

# ESSAY

## IN PRAISE OF MOOT COURT—NOT!

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*I must tell you how impressed I am with the performance of both teams. In my fourteen years on the bench, I have seldom seen lawyers who served their clients so well. In fact, I wish I had lawyers this good appearing in my courtroom all the time—it would sure make my job a lot easier.*

These words, or very similar ones, are uttered by the presiding judge at the end of every moot court competition I have attended—and there have been many. The associate judges, on either side, vigorously nod their heads and everyone in the courtroom beams—the participants, their coaches, their boyfriends and fiancées and, most important, their moms and dads, who are confirmed in the belief that their little Cadwalader or Eustacia really is the second coming of Cicero, or at least Melvin Belli.<sup>1</sup>

This is all hunky dory, except for one fact: It's not true. It's one of those standard lies like "I tested negative last week," "I didn't inhale," and "Absolutely, 100% not guilty!" that are designed to get you past an awkward situation. I've said it myself many times and never meant it,<sup>2</sup> and many more times I was one of the vigorous head-bobbers,<sup>3</sup> adding a thumbs-up or an OK signal for emphasis, all the while thinking that these young folks needed a lot of ripening on the vine before they would become real lawyers.

For many years, I thought that lack of age and experience were likely the problems with the quality of moot court advocacy. After all, there's no substitute for seasoning when it comes to something as delicate as courtroom performance. But lately I've come around to the view that there's more to it: Moot court advocates don't sound and act like real lawyers because they are not taught to act like real lawyers. At most—perhaps all—law schools, there is too much emphasis on the "moot" part of moot court and not nearly enough on the "court." Moot court programs teach the wrong lessons and create the wrong incentives, and thus help develop the wrong skills. There is, in fact, such a make-believe qual-

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\* Experienced appellate judge; former appellate lawyer; eliminated in first round of moot court competition. I thank my law clerk Harry Susman, who also did poorly at moot court, for his valuable assistance.

1. Belli is famous for a lot, but I especially like his quip that "I'm not an ambulance chaser. I'm usually there before the ambulance." Angela Townsend, Melvin Belli, "King of Torts," *Dies*, USA Today, July 10, 1996, at 3A.

2. "Never" is a strong word. I actually did mean it once. If I ever judged you in a moot court competition, you're the one.

3. Head-bobbing is the way we judges express our appreciation for lawyers' arguments, but it's too often mistaken for nodding off.

ity about the entire process that it would be hard for an experienced advocate to do well.

It's difficult to say exactly why this is so, but I can speculate. Moot court competitions are run by students with the help of faculty who have often had either no experience as lawyers or unhappy experiences, which caused them to flee into academia. Moreover, as a part of the law school curriculum, moot court is subject to the restrictions applicable to all academic endeavors—fairness, equal access for all who want to try out, avoiding certain topics thought too offensive to the sensibilities of those involved, etc.<sup>4</sup>—which do not constrain real practice. Students themselves often come to law school after several years of undergraduate and high school debating—at which they likely were successful—so they want to replicate their debate experience in moot court. But college and high school debating primarily serve to develop forensic skills and entertain participants, not to prepare them for professional careers.

There's the crux of the problem. I don't mean to suggest that moot court is not rewarding for those who participate. It clearly is, just as college debating is rewarding. Participants often have a good time doing it,<sup>5</sup> *and* they learn a lot about appearing in public and thinking on their feet. These are important skills and may be of some help in lawyering. But moot court lays pretense to more: It claims to be the preeminent tool for teaching students the skills of courtroom advocacy.<sup>6</sup> Unlike many law

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4. In this regard, I'm reminded of the experience of the NYU Moot Court Competition of 1990. The short story is that students objected to the problem because they claimed there weren't two sides to the issue. The problem dealt with a hypothetical custody dispute in which the issue was whether a five-year-old child should live with her mother, who, the husband claimed, was living with her lesbian lover. After students complained that defending the husband would require them to take a homophobic position, the moot court board withdrew the problem and offered an alternative. See Edward A. Adams, 'NYU Moot Court Competition Stirs Student Protest, N.Y. L.J., Apr. 12, 1993, at 1.

Three years later NYU did it again. The 1993 Moot Court problem included a description of a gynecological examination given to a seven-year-old hypothetical incest victim. Certain students objected that the description was so graphic that they could not work on the problem because it brought back painful memories of childhood sexual abuse. This, students argued, would put them at a disadvantage because they would have to struggle to overcome the effects of these painful memories while preparing for the case. Again an alternate problem was offered, although this time the moot court board had better sense than the faculty, only relenting under faculty pressure. See *id.*

5. Who knows; you might meet your future spouse in moot court, as did Bill and Hillary Clinton. See Donald Baer, Man-Child in Politics Land, U.S. News & World Rep., Oct. 14, 1991, at 40.

6. By using the phrase "moot court," I refer only to moot court competitions for second- and third-year students; first-year moot court programs are a mongrel breed, part oral advocacy class, part research and writing class. Here's how a fairly typical moot court textbook describes the "reality" of moot court:

If you are to be an advocate, you should have a feel for advocacy situations. There is a difference between having a client with a problem and mere analysis of legal principles on an abstract level. In moot court you have a client. You therefore must have a position. You also have an opponent, with whom you must match

school endeavors, moot court consciously strives to teach students useful, real-world skills. And this is not an unreasonable goal: After all, law school is a professional school, and students shortly after graduation may find themselves arguing appellate cases. While there are limits on how much real-world experience one can get in an academic environment, moot court falls far short of its potential. By creating a situation where competitions have a distinct air of unreality, far removed from real courtroom experiences, moot court not only fails to teach many of the skills lawyers will need when making appellate arguments, it teaches many wrong lessons that must be unlearned—if at all—by bitter experience.<sup>7</sup>

The proof of all this is in the pudding—the job pudding, that is. The simple fact is that a student's performance in moot court is seldom a significant factor in gaining legal employment.<sup>8</sup> Success at moot court may look good on the resumé, but it counts for next to nothing when compared to law review membership, which is especially damning given how little relevance law review work has to practice.<sup>9</sup> One might think that the lack of interest in moot court on the part of legal employers reflects the fact that few hire appellate litigators right out of law school.

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wits. You have a chance to win or lose; you can outsmart or be outsmarted. You must calculate and weigh your options and costs. It is a world different from the classroom, which is more theoretical, but a world to which you should become accustomed.

John T. Gaubatz, *The Moot Court Book: A Student Guide to Appellate Advocacy* 4 (2d ed. 1987). In the damning-with-faint-praise category, it's popular to laud moot court's realism in comparison to what's taught in law school classes. See, e.g., K.N. Llewellyn, *Bramble Bush* 111 (1960) (informing students that "[y]our moot court—not your courses" will teach students what real-life lawyering is all about).

