phrases appears in the documents you are seeking or to establish specific relationships between topics. The advantages to such searches are that you can control the results to get only the most complete, relevant, and precise documents you need. The disadvantages are that it takes time to learn to use it effectively, and you need to have knowledge of your subject and to formulate that knowledge into a specific query. It will take time to do precise searches that are neither too broad nor too narrow, so be sure to plan to practice before you begin doing your research. Do not search on common words—try to use distinctive words so as to be more precise—and be sure to spell the words correctly. Moreover, depending on the database you are using, you will need to learn its specific terms and connectors because it varies

across publishing source. Use Boolean search logic when you are getting specific about the type of information you need. It is the most advanced and sophisticated of all the search possibilities because it allows you to use key terms to specify your search (see the Common Boolean Terms and Connectors appendix).

Example: LexisNexis Academic Universe

Searching for materials on affirmative action in higher education that relate to the Supreme Court's decision involving the University of Michigan. (Note: the italicized words are the words you are searching on and the bold capitalized terms indicate the terms and connectors that you use (not words you are searching)).

search string: *Affirmative* **W/2** *action* **WP** *higher education* **OR** *university* **OR** *college* **W/200** *Supreme Court* **AND** *Michigan* **AND NOT** *Bakke*

Translation: This tells Lexis to go find all documents that contain the words affirmative within two words of the word action and within the same paragraph as higher education or university or college, and to be sure that within 200 words the phrase Supreme Court appears along with the word Michigan, but that we do not want documents that contain a reference to the Bakke decision. Lexis will find only those documents that meet these criteria. Note we include college or university because those words might be used instead of "higher education."

Some data sets (like LexisNexis Academic Universe and Westlaw) allow you to limit the date and to search through the titles of specific documents. You can also expand your search by using an 'expander' such as an exclamation mark (!) so that you can search variations on words. Both of these techniques can help make the search more accurate, but you have to learn the language and format used by the source.

Example: Westlaw

Searching for documents that deal with perjury in trial courts by state government officials or public employees.

search string: *testi!* **/S** *perjury* **/P** *proceeding* **OR** *hearing* **OR** *court* **AND** *government* **AND** *public* **/10 employ!** **OR** *offic!* **AND DATE** **(AFT 12/31/2002)**

Translation: This tells Westlaw to find documents that contain some variation on the word testi! (So this can include "testify", "testimony", etc. because the "!" point leaves it open ended) within the same sentence perjury and within the same paragraph either the word proceeding or hearing or court. Further, we need only documents that have a reference to government and public within ten words of some variation on the word employ! (including "employer", "employee", "employment", etc.) or the word office! (including "officer", "official", "office", "officially", etc.). Note that we have also used a date limiter so that we get only documents that are published after December 31, 2002.

c. Natural Language Search

Some data sources have begun following the path of Westlaw and LexisNexis Academic Universe that developed the natural language searches in the 1990s. Both Lexis (Freestyle) and Westlaw (WIN) allow you to avoid precise terms that you need for Boolean search logic. Essentially this is much like <http://www.AskJeeves.com> which asks for a one-sentence inquiry or query.

Example: Is drug testing public high school students who participate in extracurricular activities legal?

After you submit your query, the computer translates the sentence into a search string by relying on common terms in much the same way you use a thesaurus. Based on what documents it finds, the individual program uses an algorithm to choose the documents that are most relevant to your question. The advantage is it makes it much easier for newcomers to start doing research because the computer is formulating the query (unlike the Boolean search string where you have to do it). Moreover, you do not need in-depth knowledge of subjects and terms, and you can refine your research based on the results you receive. The disadvantages are that you are dependent on the way in which the com-

puter interprets your request, and you will probably receive some weird or unrelated results depending on how you formulated your question.

You should use natural language when you have broad topics but are unfamiliar with the specific language that might be used regarding the legal treatment of the topic. It is also helpful when you are starting your research and you are looking for broad categories of materials.

Each of the search possibilities depends on your level of expertise and the material you are searching. As you become more adept at using primary and secondary sources you will find there are certain techniques you prefer in the process. Remember the most important thing about conducting legal research is that you learn to find what works best and most effectively for you.

Primary Sources

Searching on-line is similar to doing research with traditional written texts. You need to have narrowed your topic with key phrases that relate to the cases you are researching or have specific citations to the sections or case that you are trying to find. In advance of your search, sit down and write out a list of phrases and cases so that when you begin your search, you have some idea of the broader topic areas you are trying to find. This is especially important to help you accomplish work more efficiently and effectively. It may be helpful for you to look through *Words & Phrases Digest* (a reference source your library may have) or one of the encyclopedias (listed in the section on secondary sources) to ascertain what key legal phrases are used in reference to certain topic areas.

1. Constitutions

Finding federal and state constitutions has become a much easier task with the advent of on-line communication. Depending on what aspect of the U.S. Constitution you are researching, you may want to do a Google search (<http://www.google.com>) typing key words that you may need to use. The federal constitution is on-line at the U.S. House of Representatives site (<http://www.house.gov>) and is also available at the <http://www.findlaw.com> site. There is an excellent analysis and history of the United States Constitution from the Government Printing Office

(<http://www.access.gpo.gov/congress/senate/constitution/toc.html>). While virtually all libraries have compiled copies of state constitutions, we suggest that you go on-line. First, find the official state web site for the state you plan to research through the United States government's own site (http://firstgov.gov/Agencies/State_and_Territories.shtml). Follow the links and search within each state. Remember that every state web site is different, and typically you may need to search under subdirectories containing information about the "judiciary," "judicial branch," "courts," or "law and law enforcement." Second, you can take a shortcut and go to <http://www.findlaw.com> and search under "States." That takes you to all the legal resources available for the 50 states. You can also find state constitutions on LexisNexis Academic Universe and Westlaw under the "state" data bases.

2. Statutes

There is no end to the number of sources you can use for finding both federal and state laws, but there is a consistent pattern in how the laws or codes are cited by various governments. Once you learn the tricks, you should be able to find the laws easily. If you have a specific cite to the law in question, your search is always easier. If not, be sure that you have a series of key words or phrases that help identify the substantive area of the code you want to find. Be sure to use unique words where possible.

a. Federal Law

There are three different citations, and four different ways to find federal laws. Whenever a law is passed by the federal legislature it is assigned a Public Law number indicating the Congressional term and chronological placement of the bill during that legislative session.

At that point, it is still considered to be a "slip law." At the end of the legislation session, the slip law is then assigned a number in the U.S. Statutes at Large (abbreviated as Stat.) which contains published records from 1845 forward (the Government Printing Office took over official responsibility in 1874). The first number listed is the volume where the statute appears, and the second number following the Stat. abbreviation

indicates the page number where the law begins. Also note that if you do not have the specific citation, a list of laws in particular volumes is provided in the back of each volume where it appears.

Example: *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001). For the Public Law citation, the law was passed during the 107th Congress and it was the 56th law to pass that session. For the Stat. citation, the law appears in volume number 115 and begins on page 272.

You can also find laws that have been codified by Congress after it has been assigned to a United States Code (U.S.C.). Finding a law here is slightly different because the first number to appear before the U.S.C. refers to the titles where the actual statute has been indexed. The U.S.C. is broken up into 50 different titles, and within each title there are separate parts: chapter, subchapter, and sections. Inside each of the volumes you can find an index for all of the titles, chapters, and subchapters. You can also find the statute and the case law associated with it listed under the United States Codes Annotated (U.S.C.A.). The numbers to both the U.S.C. and the U.S.C.A. are identical, the only difference is that the U.S.C.A. contains citations to cases, law reviews, and law reports that address the substance of the statute. The citation for the U.S.C (and U.S.C.A.) refers only to the title and the statutory section. You do not need to refer to the chapter and the subchapter. We discuss them here only so that you understand that each of the titles is broken down into chapters and subchapters.

Example: 42 U.S.C.A. § 1982 relating to actions for civil rights violations. The statute is in Title 42 of the U.S.C.A., and the section of the statute is 1982. For example, if you went to find the cite, you would find Title 42 (titled Public Health and Welfare), Chapter 21 (Civil Rights). The section does *not* appear on page 1982 but appears in the part of the title where *section 1982* begins.

Inside each of the U.S.C. and U.S.C.A. volumes there is a complete table of contents, as well as a summary of all the titles. By looking through the table of contents, you can find the page where the section first begins. You need to have that to find the appropriate section. Note that most of the sections go on for multiple pages, even volumes! Some of these lengthier laws are broken into "parts." Try to always have the "part" number available to find the material.

From time to time Congress amends the laws and different dates may follow the code's cite. As a general rule, the volume and the section follow the same number when the law is amended, but on occasion, Congress gives an overhaul to certain sections, and thus new numbers may be assigned—it is important to pay attention to the date following the U.S.C. (U.S.C.A.) cite. That date tells you that *as of that date*, you can find the code listed at the volume and section number that follows. Do not be concerned if you do not have the exact date that corresponds to your statute. Most sections do not change frequently, so if you have a cite that contains an earlier date, chances are good that the same section still applies for the volume you are searching. If you are searching online, the sections are always updated, so you do need to worry about having the correct date.

Searching on LexisNexis Academic Universe or Westlaw you should find that having the exact citation makes life easier. Otherwise you need to be sure you have a fairly specific search string that examines the particular section of the code you are interested in finding. Perhaps the best strategy is to have used secondary sources to come up with a list of key words or phrases that you can search, and then rely on electronic sources to find the actual law. When you search <http://www.findlaw.com> you can browse through the titles and sections and that may make it easier to get key words that you use for more specific sections.

b. State law

Finding state law is a similar process, but state laws vary in terms of how the information is presented. Like federal laws, each bill passed has a public law number attached to it, along with a numerical number indicating the legislative session in which it was introduced and passed. Unlike federal law, however, when the law is placed on the books, there are myriad possibilities for how it is numbered. Moreover, the codes of

the different states are called different things depending on the system's governmental structure. In many states there are both official and unofficial publishers of statutes that cover different periods and materials.

Example: New York State

- 1) *McKinney's Sessions Laws of New York*—unofficial full text of all public and private laws passed since 1951. Published by West.
- 2) *Laws of New York*—official full text of all public and private laws passed annually by the New York Legislature.
- 3) *Local Laws of the Cities, Counties, Towns and Villages in the State of New York*—official full text of laws passed by local governments pursuant to the New York Constitution, the Municipal Home Rule Law, Statute of Local Governments, or other statutes delegating particular powers to local governments.
- 4) *Consolidated Laws Service Session Laws*—unofficial full text of all laws passed annually by the New York State Legislature with supplemental material limited to governor's annual message since 1976. Published by Lexis.

States also vary by subdividing their codes into various substantive sections such as civil or criminal, although all the states follow the practice of establishing titles or chapters with various subdivisions. These variations in citations mean that you may have to dig deeper to find your law, and each state has different methods for cataloging material or uses different types of search engines and techniques for tracking materials. Be sure you know multiple search techniques when you go to find the law. Generally speaking, searching by text requires the use of key words and controlled language. State materials should contain an index either as a separate volume or a summary of key titles and chapters in the back of individual volumes. Be sure to check with your library to find out what state statutes they maintain as most libraries keep the statutes of their own state and perhaps those from neighboring states. Rarely do most libraries contain all the state statutes, although larger law libraries may.

When you search electronically, however, you will probably utilize key words, Boolean searches, or natural language techniques. As with other state materials, much of this information is on-line. One of the best

sources is <http://www.findlaw.com> using the "State Resources" link that allows you to access all 50 states.

Before beginning your search on-line, be sure to check the "searching tips" section that the states provide because this saves you time and energy, and allows you to be sure that you have conducted a comprehensive search. Where you can use exact phrases, you increase your ability to narrow your topic.

Example: Massachusetts Law

Conducting a search in the General Laws of Massachusetts for "driving under the influence" returns nine different possibilities including: Title XIV. Public Ways and Works. Chapter 90. Motor Vehicles and Aircraft. Section 24. Driving while under influence of intoxicating liquor, etc.; second and subsequent offenses; punishment; treatment programs; reckless and unauthorized driving; failure to stop after collision.

3. Case Law

Most case law is based on written opinions issued by judges, and when a decision is handed down, the judge may direct the clerk of the court to send a copy of it to the different publishers and electronic distribution outlets that make cases available. These *reporters*, or sources of case law, are the primary way in which legal professionals access materials with numerous reporters cataloged according to: 1) when the decision was rendered; 2) the company that printed the opinion; 3) what level of court heard the case (trial or appellate); and 4) what state or federal court decided the case. In the late 1990s, many of the federal and state courts began publishing their opinions on-line as well. Many of the cases in the text-based reporters are also available electronically, but this is not always the case. It is helpful if you know what level of court and geographic area you are searching on, but if not, you can still find your cases.

Both federal and state reporters compile cases according to the date the case was issued by the judge or justices. Reporters contain only information regarding the case opinion and include all relevant facts, the judges or justices who decided the opinion, the attorneys who parti-

pated in the case, and the body of the opinion including the legal reasoning and the judgment (who wins, who loses). One final note about finding cases—after you have done so, you need to be sure that your case is still “good law.” As such, you need to use either Shepard’s or Westlaw’s KeyCite citator service to be sure that you have only the most up-to-date materials (see the LexisNexis Shepard’s Citations & Westlaw’s KeyCite inset).

a. Federal

At the federal level, judges routinely issue written opinions to provide the lower courts with precedent that can be followed in future cases. At the trial level, however, the decision to write an opinion is at the judge’s discretion, and judges may rule from the bench without issuing a written opinion. As such, you may find appellate opinions but then be unable to find the trial court opinion that goes with it. The U.S. Circuit Courts of Appeals hear cases from the trial court level, and the federal circuits are organized geographically according to the circuit court that has jurisdiction for that region. These eleven circuits plus the D.C. circuit are courts of general jurisdiction reviewing cases that originally started in one of the 94 federal district courts. Do not confuse the U.S. Court of Appeal for the D.C. Circuit with the U.S. Court of Appeal for the Federal Circuit which only hears tax, patent, and international trade cases.

