

IN RE MOOT COURT*

Darby Dickerson**

United States Supreme Court
Washington, D.C.
January 10, 2000

1 **MARSHAL OF THE SUPREME COURT:** The Honorable, the
2 Chief Justice, and the Associate Justices of the Supreme Court of the
3 United States. Oyez, oyez, oyez! All persons having business before
4 the Honorable, the Supreme Court of the United States, are admon-
5 ished to draw near and give their attention, for the Court is now
6 sitting. God save the United States and this Honorable Court.¹

7 **CHIEF JUSTICE REHNQUIST:** We are ready to hear the case
8 of *In re Moot Court*. Counsel, you may begin.

9 **BLAIR BYRNES:** Mr. Chief Justice, and may it please the Court.
10 My name is Blair Byrnes. I am here to defend moot court as an
11 activity that is valuable for law students. There are three main
12 reasons why law students should consider participating in moot court.

13 First, it enhances students' research, writing, oral, and analytical

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1. Jerry Goldman & Northwestern University, *The Oyez Project, Frequently Asked Questions* (visited Dec. 28, 1999) <<http://oyez.nwu.edu/other/faq.html>> (audio recording of the Marshal of the United States Supreme Court).

1 skills. It teaches students to communicate more effectively and to
2 think quickly on their feet.

1 Second, it teaches students the importance of teamwork. Moot
2 court teams usually consist of two or three students. All students
3 must perform to the best of their ability for the team to succeed.

4 Third, it improves students' time management skills. Because the
5 moot court board is typically a co-curricular activity, students must
6 learn to complete their school work, their moot court work, and fulfill
7 any other obligations.² Thus, students learn to set goals and priorities
8 and to work effectively under pressure, which simulates conditions
9 most attorneys face in practice.

10 **JUSTICE O'CONNOR:** Counsel, it's been quite some time since
11 my law school days. Can you briefly describe what you mean by "moot
12 court"?

13 **BLAIR BYRNES:** Moot court is an activity in which students
14 practice appellate advocacy skills. They write briefs and present oral
15 arguments to appellate courts.³ Because the cases are not real, the
16 term "moot," which means "hypothetical,"⁴ is used. Moot court — or
17 appellate advocacy — skills are typically taught as part of the first-
18 year legal research and writing curriculum and are sharpened in some

2. See JOHN T. GAUBATZ & TAYLOR MATTIS, *THE MOOT COURT BOOK* 1–6 (3d ed. 1994) (describing the various purposes of the moot court experience); Michael V. Hernandez, *In Defense of Moot Court: A Response to "In Praise of Moot Court — Not!"*, 17 REV. LITIG. 69, 72 (1998) (commenting that "[t]he brief-writing skills of most students I have coached have improved noticeably during the briefing process").

3. Appellate courts consider legal arguments from counsel if one or both sides believe errors occurred in the trial court. For a concise overview of appellate courts, see DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* (1994).

4. BLACK'S LAW DICTIONARY 1024 (Bryan A. Garner ed., 7th ed. 1999). In addition to the problem being hypothetical, the court hearing the appeal might also be hypothetical. Although some moot court problems are set in a "real" court, such as the United States Supreme Court or a specific state supreme court, other times fictitious jurisdictions are used. Favorites are the "United States Court of Appeals for the Thirteenth Circuit," the "Fourteenth Circuit," or a hypothetical supreme court named after a law school, such as the Supreme Court of Marshall (which is used in the John Marshall Information Technology and Privacy Competition). The setting for the competition determines which law is binding for the competition. If a problem is set in a hypothetical jurisdiction, then the only binding authority is the United States Supreme Court on federal issues. All other law is persuasive, which means that advocates must research the law in all jurisdictions and present the majority and minority views.

1 upperlevel electives.⁵ In most schools, several upperclass students are
2 selected to serve on the moot court board.⁶

1 **JUSTICE KENNEDY:** How does a student make the moot court
2 board?