7. It's not unusual to see lawyers—particularly jury lawyers—make some of the mistakes I discuss below. When I check Martindale-Hubbell, I often find, sure enough, that they were stars in moot court.

8. Few students select a law school based on the quality of its oral advocacy programs. One exception may be South Texas College of Law in Houston, Texas, which is the "undisputed king of general advocacy," having won 7 of the last 11 American Bar Association National Appellate Advocacy tournaments. See Todd Ackerman, *South Texas' Success in Moot Court Is Indisputable*, *Houston Chron.*, Feb. 25, 1996, at 31A (reporting that graduates of South Texas's advocacy program are sought after by law firms); Gary Taylor, *School Focuses on 'Legal Sport' to Enhance Its Rep*, *Nat'l L.J.*, Sept. 4, 1995, at A13. In fact, many moot court programs have trouble generating interest among the larger student community—such as at Yale where attendance at mock trials got so low that, instead of inviting the likes of John Sirica or Gerhard Gesell to judge, Yale students invited, as a publicity stunt, Judge Wapner of *People's Court* fame. See David Margolick, *Elitist Yale Breaks Precedent and Invites a Symbol of Populism to Preside at a Legal Rite*, *N.Y. Times*, Apr. 12, 1991, at B16 (reporting that students sold T-shirts promoting the event with a picture of Judge Wapner surrounded by two hamburger buns and the caption "Home of the Wapner").

9. Cf. Linda A. Cinciotta, *Why Top Legal Talent Seeks Justice Dept. Jobs*, *Nat'l L.J.*, Dec. 26, 1988, at 14 (reporting on the U.S. Department of Justice's hiring criteria: "Academic achievement is always important, and law review experience is always a big plus. Opinions with respect to the value of moot court participation and clinical experience vary.").

Appellate judges are an obvious exception and could be expected to have an affinity for a clerkship candidate who has done well at moot court. Reality is different. I have never heard of a judge who picked up the phone and hired the winner of a moot court competition, as Judge Skelly Wright would occasionally do with the newly-elected President of the *Harvard Law Review*.<sup>10</sup> Serious clerkship applicants never send me their moot court briefs as writing samples, and success at moot court usually impresses judges more as an index of the student's ability to juggle many activities than as an accomplishment in its own right.<sup>11</sup> The simple fact is that when it comes to getting a job, moot court has squat resumé value. If moot court actually teaches useful skills to young lawyers, this fact has escaped nearly everyone who is engaged in legal hiring.

What I will discuss below are the ways in which moot court differs from real court, and show how these differences undermine the verisimilitude of the experience. Whether you agree with me as to any particular point, keep in mind the cumulative effect of all these factors, which makes moot court different in material respects from real court. Some differences, obviously, can't be avoided—such as the fact that there is no real client and no real court. But many of the other differences are built into the process out of convenience or complacency, or to serve other values. These differences can be eliminated, but at some cost. Whether that cost is worth the candle is a matter of judgment.

### I. MOOT CLIENT

Perhaps no rule is more universally accepted among moot court competitions than the rule that winners and losers are judged not on the merits of the case, but on their advocacy skills. This principle is so widely accepted—and with so little question—that no one bothers to offer a justification for it. Yet this is a drastic departure from the way things happen in real life.<sup>12</sup> It's as if a medical school held a competition for treating patients, but the contestants were judged on their bedside manner, not on how often their patients survive.<sup>13</sup>

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10. See Bill Monroe, In Memoriam: J. Skelly Wright, 102 Harv. L. Rev. 369, 373 (1988) (reporting on Judge Wright's habit of hiring the President of the *Harvard Law Review* over the phone without an interview).

11. Only a small percentage of federal circuit judges view moot court participation as significant enough to list it on their resumes. A search of the Westlaw Judge's directory on October 2, 1996 revealed that, out of 256 listed circuit judges, only 9 list moot court participation, while 120 list law review membership. These numbers may not be entirely accurate. For example, I'm not among those listed as having made law review, but Mom still keeps the certificate to prove it.

12. As Judge Rubin once put it, "Moot court judges grade advocates. Court of appeals judges decide cases. The difference is vast." Alvin B. Rubin, What Appeals to the Court, 67 Tex. L. Rev. 225, 225 (1988) (reviewing Michael E. Tigar, *Federal Appeals: Jurisdiction and Practice* (1987)).

13. A gag making a similar point is told about two carrots who are in a car wreck. One carrot is rushed to the hospital for surgery, while the other carrot waits anxiously for news

In real court, the advocate's focus is on winning the case for the client. The client's and lawyer's interests almost always dovetail, so the lawyer isn't happy unless the client wins. No lawyer I know—no self-respecting lawyer at least—is satisfied with praise for a brilliant oral argument if he winds up losing the case.

Moot court is much different: The advocate has no interest in the outcome of the case; his interest is entirely personal—winning praise for his performance. His interest often differs even from that of his co-counsel, as they may be competing for the best advocate prize. In real life, the game turns on saying—or refraining from saying—what will advance the client's cause.<sup>14</sup> In moot court, the game consists of making yourself sound clever. This means that each advocate desperately wants the maximum time at the podium and is jealous of any extra time taken by opposing counsel, even when the time is spent giving damaging answers to questions from the court. The theory seems to be that, since you're judged on your performance, not on how good your client's case is, extra time at the podium is a good thing because it gives you the chance to show off.<sup>15</sup>

Experienced lawyers do, of course, use their wit and charm to win the trust of the judge or jury. But this is not an end in itself; it is a means for winning the case for the client. Personal charm, the ability to give

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of his friend's fate. A doctor finally emerges and says, "I've got good news and bad news. The good news is the operation was a complete success. The bad news is your friend is a vegetable."

14. In fact, the best advocates and most seasoned judges usually recommend that lawyers waive their rebuttal if the case appears to be going their client's way. See, e.g., Jim R. Carrigan, *Some Nuts and Bolts of Appellate Advocacy*, 6 Litig. 5 (1980), reprinted in American Bar Association, *Appellate Advocacy* 207, 211 (1981) [book hereinafter *Appellate Advocacy*] ("There is always the danger of flaying a dead horse back to life with your tongue.").