In contrast, the U.S. Supreme Court always issues an opinion, but while there is only one “official” cite, there are four text-based places where it is reported, in addition to multiple electronic sources. First, the official reporter of the U.S. Supreme Court is the United States (U.S.) reporter with cases reported in sequential volumes. Second, The Supreme Court Reporter (S.Ct.) is published by West Publishing Company. Third, the Lawyer’s Cooperative Publishing Company publishes yet another version of the opinion in the Lawyer’s Edition (L.Ed.) through multiple series. Fourth, the Bureau of National Affairs (BNA) issues the United States Law Weekly (U.S.L.W.)—a publication addressing legal issues presented by recent Supreme Court decisions. Be careful using U.S.L.W. because it is not as comprehensive as the other three sources. Both LexisNexis Academic Universe and Westlaw assign their own numbers to cases, plus www.findlaw.com and Cornell’s Legal Information Institute also publish High Court decisions. Thus, potentially eight different

sources with four different citations appear for one case! When U.S. Supreme Court cases are cited, typically all three of the traditional reporters are listed (U.S., S.Ct., and L.Ed). Lawyers refer to this as *parallel citation*, and three forms are given so that if attorneys are unable to access one set of reporters, they may be able to find the case in another set.

All cases—whether federal or state—are easy to find, and the cites to a particular case are listed according to the following formula, with the same logic applying to all cases. The name of the primary two parties comes first with the reporter where the case is found coming second, and the page number where the case begins to appear. *Party A v. Party B, volume number name of reporter page number (year)*.

Example: *Victor's Little Secret v. Victoria Secret Catalogue, Inc.*, 537 U.S. 418; 123 S. Ct. 1115; 155 L. Ed. 2d. 1; 2003 U.S. LEXIS 1945; 71 U.S.L.W. 4126 (2003). The volume in the U.S. Reporter (U.S.) is 537 and the beginning page number is 418. The case is also in the Supreme Court Reporter (S.Ct.) volume 123 beginning on page 1115. In volume 155 of the Lawyer's Edition, second series (L. ED. 2d.) the same case begins on page 1. If you use the "Get a Case" function on LEXIS, enter cite 2003 U.S. LEXIS 1945. The page number is where the first page of the opinion begins—the actual opinion may go on for quite a few.

Federal appellate and trial court opinion citations follow the same logic, but information in parentheses provides additional information to assist you in knowing what lower court decided the case. The same logic for party names, volume number, reporter name, page number, and date applies, but you also include the circuit or district court where the case was heard. In some instances with the district courts, there is more than one district court in the state. Be sure you get the correct district court.

Example: Federal appeals courts

U.S.A. v. Kimler, 335 F.3d 1132; 2003 U.S. App. LEXIS 13586 (10th Cir. 2003). This means this case is in volume 335 of the Federal Reporter, third series, beginning on page 1132. The information in the parentheses tells you the case was decided by the Tenth Circuit in 2003. Note that you can find it on Lexis in the U.S. appeals database (volume 2003 and page 13586).

Example: Federal district courts

U.S.A. v. Reynard, 220 F. Supp. 2d 1142; 2002 U.S. Dist. LEXIS 21855 (S.D. Cal. 2002).

Here the case is in volume 220 of the Federal Supplement series, beginning on page 1142. The case is out of the Southern District of California in 2002. The same logic applies to LEXIS in this example.

b. States

State cases are compiled in both state and regional reporters published by West (Thomson Publishing), and these reporters provide the full text of state court opinions. Most libraries have at least their own state and regional reporters, but, depending on resources, may not have all the text volumes for every state. Increasingly, libraries are relying on electronic sources for more recent cases. In addition to the individual state reporters, there are also regional reporters where state cases are organized by date and according to the geographical location of the court. Remember, these are *state* court opinions, and the reporters are *not* grouped according to the federal circuits. The format is identical to federal cases (volume, reporter name, page number, and date), but commonly you see two parallel citations—both to the regional reporter and to the state court reporter. Not all states have official state reporters, and even the regional reporters are not considered the official reporters.

A note of caution about one of the most frequent mistakes made when researching both federal and state law. The "2d," "3d", or even "4th" references you see in different citations refers to the volume series. Legal materials are compiled chronologically, and rather than let volumes continue endlessly, when a reporter volume reaches a given number, the publishers begin a new series and renumber the series accordingly. For the first series of the Federal Reporter (F.), the volumes went up to 300, but for the Federal Reporter, second series (F.2d), the volumes went up to 999, and they are now in their third series beginning in 1993. Be sure you have the correct series number (2d, 3d, 4th, etc.) because otherwise you may not find the material. Most series of reporters or other materials are well into the second series.

Example: Illinois appellate case

People v. Daly, 792 N.E.2d 446; 275 Ill. Dec. 215, 2003 Ill. App. LEXIS 865 (2003). The volume is 792 in the Northeastern reporter, second series, beginning on page 446. You can also find the same case in volume 275 of the Illinois decisions, beginning on page 215. Note that as with federal cases you can also find the citation on LexisNexis Academic Universe under the section titled state law.

Regulations

Regulations from a variety of agencies may also play an important part in determining the meaning of the law. Further, regulations may be from either federal or state agencies.

a. Federal regulations

There is an extensive process for the development of these rules and a formal set of laws that govern the implementation and interpretation of rule-making authority. The *Administrative Procedures Act* (1946) includes a notice and comment period so the public can respond or provide feedback to the agency. As such, you should access materials from the *Federal Register*, but also in the *Code of Federal Regulations* (C.F.R.). As with other reporting volumes, the volumes are divided into subject areas depending on the legal issue (and federal agency) implementing the regulation. Regulations exist for most everything that exists. Understanding how and where to find regulations (even if you don't understand the need for them) provides a very useful skill. Like the U.S. Code, the first number listed refers to the title and the second number refers to the section where the regulation appears. Most regulations are subdivided into sub-parts which are the numbers that appear after the decimal. Pay close attention to each of the titles, sections, and sub-parts when trying to find a cite.

Example: Catsup/Ketchup has been subject to regulation since 1953, and the U.S. Department of Agriculture devotes eight pages to what constitutes the different grades of catsup, including Grade A Fancy. The regulation that governs what can be called catsup requires that the "consistency of the finished food is such that its flow is not more than 14 centimeters in 30 seconds at 20 degrees Celsius when tested in a Bostwick Consistometer" (scientific ramp device with approximately a 30 degree angle). 21 CFR 155.194. The citation indicates that it is in Title 21 of the Code of Federal Regulations appearing in section 155 and subpart 194.

b. State regulations

The citation format of state regulations varies according to the state but is set up similar to the federal system. Each state has a publication to disseminate information about regulations that are being considered. After comments from the general public and interested parties, the rule is published via an official publication and posted. The text-based form of these materials is made available to all the state's depository libraries. Typically the code for each state is published on a state web site. You may find that the further back in time you go that you have to use text-based sources for these materials because states do not archive the materials for more than three to five years. In a number of states a private publisher may have a service that compiles the state regulations as part of their materials on different substantive areas. LexisNexis Academic Universe and Westlaw also have materials regarding state regulations. Check with your reference librarian to find out what resources may be available to you through your university. The quickest source that we recommend is through <http://www.findlaw.com>.

Procedural Rules

Most undergraduate students do not do research on substantive issues surrounding procedural rules, but when you get to law school, you will have to access both federal and state rules. On occasion as an undergraduate you may need to look up a procedural rule to read it in its entirety because it is referred to in your materials. Every state publishes a text-based version of its rules that are available at most university book

stores. The easiest thing for you is to rely on federal and state materials found at <http://www.findlaw.com>. This is particularly helpful because a number of ethics and courts rules are posted as well (by state). In addition, Cornell's Legal Information Institute has a full-text version of all federal rules of procedure (including criminal, civil, and evidentiary). You can also purchase a downloaded version. Be sure to have at least some idea of the substance surrounding the rule if you do not have a specific rule number.

SECONDARY SOURCES

Secondary sources are materials that are summaries of primary source conclusions and arguments about the correct interpretations regarding the rules of law enunciated by primary sources. Secondary materials are often more helpful and easier to understand than primary sources, but you must be careful to remember that only primary sources have binding authority. Many persons use secondary sources to help synthesize complex legal issues, but rely on primary materials for making their legal arguments. Be sure that you do not solely rely on secondary sources because there is no substitute for reading the primary source material.

1. Case Digests

Case digests are helpful guides summarizing legal cases according to the legal issue that is presented in the judicial opinions. These volumes are a chronological quick reference to a comprehensive set of cases for court opinions so you can compare how federal or state courts have decided different legal issues. Rather than reprint an entire case opinion, and because one case may encompass several legal issues, Thomson Publishing hires attorneys or legal scholars to comb through the cases and write concise summaries of the legal points. These points are then categorized according to legal area and topic so you need to use a subject approach to finding your topic and the cases that relate to it.

Each digest has a "Descriptive Word Index" volume of topics that you should skim to find the most appropriate topics that relate to your issues. Additionally, a "Table of Cases" volume can help you find the cite to cases and "key numbers" that are associated with the topic area. Finally, West also provides a "Defendant-Plaintiff Table of Cases," so

that if you do not know the plaintiff's name, you can look up the Defendant instead. These volumes are located at the end of the stack of volumes covering the digest.

You do not cite to the digests, they are just helpful for summarizing information quickly and finding cases that you may want to use. These are only in text-based format, and increasingly some researchers find them to be limited compared to the vast majority of electronic searches you can do. Digests can be helpful if you know the subject area that you want to examine, and they are particularly helpful because they summarize all federal *and* state cases according to the topic of the case. They can also be overwhelming if you have no idea about the topic area where you should begin to look.

2. Legal Summary Materials

Legal summary materials take a wide variety of forms. The most common: law review articles, annotated law reports, and legal encyclopedias are discussed in the following sections.

a. Law review articles

Law review articles are tremendous sources of secondary information because they provide you with analyses of issues that you are interested in researching. These lengthy articles are written by law professors, judges, practitioners, and on occasion, law students. The information contained in these articles is superior because these scholars have spent a great deal of time studying the issues and providing frameworks about the issue being considered. Law review articles cover a broad range of subjects, and the inquiry ranges from case notes to broad surveys of legal topics including arguments about the legal interpretation or questions about whether certain rules of law should be changed. Case notes are articles that focus exclusively on one particular case, usually by the Supreme Court. These are in-depth analyses and are excellent for providing you with extensive detail about the case. Other law review articles provide you with legal evaluations or current controversies. Scholars propose their ideas about why a certain legal standard should be adopted or whether certain court decisions were decided correctly. Law reviews save you literally hours of doing research because they provide

synopses of key cases and relevant points. In a sense, legal scholars have done a great deal of the busy work for you!

If you are using text-based materials, the easiest thing to do is to peruse the subject areas listed in the *Index to Legal Periodicals* with the lists of all articles that relate to that topic. Using the index is helpful in getting you started because it provides a quick source of topical issues. Unlike digests or encyclopedias, it is not organized according to legal topic area, but is instead organized according to common terms associated with cases (e.g., flag burning, abortion, freedom of religion, etc.). We recommend you look through it first if you are unsure about how to begin your legal research. Most students find that LexisNexis Academic and Westlaw are the easiest way to access law review articles because you can search by natural language and Boolean searches. Moreover, you can limit your search to looking within titles or by certain dates so that you obtain specific materials, as well as only the most recent works available (see the Common Boolean Terms and Connectors appendix). Be careful, because if you use an idea that comes from a law review, you must cite the author and source. Remember, given the easy access to electronic information, one of the downsides in the age of the superhighway is that it is much easier to check on plagiarism. If you are in doubt about whether you should cite some particular source, cite it. Lawyers are very conscientious about documenting where they obtained their information.

LexisNexis Academic uses a template for doing searches that guide you through the process. When you access the database, go to "Legal Research," then "Law Review." While you have two options—either a "Basic" search or a "Guided" search—we suggest using the guided search because you can search on specific areas, such as title, author, citation, or full text. You need to specify on the pull-down menu which category you are seeking to search. Some of you may already know a specific author, citation, or title for which you are searching. Many of you, however, may want to do full text searches to find out what types of articles have been written—in that case, use the "full text" search. If you use the "full text" option, you should rely on your Boolean search strategies and choose words carefully to ensure an accurate search. Also be sure to specify a date delimiter. LexisNexis goes back to 1981, so if you are looking for articles before that time, you should use other text-based sources.

Example: LexisNexis Academic Universe search string:
separation W/2 power WP executive OR presiden! WS congress! OR legislat! AND NOT international

This search string, done in full text mode, says find all articles where the word *separation* appears **within two words** of *power* and **within the same paragraph** the word *executive* or some variation of the word *president* appears **within the same sentence** as a variation of the words *congress* or *legislate*, **but not** the word *international*. When limited to the dates 08/01/02 to 08/01/03, we found 19 articles.

Westlaw operates in much the same way as LexisNexis Academic in that you have options for how you go about your search. It varies slightly when it comes to the language that you use for conducting the search. You may also want to rely on Westlaw's KeySearch system for getting comprehensive access to case, law review, and encyclopedia materials.

Example: Westlaw
*TI(*free!* or *hate* and *speech*) and KKK & DA(AFT 09/01/1999 & BEF 09/01/2003)*

This search string says find all law review articles where some variation of the word *free* or *hate* appears along with the word *speech* in the **title**, and somewhere else in the article the phrase *KKK* must also appear. The **date** is restricted to only those articles written **after September 1, 1999**, and **before September 1, 2003**.

Law review citations resemble closely the pattern used for case law—volume number, law review title, and page number. When you cite a law review article you need to cite it in the following manner: author first and last name, title of article, volume number of article, abbreviated name of law review, page on which the article begins, and the date or year of publication. The hardest part of getting law review citations is figuring out the abbreviated version of the law review titles that are

used. You can find a summary of these inside the *Index to Legal Periodicals* and also on-line.

Example: Madeleine Morris, "Democracy and Punishment: The Democratic Dilemma of the International Criminal Court", 5 *Buff. Crim. L.R.* 591 (2002). Note that the citation indicates that the article is found in the fifth volume of the *Buffalo Criminal Law Review* and it begins on page 591.