3 **BLAIR BYRNES:** Different schools use different selection tech-
4 niques. Some schools select students based on their performance in
5 research and writing courses.⁷ A few schools select students based on
6 overall grade point average. Others have a separate competition in
7 which students may be required to write a brief and to present an oral
8 argument before a panel of judges. Still other schools have one or
9 more intramural competitions, in which students compete for slots on
10 the moot court board, and some schools have a moot court class in
11 which students are selected for the board based on performance in
12 that elective class.⁸

13 The slots on the board are prestigious. Some schools may select
14 only eight or ten students for the board; others may select as many as
15 fifty. The size of the board will depend on the size of the student body,
16 the number of competitions in which the school participates, and other
17 factors, such as whether the school hosts a competition.

18 Once on the board, students are then divided into teams for
19 specific competitions. In some schools, the students themselves select
20 the teams; in others, a faculty advisor holds the appointment power.

21 **JUSTICE THOMAS:** What do students on the moot court board
22 do?

23 **BLAIR BYRNES:** Moot court students typically do two things:

5. See, e.g., RALPH L. BRILL ET AL., ABA, SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, SOURCEBOOK ON LEGAL WRITING PROGRAMS 130-31 (1997).

6. Some schools have different names for their moot court board. Examples include moot court society, moot court honor society, moot court council, moot court team, and board of advocates.

7. For additional information about first-year research and writing programs, see Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193 (2000).

8. See generally John T. Gaubatz, *Moot Court in the Modern Law School*, 31 J. LEGAL EDUC. 87 (1981) (describing a three-year moot court program); Memorandum prepared by Jan Levine, Associate Professor and Director of Research and Writing at Temple Law School, 52 *Schools' Responses to Internet Queries About Moot Court Models* (copy delivered to author on Nov. 29, 1999).

write appellate briefs⁹ and deliver appellate oral arguments.¹⁰

1 In all competitions, students receive an appellate “record,” the
2 hypothetical problem. The problem might consist of the trial court's
3 opinion and the lower appellate court's opinion, a narrative fact
4 pattern, or, in a few competitions, selected documents from the lower
5 courts, such as pleadings, discovery material, motions, judgments, and
6 opinions.

7 Students have several weeks to produce an appellate brief for one
8 side or the other. Sometimes the team gets to select which side it rep-
9 resents on the brief; other times, the competition assigns the side. The
10 briefs typically range from twenty-five to fifty pages. Students must
11 research relevant legal authorities, craft persuasive arguments, write
12 in a clear and understandable fashion, and comply with the con-
13 trolling court rules. Most competitions prohibit students from
14 receiving outside assistance while writing the brief. Other competi-
15 tions permit students to speak with coaches, professors, and attorneys
16 about the general subject matter of the competition. A few permit the
17 coach to comment on or help edit the brief.

18 Once completed, the students submit the brief to a set of judges
19 selected by the competition. Although some competitions use students
20 on the host school's moot court board to grade briefs, more and more
21 competitions use outside attorneys who specialize in the topic at issue
22 to critique the briefs.¹¹ Briefs are typically evaluated on content,
23 organization, persuasiveness, clarity and writing style, and compli-
24 ance with competition and controlling court rules.

9. Several excellent sources describe how to write effective appellate briefs. As just a few examples, see RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* (1st rev. ed. 1996), BRYAN A. GARNER, *THE WINNING BRIEF* (1999), and GAUBATZ & MATTIS, *supra* note 2, at 41–79.

10. For a more detailed description of a moot court argument, see Ronald J. Rychlak, *Effective Appellate Advocacy: Tips from the Teams*, 66 *MISS. L.J.* 527 (1997).

11. See, e.g., Pace University School of Law, *National Environmental Law Moot Court Competition, Fact Sheet* (last updated Sept. 19, 1999) <<http://www.law.pace.edu/pacelaw/environmentalm/2000-fact-sheet.html>> (section on briefs) [hereinafter *Pace Competition*].