It's not unusual for a lawyer to sit down with time left on the clock, having sensed that he's ahead and can only make things worse by talking. The prime example of this that I have witnessed comes not from my experience as a judge, but as a spouse. My wife, Marcy Tiffany, argued *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), as counsel for petitioner, and after her initial argument she had about 10 minutes left for rebuttal. Her opposing counsel took his full half hour and made what I thought were some telling points. "How," I asked myself, as I sat there in the front row biting my nails, "would Marcy be able to dispel all those half-truths in just ten minutes?" She walked up to the podium, and when the Chief Justice recognized her, she said, "I have nothing further, your honor," and sat down. I seriously doubt I would have had the discipline to do this had I been in her position, but her trained ear told her that her opponent had not, after all, scored any points. Sure enough, she got a unanimous reversal of what had been a unanimous decision in the court of appeals.

15. See Alan D. Hornstein, *Appellate Advocacy in a Nutshell* 306-07 (1984): [A]fter making the points [the advocate] sought to make . . . the best thing she can do is to conclude, thank the court, sit down and shut up. Yet all too often advocates—especially neophytes or students involved in academic moot court exercises—believe it is poor form to fail to use all one's time. In this view, every moment that the advocate has to connect with the minds of the court should be used to the full.

good answers to questions, the subtle art of intimidating judges with veiled warnings that they will look foolish or unprincipled if they reach a particular result—these are merely some of the tools in the advocate's arsenal of persuasion. But persuasion is an art quite distinct from any of the techniques used to persuade; you can master each of the techniques, yet be unable to deploy them in a way that's effective. Thus, I have seen more cases than I can count where the lawyer was witty, charming, direct and forthright—all the qualities of a Boy Scout or a lapdog—but did not persuade. Similarly, many lawyers think they've won their case when they flawlessly distinguish precedent or make a first-rate policy argument, but they're wrong because the judges just don't think this is a key issue. A lawyer can exercise all the lawyerly skills in a technically flawless fashion and still not carry the day because she didn't figure out what was really important to the judges, or did not manage to gain their confidence.<sup>16</sup>

In truth, we know very little about the theory of persuasion—what works, what doesn't, what attracts, what repels. We can judge how well people utilize the various tools by putting them to a variety of hypothetical tests, but can seldom tell how persuasive they are unless and until we subject ourselves to the process of persuasion. A lure may look attractive sitting in your tackle box, but the real test is whether it catches fish. What this means is that we can almost never tell how persuasive an advocate is unless we actually let him try to persuade us.

But this is precisely what moot court judges are told NOT to do: Judge not the merits of the case, they are told, but the effectiveness of the advocates.<sup>17</sup> From the start, then, judges are instructed to make themselves impervious to the very process the effectiveness of which they are supposed to judge. It's sort of like being told to judge the quality of a dish by looking at the list of ingredients, asking the chef questions, feeling it with your fingers, sniffing it, considering the fat and carbohydrate content—in short, doing everything EXCEPT tasting it.

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16. See, e.g., William H. Rehnquist, *The Supreme Court: How It Was; How It Is* 279–80 (1987). The Chief Justice describes one type of advocate who pulls out all the stops, welcomes questions, and exudes confidence; when he has finished and sat down, one judge may turn to another and say, "Boy, he certainly knows his subject." But simply showing how well you know your subject is not the same as convincing doubters by first carefully listening to their questions and then carefully answering them.

Id.

17. See, e.g., *Forty-Seventh Annual National Moot Court Competition* (1996), available in 1996 WESTLAW 506115, Moot Database, at \*75 ("The Judges' evaluations of the oral arguments presented should not be affected by their personal views of the merits of the case at bar."); *The 1996 Cardozo/BMI Entertainment and Communications Law Moot Court Competition Rule V(C) (7)* (1996), available in 1995 WESTLAW 793206, Moot Database, at \*41 ("In determining the scores, judges may not consider the merits of the case."); see also *National Appellate Advocacy Competition, 1996 Problems and Rules art. 10(2)* (1996), available in 1995 WESTLAW 684208, Moot Database, at \*33 ("The [judging] criteria shall include: Knowledge of the law, Ability to Answer Questions, Persuasiveness, Forensic Performance and Courtroom Demeanor.").

Having been given this constraint, participants and judges engage in a minuet that resembles very little the process of deciding real cases. Judges, for their part, try to ask questions that will test the advocacy skills of the lawyers, which are not necessarily the questions they would ask if they were trying to make up their minds about the case. The advocates, for their part, try hard to score points with the judges by giving glib or bombastic answers—ones that get a reaction from the judges and the audience. It is not at all uncommon, for example, for moot court advocates to give smart-alecky answers that elicit a laugh from the audience, and maybe even the judges, and thus score debater's points. This seldom happens in real court because experienced lawyers know that playing to the audience is almost never a good idea, and smart-alecky answers distract from the merits of the case and make the judges impatient.<sup>18</sup>

The only way to tell how persuasive advocates are is to ask the judges whether they were persuaded. This is never done, I believe, out of a misplaced sense of fairness: Why should success or failure in the competition turn on how good a case a contestant happens to draw? But then, why not? Losing and winning in real practice is always affected by how good a case you start out with: No one comes around after you lose a weak case and awards your client damages because you did well with a real dog. What separates a first-rate lawyer from a mediocre one is the ability to take that howler and turn it into a diva. The tougher the case, the more it taps the advocate's skills. And no good lawyer ever wins all of his cases.<sup>19</sup>

Having moot court judges decide winners and losers based on the perceived skills of the advocates rather than the merits of a case serves academic values—fairness and equality in distributing scholastic honors—which are extrinsic to the litigation process.<sup>20</sup> All things being

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18. Another ill-advised tactic is to publicly accuse the judges of intentionally throwing the contest, as one moot court advocate apparently did when a panel including two Georgia Supreme Court Justices awarded victory to a team from the University of Georgia. See Jonathan Ringel, *Moot Apology*, *Fulton County Daily Rep.*, Feb. 15, 1996 (reporting the student's apology).

19. There's one famous exception: Gerry Spence, at least to hear him tell it. See Gerry Spence, *Gunning for Justice* 47 (1982). But see Sherrie F. Nachman, *True Lies, Starring Gerry Spence*, *Am. Law.*, Sept. 1994, at 13 (disputing Spence's claim made in *Gunning for Justice* and widely reported by the media, and quoting one victorious Spence adversary, "It's a lie.").

20. For a good example of a proposal to harness moot court to a non-litigation related agenda, see Mairi N. Morrison, *May It Please Whose Court?: How Moot Court Perpetuates Gender Bias in the "Real World" of Practice*, 6 *UCLA Women's LJ* 49 (1995):

[O]nly by degendering the Moot Court experience can we create a legal world in which students are not only taught to see change as necessary, but are also empowered to act as "change agents." Moot Court taught from a feminist perspective would continue to train students to operate in the real world of practice and, at the same time, show them an "ideal world," a goal to work towards.