Pay close attention to the footnotes in law review articles because authors rely heavily on footnotes to place information tangential to the direct issue being analyzed. Here you can find other references and citations. Occasionally, there are important facts that may bear on the legal analysis. This reliance on footnotes IS NOT something used frequently when you begin actually writing your legal brief. Unlike other college papers that you write, most legal briefs do not place great emphasis on footnotes or endnotes. Instead, the relevant material is placed in the full body of the brief itself following the idea that you are supporting. Check with your professor or teacher to find out what format he or she prefers for your assignment.

b. Annotated law reports

Annotated Law Reports (ALRs) are similar to law review articles, except these reviews are much more comprehensive and exhaustive in their analysis. As such, the reviews can be helpful, but trying to comprehend all of the information provided can be overwhelming. You may want to identify only the key ALRs that are relevant to your research, and then use the topics to search for other materials. Published by Lawyer's Cooperative since 1888 (the same group that publishes the Lawyers' Edition of Supreme Court cases), each ALR has selected (but not all) state and federal court opinions followed by an analysis of all the legal issues presented by the case. It was originally called the *Lawyers Reports Annotated*, but in 1919 the title changed to the *American Law Reports*, and two series of the *Lawyers Reports Annotated*, as well as six series of the ALR exist, including one that comprises only federal cases, statutes, and regulations.

You may find using the manual volumes easier than researching the information on-line if you do not know where to begin because you can view the different topic areas. Each ALR volume encompasses between twenty to thirty cases, and a table of contents begins each of the annotations. The ALR has a "Quick Index" that is organized according to descriptive topics. You should look through the index to see which topics apply to you. This index does not cite the specific authorities but gives you cites to the annotated law reviews themselves. Remember: the ALRs are not jurisdiction specific, so check the "Table of Jurisdictions" when trying to find particular material. Depending on when the ALR was published some of the materials are superseded by recent decisions. Pay close attention to the publication date and check for pocket parts. Searching on-line can be easier if you know the topic and subject areas you wish to find because it is most efficient to look for your terms in the titles of the annotations which reflect its contents.

ALR citations, like law reviews and case laws follow the same format, although you may find in some instances that no author is provided (the work is done by ghost writers who work for the publisher). When you cite the ALR cite as: author first and last name (if appropriate), title of article, volume number of article, abbreviated name of law review, page on which the article begins, and publication date and year.

Example 1 (without author): Annotation, Use of Plea Bargain or Grant of Immunity as Improper Vouching for Credibility of Witness in Federal Cases, 76 A.L.R. Fed. 409 (1986).

Example 2 (with author): Theresa L. Kruk, Annotation, Failure to Object to Improper Questions or Comments as to Defendant's Pre-trial Silence or Failure to Testify as Constituting Waiver of Right to Complain of Error—Modern Cases, 32 A.L.R. 4th 774 (1984 & Supp. 1992).

c. Legal encyclopedias

Encyclopedias are organized according to subject areas and then broken down into sections regarding the specific legal overviews. Like ALRs, they provide summaries of legal areas so you can have a synopsis of what your topic entails. There are two leading sources of national ency-

clopedia materials—Corpus Juris Secundum (C.J.S.) published by West and American Jurisprudence (Am. Jur. 2d) published by Lawyers' Cooperative. There are state-based encyclopedias although not every state has one. The only difference between the two national encyclopedias is that C.J.S. is known for providing the general rule of law, an extensive list of cases, along with the exceptions and qualifications to that general rule. Am.Jur.2d is known for providing broad principles and citations to the more important cases, along with statutes, rules, forms, and A.L.R. annotations.

With the text-based encyclopedias you need to have an idea of your subject area because the encyclopedias are divided according to legal points. Going through this version, you should rely on the "General Index" which is divided alphabetically into separate volumes that accompany the encyclopedias (they are located at the end of all the subject area volumes). This gives you an idea about what subject areas you can examine. If you are using the text version, check the pocket part in the back of each volume according to your subject section because there are almost always updates to the materials in the full volume. On-line you can search on key words and use Boolean searches to make the task much easier.

Encyclopedias can be helpful, but the topics tend to be exhaustive. After you find an entry of interest to you, go to the section where your topic of interest begins and scan through the outline of the discussion. The outline may extend for several pages and include topic areas that may not necessarily be relevant to your research. Following this summary, the outline provides information about what section contains the discussion relevant to your needs. Each section contains information about applicable statutes and also provides information about cases.

Citing the encyclopedias is straightforward because you are citing only the volume, abbreviated name of the encyclopedia, section number of the topic, and the date of the publication. In most instances when you are using electronic materials, the date will be current. While some searches yield hundreds of results, you should work on getting your searches to be as specific as possible. Practice using different Boolean strings until you find one that yields the information you need.

Example: Westlaw search *miranda /2 warn! /p waiv! & DA (aft 01/01/02)* yields 9 hits including 22 C.J.S. Criminal Law § 291

Example: Westlaw search *miranda /2 warn! /p waiv! & DA (aft 01/01/02)* yields 21 hits including 21A AM. JUR. 2D *Criminal Law* §1137 (2003).

CONCLUSION

Think of doing legal research as a treasure hunt that you are on for finding the materials you need. In the beginning, you start out with clues or ideas about general legal principles. After that, you begin systematically finding information that will help you in presenting your arguments or writing your papers and briefs. One of the most interesting things about studying the law is that in many ways it resembles a puzzle that you must piece together to form the arguments that you need for representing your clients. Preparation for doing legal research should not be an ominous task. Judges and lawyers need to be able to access information quickly whether it is in a text-based or an electronic format. Most of the difficulty associated with legal research and argumentation is understanding the sources of law, analyzing primary and secondary sources, and knowing where to find the different places where you may find legal information.

This chapter has provided you with an introduction to doing legal research, but the only way to become an expert is to go out there and start trying to find your pieces of the puzzle. As you go through sources, learn what works and what does not work for you. If you find that you seem to be running into dead ends for your research topic, consult with a reference librarian or your professor to find out how you can make your search process more efficient. Above all, remember that it takes time and patience to learn to access the different materials, and that as you grow more proficient, it will become easier for you. Happy hunting!



CHAPTER THREE

The Basics of Oral Argument

Kimi King

For many students, speaking in front of other persons can be a daunting task, but once you have the basic principles down, it can become quite rewarding. The ability to communicate persuasively is a skill that virtually everyone needs to use throughout their lives. After you have mastered the ability to participate in moot court, most people find that they are less intimidated by public speaking in general. When you have been grilled by judges, attorneys, and law students, everything else is easy by comparison!

This chapter helps you prepare for your oral argument, and it contains two components to develop your speaking skills. The first component provides an introduction to principles of legal argumentation and underscores the importance of developing a "theory" about your case. It includes the fundamentals about structuring your argument so that it is coherent. The second component introduces you to principles of persuasive and effective speaking in the context of moot court. Here we include suggestions about how to improve your verbal skills and tips for successful moot court arguments.

PRINCIPLES OF CONSTRUCTING ARGUMENTS

Arguments are statements that assert a situation, condition, or state of affairs to be true by providing *premises* (underlying statements) to support the *conclusion* (end result you are seeking). The most important aspect of argumentation involves structuring your argument in a

logical manner to avoid common weaknesses that can undermine your points. On its face, your reasoning should be apparent, and you should weave a story that combines both law and fact into a persuasive case for your client on the issue you are addressing. Make sure that as you structure your argument you set up your *premises*, provide *law* to support it, and then reach your *conclusion* about what this means for your case. A successful argument presents the claims, the use of logical reasoning and evidence to support the claims, an acknowledgment and refutation of counterpositions, and a summary of why your claims should be the preferred position.

A common mistake in argumentation is to spend too much time refuting the counterpositions without fully developing your position and establishing its superiority. Another frequent mistake is to imply the conclusion by setting out only the premises. Finally, be aware of the logical reasoning that underlies the structure of your argument so you can be prepared to counteract potential criticism that may be leveled against you. You may use both deductive and inductive reasoning to present arguments, but the arguments must be internally consistent and the premises should be valid.

An *inductive argument* is where you proceed from a specific observation to a generalization based on the premise of the specific observation. Inductive arguments are based on experience or evidence that may or may not be consistent with factual premises. It is concerned with empirical investigation upon which conclusions are reached or hypotheses tested (on the basis of experience, a generalization is made in terms of the probability). As such, inductive arguments depend more on the probability that the conclusion is true rather than pure logic that it can be proven to be true. As such, inductive reasoning can be easier to attack.

Example: All students sitting at the table in a local bar are students on the moot court team. Those students at the table in the bar all party too much. Therefore, all students on the moot court team party too much.

A *deductive argument* is one in which you examine an issue by proceeding from general observations based on premises that are true to the specific statement about an individual observation that can be concluded based on the premises. Deductive arguments are based on knowledge that is already known and rely on declarative statements and establishing logical connections between known facts to generate conclusions.

Example: Students who are on moot court teams study too much.
A woman in my class is on the moot court team.
Therefore, the woman in my class studies too much.

The biggest mistakes persons make in structuring arguments are using logical fallacies and faulty premises to support their position. A fallacy is a defective argument that is based on a false premise (all arguments are based on some underlying premise that applies in the context of the issue with which you are dealing). Both formal and informal fallacies weaken your argument and cause you to lose credibility—your arguments are easily attacked. For both previous examples, discuss what problems you may or may not see with the statements as presented.

A *formal fallacy* is a flaw that can be identified by examining the structure of the statement presented. Such statements look like valid arguments because the premises seem true enough, but the conclusions are invalid.

Example: Wine is a beverage.
Milk is a beverage.
Wine is milk.

Here the fallacy is in the structure of the syllogistic reasoning. One classification is not necessarily related to the other simply because they both belong to a similar category. In contrast, an *informal fallacy* is an identifiable flaw that can be seen by analyzing the content and structure of the argument. Such statements are invalid because they fail to demonstrate the truth of the conclusion that is reached and

derive plausibility from improper usage of language and the structure of arguments.

Example: That man drank milk for twenty years.
That man became addicted to cocaine.
Milk causes cocaine addiction.

Here the fallacy is one of false causation—erroneously attributing two events to be related to one another when in fact they are not.

Before going on, be sure that you understand the different types of fallacies that can be made, the problems they can cause, and potential solutions to correcting such mistakes by referring to “Common Criticisms of Arguments”. We now turn to developing a moot court argument.

DEVELOP A THEORY OF THE CASE

To develop a coherent argument, you must develop your “theory” of the case. After examining the questions presented, begin asking yourself about the propositions that you want to communicate. *What* is it that you think is going on here? *How* do the underlying suppositions form the core of the arguments you want to make? *Why* should the court decide in favor of your client’s position because it is the preferred outcome among a range of alternatives? A theory of the case requires a particular perspective on the legal and policy issues. By having a theory, you can easily revert to the major premises that underlie that theory and avoid making inconsistent arguments. The theory should be focused and framed in a definitive manner so that it is presented in a few short phrases that are easily understood. Each section of your argument should address the legal issues for that section and conform with the theory. Watch assumptions you make about your argument to be sure you remain consistent with the philosophy of the case. Your theory begins with the general position you want the court to adopt and then proceeds to the legal and policy reasons why it is preferred. You may acknowledge countervailing values in your theoretical statement, or you may reserve that for points in your main

argument. From your theory develop the major points, sub-points, and minor points. The entire structure of your argument follows from your theory, so invest some time in carefully articulating it.

Example: The right to bear arms should not be infringed upon by the state because it is a core principle upon which this country was founded. The right to life, liberty, and the pursuit of happiness as embodied by the Second Amendment of the U.S. Constitution should be incorporated through the Fourteenth Amendment to apply to the states. The right to protect your personal integrity from the encroachment of others must be protected even if others misuse the right and carelessly disregard the responsibility of gun ownership.

RESEARCHING AND DEVELOPING AN OUTLINE OF THE LEGAL POINTS

Your outline will be a critical component setting out the structure of your argument, and it presents the broad strokes of your legal points based on your theory of the case. As such, it is more of a reference guide that you refer to throughout your argument. It should be no longer than 1-2 pages. *NEVER use a speech that is written out on multiple pages.* It makes you look unprepared, and judges are more likely to question you more vigorously as a result.

To prepare your outline, begin by going through the lower court cases and records that are available. In most instances, only the lower court opinion(s) will be accessible, so you should read through and brief what the lower court(s) said. (See the appendix of "How to Brief a Case.") After you have briefed the case, set down arguments for and against your issue. One helpful tip is to divide a sheet of paper in half—on the left side place all the strong arguments in favor of your client's position, and on the right, put all the counterarguments that your opponents may use to challenge your position. After you have summarized the key legal points, look over what you have written and give a rank ordering to what arguments you consider to be the strongest—you want to always present the strongest arguments first.

Next you need to begin doing legal research. (See Chapter Two on understanding of legal research). The best place to begin is by finding the cases that are cited in the problem or case that you have been given for the moot court problem. In some instances, you have access to textbooks that can help you find key words to search on, so be sure to use those to help brainstorm key words and phrases. In other instances you have what is considered a "closed case," meaning that you are confined to a limited number of materials and cases that you may use. (See the Important Legal Terms appendix). Read the resources that you are to use to help find the relevant issues. You need to be sure that you use the most up-to-date version of all your materials. The general rule is that material that is more than five years out of date should be double checked. Shepardize or KeyCite all cases that you intend to use.

After collecting the cases that you might use, begin to read through and brief each of the most relevant ones to give you a better picture of the sources you have for developing your client's case. You cannot possibly use every single case you find if you are operating under an "open case" system. Roughly one to three key cases for each minute of arguing is about all you have time for, so be sure to pick and choose your cases carefully. Do not discard cases that have one or two key points because later on these may serve as additional or subsidiary sources of authority. As you did with your original case, divide your arguments according to those favorable to and those against your case. After you have done this, look back at your original case and begin the process of synthesizing and arranging by topic all of the legal points that seem most relevant to your theory of the case.