The judges who grade the brief typically do not grade the oral arguments. In addition, oral-argument judges are not given copies of teams' briefs. Instead, they are given a “bench brief,” prepared by the competition director, which summarizes important cases and possible arguments for each side. Thus, unlike appellate advocacy in the real world, during oral arguments, teams are not wedded to arguments advanced in the brief.

1 After submitting the brief, the students begin preparing for oral
2 arguments. In most competitions, each side has two oralists. Each
3 oralist takes one or two issues in the case and has approximately
4 fifteen minutes to present the client's position. Interestingly, each
5 oralist typically must present an argument for each party. This is
6 known as arguing “on brief” and “off brief.” In the first round, the
7 student will represent one side on the issues; in the next, the student
will represent the other side on the same issues.

1 At many schools, each team practices three to five times a week
2 for three to six weeks, depending on the competition. During practice,
3 the students present their arguments, but are peppered with
4 questions they must attempt to answer. What many students don't
5 initially understand is that an appellate argument is more like a
6 conversation than a speech. The advocate must present key points to
7 the court, but the judges may ask questions at any time during the
8 presentation. When a question is asked, the student must stop,
9 answer the question, and then transition to a prepared point. That's
10 why advocates must think quickly. Also, because of this give and take
11 with the judges, no two arguments are the same.

12 After each practice, the students must research the answers to
13 questions they could not answer during practice, rework the argument
14 to eliminate as many weaknesses as possible, and strive to simplify
15 and clarify points. Team members often work together informally
16 outside of practice to advance their understanding of the subject
17 matter and to discuss new theories, arguments, and
18 counterarguments. The more a student practices and ponders the
19 problem, the more she develops a feel for how best to present her
20 client's position and how to deal with a wide variety of questions.

21 Finally, the team travels to the competition to argue against other
22 schools. Depending on the competition, the team may argue from two
23 to four times in preliminary rounds. Usually, the team represents the
24 petitioner half the time and the respondent half the time. Some
25 competitions match schools based on brief score — the team with the
26 highest brief score argues against the team with the lowest brief
27 score. Other competitions use random pairings.

28 In each round, a panel of two or three judges hears two teams.
29 The competition judges are typically practicing attorneys or actual,
30 sitting judges. The judges listen to the arguments, ask questions, and

1 score the oralists on a variety of categories, such as ability to answer
2 questions, speaking style and poise, knowledge of the law and facts,
3 deference to the court and professionalism, and organization. The
4 judges are instructed not to vote based on the merits of the case.
5 Instead, scores should reflect each oralist's advocacy skills. The oral
6 scores are added to the brief score to determine the winner of the
7 round. Brief scores typically account for thirty to fifty percent of the
score, with the oral scores accounting for the remaining percentage.

1 After the preliminary rounds, the teams with the best won-loss
2 records advance. Some competitions have octofinal (best sixteen
3 teams) or quarterfinal (best eight teams) rounds, while others cut
4 right to the semifinal round (best four teams). After the preliminary
5 rounds, teams advance in a single-elimination fashion: teams who win
6 advance, those who lose are eliminated.

7 **JUSTICE STEVENS:** That sounds like a lot of work. By the way,
8 how many schools typically compete in any given competition?

9 **BLAIR BYRNES:** It is a lot of work, Your Honor, but students
10 who participate typically believe that they learn a lot and that the
11 time is well spent. In addition, many schools award academic credit
12 to members of the moot court board.

13 With regard to the number of schools who compete, the number
14 depends on the type of competition. Some state and local bar associ-
15 ations sponsor intrastate competitions, in which only law schools in
16 the state or region may compete. Other competitions are rather
17 specialized and draw about a dozen or so schools. In many compe-
18 titions, however, it's not uncommon to have between twenty-four and
19 thirty-two teams competing. I've even heard of one national competi-
20 tion that draws over seventy schools.¹²

21 Finally, there are three large competitions. The National Moot
22 Court Competition, which is sponsored by the Young Lawyers Com-
23 mittee of the Association of the Bar of the City of New York and the
24 American College of Trial Lawyers, routinely has over 150 schools