*Id.* at 54 (footnotes omitted).

equal, it is a good thing, of course, to have things fair. But things are not equal in the real world. Asking judges to shut their minds to the merits of the case is asking them to engage in a process quite antithetical to that of normal litigation. It does not, as many may assume, result in a fairer decision where the advocates win or lose regardless of the merits of their cases. Rather, it fundamentally skews the competition, making it a contest of personalities rather than of persuasive abilities. It also teaches students the perverse lesson that the strength of the client's case—indeed the fate of the client—is irrelevant, and the only thing that counts is how well the lawyer engages in repartee with the judges. It is this, perhaps more than anything else, that gives moot court its strange air of unreality.

## II. TWEEDLEDEE AND TWEEDLEDUM

In their relentless pursuit of fairness, law schools not only insist that moot court cases not be decided on the merits, they also force the lawyers to argue both sides of the case in various rounds of the competition. This is known as arguing on-brief (arguing the same position taken in the briefs prepared by the students) and off-brief. Again, the reasons for this practice are nowhere articulated, but presumably it is meant to ensure fairness—by giving each student a chance to argue the easier as well as the harder side of the case—and to facilitate pairing as the competition progresses. This practice, too, is antithetical to normal litigation where a lawyer always argues only one side of a case.<sup>21</sup> Arguing a client's position one day, and the opposing position the next, underscores the notion that the lawyer is not really representing the interests of the client, but pursuing his own instead.

In normal litigation, of course, the lawyer's and the client's interests are closely tied together. A good litigator is not merely an advocate—a totally detached mouthpiece for the client's position—but comes to identify with the client. While maintaining a sense of professional distance, a first-rate lawyer spends many of his waking moments thinking about his client's case and trying to come up with better and more convincing arguments in support of his position.<sup>22</sup> To be sure, good advocacy does involve knowing the weakness of your case, but a lawyer is never put in the position of taking the opposing side in public. In moot court, students not only must represent the opposing side, they must win in order to proceed to the next round in the competition. Arguing each round of the competition thus becomes a purely academic exercise, lacking the

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21. Indeed, it is considered unethical for a lawyer to represent a client where he has represented the opposing side in the same case. See Model Rules of Professional Conduct Rule 1.7 (1994).

22. See Thomas B. Marvell, *Appellate Courts and Lawyers* 58 (1978) (reporting, based on numerous interviews with appellate lawyers, that "the lawyers praised their own clients or sympathized with their plight, and this may, especially if the client is an individual, provide considerable impetus to win").

type of moral commitment and intellectual fervor that one observes among first-rate litigators.

The effect this has on the students' learning process is subtle but very significant. A student who wants to do well in the competition cannot become too committed to one side of the litigation because doing so will undermine her confidence when she argues the opposing side. A moot court advocate thus typically approaches each round with an unhealthy distance from the side she happens to be representing because in a future round success will turn on defeating the very arguments she is now making. The bond between lawyer and client, which is the essence of first-rate advocacy, is lost. This is an attitude that, if carried forward in practice, can have dire consequences. Having learned from experience not to get too enmeshed in a client's case, a moot court graduate may approach real-life clients with the same degree of detachment.

The practice of arguing both on- and off-brief also makes it difficult for judges to question students about points they have made in their briefs. Many schools do not even provide the students' briefs to the judges as they prepare for the argument, encouraging them to rely instead on a bench memo prepared by a member of the moot court board. By contrast, oral arguments in real cases rely heavily on the briefs. I have participated in many a moot court competition where the judges tried to question the advocates on something they said in their brief, only to hit a brick wall: The briefs, it turns out, were prepared many weeks—and many rounds—before the current oral argument, and the advocates didn't find it necessary to review the briefs and prepare to defend them.<sup>23</sup>

### III. SPEAK EASY

The practice of arguing on- and off-brief merely contributes to one of moot court's most notorious shortcomings—the overemphasis of oral argument over brief-writing. Even in competitions where judges have the briefs and parties argue on-brief, the brief plays a very small role in the proceedings. By the time of the oral argument, the brief will have already been graded by someone on the moot court board, and its score usually counts for too small a percentage of the overall score to make a difference. Moot court thus treats oral argument and brief writing as distinct events, with brief writing relegated to the status of an ugly stepchild.

In real life, of course, the brief is the principal advocacy tool, and oral argument is merely a means to clarify and emphasize points made therein.<sup>24</sup> Cases are seldom won—but occasionally lost—at oral argument. Indeed, oral argument only makes sense as a supplement to brief-

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23. One of my colleagues reports that, in some competitions, everyone argues based on the same brief, the best one written for that competition. This puts advocates in the interesting position of either arguing exactly what one of their competitors felt was persuasive or arguing their own position and ignoring what is supposed to be *their* brief.

24. In this regard, I think Justice Thurgood Marshall aptly captured the importance of the brief:

ing. Judges, in preparing for cases, carefully read and analyze the briefs; they form most of their impressions about the case from the written words, which they can study in greater depth. Oral argument, as it works in practice, is a time to tie up loose ends, to amplify points made in the briefs, and most importantly, to answer the judges' questions—questions formed in reading the briefs. Indeed, so strong is the drive to talk that moot advocates are notorious for cutting judges off in the middle of a question. This, of course, is perfectly understandable if one is taught that your job is to show off your speaking skills. But interrupting a question is a bad idea for a variety of reasons, not the least of which is that it breaks the rapport with the court, making judges reluctant to ask further questions. Thus, your retort to the judge's half-asked question may be brilliant—it may play well with the audience—but the judge may find the interaction so unpleasant he may decide it's not worth his while to ask another question.<sup>25</sup>

This is not to say oral argument is unimportant.<sup>26</sup> The briefs often raise questions and misconceptions that a skillful lawyer can answer or

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Regardless of the panel you get, the questions you get, or the answers you give, I maintain it is the brief that does the final job, if for no other reason than that opinions are often written several weeks and sometimes months after argument. The arguments, great as they may have been, are forgotten. In the seclusion of his chambers the judge has only the briefs and the law books. At that time your brief is your only spokesman.

Thurgood Marshall, *The Federal Appeal*, in *Counsel on Appeal* 139, 146 (Arthur A. Charpentier ed., 1968). The opposite occurs in moot court, as it's the brief, not the argument, that is forgotten.