Outlining and Structuring Your Oral Argument

Your oral argument should be in outline form. Writing the presentation out longhand wastes space, forces you to depend on your notes, and increases the likelihood you "read" rather than argue. The argument should be typed on a computer because you should change it around as you practice and learn what works best. The argument should be structured by presenting your strongest points first and proceeding to weaker ones—keeping in mind the time frame. Gener-

ally speaking, you cannot get through more than four to five major points, and most persons tend to rely on just two to three major points to clarify the crux of their case.

Now you are ready to begin outlining your arguments. Set out the strongest arguments for your side and issue first. If you are working with a partner, go over key points to ensure that you are not duplicating or contradicting one another. Stay focused only on the issue that you are presenting without addressing tangential points. The outline should be a series of syllogisms presented in single sentences that persuade the court to rule for your client. Present each point as a one-sentence affirmative and argumentative statement that clearly spells out the legal issue you are presenting for your client. When the judges hear that statement, they should be able to quickly identify the issue, the law you rely on, your position about which way they should rule. Stay focused on the legal issues and facts—avoid using rhetoric, clichés and colloquialisms. Your outline is a skeleton that you fill in with the substantive law and facts to support the central issue. Do not make peripheral arguments that do not address directly the theory of your case.

Example: The First Amendment Establishment Clause prohibits the national government from funding school voucher programs to religious educational organizations because it creates an impermissible endorsement of religion.

In setting up your case, break the major points down into sub-points that present each of the lesser points relevant to the main premise. The actual structure of your outline varies depending on the topical issue. While all major points do have sub-points, not all sub-points and minor points have lesser points (or divisions). Do not *hyper-structure* your argument. This occurs when you go into too much detail. The central points and conclusions are difficult to follow because they are lost in the structure. Avoid making your outline more cluttered with sub-points and minor points than it needs to be. What you want is a clear concise structure that you can present easily and that has sufficient detail to address your legal argument.

I. MAJOR POINT**HEADING ONE**

- A. Sub-point one
 - 1. Minor point one
 - 2. Minor point two
- B. Sub-point two
- C. Sub-point three
 - 1. Minor point one
 - 2. Minor point two
 - 3. Minor point three

II. MAJOR POINT**HEADING TWO**

- A. Sub-point one
- B. Sub-point two
 - 1. Minor point one
 - 2. Minor point two
 - 3. Minor point three, etc.

Rely on Laws, Policy and Precedent

You should use authoritative sources for your outline and for the points you are making. Primary sources such as the statutes and legislative histories, as well as court opinions, are preferred to secondary sources such as law reviews or scholarly articles. Legislative histories are helpful because they reveal the intentions behind a law's enactment, and they can reveal flaws and criticisms about the law that you may use to attack your opponent's argument. Use policy arguments from the debates on the legislative floor to point out the ramifications of a law. Examine whether the purpose of the policy has been met or whether it has been subverted as it has been applied in practice.

Supreme Court and appellate court opinions are more influential than trial court cases, but if you find a "killer" case from a trial court, do not discount it. If it supports your argument, use it. Pay attention to what cases come from which circuit and state. Opinions from the same circuit or state as yours are important, but they are not the final word. Find cases that are directly on point (similar fact patterns or arguments). If you have a case where a court ruled in a way that supports your opponent, think about ways to distinguish it from your case. Point to key facts that are different or find statements that show a judge was influenced by certain factors that are irrelevant to your client's case. How you use the case law is critical to whether you have a strong argument. Even if you have a case that seems negative because of the party that ultimately won the case, argue that it is the le-

gal reasoning, standard, or principle established by the court that is important and that it militates in favor of your client.

Keep an eye open for "tests", standards, and key phrases that are used in legal sources because these help keep you focused on the issues. These phrases not only assist you in doing legal research, but they also help you structure your arguments and provide you with "punch lines" that can be used for answering questions. Your legal arguments should revolve around an analysis of these key phrases and whether the tests that the courts have used apply to your client's case. Do not use countless paragraphs and quotes of material from earlier cases. This is ineffective and increases the likelihood that you will read from your notes. While two or three key quotes may be effective and the quoting of precise terms or tests is preferable, using numerous quotes makes it look like you are not able to analyze the issues yourself. It is your synthesis that the court is interested in hearing.

Secondary sources can also provide you with authority even though these are not from legislators or judges. These can be particularly useful for finding policy arguments. Use the logical reasoning from these sources to support your argument and know the credentials of the authority that you are using. What is their background? Why are they experts? Why should the court listen to what they have to say about some issue? Remember—persons who write law reviews are often experts in their field and may have prior legal experience.

Preparing Your Materials for Presentation

After you have your basic outline and legal sources, you are ready to begin integrating the two into a comprehensive outline. Even though you have pages and pages of material, resist the urge to use everything. For each point you have on your outline you need to go through and establish one of the paradigms which follow for each of your points. Each one stands for a formula you should use as you go through each of your points. Law schools, attorneys, and judges differ in terms of which ones they prefer, but the following summarizes your choices.

IRAC - Issue, Rules, Analysis, (or Application), Conclusion

CRAC - Conclusion, Rules, Analysis, (or Application), Conclusion

CREAC -Conclusion, Rules, Explanation, Analysis, (or Application), Conclusion

Issue—Refers to the legal subject under consideration by that point or section of your outline. What is it that has to be decided?

Rule—Refers to the law or policy that is to be used for analyzing the issue. This can be either an established principle, or it can be a rule of law from a case that has been delivered. What is the law under consideration?

Explanation—Refers to the synthesis of the rule to the case facts where the rule comes from. How do rules from other cases assist in resolving the issues before the court in the case at bar?

Application/Analysis—Refers to the application of the rule to the facts for the case to clarify how the issue should be resolved. How does the law militate in favor of your client's case and position given the case at bar?

Conclusion—State what the outcome of the issue should be given the rules and how they are explained or applied in the analysis. Be sure to note if this is an extension of pre-existing law or if any new precedent is being created by the position you are representing. What is the appropriate interpretation of the law?

Example: Peter (Texas resident) and Danielle (who runs off to Nevada) break off their engagement, and Peter sues for the return of a ring (total value \$10,000). In federal district court he wins because the court finds that the ring was given with the understanding that Danielle would marry Peter—the items were *not* gifts. Danielle appeals to Fifth Circuit which overturns the decision on a technical error (Peter did not file his federal court case in a timely manner). Peter appeals to the U.S. Supreme Court which denies certiorari. Peter then files in the Texas state trial court. (continued)

Issue: If Peter took the case to the highest federal court, is he prevented from suing in a state court?

Rule: The principle of *res judicata* requires that if a final judgment on the merits was delivered, the plaintiff cannot bring the same case against the same defendant in either the same or a different court. The case filed in federal court met all of the necessary elements outlined in federal and state law.

Analysis: When Peter appealed the case to the highest court, that judgment is the final statement on the issue. At that point he had exhausted all of his remedies because he had gone to the highest court of appeal. He cannot try to re-litigate the case in the state court.

Explanation: The federal elements of *res judicata* include: 1) identical parties in both suits; 2) prior judgments from court with proper jurisdiction; 3) a final judgment on the merits; and 4) the same cause of action involved in both cases (*Flippin v. Wilson State Bank*, 780 S.W.2d 457 (Tex. App., 7th Dist. 1989)).

Conclusion: Peter cannot bring his suit in state court after having lost in the federal court because the issue is barred by *res judicata*.

You will need to go through your outline, and for each point you make do the same type of analysis. In this manner you are weaving law and facts together to build an argument that reaches a particular conclusion.

When you get to law school or begin practicing law, you will find that the most appropriate format can vary depending on whether you are writing a legal essay, memorandum, or brief, as well as whether you are presenting an oral argument to a trial or appellate court. Some court opinions even follow one of the styles depending on the preferences of the judge responsible for authoring the opinion. The common wisdom is that IRAC is best for written materials, but that oral arguments follow the CRAC or CREAC formula. The virtue of the latter two styles in oral argument is that you are stating up front what your conclusion is about the issue being addressed by your point. When you present it in a conclusive manner you are being more argumentative and are more likely to be an advocate. You also tell the judge(s) where you are going with your argument and sign-

post what you expect them to support by the time you are finished evaluating and explaining the rule of law as it applies to your case. Use your own judgment to develop your own style and do what works best for you. In time, the structure will be dictated by other authorities, so enjoy the chance now to do what you like!

Develop a Style and Practice, Practice, Practice

As you begin to develop your style, use your native talents and natural qualities. Do not try to mimic someone else or be something that you are not—that usually translates into a phony performance. Most students find it helpful to think of their moot court personality as an extension of how they communicate in general. For some, this means keeping the tone, quality, and volume of their voice at the same level at which they usually speak. For others, this means they must be more conscientious about making eye contact and being assertive with the bench. The same also holds true for your physical mannerisms. More effective speakers have a straight posture that is firmly rooted showing command of the podium and the material presented at all times. This may not work for some who need to be more fluid and interactive. For them what works best is to lean forward to emphasize points and then resume a stance. One thing virtually everyone needs to watch is how they deal with their hands. Appellate style is much more formal than trial advocacy, so avoid flailing your hands about in the air. A few key hand gestures to drive certain issues home can be effective, but don't pound the podium or give it a death grip so your knuckles turn white! As you develop your style, get feedback from others who observe you. This helps you know what works and how you are being perceived by others.

Always remember to whom you are speaking as your audience. In moot court, you will be in front of judges, attorneys, and law students (or even undergraduates), who will have different levels of knowledge about the case. Be careful not to insult the panel by assuming they do not understand the argument, but also be careful to assume that they know everything about every authority you Try to find a middle ground where you are discussing you

the context of other cases and authorities that are relevant for resolving the issue.

Extensive preparation and practice is the best thing you can do to develop your style and reduce nervousness while speaking. Try to work in as many practice rounds as you possibly can and get feedback from the persons who are watching your presentation. Watch yourself in front of a mirror to help develop your style of argumentation and go over key phrases to hear what is the most effective way to highlight critical points.

Try to rely on the active voice rather than the passive voice when you are speaking. The active voice is direct and concise, avoids the use of flowery language, and clearly expresses the point. The passive voice tends to be more rhetorical and uses unnecessary words to express the point being made.

Example:

Active voice—The Supreme Court upheld a state legislature's practice of having a paid chaplain open sessions with a prayer.

Passive voice—The decision handed down by the Supreme Court found that a state legislature could lawfully use funds in order to pay ministers for beginning legislative sessions with a prayer.

Listen to your voice as you are practicing and pay attention to your vocal mannerisms, including the speed and pace of your delivery. The most common mistakes that interfere with a person's style are unconscious statements and movements. Successful speakers use their diaphragm to control their voice and to give added authority to their speech pattern. Learn to pause effectively to emphasize key points and to raise the volume of your voice when there are particular arguments that merit distinction. If you are someone who says "ah, uhm, or er" regularly, practice just remaining silent when you come to pauses. Let your voice find a rhythm that is even without becoming "sing-song" or "rat-a-tat-tat." Also be conscious of how quickly you are speaking. When you get up to give your presentation you will probably be nervous and speed up your delivery. This is why

you want to practice—you already know how to keep the pace of your presentation at an even tempo.

Similarly, unconscious body movements are distracting no matter how persuasive you are with your voice. You should be careful not to wave your hands around, play with your hair, or toss your head back and forth. Plant your feet squarely in front of the podium so that you are rooted (like a tree) to withstand the onslaught of the questions. Watch your posture and avoid slouching over the podium. You should videotape your practices so you can see whether you are fidgeting, shifting your feet, or moving at the podium. When you watch the videotape, also watch it in fast forward mode. That will highlight your overall style and what moves the most when you are arguing.

FROM START TO FINISH

Now that you know how to put your argument together, the following section is designed to help you present the argument in the most effective way possible.

Pleasing the Court and Easing Yourself

As difficult as it may seem, try not to be nervous when you are actually arguing and pay attention to your voice and your body while you are arguing. It helps to focus if you close your eyes and take several deep breaths (through your nose if possible) before getting ready to get up to speak. When you begin your presentation, relax your shoulders down to the floor and lift up the top of your head confidently to the ceiling so that your stance is forward looking and direct. Remind yourself that you have the inside scoop on how this is done. (See the "Things Someone Should Have Told You but Probably Didn't!" appendix).

While the length of time may seem like forever at first when you are speaking, the time passes too quickly. Because you are going to be interrupted to answer questions, you need to allocate your time accordingly. There should be a timekeeper with cards so you can pace yourself, but if not, take a watch with a sweeping second hand so you can keep track of your time or have someone else keep track of time

for you. While you have your written notes, do not be alarmed if you are unable to address all of your points. You *MUST at least try* to address each of the major points that you want to make. The judges want to throw you off course, so answer the question and get back to your argument. If a judge asks you a question that deals with a part of your argument that you were going to argue later, just argue that point when it is raised and move back to your argument. Do not be afraid of the judges (they rarely bite)! They want to illuminate issues and see how well you know your argument.

Your job is to crystallize issues before the court. You are helping your colleagues clarify issues and arguing on behalf of your client. Think of it as giving persuasive points about the most relevant issues that should be decided. Rather than see this as a hostile situation, think of it as a chance to engage in a dialogue with the judges about the critical issues. You are, in a sense, having a conversation with them about important points of law. Use phrases that will lead the judges down a particular road that you want to travel. You should not view the oral argument as an intimidating experience or else you may get defensive. No one has ever exploded while answering questions! Use the questions that the judges ask you to answer key points that relate to your argument. Part of the reason you should not read a set speech is that the questions will address the different legal points you have made. After you have responded to a question, move back to the organization of the argument and continue presenting your other points. Try to think of questions that you think the judges may ask you or arguments that your opposing counsel may make. What are the weak points about the argument that you are making? What points of the opponents do you need to address? What are the key points from the lower court opinion(s) that you feel need to be given consideration?

Winning at moot court is not just a function of performance—students who do the best are the ones who are well prepared and organized before they ever walk into a “courtroom.” You should brief every case that you are relying on and take notes of ones that may be used by other student attorneys. Make notes for yourself of the cases. It is helpful to use note cards that contain key cases and facts. For each case, do a “mini”-brief about the case, including the name, date, citation, holding, relevant tests or standards, and a brief fact sum-

you want to practice—you already know how to keep the pace of your presentation at an even tempo.

Similarly, unconscious body movements are distracting no matter how persuasive you are with your voice. You should be careful not to wave your hands around, play with your hair, or toss your head back and forth. Plant your feet squarely in front of the podium so that you are rooted (like a tree) to withstand the onslaught of the questions. Watch your posture and avoid slouching over the podium. You should videotape your practices so you can see whether you are fidgeting, shifting your feet, or moving at the podium. When you watch the videotape, also watch it in fast forward mode. That will highlight your overall style and what moves the most when you are arguing.

FROM START TO FINISH

Now that you know how to put your argument together, the following section is designed to help you present the argument in the most effective way possible.

Pleasing the Court and Easing Yourself

As difficult as it may seem, try not to be nervous when you are actually arguing and pay attention to your voice and your body while you are arguing. It helps to focus if you close your eyes and take several deep breaths (through your nose if possible) before getting ready to get up to speak. When you begin your presentation, relax your shoulders down to the floor and lift up the top of your head confidently to the ceiling so that your stance is forward looking and direct. Remind yourself that you have the inside scoop on how this is done. (See the "Things Someone Should Have Told You but Probably Didn't!" appendix).

While the length of time may seem like forever at first when you are speaking, the time passes too quickly. Because you are going to be interrupted to answer questions, you need to allocate your time accordingly. There should be a timekeeper with cards so you can pace yourself, but if not, take a watch with a sweeping second hand so you can keep track of your time or have someone else keep track of time

for you. While you have your written notes, do not be alarmed if you are unable to address all of your points. You *MUST* at least try to address each of the major points that you want to make. The judges want to throw you off course, so answer the question and get back to your argument. If a judge asks you a question that deals with a part of your argument that you were going to argue later, just argue that point when it is raised and move back to your argument. Do not be afraid of the judges (they rarely bite)! They want to illuminate issues and see how well you know your argument.

Your job is to crystallize issues before the court. You are helping your colleagues clarify issues and arguing on behalf of your client. Think of it as giving persuasive points about the most relevant issues that should be decided. Rather than see this as a hostile situation, think of it as a chance to engage in a dialogue with the judges about the critical issues. You are, in a sense, having a conversation with them about important points of law. Use phrases that will lead the judges down a particular road that you want to travel. You should not view the oral argument as an intimidating experience or else you may get defensive. No one has ever exploded while answering questions! Use the questions that the judges ask you to answer key points that relate to your argument. Part of the reason you should not read a set speech is that the questions will address the different legal points you have made. After you have responded to a question, move back to the organization of the argument and continue presenting your other points. Try to think of questions that you think the judges may ask you or arguments that your opposing counsel may make. What are the weak points about the argument that you are making? What points of the opponents do you need to address? What are the key points from the lower court opinion(s) that you feel need to be given consideration?

Winning at moot court is not just a function of performance—students who do the best are the ones who are well prepared and organized before they ever walk into a “courtroom.” You should brief every case that you are relying on and take notes of ones that may be used by other student attorneys. Make notes for yourself of the cases. It is helpful to use note cards that contain key cases and facts. For each case, do a “mini”-brief about the case, including the name, date, citation, holding, relevant tests or standards, and a brief fact sum-

mary. You may also want to write why the case is persuasive for your argument. Similarly, for cases that go against your argument, point out key facts that show why they should not apply to the case at bar. These note cards will help refresh your memory when you are actually presenting your argument. One helpful device is to use a manila folder and tape the outline on the left-hand side and the case "mini"-briefs on the right. Organize the cases according to the order in which you argue them so that you can flip a case up when you are finished using it. **YOU SHOULD NOT PLAN ON SIMPLY READING A SPEECH!** This is the most common mistake that is made by students and it is the one thing that is the easiest to change. If you read, it looks like you are unprepared.

Nuts and Bolts

The structure for your presentation is as follows, but ask your instructor or coach what the rules are for the simulation or competition. Time is divided between the two co-counsels, and the length of time can vary from 10-30 minutes. As for the rebuttal, only one speaker for the Petitioner/Appellant presents for a short period of time after the main arguments have been presented. It is up to the student attorneys for the Petitioner/Appellant to determine who presents rebuttal. As a general rule, the stronger speaker does the rebuttal, but you should choose the person who thinks the best on his or her feet and who reacts well to arguments made by the opposing team. Some teams prefer to trade off. The Petitioner/Appellant gets a rebuttal because they have a tougher case to make (they lost at the lower level). Be sure that the counsel which is *NOT* giving rebuttal writes notes to co-counsel about which points should be addressed. You want to have coverage during the rebuttal—points should not be dropped or go unanswered. The following should help you with a mental picture of how a typical moot court proceeds.



Example for one hour round:

1st Counsel for the Petitioner/Appellant—15 minutes

2nd Counsel for the Petitioner/Appellant—12 minutes + 3 minutes rebuttal

First Counsel for the Respondent/Appellee—15 minutes

Second Counsel for the Respondent/Appellee—15 minutes

Rebuttal by One Counsel for the Petitioner/Appellant—3 minutes

Opening

The format for the opening by the court varies according to the simulation or competition, but after the judges have arrived in the room, the first speaker should take his or her outline and immediately go to the podium to await a signal for when he can begin. At the Supreme Court, the oral argument always begins with the statement by the Chief Justice: "Now we will hear case number _____ titled _____." Counsel, you may begin when ready." At lower court levels, this does not apply, and the judges may only ask if you are ready or inform you that you may begin.

The opening has three components: greeting and announcement to the court; introduction of co-counsel; and summary of issues that are being presented in the case at bar. After the judges have acknowledged you, the first student attorney for the Petitioner/Appellant should respond by saying, "Chief Judge (or Justice), your honors, May it please the court. My name is _____, and I along with co-counsel _____ are arguing this case on behalf of _____ in this case of _____. The issue I address today is whether _____. My co-counsel is addressing the issue of _____. You may vary this, of course, by introducing co-counsel and his issue at the same time, but for the most part, be sure you get the basics down.

Roadmap

Before proceeding with your main argument, you should give a brief overview (a roadmap) of your key points. This lets the court know

where you are going with your argument, what to expect, and how your argument unfolds. Typically it is the major point headings from your outline, so remember not to have too many issues because that is a signal to the court that there is no way you can get through everything. Students usually select the two to four key points they are using to provide a quick summary. It also assists in helping you make transitions from one section to another. The roadmap should be no more than 30-45 seconds depending on the total amount of time you have allotted. Students frequently make the mistake of spending too much time on the overview and not moving quickly enough to the substance of the argument.

Fact Statement or Clarification

If you are the first speaker for the Petitioner/Appellant, you have a unique role because you are the first person to speak. As such, you need to ask the court whether it would like a brief summary of the facts after you have given your roadmap. This helps the judges familiarize themselves with the case at bar. Some judges prefer you ask the court whether they would like a brief recitation of the facts; still others prefer that you give the fact summary without asking. Keep the overview of the facts short and cast it in a light that is most favorable for your client. Most student attorneys find that they do not have time for more than four to five salient points—you should spend no more than 30-45 seconds on this section. You should not mislead the judges about the facts, but identify those key facts that are most important for your case.

Occasionally, when the first speaker for the Respondent/Appellee gets up to speak, she may want to clarify some facts before proceeding with the main points of the argument. This is especially true if opposing counsel has misrepresented key facts. Do so quickly, and then return to the argument. You do not need to ask the court for permission to do so.

Main Argument

The main argument should constitute about 90-95 percent of the time that you have allotted. Always keep in mind the central theory of

your case to help guide you through the thicket of questions. The thrust of your main argument should be to take the known rules, laws, and policies and apply each to the facts of the case at bar. The most common mistake students make is that they emphasize one aspect disproportionately—either they focus on the case law and never apply it to the case under consideration, or they focus on the facts of the case and ignore the case law that supports their position. To be an effective advocate you need to entwine both law and facts for your client.

When judges begin to ask questions, stop speaking immediately, even if you are mid-sentence, and look directly at the judges to let them know that you are listening and responding to their concerns. This also helps you to analyze what type of question is being asked. (Is it a hardball or softball?) Engage with your eye contact and give facial reactions that indicate whether you are understanding the question. Pause briefly before giving the answer to the question to signal that you are reflecting on what was asked. Always be as direct as possible, and *frontload* by answering the question with a "Yes" or "No" answer before going on to explain why and the reasoning behind your answer. Answer each question directly and then segue way back into your argument with a transition. You may want to have some sample transition phrases ready to help you move more smoothly between questions and your prepared argument. Do not say "now returning to my argument" because that is a red flag for the judges to stop you right there for a question! If you do not know the answer, be honest and deal with it directly. You can tell the judges "I'm sorry your Honor, I don't have that answer. We would be happy to submit a supplementary brief on that issue." Always respect the judges, and do *not* be argumentative when you disagree with a judge's positions no matter what demeanor they are expressing toward you.

The goal of some judges is to keep you from being able to finish your argument and to identify weaknesses in the case that might militate in favor of your opposing counsel. Here the problem is trying to move through all of your points, and you may need to adjust accordingly by dropping some of the less important points. If you get a "hot bench," make sure that you focus on coverage and transition back to your argument as quickly as you can after questions. Still other judges are quiet or unprepared, and you may have just the opposite

problem because the judges hardly ask you any questions. With a "cold bench" the problem is having enough material to fill in the time. Always adjust according to your bench and learn which sections you can drop if it heats up, and which points you can add if things cool down.

Summary and Prayer for Relief

Within the last minute of your presentation finish the last argument you are making and go to your conclusion which is composed of a summary and prayer for relief. You want to be sure you leave enough time for a conclusion (summary) and prayer for relief. Your summary should hit those key points that you outlined in the roadmap, only this time, emphasize the key elements of those major points. Your prayer for relief is what you want the court to do. Be direct about how you want the court to rule and remind them of why they should reverse or affirm the lower court decision. State specifically how they should rule (either for or against what a prior court decision indicated), and reiterate why this is important for not only your client, but for principles of law that need to be protected.

You must adjust accordingly depending on the amount of time you have remaining. When there are about three to four minutes remaining, scan your outline and see which points you absolutely must hit and which points can be eliminated. In most cases, you will have had barely enough time to get through all of your argument when you receive the one-minute warning—watch time closely. You always want to use ALL of your time right up until the last second. Student attorneys who do not prepare enough material may struggle to keep speaking, but try. Some professors, judges, or law students, take off points for not fully using your time, so keep going forward until time is up. It is better to err on the side of not having enough time than to err on the side of not having enough material.

In the event you run out of time, your sum and prayer should be very short, otherwise you may have judges take off points. In the event your time expires just as a judge is in the process of asking a question, ask the judge if you may finish answering the question and then briefly sum and pray. In most cases, judges will allow you to do

this. There will be some judges who are more curt with you and either ask you to be seated or else allow you to finish the question, but will not give you permission to do a summary and prayer. Do not let it throw you off. Just answer the question and graciously thank the court for its time.

Example: In conclusion, your honors, the execution of a person who is mentally retarded does not violate the prohibition on cruel and unusual punishment for three reasons. First, the death penalty is consistent with the Framer's view of the Eighth Amendment, and indeed was widely practiced at the time of the Founding. Second, views by religious institutions, public opinion surveys, or the practices of other states do not establish that there is a national consensus in the U.S. States should each determine whether such a policy is prudent for that state. Finally, regardless of the mental condition of the convicted murderer, that person has been found by a jury of his peers to be a continuing danger to society. Moreover, the jury has determined that the only appropriate punishment is complete incapacitation of the defendant. We ask this court today not to take away one of the most powerful and effective tools in deterring and combating crime—the death penalty. Please affirm the Fourth Circuit Court of Appeal's decision upholding the imposition of capital punishment. Thank you for your time.

VI. Common Criticisms of Oral Arguments

Table 3.1

Argument Type	Mistake Made	Problem	Solution
Ad hominem attacks	Attacking the individual, not the argument.	Makes it appear as though you can't attack the argument on its face	Address arguments & not the person making it.
Ad populum attacks	Appealing to bias, prejudice, or fears of the population to support your position.	Makes it appear that you do not have facts and evidence to support your position & can backfire if your	Address arguments with facts and evidence, not the audience's potential biases.

Table continued on next page.

		audience does not have the same bias.	
Circular reasoning (begging the question)	Re-asserting the claim's truth by repeating the claim in different words.	Wastes time & makes it look like you do not have evidence to support your conclusion.	Prove your major premise by discussing the fundamental question before arguing the conclusion.
Equivocation	Equates two meanings of the same word falsely	Forces you to lose credibility because of a faulty definition which is easily corrected.	Be sure to use words with their proper meaning & have definitions with authorities to support your position.
False analogy	Assuming is similar to another, the conclusions drawn from one apply to the other.	Once the connection is attacked, undermines other analogies that may be valid.	Choose analogies carefully to ensure that the similarities between the two are not superficial.
False causation	Assuming that because one thing occurred before another, the former caused the latter.	You are making a mistake of construction—also called post hoc, ergo propter hoc (“after this, therefore because of this”).	Establish the connection between events occurring by providing facts & evidence.
False dichotomy	Presenting only two possibilities to a situation & forcing a choice of one.	Makes you appear unreasonable, dogmatic, & lackadaisical in your approach to analyzing a problem.	Present sophisticated analyses that show why your position should be preferred among alternatives.
Hasty generalization	Providing only weak or limited evidence to support a conclusion.	Looks like you are relying on prejudice, superstition, “common knowledge,” rather than known facts.	Avoid sweeping generalizations by providing facts and evidence to support your conclusion. Restate your premise so as not to be so broad.
Non-sequitur	Presenting premises or reasons that are irrelevant to a conclusion.	Makes it appear as though you do not fully understand the logic of your argument.	Offer only evidence in support of your claim that is relevant to the issue you are discussing.

Table continued on next page.