25. Real advocates appreciate how important it is to keep the questions flowing. See John W. Davis, *The Argument of an Appeal*, Address Before the Association of the Bar of the City of New York (Oct. 22, 1941), reprinted in *Appellate Advocacy*, supra note 14, at 213, 218–19 (“Rejoice when the court asks questions. . . . If the question does nothing more it gives you assurance that the court is not comatose . . . . Moreover a question affords you your only chance to penetrate the mind of the court, unless you are an expert in face reading . . .”).

26. Although some might argue that appellate judges are too stubborn to be persuaded, see, e.g., Lawrence M. Friedman, *Justices in Black and White*, *N.Y. Times*, June 24, 1984, § 7 (Book Review), at 18 (“There are many brilliant lawyers who argue magnificently in front of the Supreme Court. They mostly lose. The Justices are stubborn and intelligent.”), I am convinced that most judges come to oral argument with relatively open minds. See, e.g., Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 *Iowa L. Rev.* 35, 40 n.32 (1986) (reporting that Judges Bright and Richard Arnold of the Eighth Circuit kept records for 10 months on their impressions of oral argument and determined it changed their minds in 31% and 17% of the cases respectively—proving perhaps that Chief Judge Arnold is about twice as stubborn as Judge Bright).

In the courts of appeals, we always take a tentative vote in conference immediately following oral argument. While judges may change their minds later, the final outcome more often than not reflects the tentative vote at conference. Thus, oral argument provides advocates with an opportunity to persuade at the most crucial moment in their case's appellate life. See Carrigan, supra note 14, at 209 (“Thus, for practical purposes, the ‘tentative’ vote taken immediately after oral argument, which is greatly influenced by the oral argument, generally decides the case.”); Frank M. Coffin, *On Appeal: Courts,*

assuage during a colloquy with the court. A good lawyer will listen carefully to the judges' questions, keeping clearly in mind what he and his opponent have written in their briefs, and try to figure out which parts of his case the judge is focusing on. He will then concentrate his discussion on those areas, or beat a tactical retreat and try to divert the argument to more fruitful areas. The key point, however, is that lawyers arguing real cases must deal with the reality that the judges' impressions of the case will have been molded by the written words submitted by both sides; the oral argument is merely an extension of the points made in the briefs.

#### IV. JUST THE LAW, MA'AM

It is a widely-honored myth among lawyers that facts don't matter on appeal, because that's where you argue law.<sup>27</sup> It is difficult to blame this misconception on moot court alone, as this is a shortcoming of legal education in general. Law teaching in this country is based largely on a study of appellate opinions where the facts are assumed or given, and the key point is legal or doctrinal.<sup>28</sup> Moot court competitions perpetuate this misconception by providing little or no training in dealing with what is normally the most important aspect of any case: the record. A typical moot court record consists of an opinion below, sometimes a concurrence or a dissent, and occasionally a trial court's or administrative law

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Lawyering, and Judging 134 (1994) ("While the judges are in effect opening their post-argument conference, the advocates are having their own opportunity to participate in that conference by guiding and advancing the discussion.").

27. This is best illustrated by a story told by a well-known appellate judge in a very funny speech that is even funnier when delivered in person at swank resorts in places like Maui and the Virgin Islands:

*Judge* (exasperated): Look counsel, you claim there is no disputed issue of fact on this point, but isn't it true that the affidavit of Joe Smith, submitted by opposing counsel, directly contradicts your client's affidavit? *Lawyer*: Well, your honor, I'm not really sure. *Judge*: Let's not guess. The affidavit appears at page 635 of the Excerpts of Record. Why don't we read it together and you can explain to me what it says? *Lawyer*: Your honor, I don't have the Excerpts. *Judge*: That's OK counsel, you can go over to your briefcase and bring it to the lectern. I'll wait. *Lawyer*: Well, what I mean, your honor, is I didn't bring the Excerpts with me to court. *Judge*: I see. Well, what did you think we were going to do here today, have coffee and donuts and talk about the weather? *Lawyer*: To be truthful, I thought we were going to talk about the law. I wasn't counsel in the district court so I'm not really all that familiar with the record, but if you say the affidavit is in there, how can I deny it? *Judge*: Well, let's talk about the law then. Isn't it the law that you can't get summary judgment if there is a disputed issue of fact? And the affidavit seems to establish a disputed issue of fact. *Lawyer*: But that's true only if you believe the affidavit. I can tell you for a fact it's a lie. In any event it's hearsay since it describes out of court conduct, and it's not the best evidence.

The Wrong Stuff, 1992 BYU L. Rev. 325, 332-33.

28. See, e.g., Robert W. Gordon, Lawyers, Scholars, and the "Middle Ground," 91 Mich. L. Rev. 2075, 2108-09 (1993) (lamenting the "narrow doctrinalism of law students" and noting that "working with messy and complicated factual records" is one of the skills they aren't taught).

judge's opinion. Never, in my years of judging moot court competitions, have I seen a case which contained the normal accoutrements of an appellate record: a complaint; a summary judgment motion with supporting affidavits; trial testimony and jury instructions; and a docket sheet.

Yet these are precisely the things on which most appellate cases turn. Arguing about the law in the abstract is interesting and fun, but what wins cases is the lawyer's ability to marshal the facts littered over an extensive trial court record in a way that's consistent with favorable controlling authority. It is true that there are some cases where the facts are clear or stipulated, and the law is the only issue. But these are the rare exceptions. In real-life appellate advocacy, the record plays a key role, and a lawyer's mastery of the record—or lack thereof—often makes the difference between winning and losing.

Viewed in the most benign light, the absence of a meaningful appellate record simply denies moot court participants the opportunity to hone one of the key skills of appellate advocacy. But it's likely far worse than that: By failing to provide a meaningful record, moot court boards teach the wrong-headed lesson that cases can be won on appeal by talking about the relevant authorities and policy considerations alone—and that the record doesn't count for very much. In fact, there is relatively little a lawyer can do to sway judges based on caselaw and policy alone. The judges can read the cases as well as the lawyers—often the judges have written some of the opinions themselves—and pretty much know the competing policy considerations. Where the lawyer can really help his client is by pointing to various parts of the record—such as jury instructions, colloquies with the court, arguments to the jury—and showing how they comply (or fail to comply) with the applicable authorities. When there is no record, this is simply not possible. Without a complaint, testimony or affidavits, and without motions and objections below, such key appellate questions as the existence of a material factual dispute or waiver—the kinds of things that regularly make or break real cases—simply are not available for advocates to deal with. This, again, gives moot court arguments a surrealistic, foreshortened quality, making them poor training vehicles for would-be appellate litigators. They are dress rehearsals for a play that is never performed.