Overreliance on authority	Assuming that something is true because an expert says so & ignoring evidence to the contrary.	Undermines your argument if other authorities with greater credibility are introduced.	Appeal to multiple sources for authority & have concrete evidence to refute attacks on your authority.
Oversimplification	Appealing to emotions by giving easy answers to complicated questions.	Can be easily attacked with facts & evidence that will undermine your conclusions.	Appeal to logical construction of premises rather than emotional statements.
Red herring	Attempting to avoid the central issue by changing the subject or digressing into a tangential point	Deflects the audience's attention from key points that need to be made.	Emphasize your main points & only those arguments relevant to those points.
Slanting	Selecting or emphasizing only the evidence and arguments that support your claim while suppressing or minimizing other evidence.	Makes it look like you have not considered or evaluated all the facts & evidence.	Recognize counter-arguments, propositions, facts, & evidence, but argue why your arguments & evidentiary proofs are preferable.
Slippery Slope	Asserting that if a course of action is taken, undesirable consequences will inevitably follow.	May not necessarily be wrong to make if you are trying to assert future harms. Be careful that you support the premise that the undesirable consequence will follow.	Provide concrete evidence that the second event will follow based on other similar experiences or events.
Straw Man	Setting up a very weak version of an argument the opponent might make, & then attacking it.	The opponent may never make (or may not actually be making) that argument so you waste time articulating it.	Be sure that the argument you are making is relevant to your own

CONCLUSION

Beware! While the thought of oral argument scares most people when they first consider the challenge, after they have done so, they often find themselves addicted! There is a certain adrenaline rush that comes with being able to hold your ground under tough questioning and to present your client's position as an advocate. The ability to persuade others to your viewpoints is an influential skill that lasts

with you no matter what profession you decide to pursue. With practice, most of you will find that improving your speaking expertise begins to permeate your verbal communication in general. It is not just when you are before judges, but even in your interpersonal discussions or in workplace meetings you will begin to notice that you are more effective and direct in addressing issues that arise.

This chapter has presented some of the basics of oral argument, but the real test is out there waiting for you. It is important to note that as you go forth to conquer that the circumstances of your presentation vary, and you need to be able to modify depending on your situation. To that end, we have compiled a list of tips that have come from over twenty years of comments that our students have received regarding what judges recommend or what they look for in an outstanding presentation. Note that not all judges agree on these. As we have noted elsewhere in the book, depending whether you are doing moot court for a class or for a competition, remember that styles and preferences vary. Undoubtedly anyone who engages in "mooting" finds that judges differ in terms of what they like to see. Modify your techniques and approaches accordingly depending on the type of feedback you receive from others. Do not be discouraged if you receive contradictory advice from different sets of people. That is part of the process of learning to create your own style and doing what works best for you. In the final analysis, doing moot court should be exhilarating, and yes, even fun!



CHAPTER FOUR

From Opening to Closing: Ten Keys to Success and Other Helpful Tips

Lewis Ringel

INTRODUCTION

The time to get to work with your fellow students to prepare for oral argument has arrived. Put another way, it's go time, and we are here to help. Our assistance comes in three sections which provide advice for how to organize and operate a good moot court group. The first section offers general strategies for a successful group. The second section is designed for the legal teams, while the third addresses the court. Students may find it useful to examine all three sections.

Before we proceed with the remainder of the chapter, a word of caution is in order. Generally, group projects go well; especially if team members work hard and put the group first. There is always a chance that a group will have problems with getting everyone to share the work. On the rare occasion there may be a personality conflict. There is no "silver" bullet to deal with such problems. In this chapter we offer advice for how we have advised *our* students to address such problems. In the end, however, you should refer such problems, in the rare instance that they occur, to your instructor; he or she will be the best person to address such issues in an appropriate manner. Moot court can take various forms. For example, in tournament competition, students act as attorneys only and argue before ac-

tual judges and lawyers. For in class simulations, students may play the role of justice, attorney, or both. This chapter offers tips on all potential aspects of the moot court experience.

Ten Key General Strategies for Success in Moot Court

The authors of this book have helped to coordinate countless legal teams and moot courts. In our experience, there are certain traits that successful moot court teams share. Accordingly, we offer ten key general strategies for a successful moot court experience.

1. *Divide Labor, Divide Labor, Divide Labor*

There is an old saying that a defendant who represents himself in a trial has a fool for a client and a lawyer. A similar analogy can be made with respect to a lead attorney in moot court who tries to do all the work himself or herself, or a legal team that fails to do its fair share and relies primarily on one student. Moot court is a lot of work and the fact is that you are not experienced attorneys. Furthermore, life is full of unexpected events that might cause a lead attorney to miss oral argument. Whereas a real attorney might be able to gain a continuance from the court, students in moot courts will be unlikely to be granted such a postponement. It is unfair for one student to monopolize the floor in oral argument or for a group to refuse to do its fair share and leave all the work to one or two unfortunate souls. Furthermore, if one person does all the work, either by personal choice or necessity, it will likely breed resentment, and it may increase the odds that your group's presentation may not be the best it could have been.

2. *Establish a Hierarchy Within the Group*

If your moot court facilitator has not done so, and does not object, you might establish some form of hierarchy. This is recommended for groups in excess of two or three members. Some teams will install a

lead attorney and one or two assistant lead attorneys. Others (like the tournament format) rely on two-person teams with equal responsibilities. With our courts, some may select a chief justice and a senior justice to assist the chief with running the court. The advantage of such a hierarchy is that it promotes efficiency and decision-making. Groups need to make decisions about strategy and who will do what when it comes to assigning tasks. They need to communicate with their facilitator, and, in an in-class exercise, with each other. Speaking with one voice, knowing who to contact to schedule a meeting, and having fewer schedules to work around can be advantageous. It is important that the creation of a hierarchy be done fairly and that leaders not abuse their powers. Rank and file members must not use a hierarchy as an excuse for shirking their responsibilities to the team. No team will succeed otherwise.

3. Expect the Unexpected

One of the most common pieces of advice that students who have participated in moot court offer to future "mooters" is to expect the unexpected. What does this mean? When it comes to preparing for oral argument, it means do not attempt to script everything, rather go with the flow of where the court's questions take you. If as a lawyer, or a justice, you enter oral argument prepared to discuss too limited a set of issues, you may get left behind. Do not assume that the court will utilize a certain legal doctrine, or will apply a test to achieve a specific result, without considering the alternatives. Do not presume to know how a specific justice or a bloc of justices will vote if such an assumption will affect how you argue the case. Be careful about assuming that you know what issues a case will turn upon or how the court will vote on or resolve a specific issue or question. We have seen many a legal team faced with an unanticipated issue or argument and, in the case of justices; we have seen many a voting bloc fracture as the result of oral argument. The judicial process can be a fluid one; assuming it is anything otherwise can lead to a less than serendipitous surprise.

4. Redundancy

A key aspect of military strategy is redundancy; having multiple weapons aimed at or planes strike the same target. The same can be said for assigning the duty of bringing along water for a trip through the desert; assigning such a vital task to more than one person increases the odds that the task will be completed. Although not every task in moot court is vital, some are of a vital nature. To minimize the likelihood that an important task remains undone, or that a mistake in reasoning is made, moot court groups are advised to assign such tasks to multiple persons. For instance, if your chances of success will likely turn on preparing for a specific issue or knowing a specific case, practice redundancy and assign these tasks to multiple persons. The key to this is to know what to assign to more than one person and to do so in a manner that conveys respect for all. You want people to feel appreciated and trusted as well as not needlessly overworked. Determining how to do so may require knowing your group and explaining the strategy involved.

5. Be Selective

The political scientist E.E. Schattschneider once wrote that, "The compulsion to know everything is the road to insanity." "Mooters" need to be selective. Former U.S. Supreme Court Justice John Harlan listed case selection as one of the keys of a good oral argument. Not every case, or every issue, is important. It is one thing to be prepared by knowing the cases and your arguments well, it is quite another to be so over-prepared as far as issues or minutia go that you fail to focus your time and resources on key issues. Not everyone is adept at being selective. While it is important to expect the unexpected, student lawyers and judges would do well to boil their case down to a few (three to five) key issues and focus your research and your efforts in oral argument on those key issues.

6. Read Cases Thoroughly and Carefully

Much of moot court involves legal research. This means reading cases. When you read the case you are trying, pay attention to at least two things: the facts and any important legal precedent or legal doctrines that are cited. Knowing the facts of your case will enable you to tie the case to controlling precedent that benefits you as well as to distinguish the case from the facts of precedent that do not benefit your argument. In addition, knowing the facts will enable you to better answer questions from the court with respect to how your argument would affect future cases involving similarly situated parties. Knowledge of case law will provide your argument with an air of authenticity and increase the likelihood of convincing the justices that what your side is asking is that the court decide the matter before it in a manner consistent with settled precedent or legal principles. If the court appears uncertain what legal mechanism to use to achieve the result you desire, it may help if you can cite a case in which the court used a specific legal test to resolve a similar case. It is a good idea to have team members prepare short summaries of cases and to keep these summaries in a folder or binder so that it can be referenced if needed. These case briefs should be short and include a summary of the facts, the questions at bar, the holding, and any relevant legal doctrine or legal test that the case established or employed.

7. Ask Questions

If you have a question about moot court, for instance about the case you are trying or a relevant precedent, contact your moot court facilitator or a fellow student. There is no reason that anyone in an assignment meant to foster critical thinking and improve communication skills should refrain from asking questions. Getting answers can lead to a well-reasoned oral argument. If you are a lawyer and you do not understand a question from the bench, ask for clarification before answering. If you are a justice part of your grade may depend on how many questions you ask and the quality of those questions. A successful moot court depends on the quality of the questions asked by the court. Questions are not something to fear.

Rather, questions are opportunities to demonstrate mastery of the subject matter.

8. Know Both Sides

Some "mooters" are ill-prepared to rebuke the other side, or they fail to ask reasoned questions to both legal teams. For lawyers, this can be lethal because they are unable to respond to their opponent's arguments in a cohesive or convincing fashion. For justices, this may mean that they fail to spot a flaw in the arguments before them. It may also mean that they do not have a balanced number of challenging questions for both sides. As a result, oral argument may turn repetitive or be chock full of unchallenged errors by one side. If this happens, your facilitator, and your fellow students, will likely be less than pleased. As a lawyer, you will never know what you will be asked. Some questions may even be unfair. The more you know about all of the issues, the more confident you will be in dealing with anything that arises.

9. Be Aggressive, Be Fair, and Be Candid

"Mooters" should not be intimidated. They should be collegial and respectful. "Mooters" should be honest. No case is airtight and no legal team, or justice, needs to win every point in order to triumph. If you are evasive, or refuse to acknowledge a weakness, you risk credibility. Candor, fairness to others, and a vigorous defense of your side are the hallmarks of a good "mooter." The key is not to win at all costs but to learn and have fun. Sometimes, you will gain more from admitting that you don't know something than you will from pretending that you do and being wrong. Faking it and getting caught will make the justices question all of your responses. Know as much as possible, but you can't know everything.

10. Approach Oral Argument as a Dialogue

The Supreme Court frequently grousing about the quality of the lawyers in oral argument. A common complaint is that the lawyers do not understand the purpose of oral argument. Oral argument is meant to be a dialogue about what the law means, how it should be interpreted, and how a party's request, if observed, will affect the nation. Oral argument is meant to offer lawyers the unique opportunity to assist the Court in interpreting the law and making good policy. Lawyers are afforded a rare opportunity to be a part of such an enlightened discussion; their role is both part advocate and part educator. Ideally, lawyers should approach oral argument as an opportunity to talk with, not at, the court about the law and its relation to the case at bar. What oral argument is not in its ideal form is a forum for lawyers to tell the justices about the substance of the law or to simply attack the other side. Justices should approach oral argument as an opportunity to question talented lawyers about how to decide important legal issues, in particular with respect to how their rulings will affect the nation. Oral argument is a conversation, not a debate. The more relaxed and conversational you are, the better you will come across.

Organizing a Successful Legal Team or Court

The keys to success also must include a focus on organization. Following are some additional tips for a successful moot court experience.

Getting Started

One of the first things a moot court group should do is schedule a meeting. People usually work best with people they trust. Unfortunately, students often do not know each other. An informal meeting may help students get to know and trust each other. It may also provide the group a sense of who is reliable and who is enthusiastic about moot court. Past "mooters" stress the need to hold this first meeting early in the process (perhaps the day teams are announced or

at the next class meeting). At this meeting, members should swap phone numbers, email addresses, and schedules, settle on a time for a working meeting, and discuss what resources they possess or have access to that might benefit the group. For instance, students may have, or have access to, photocopiers, fax machines, legal databases, law libraries, laser printers, conference rooms, or, not to be underestimated, a good pizza parlor. The group might organize an email or phone chain and may discuss when its members can meet and where. Groups might create informal sets of rules or expectations to guide behavior. These might include calling if you are going to miss or be late to a meeting, keeping discussions civil, and meeting deadlines. Justices might agree to respect the need for confidentiality when it comes to internal court discussions and processes and to recognize the need to remain impartial.

Students may choose to discipline themselves if students commit infractions such as miss a meeting or show up late. One former "mooter" suggests appointing a reliable team member to keep after habitual "slackers." In the unlikely event that a member routinely violates or ignores these rules or becomes disruptive to the group, the team may need to take a more drastic step and talk with their facilitator. Everyone should know these rules and the consequences for breaking them at the start. Invariably, rules are broken, or questions about rules arise. If your team or court does not have pre-selected leaders, such as a lead attorney or a chief justice, you might, with the permission of your facilitator, select leaders to help ensure that group members follow the rules. Leaders should be made to understand that they are to work with and for the group. The rank and file should be made to understand that it is to work with the leaders and certainly not simply dump on the leaders.