#### V. POLICY, POLICY EVERYWHERE

For reasons we can only speculate about, moot courts love to run their competitions around the BIG ISSUE—whatever is the latest hot legal question from around the country.<sup>29</sup> And just to add to the pizzazz,

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29. Here's a sampling of topics selected for the 1995–96 moot court season: English-only policy for state employees (Boalt Hall) (cf. *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), cert. granted sub nom. *Arizonans for Official English v. Arizona*, 116 S. Ct. 1316 (1996)); constitutional right to physician assisted suicide (USC) (cf. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir.), cert. granted sub nom. *Washington v. Glucksberg*, 117 S. Ct. 37 (1996)); affirmative action in higher education

the case is almost always argued before the United States Supreme Court.<sup>30</sup> A worse possible setting, from an educational perspective, I cannot imagine. It suggests that moot court boards have fallen prey to the facile assumption that if a straightforward legal issue is good, a BIG ISSUE is better, and if a court of appeals problem is good, a Supreme Court problem is tops. What those who run moot courts don't seem to realize—probably because they've never been appellate advocates themselves—is that the type of legal issue and the forum very much affect the kind of advocacy the lawyers must engage in; they fundamentally change the scope of the problem.

Argument in the Supreme Court on a case raising a BIG ISSUE is a very rarefied form of advocacy, one that only a handful of lawyers engage in each year. To begin with, something wouldn't be a BIG ISSUE if there were controlling authority on point. Something is a BIG ISSUE because applicable Supreme Court cases are unclear or because the Court has given signals that it is thinking about overruling or cutting back on a particular line of authority. The Court, of course, is unique in being totally free to reconsider any of its precedents, going back to *Marbury v. Madison*,<sup>31</sup> if five of its members choose to do so. While such sea changes are rare,<sup>32</sup> more modest swings are relatively common,<sup>33</sup> and much of the

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(Chicago) (cf. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2580 (1996)); ban on gay antidiscrimination laws (Georgetown) (cf. *Romer v. Evans*, 116 S. Ct. 1620 (1996)); ban on receipt of honoraria by government employees (Pennsylvania) (cf. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995)); ban on internet pornography (Harvard) (cf. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (3-judge panel)); anti-aggressive begging ordinance (Stanford) (cf. *Roulette v. City of Seattle*, 78 F.3d 1425 (9th Cir. 1996)); statutory ban on price advertising for cigarettes (UCLA) (cf. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996)). All problems were set in the United States Supreme Court.

30. In moot court competitions that focus on state issues, the states' highest court is used as the setting. A few competitions inexplicably set the case in the United States Court of Appeals for the Thirteenth Circuit—a barren wasteland of precedent where the judges seem to have issued all their decisions in unpublished form.

31. 5 U.S. (1 Cranch) 137 (1803).

32. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), overruling *McGautha v. California*, 402 U.S. 183 (1971); *Brown v. Board of Education*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), implicitly overruling *Lochner v. New York*, 198 U.S. 45 (1905).

33. See, e.g., *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996) (holding that the Commerce Clause does not abrogate states' 11th Amendment immunity), overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (applying strict scrutiny to federal race-based classifications), overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *United States v. Dixon*, 509 U.S. 688 (1993) (rejecting the "same conduct" rule for determining when a subsequent prosecution violates the Double Jeopardy Clause), overruling *Grady v. Corbin*, 495 U.S. 508 (1990); *Payne v. Tennessee*, 501 U.S. 808 (1991) (allowing the admission of victim impact statements in capital trials), overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989), and *Booth v. Maryland*, 482 U.S. 496 (1987); *Solorio v. United States*, 483 U.S. 435 (1987) (holding that a military tribunal has jurisdiction over crimes committed by military personnel but lacking a "service connection"), overruling *O'Callahan v. Parker*, 395 U.S.

Court's work consists of fine-tuning its jurisprudence. In carrying out its functions, the Court is constrained by very little other than its own conservative impulses, concern for its legitimacy with the public, and sense of proper policy. Supreme Court arguments thus tend to center relatively little on questions of law and far more on questions of prudence. And this is how most moot court arguments go as well. But because the problem is carefully engineered to avoid hard precedent, the colloquy between court and counsel usually centers on the policy implications or political wisdom of a particular outcome.<sup>34</sup> This is great fun, and very heady stuff, but has little in common with what appellate litigators do most of the time.

Most cases, it must be recalled, are decided by courts bristling with controlling authority. State trial courts have two levels of appellate courts above them, plus a supervening layer of federal law. In the federal system, circuit law binds all courts within a federal judicial circuit—bankruptcy courts, district courts, the Tax Court (insofar as the taxpayer is located within the circuit), and administrative agencies (insofar as their decisions are reviewed by the courts of that circuit). One of the courts bound by circuit law is the court of appeals itself, at least insofar as it sits in panels of three judges.<sup>35</sup> Lawyers arguing cases in courts inferior to the Supreme Court thus must deal with a very significant concept, and one that does not truly exist in the Supreme Court: binding authority.

Navigating the treacherous waters of binding precedent turns out to be the most common—and at times the most challenging—task of the advocate. Often there will be not one but several cases on point, each presenting slightly different fact patterns, and the lawyer must show how his client's case (as detailed in the record below) resembles the prece-

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258 (1969); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (rejecting a "traditional governmental function" of state test for limiting the Commerce Clause power), overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976).

34. Not surprisingly, moot court textbooks contain advice like the following: "The ability to argue policy is particularly important in cases purporting to be in the United States Supreme Court or local supreme courts. Such courts particularly will want to know the 'whys' behind the rules stated or the rules you phrase . . ." Gaubatz, *supra* note 6, at 78.

35. A court of appeals can escape the binding force of circuit law by sitting en banc. See, e.g., Fed. R. App. P. 35 (authorizing en banc hearing and rehearing); *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (9th Cir. 1987) (en banc) ("A panel faced with [an irreconcilable] conflict must call for en banc review . . ."). But a panel of three court of appeals judges is no more free to ignore or overrule circuit law than any other court in the circuit, even though the law may have been made only recently by another panel of the same court. See, e.g., *United States v. Farnsworth*, 92 F.3d 1001, 1006 (10th Cir. 1996); *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1300 (D.C. Cir. 1996); *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1509 (3rd Cir. 1994); *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992); *National Cycle, Inc. v. Savoy Reinsurance Co.*, 938 F.2d 61, 64 (7th Cir. 1991); *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991); *United States v. Guglielmi*, 819 F.2d 451, 457 (4th Cir. 1987); *Salmi v. Secretary of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

dent that is favorable, and is distinguishable from that which is deadly. Or, there may be seemingly binding language in an earlier court of appeals opinion, but it's part of an alternative holding or entirely gratuitous verbiage, in which case it might be ignored as dicta. Favorable controlling authority may have been overruled or modified by intervening Supreme Court or circuit en banc opinions, or by intervening legislation.

To be sure, policy does play a role in many cases, because policy considerations often affect how broadly or narrowly judges read precedent. Or, within the interstices of binding authority, a panel may confront an unconstrained choice and that choice is often made based on policy considerations. But in the inferior state and federal courts, hard law is by far the most potent consideration, and even in the Supreme Court itself hard law plays a much greater role when the Court is not dealing with BIG ISSUE cases.

By perpetually focusing moot court problems on the BIG ISSUE and locating the argument in the Supreme Court, moot court boards teach students the wrong lesson that policy, not law, plays the key role in arguments in most of the courts where they will appear.<sup>36</sup> The young lawyers then have a rude awakening when they discover that the precedent they were hoping the court would ignore or overrule turns out to be pile-driven into the bedrock of the circuit law. I can't count the number of times I've seen lawyers come face to face with this reality for the first time during oral argument in our court when a member of the panel is obliged to explain it to them. That's a terrible time to learn such an important lesson; the time and place, it seems to me, is in law school and particularly in moot court.

## VI. DIVIDE AND BE CONQUERED

Moot court competitions are generally not between individual contestants, but between teams. Usually, the team consists of two members, although sometimes there are three. The brief writing is divided between the members, with each writing one half of the argument. The oral argument, too, is divided, with separate team members using half the time to address one of two issues. The team concept also drives the nature of the problem, which must be structured so that two, more or less evenly weighted, issues are presented.

It is unclear where this team tradition comes from, but it's certainly not from practice.<sup>37</sup> Needless to say, the mine run of cases we see do not have two equally weighted issues. Sometimes there is one issue that over-

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36. Moot court's focus on the advocates' debating style rather than the merits of his case, see *supra* Part I, may also contribute to the tendency to emphasize policy arguments. It's easier to sound eloquent when invoking high-minded principles than when attempting to distinguish precedent.

37. I suspect that this, too, is a reflection of college debating; in both the National Debate Tournament and American Parliamentary Debate circuits (the two major college debate circuits), debaters compete in two-person teams.

shadows all others; more often there are several issues of differing weight and importance. While counsel sometimes ask for divided argument, appellate judges are generally not too happy about it,<sup>38</sup> and it's usually a bad idea anyway.<sup>39</sup> For one thing, it takes time for each lawyer to establish rapport with the court; double the number of lawyers and you double the amount of dead time spent introducing counsel, shedding argument jitters<sup>40</sup> and getting to the meat of the coconut. For another, legal issues do not always divide neatly into segments: A standing issue may have a lot in common with the merits of the case, for example. Almost invariably, there will be crossover during questioning, and the lawyer must take time explaining that *that* issue will be addressed by his partner, and by the time the partner stands up, the judge may have forgotten the question.

Then again, the court may not be interested in all issues to the same degree: It's hard enough to get a problem that is evenly balanced between opposing sides, harder still to get one that's evenly balanced among teammates. At moot oral argument, the first counsel may realize that the judges have no interest in what he's there to talk about and are impatiently waiting for his co-counsel to speak. In such a situation, a single counsel could quickly move on to the next issue, but not so if the issue is reserved for co-counsel who is more familiar with the issue.

Dividing argument during moot court thus teaches another very bad lesson—that dividing oral argument is an acceptable advocacy tool. In real life, a good lawyer almost never divides his time with other counsel; rather, he immerses himself in the case and is ready to discuss whatever is on the judges' minds when he stands up to argue.

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"Picky, picky, picky," you may be thinking. "So moot court is not exactly like real court—how could it be? The name *moot* court should have tipped Kozinski off that this can't be exactly like real court;<sup>41</sup> surely,

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38. See, e.g., Sup. Ct. R. 28(4) ("Divided argument is not favored."); Robert L. Stern, *Appellate Practice in the United States* 380 (1981) ("The common theme of many of these [court] rules, as well as of all judicial and other commentators on the subject, is that 'divided arguments are not favored.'").

39. See Stern, *supra* note 38, at 380 (quoting Justice Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 801-02 (1951) ("If my experiences at the bar and bench unite in dictating one imperative, it is: Never divide between two or more counsel the argument on behalf of a single interest.")).

40. For a good example of argument jitters, consider the Harvard student who began his argument before Justice Lewis Powell and two circuit judges with, "Your honor, I along with my co-counsel . . ." at which point he paused long enough for someone to yell, "are very, very nervous." *Students' Court Is Moot, but the Judges Are Real*, N.Y. Times, Nov. 21, 1988, at A14.

41. We usually understand "moot" to mean theoretical or "deprived of practical significance." Webster's Ninth New Collegiate Dictionary 771 (1985). It turns out "moot" comes from the Old Norse word for "meeting" and subsequently came to also mean "debatable." William Safire, *On Language: Murder Board at the Skunk Works*, N.Y.

we must allow for the fact that this is a competition run as a training vehicle for students, so there will be some differences from real court. After all, medical students operate on cadavers before they're allowed to operate on real patients."

True enough. Some differences between moot court and real court are inevitable, and those differences will diminish the value of the experience somewhat. What troubles me, however, is that many of the differences are avoidable; in fact, they seem to be driven by something other than the necessities of the situation. What it is exactly, I'm not sure; perhaps it's only inertia. I hope it's not a belief that law school cannot teach anything real—i.e., that all law school classes are unrealistic so why should moot court be any different. While law schools may not be equipped to teach, and law students may not have the time to learn, what it's like to try a real case or to put together a real merger, appellate advocacy is one aspect of real-life practice that seems uniquely suited to simulation in the law school environment. To begin with, appellate advocacy is suited to the law student's schedule. Appellate cases, like most law school work, generally proceed in predictable fashion with clear deadlines; they also present fairly discrete problems which students can tackle while still focusing on their other responsibilities.

More importantly, appellate advocacy is as close as real-world practice comes to the world of academia. Although the pragmatic aspects of appellate advocacy, such as reliance on factual records, are extremely important, appellate lawyers nevertheless focus on theoretical issues much more than their colleagues practicing insurance defense or ERISA law. Not surprisingly, there's great overlap between the appellate bar and law faculties; many appellate lawyers want to be law professors and many law professors are appellate lawyers. In fact, I suspect that appellate advocacy is the one real-life practice area with which law faculties are generally familiar. I therefore think it's possible to make moot court a lot more like real court, and thereby make the experience more useful to law students. Here are my suggestions:

Were I running a moot court competition, I would start with a real case pending in a state or federal intermediate court of appeals, with a real record.<sup>42</sup> I would make a copy of the entire record available to the participants. I would let participants decide which side they want to rep-

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Times, Oct. 11, 1987, § 6 (Magazine), at 18. At some point, the two meanings were combined and moot came to be used as a noun for a "meeting for discussion and deliberation." Webster's Third New International Dictionary of the English Language, Unabridged 1468 (Phillip B. Gove et al. eds., 1986). The term "moot court" was apparently first used in this country by Thomas Jefferson in 1788. See Safire, *supra*.