Preparing Your Legal Team for Oral Argument

The first step in preparing for oral argument is to read the case you are trying. You might do so as a group with the emphasis being on ensuring that everyone understands the assignment (e.g., who your side represents), and the facts. As a group, discuss what key issues stand out and why they are important. When this is done, you might

discuss what oral argument means; again making certain team members understand the group's role in the process. When this is complete, familiarize yourselves with the most relevant issues and case citations. It is probably impossible for any individual to read all of the cases cited in the sample briefs. Legal teams should divide the cases so that everyone is responsible for reading and preparing a summary of selected cases; deadlines for these briefs should be set and they might be shared by the group. The group might decide that members who miss these deadlines will be denied access to other students' work until they have completed their assigned briefs. It is important that communication among group members with respect to setting rules, planning meetings, and dividing chores should be done in clear, unambiguous terms so as to avoid possible misinformation or miscommunications. If you have made it this far at your first meeting, you should likely break for the time being. Before you do, be certain to discuss the time, date, and place of your next meeting. Teams may decide to hold regular mandatory weekly meetings. To encourage attendance, keep a sign-in sheet for your facilitator.

At your next meeting, or two, review what people have written and begin to discuss what issues or cases are most important to your team's case. After this, the team might assign issues to members for more in-depth study. All issues are likely to be of importance, and no one can know what issues the court will ask about; however, certain issues may be more salient than others. Thus, certain issues may emerge as "main" issues. Do not assign all of the main issues to one person and consider assigning at least two persons to "main" issues. Teams should meet again, and again, work to decide on the issues the team will stress and how the team will address certain key issues (e.g., aspects in the facts, or a precedent that seems to work against your argument). You might also discuss what legal doctrine you believe applies and strategies for getting the court to see things your way and apply such doctrines as you wish them to be applied. You might also discuss fallback positions for how to argue the case if the court does not accept your favored application of legal tests or doctrines. At this time, the group should begin to decide who will do what during oral argument. Groups might agree ahead of time that the weight and desirability of its members' assignments depend on the quality of your work and contributions to the group as well as

your reliability and the respect you exhibit for others. Tasks to be fulfilled include: delivering the opening and closing statements, delivering the main body of your argument (this may be divided by issue), and rebutting the other side. Someone may be needed to handle the team's case summaries in the event that they are needed during oral argument itself and individuals may be needed to keep notes with respect to what issues the other side raises and what questions the court asks of the other side that need to be redirected or what questions the court asks of your side which may need to be followed up upon. If time allows, stage a mock-moot court, taking turns answering questions or raising points that the court or the other side will raise. Prepare your answers. Consider divvying up the questions so different people are prepared for different issues. Do not assume that the court will overturn precedent that runs contrary to your argument. Brainstorm how to distinguish the facts of harmful precedent from the facts of the case at bar; your goal should be providing the court with a reason, or legal cover, to ignore precedent that might harm your side.

Preparing the Court for Oral Argument

For moot court to succeed, judges need to understand their role in oral argument. This may be complicated if only because people may be more aware of trial courts than appellate courts and, as a result, they do not truly understand or appreciate what appellate judges do or how they function. It will be important to discuss how oral argument will proceed and what is expected of judges in oral argument. Some student judges may be reticent to vigorously question student-lawyers; others, in classes where judges produce graded work such as legal opinions that are due after oral argument, may think that their real work begins after oral argument. This is a mistake. Being competent in your moot court requires working hard and long; it cannot be achieved in a short time-span.

Once the justices have a good sense of what is expected of them, how things will proceed, and what their roles or duties are, the court might begin to discuss the case. Because you are judges rather than advocates, your focus might be less on what is right or wrong or what should or should not be but rather on what has happened, what is-

sues are before you, and where you might look for answers. A key aspect of this will be to familiarize yourselves with the most relevant issues and case citations. Because it will be difficult for any individual to read all of the cases cited in the sample briefs, the court might divide the cases in such a way that everyone is responsible for reading and preparing a brief summary of some select number of cases. As with the lawyers, it may be helpful to set deadlines for these briefs. Students who miss these deadlines should expect to be denied access to other students' work until they have completed their assigned briefs. The lawyers have been counseled to assign issues relevant to the case to members for more in-depth study. Because you are not lawyers but rather judges, your focus is less on the parts than the sum. To use a different cliché, you need to consider the big picture—namely how the case affects the nation—consequently it may be inappropriate to divide issues in the same way as the lawyers.

Leading up to oral argument, the court should meet to discuss issues that are emerging as well as what may be the relevant doctrine or precedent. Because this is an academic assignment, the justices might work together to identify and understand these issues as they emerge. Because you are a court, the justices would do well to be neutral when explaining precedent to your fellow justices and to avoid dividing yourselves into voting blocs or forming a consensus on how the case should be decided until *after* oral argument. The court should use the time before oral argument to identify key issues, perhaps even forming consensuses about what issues are important and identifying questions it wishes the lawyers to address. Some courts may decide to divide responsibilities in this area so that certain justices take the lead on asking certain questions. Others will allow things to develop over more informal lines. Regardless of your path, good questions will be essential to the development of an enlightened and lively session. Correspondingly, justices should use the time leading up to moot court to develop questions they will ask the lawyers in oral argument. Justices might set goals for producing a set number of questions. These might be collected by your facilitator, or even the chief justice, and checked to ensure that they are appropriate to the simulation and free of mistakes or errors. This will enable justices to avoid wasting time on questions that are misplaced or error-laden. Students might find it helpful to examine the types of questions that are frequently

asked during the deliberations of appellate courts—in particular a court concerned with national issues such as the U.S. Supreme Court.

Successful Strategies for Legal Teams Preparing for Oral Argument

The actual procedures for oral argument may vary by simulation. In general, certain strategies are advisable for a successful oral argument. As mentioned earlier, one key is to continue to divide labor. No one individual, no matter how gifted, should attempt to do everything. Until one has been through oral argument, one has no idea how tough and intimidating it can be.

A second strategy is to develop an acceptable form of communication among members during argument itself. A key point to bear in mind is that students need to check their egos at the courthouse door; if you are passed a note saying to defer to a team member, do so for the good of the team.

A third strategy involves how you approach the case, moot court and, more specifically, oral argument. Believe in your case. Have confidence that if you present your arguments to the court in a reasoned fashion you will win. At the same time, keep things in perspective. Moot court is not about winning at all costs. Your goal is to work with your team, the other team, and the court to find the correct, or best, solution in a manner that benefits everyone. Moot court is about learning and competing in a civil, collegial spirit against worthy adversaries before learned jurists to whom lawyers should defer and be respectful. Do not lose your cool or be goaded into unpleasant scenes. This is meant to be fun. No one will go to jail if you lose. Relax and stay cool. Your goal is to be civil, courteous, and respectful in your manner and sober, reflective, and deliberative in your argument. A good oral argument is a discussion, not a debate, about what the law means, how the law should be interpreted, or how a party's request, if observed, will affect the nation. Do not presume to tell the nation's top judges the law; view this as a rare chance to discuss with them what the law should be or how to apply it to the case at hand. The key is to help the court to see things your way by suggesting how to decide the case—what test to use, what precedent applies, or how the court might distinguish cases or produce a narrow decision. Do not

assume that all strong arguments raised by the other side are fatal or that you need to refute every argument. No argument is without weaknesses. A lawyer may lose the court's confidence through excessive evasiveness or by being too argumentative. Put simply, being candid about the flaws in your argument may convey to the court that these points are minor and at worst inconsistencies to be ignored. Perhaps say something like, "Yes, your Honor, that is a good point, but there are many important aspects of the case and we feel that on the balance they favor our side...." One need not refute every point the other side makes. It strains credibility to suggest that you are correct about everything. In addition, there are times when it is better to move on to your side's strengths rather than dwell on its weaknesses.

A fourth strategy concerns how you view the court. Do not be pathologically scared of the court; sometimes a justice will attempt to help you. Listen to the justices, and take your lead from the Court—if it says it does not want to discuss an issue, drop it and move on. If a question is unclear, ask for it to be repeated. Some questions may strike you as dumb (don't say that)—try to make it appear as if you had anticipated such a question and that you view it to be one of significance. If a justice suggests how to answer a question, you might accept that answer and move on.

A fifth strategy is to not attempt to script how oral argument will proceed. Have a few basic points or arguments that you wish to make and return to them early and often. Keep jabbing home your points. Do this even if it becomes repetitive—you want to control the agenda as best you can—this may not be easy—but do it the best you can. At the same time, do not expect to control the course of oral argument. Things will likely proceed with little rhyme or reason and hardly as you would like or expect. Roll with it (as they say). Of your total time, you may be lucky to speak for fifteen minutes and for a minute or so at a time without interruption. If not; it is a dead court (not a good sign). Be prepared to be interrupted by questions and be asked to discuss matters not necessarily germane to the point you are raising. You can attempt to return to where you were when there is a break in the questioning. Expect hypothetical questions or questions like "what will be the effect on the nation or the law if we do what you want us to do?" Have your answers set and by all means stress how your answers are prudent. Be prepared for the terms of the different legal

tests, and decide ahead of time how to argue for or against the application of each.

A final strategy, if allowed, is for the appellant (the side that starts oral argument) to ask for permission to reserve time for rebuttal so as to have the final word. Use this time to rebuke points that the other side made, stress or reiterate arguments, correct mistakes, return to questions, answer questions that the other side was asked, and conduct your conclusion.

Successful Strategies for Justices Hearing the Oral Argument

In a good oral argument, justices engage lawyers in an informed discussion about the case. For this to happen, the court must be prepared. Justices might come to oral argument with a memorandum that summarizes the issues and whatever questions they might have. Justices might consult this memorandum as argument ensues. The previous subsection discussed strategies to use to prepare for oral argument. This subsection will discuss strategies to employ during oral argument.

The key to a successful oral argument from the court's perspective may be the quality of the questions asked; thus, as we have indicated, preparation is important. Being prepared, however, is not enough. Justices need to develop a questioning style or a manner of inquiry with which they are comfortable and which is appropriate to the exercise. Whatever the specific style or manner justices develop, they should strive to be vigorous questioners, while at the same time not so vigorous so as to be unnecessarily intimidating or so vigorous so as to close your ears to what is being said in response. A key to critical thinking is the ability to listen and reflect upon what you hear; do not sacrifice that for the "thrill" of firing questions at a machine-gun-like pace. Your purpose is to ask questions, not grandstand or torture the lawyers. Justices, therefore, are advised to maintain a degree of civility and decorum in their questioning as well as their interactions with their fellow justices. While debate and disagreement are an acceptable, even desired, part of moot court, the exercise itself is not meant to be personal. One strategy for ensuring a harmonious court may be for the justices, just prior to oral argument, to emulate the U.S. Su-

preme Court's tradition of shaking hands and wishing each other luck during the proceedings to come. For moot court to succeed, participants must believe that the court is fair and unbiased. It is crucial, therefore, for justices to keep their pre-oral argument discussions a secret from the lawyers lest it appear that the court's mind is already decided. In addition, because the court needs to appear impartial, justices should treat lawyers, friend or foe alike, in an equal fashion. Justices should behave in a judicious manner; they should not scream at the lawyers or insult them—they should be polite and respectful.

Another key to a successful moot court is that participants engage in a type of suspended animation. It is important that the justices, especially the chief, be firm, yet fair. The court must not allow the lawyers to show disrespect for the court by failing to acknowledge its legitimacy or powers insofar as they go. Justices need to portray a sense of sobriety about their duties, and, if possible, they need to project a degree of gravitas. This is hard to teach. It can, however, be enhanced by manner, how one carries oneself, and perhaps one's attire. The point is that the justices, if they wish to be taken seriously and to have the lawyers and the audience suspend their disbelief, need to take oral argument seriously and to exude a high level of respect for each other and their classmates. To achieve such, courts might develop informal rules that will govern their behavior. These might include not allowing the lawyers to witness disagreements among the justices. It might also be advisable to insist that the lawyers rise when addressing the court and that they preface all remarks with the traditional phrase, "Your Honor, May It Please the Court." The justices should not refer to each other, or the lawyers, by first names and insist that if a lawyer and a justice speak simultaneously, the lawyer yield the floor (so to speak) to the justice. Some courts may elect to develop a dress code for oral argument to add to the authenticity of the simulation. In fact, in tournament competition, attorneys are judged in part on proper dress and respect for the court.

Having a chief justice can go a long way to making a court a success. In oral argument, the chief would preside; by using a gavel, if one is available, or a stern look, if one has one, the chief can help to maintain order and keep a sense of decorum. The chief may act as a type of unofficial spokesperson for the court when it comes to communicating its concerns or select questions to the lawyers in a fashion

that is both dignified and impartial. The chief can help to keep discussion from stagnating or being dominated by the court's most outspoken or assertive members.

Successful Strategies for the Court's Conference

When moot court is over, the justices will likely render some opinion, written or otherwise, that settles the dispute and explains the court's rationale for its decision. Ideally, the court will not vote immediately at the conclusion of oral argument, in front of the lawyers, but instead retire to discuss the case, in secret, among themselves in the presence of their facilitator. At conference, the court should debate the merits of the different sides, address whatever issues or concerns its members have, consider case law or the needs of the nation, explore the existence of whatever consensus might exist on the issues before it, and hold a vote on the merits of the case. If possible, the court should arrive at a consensus for the rationale for its decision that it will later disclose to the lawyers. This process can be accomplished in one session but will likely require more than one meeting. However handled, there are certain strategies that can serve to improve conference.

The chief justice should preside over conference. This involves keeping discussion moving, putting issues on the agenda for consideration, ensuring that members who wish to participate are afforded the opportunity, and recording the results of any votes taken. A good chief can boil complex issues down to understandable terms. This ability may be more innate than taught; however listening carefully to what members say is a good start. Chief justices should pay attention to any key assumptions made, any legal doctrines at hand, and, if dissent exists, any common area that may exist between the different sides. It may be beneficial for the chief, every so often, especially before a vote is taken, to summarize the views of the different sides in a fair and comprehensive manner. To do so, it may help to keep a record of the proceedings. The chief should keep such notes; however, it may be beneficial to ask that one of the associates also keep track of debate.

The conference should operate according to a clear set of rules, addressing matters such as what will determine the order in which

justices will speak or vote, whether to set a time limit for discussion, and, if there will be a majority opinion, how the court will handle its assignment. In addition to operating according to some rules of procedure, justices might consider observing similar rules of decorum to those used in oral argument. This would include no name calling, no outbursts, no profanity, and no fisticuffs. Justices should be encouraged to take the conference seriously and not view it as irrelevant or a tiresome waste of time.