I'm still not sure why they call moot court "moot" and mock trial "mock." Perhaps lawyers wanted to save the phrase "mock court" to refer to the hand signals they make behind judges' backs.

42. Finding such a case should not be difficult. Any judge of my court could easily come up with a dozen cases presenting difficult, close questions of law and complex, but manageable, records. If the case selected for a moot court problem were decided while

resent, and also whether they want to work alone or in teams.<sup>43</sup> Once sides were chosen, participants would prepare briefs and excerpts of record (or an appendix).<sup>44</sup> The briefs would not have to be evenly divided in covering the issues presented in the appeal; the students would have to decide how much space, if any, they will devote to a particular argument. In preparing the briefs, as well as arguing the case, the participants would be bound by the binding authority of the court where the case is situated.<sup>45</sup> Thus, if the case came out of the Ninth Circuit, the litigants would have to consider themselves bound by Ninth Circuit caselaw, and would have the responsibility to monitor caselaw coming out of that court for anything that might bear on the issues presented in the appeal.

At each round of the competition, the court would announce which party won *the case*, not just who had the best argument. Winning the case would count for at least half the points awarded—preferably much more. Competitors would argue the same side of the case throughout the competition. Because cases are not always equally weighted, competitors would be compared only to others on the same side of the case, and thus half the appellants and half the appellees would advance to the next round even if the appellants won most of the arguments. In other words, if twenty teams entered, then the best five appellants and five appellees would advance to the second round, even if all ten cases were won by the appellees—those appellees who didn't win “big enough” would, in effect, have lost.<sup>46</sup>

At oral argument, I would let the competitors decide who will argue and for how long. Students who compete as part of a team would have to

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the competition is still going on, the opinion in that case could be put off-limits to the participants.

43. To avoid oversubscription to one side of the problem, I would conduct sign-ups on a first-come, first-served basis. Once one side is filled up, others wishing to participate would have to take the other side. Sides could also be picked randomly or on the basis of how well participants had done in earlier competitions.

44. Cf. Fed. R. App. P. 30.

45. I would abolish the practice, used in competitions like Harvard Law School's Ames moot court competition for first-year students, of setting the problem in mythical jurisdictions where the common law is comprised of all reported cases of the 50 states. See Scott Turow, *One-L*, at 210 (1977).

46. This is, in fact, realistic. What usually distinguishes a good lawyer from a bad one is not that the good one wins and the bad one loses; rather it's how they win or lose. Even a good lawyer may not be able to win an unwinnable case, but he can sure limit the damage. He can persuade the court to decide the case on narrow grounds and thus not make bad law for his client in future cases. A good lawyer with a good case can run up the score for his client: winning an outright reversal when only a remand seemed possible, coaxing the judges into writing an opinion that will have precedential value rather than deciding the case in an unpublished disposition and on the narrow facts, etc. In other words, “he can try to help the client win as ‘big’ or lose as ‘small’ as possible.” See Frank M. Coffin, *A Term of Court, in The Ways of a Judge* (1980), reprinted in *Appellate Advocacy*, supra note 14, at 223, 228. Under my proposal, those advocates who were able to help their clients win the biggest or lose the smallest would advance.

decide whether to file a motion for divided argument.<sup>47</sup> If there is divided argument, I would let counsel decide how much time to allocate to each issue, and to change that allocation even in mid-argument if the exigencies of the case demand it.<sup>48</sup> If counsel learn of a new, recently decided case they wish to discuss at oral argument, they would be required to file an appropriate notice with the court.<sup>49</sup>

Before oral argument, the judges would be provided with the briefs of the actual lawyers who will appear before them, along with the excerpts of record (or appendix) they have prepared. The record itself, including any transcripts, would also be made available on request and would be fair game for questions at oral argument.

All this would work well enough, one might think, until the final round of the competition. So long as advocates compete only against those on the same side of the case, any unfairness in having unevenly weighted cases would not be material. In the final round, however, the appellants and appellees will be competing directly against each other and there can only be one winner. The difficulty of each side's case will almost certainly determine the outcome. Perhaps so, but I would point out that very good lawyers often make even the easiest case close through forceful advocacy.<sup>50</sup> Moreover, some of this unfairness can be avoided by picking the problems carefully; there are certainly plenty of cases in our intermediate appellate courts where there is no clear answer and the outcome can be influenced by the skill of the lawyers.

Still, some unfairness may remain—to which, borrowing a movie title, I say, "Reality Bites." In life, and certainly in litigation, things are not always fair. You take the client you get, and sometimes you lose despite your best efforts. That, too, is an important lesson to learn—a lesson that the current moot court process goes too far in concealing.

But there is a flip side to the story: Once in a while a team will do the unexpected and win the unwinnable case. When that happens, I predict that the electricity in the courtroom will be palpable and those present will remember the event for years to come.

Change is easy to talk about but hard to implement. This is especially true when law students seem to enjoy the way things are. The prob-

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47. If the panel of judges is unable to rule on the motion three days before oral argument—perhaps because they are from out of town—I would deem the motion granted. As well, the moot court board might create a motions panel comprised of students, or designate a court clerk to handle procedural motions. Cf. Fed. R. App. P. 27(b).

48. Thus, if counsel A sees that he's not making any headway on his issue, he might sit down early and yield the rest of his time to counsel B. Or vice versa.

49. Cf. Fed. R. App. P. 28(j).

50. Even if the side with the weak case couldn't muster much of a fight, the winners would have proven their ability to fulfill a common task assigned to good lawyers in real life: ensuring that a winnable case is actually won and that the judges don't make a mistake. See Coffin, *supra* note 46, at 227 ("A lawyer who argues well will not lose a good case. . . . A good argument ensures that a court will not unwittingly go astray.")

lem is that students might prefer a more realistic experience; presumably, that's what they paid for when they came to law school. They deserve better, and it's not difficult to give it to them. As my suggested reforms illustrate, a lot can be done with just a little effort and without much extra cost or time commitment. It's not as if there's some secret formula for real-life appellate advocacy that is costly to copy. Moreover, while moot court may be fun now, there ain't nothing like the real thing.