SUMMARY

This chapter has offered a variety of strategies to guide lawyers and justices through moot court. At the outset, we identify ten key general strategies. Among these are divide labor, be selective, read cases thoroughly and carefully, and establish hierarchies within groups. In addition, we discuss in greater detail how legal teams and the court should function prior to and during oral argument. In the case of the court, we also discuss how it should function during its conference, and we offer tips to assist in the administration of the court. Mooters need to bear in mind two additional matters of significance. First, the purpose of oral argument is to allow lawyers the rare ability to take part in an enlightened dialogue with the court about the law and the immediate case. For justices charged with the task of interpreting the law, moot court offers the opportunity to question talented lawyers about how to decide important legal questions whose resolution will have an impact upon the nation. Second, the purpose of moot court itself is to allow "mooters" the opportunity to do more than learn about the law or the judicial process. Lessons about critical thinking and logic, leadership, and working within a group abound; they are yours for the taking. So, belly up to the bar (so to speak) and get started on your moot court experience—bearing in mind that utilizing the strategies discussed in this chapter and assuming the right mindset will tend to enhance your moot court experience and make it the very best it can be.

to research original texts related to old charters. These have been collected in all the libraries across the world, making it easier for scholars who want to refer to relevant evidence. Guidance on the use of manuscripts is provided to ensure reliable guidance is given to scholars of Anglo-Saxon history. This guide is intended to assist scholars in their work on Anglo-Saxon charters and to help them to understand the nature of these documents.

When a court is over, the justices will likely render some opinion, written or otherwise, that settles the dispute and explains the court's reasoning for its decision. Ideally, the parties will vote immediately after the conclusion of oral argument. However, the justices will instead vote to decide the case in open court, in the presence of the parties and their legal counsel, and the public. The decision will be made public by the court's clerk or reporter, and the organization of the hearing will be responsible for publishing the decision online. The decision will be published in the court's official journal and will be available to the public through the court's website.



CHAPTER FIVE

Moving Beyond the Classroom: The Moot Court Tournament

Charles Knerr and Andrew Sommerman

American justice is adversarial: the "truth" will emerge, it is believed, by using a process of attorneys competing with each other. Since the process of answering questions and reasoning through moot court competition allows the students to experience how the adversarial process operates, nearly all American law schools require students to compete in moot court. Schools which are members of the American Bar Association (ABA) are *required* to send at least one team to a national competition. The ABA feels that competition will sharpen students' ability and motivation to practice law. Moot court competitions additionally stimulate students' desire to prepare for "court" and sharpen their critical thinking and communication skills.

COMPETITORS

Nearly every law student will experience moot court; undergraduate students can also benefit from moot court competition. There is no other program which can provide adequate opportunities to sharpen an undergraduate student's abilities at persuasive speaking, research, and logical reasoning. While the traditional class is graded solely on a final exam, final exams do little to improve the true skills that will most benefit undergraduates in whatever career they choose.

In business as well as legal settings final exams are non-existent. However, throughout nearly all business and legal settings, individuals communicate verbally in a concise logical fashion with prepared re-

search and information to back up their positions. Undergraduate students significantly benefit, therefore, from participation in these moot court competitions.

The undergraduate student should be prepared for a significant time commitment. It has been the experience of the authors that the minimal time requirement to prepare for a tournament is at least 50 hours of concentrated effort. Those students wishing to advance significantly might spend up to 200 hours doing research and preparing their oral argument. Moreover, the competition itself usually lasts over a two-day time period. However, few students leave the competition without feeling a sense of accomplishment and learning after the completion of the competition itself.

THE CASE

Moot court problems use a "case" in order to challenge the competitors. The "case" is a simulated or actual appellate court decision. In the moot court case, a trial court has made a decision which is then appealed to an intermediate appellate court. Usually, the moot court case is an appeal from the intermediate appeal court to a Supreme Court either of the United States or a fictional state.

The intermediate appellate court usually cites cases as precedent to support the position that it took in making its decision.

Also included in the decision is a *dissent*. A dissent is at least one of the justices at the intermediate court disagreeing with the holding of the majority. The dissent will also include case law which lends support to their dissent. These cases form the core group of research that a competitor has to use in order to formulate an argument.

Competitions can either use an open or closed format. An "open" case is one where the competitors may use any decided court opinion as precedent to support the competitor's position. With literally millions of cases to search from, the "open" case poses the challenge of refining research and presenting case law which will be persuasive and authoritative to the judges.

The "closed" case is one where the competition rules do not allow the competitors to use any other cases besides those cited in the intermediate court opinion and dissent and any of those listed with the instructions for the competition itself. The "closed" case does not place

such a premium upon research but rather upon reasoning and the ability to use the cases provided to them.

Nearly every case tries to have an even balance to it. That is to say neither the petitioner nor the respondent has a clear advantage based upon the positions taken in the case. However, nearly all problems have some bias contained within them. It is nearly impossible to find an evenly balanced appellate court decision. As a result, usually one side has the "law" on its side and the other has equity.

Finding the right argument on each side is essential in order to exploit the bias that is present on either side of the case. Further, this balances out in the end since all competitors are required to argue both sides of the case in competition.

JUDGES

Judges generally come from four basic groups of individuals: 1) lawyers; 2) judges; 3) law students; and 4) faculty.

- 1) *Lawyers*—the vast majority of judges in a moot court competition come from the legal community in and about the area where the competition is being held. The time commitment associated with being a judge can be significant. Generally, judges will be required to review the information prior to coming to the competition and then spend at least two hours at the competition itself. Obviously, with the pressures of billing time lawyers are reticent about volunteering their efforts along these lines. Moreover, many of the lawyers who do attend the competition may not be experienced advocates. Although nearly every attorney has experienced moot court in the law school setting, very few have actually experienced presenting oral arguments in front of a panel of judges in a real appellate courtroom. As a result, screening by the competition coordinator is important to ensure that the most experienced lawyers are present for the competition.
- 2) *Members of the Judiciary*—many state and federal judges are willing to invest time in the education of students. As a result, a number of judges volunteer their time and experience and various moot court competitions. This is invaluable since the role that they play in the

legal community is the same as they would play at the time of the competition itself. Giving this real-world experience is of great benefit to the competitors themselves.

- 3) *Law Students*—because of the time constraints of lawyers and judges, some undergraduate moot court competitions are held at law schools. Because law students have recently experienced moot court competitions, they make excellent judges for moot court. Moreover, their fresh understanding of the law is also beneficial to the students who will have judges who have recently studied the area of law in which the setting is placed.
- 4) *Faculty*—undergraduate moot court competitions are generally organized and managed by faculty from various undergraduate colleges. One should be cautious about having judges from these same faculties. In addition to the obvious concerns about bias for various schools, the faculty also will have certain preset ideas as to how the arguments should be run since they have assisted students in constructing their own arguments. Rather than having an open mind, they generally have a closed one, and as a result it can be difficult for students to be judged by undergraduate faculty.

Generally moot court competitions are structured where there are preliminary rounds with a number of undergraduate schools participating. Because a vast number of rounds might need to be held, there are very few judges who can actually attend the initial rounds. As a result, in the initial rounds, usually one or two judges are present for the preliminary rounds. This makes appealing to that particular judge all the more important.

SCORING

Scoring at various law school and undergraduate moot court competitions varies somewhat from one tournament to another. Judging guidelines for the Texas Undergraduate Moot Court tournaments are included next. A sample judging form is included at the end of this chapter. Obtaining a judging form and judging information in advance of any tournament is strongly recommended. While each competition uses scoring guidelines which are unique to that competition, the au-

thors have surveyed most of the competitions offered and have found that the four areas outlined next are addressed in some manner.

Here are the rules set out for judges in the Texas Undergraduate Moot Court competition. These guidelines outline the criteria by which a competitor may be judged.

**TEXAS UNDERGRADUATE MOOT COURT COMPETITION:
JUDGING GUIDELINES**

Your judging guidelines should be independent, based upon each speaker's oral advocacy skills only, without consideration for which side should win on the merits.

Please be sure to mark whether the Petitioner or the Respondent won the round. This is very important because teams advance based on their win/loss record.

Your point differential on the scoring sheet is also very important because in the event of a tie, teams advance according to their cumulative point totals. Therefore, please avoid making the scores close if the performances are not close. Please be sure to complete accurately every blank on your ballot and sign it.

Please note that there is a range for each category. Do try to give students scores within those ranges. Superior scores should receive higher points, and inferior performances should be lowered accordingly.

Following this narrative, the judging form contains specific areas to be evaluated as well as specific points within each area upon which judges are instructed to focus. Four areas are generally evaluated by judges: The first is knowledge of the subject matter, the second is response to questioning, the third is forensic skill, and the fourth is courtroom demeanor. Each of these areas is important for the competitors to master.

I. KNOWLEDGE OF SUBJECT MATTER

1. Does the speaker give a broad but brief overview of his/her argument in the beginning?
2. Is the speaker's presentation well organized, with his/her organization clearly expressed?
3. Does the speaker have a thorough knowledge of the record? Can the speaker direct you to important language therein?
4. Does the speaker emphasize the important issue?
5. Does the speaker argue the heart of the matter adequately and is he/she selective in discussing issues?
6. Does the speaker employ a variety of types or arguments (precedents, logic, policy, etc.) rather than relying on too few types?
7. Are the speaker's arguments clear and direct?
8. Are the issues firmly fixed in the Court's mind when the speaker finishes?
9. Does the student stay within the time limits placed on him/her, speaking NEITHER TOO LONG NOR TOO BRIEFLY?

II. RESPONSE TO QUESTIONING

1. Is the speaker responsive to questions rather than evasive or repeatedly unable to give an answer? (Some deferring to one's partner is permissible where such a question involves the other speaker's argument.)
2. Is the speaker able to answer a question with authority, either theoretically or with case names?
3. Is the speaker able to fit relevant questions into his/her overall analysis and presentation?
4. Is the speaker able to continue his/her argument after a question?
5. Is the speaker candid about the weak points in his/her arguments?

III. FORENSIC SKILL

1. Does the speaker use correct pronunciation and grammar?
2. Does the speaker use timely emphasis?
3. Does the speaker effectively use pauses?
4. Does the speaker's voice have proper volume and good inflection?
5. Is the speaker's voice clear rather than inaudible or difficult to understand?
6. Does the speaker employ "ahs," "ums," or "ers" that are distracting?
7. Does the speaker use gestures effectively and appropriately?
8. Does the speaker exhibit a professional stance at the podium (stands straight, avoids distracting mannerisms, etc.)?

IV. COURTROOM DEMEANOR

1. Does the speaker appear to be trying to be helpful to the Court?
2. Does the speaker project an image of professional sincerity toward his/her client?
3. Is the speaker forceful without being overbearing?
4. Does the speaker talk to and look at the judges in a conversational manner INSTEAD OF READING A PREPARED TEXT?
5. Is the speaker courteous rather than sarcastic, condescending, or resentful?
6. Is the speaker poised and at ease rather than stiff and/or jittery?
7. Does the speaker display the proper degree of confidence?
8. Does the speaker use all of his/her time but not exceed his/her time limits?
9. Does the speaker begin with "May it please the court" and end with a specific prayer for relief?
10. Does the speaker demonstrate the skills of an effective advocate for the client?

Tournament Skill Components

The following are strategies the competitor may consider when preparing for competition. Each topic the competitor will be scored upon is addressed.

1) *Knowledge of the Subject Matter*

Knowledge of the law is perhaps the single most important area in which the competitors can show their skills. Knowledge is achieved through appropriate research and study of case law and the moot court problem. Obviously, being familiar with all the cases cited in the problem is essential in order to prevail at any competition. One should be familiar with all of the facts in every one of the cases that is cited in the moot court problem as well as the issue presented in each case and the holding of each one of those cited cases. Moreover, the skilled moot court competitor will work in details of these cases so that one may present his or her knowledge to the judges.

2) *Forensic Skills*

Forensic skills are essential to a good moot court argument. One must show confidence and use a correct iambic pentameter. Reading one's argument should be forbidden. Also important is to look each of the judges in the eye. Unlike public speaking, where one tries to look just above the eyes of the crowd, in moot court, one should look directly at the judges, especially when answering their questions. Moving eye contact from judge to judge is also essential so that they can feel that you are paying attention to them and are speaking directly to them.

Most important of all with forensic skills is the concept of enjoying yourself. One should make the judges feel that you are comfortable with your argument and also make the judges feel good about the questions that they ask. Never let the judges believe that the competitor believes that the question or issue being raised by a judge is stupid.

3) Answering Questions

The ability to carry on a conversation with a judge by answering the questions being posed to them is essential to a high score. Answering questions should be done directly to the judge posing them. If at all possible, the competitor should answer the question by citing a case. That is, giving the court an example of how there is case law which supports the competitor's position and how that answers the judge's question. By doing so, the judge knows that they asked an appropriate question that is cited with case law and supported by that position. Moreover, it shows the knowledge of the law of the competitor. Finally, in answering a question, one should also give a policy argument. That is, one should show why it is that the question being posed would have either a positive or negative effect (whichever is appropriate) on the state of the law and/or society. In essence, the competitor should provide a picture to the judge as to how the effect of the question being posed would affect the law or people in general. This strategy of giving someone a case and a picture generally has the effect of high scores at competition.

4) Appearance

The appearance of the competitor is always important. While the concept of relaxed dress has become more prevalent, courts have not adopted this philosophy. As a result, men should be dressed in suit and tie and should make a conservative appearance. Ladies should always dress in appropriate attire as well. One should not stand still nor wave his or her hands about in wild gestures. Rather, simple and appropriate hand movement is always essential to a high score.

THE WRITTEN BRIEF AND ORAL ARGUMENT

Many competitions will require submission of written briefs in addition to oral argument. This is closer akin to the competitions offered at law school. In law school, moot court competitions always require a written brief that is scored and weighed in conjunction with a competitor's oral argument. When arguing in front of an appellate court,