12. See *Pace Competition*, *supra* note 11 (identifying 75 schools participating in the February 2000 competition).

1 compete.¹³ The American Bar Association's National Appellate
2 Advocacy Competition attracts nearly 100 schools.¹⁴ In addition, the
3 Jessup International Moot Court Competition is a truly worldwide
4 competition. Over 1500 students from 300 law schools in 50 countries
5 participate in Jessup.¹⁵ In these three competitions, teams must first
1 compete and win a regional competition to advance to the national, or
2 in the case of Jessup, the “world,” rounds.¹⁶

3 **JUSTICE SOUTER:** How many interscholastic moot court
4 competitions exist?

5 **BLAIR BYRNES:** The number has increased dramatically over
6 the last decade. Over forty interscholastic competitions currently
7 exist — and this number does not include intrastate competitions.¹⁷
8 The different competitions cover a variety of topics, including
9 administrative law, bankruptcy, civil rights, constitutional law,
10 corporate law, criminal law, criminal procedure, entertainment law,
11 environmental law, evidence, family law, health law, insurance law,
12 intellectual property, international law, juvenile law, labor and
13 employment law, law and economics, medical and legal ethics, na-
14 tional security issues, Native American issues, privacy law, products
15 liability, space law, sports law, tax law, and telecommunications law.¹⁸

16 **CHIEF JUSTICE REHNQUIST:** So is moot court a relatively
17 new activity?

18 **BLAIR BYRNES:** No, Your Honor. Moot court has long been a

13. See 1 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK YOUNG LAWYERS COMMITTEE, NATIONAL MOOT COURT COMPETITION iii (1999) (indicating that in 1979, 170 schools participated) [hereinafter NATIONAL MOOT COURT].

14. See American Bar Association, Law School Division, *Competitions* <<http://www.abanet.org/lstd/compresults.html>> (visited Dec. 8, 1999).

15. See International Law Students Association, *About the Philip C. Jessup International Law Moot Court Competition* (visited Nov. 28, 1999) <<http://www.ilsa.org/jessup/index.html>> [hereinafter *Jessup Competition*].

16. See American Bar Association Law Student Division, *1999–2000 National Appellate Advocacy Competition Rules* art. 6 (copy available at <<http://www.abanet.org/lstd/advocacy.html>>); *Jessup Competition*, *supra* note 15; *Rules of the 1999 National Moot Court Competition* pt. 1, available in WL, MOOT Database, 1999 WL 787601 (NMCC).

17. See The George Washington University Law School, *George Washington University Moot Court Board* (last updated Nov. 11, 1999) <<http://www.law.gwu.edu/moot/>> (listing many, but not all, interscholastic moot court, mock trial, negotiation, and client counseling competitions).

18. See *id.*

1 part of legal education. The concept of arguing hypothetical cases
2 originated as early as the fourteenth century as part of the Inns of
3 Court movement in England.¹⁹ In the United States, moot court
4 started at Harvard in 1820.²⁰ The University of Virginia offered a
5 moot court program starting in the mid-1840s.²¹ Students at North-
6 western University participated in moot court as early as the 1860s.²²
1 Moot court has been part of Boston University's curriculum since the
2 1870s.²³ The moot court program at the University of Mississippi is
3 over 140 years old.²⁴

4 In addition, a few of the interscholastic competitions are several
5 decades old. For example, the Jessup competition started in 1959²⁵
6 and the National Moot Court Competition started in 1950.²⁶ The
7 explosion of interscholastic competitions has occurred in more recent
8 years.

9 **JUSTICE SCALIA:** Counselor, earlier you said that students
10 represent *both* sides in the oral argument. That sounds dubious to me.

11 **BLAIR BYRNES:** Others agree with you. For example, Judge
12 Alex Kozinski of the United States Court of Appeals for the Ninth
13 Circuit, has criticized moot court for the fact that most competitions
14 force participants to argue both sides of the case.²⁷ He suggests that

19. See MARIAN C. MCKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL 2-3 (1986).

20. See Harvard Law School, *First-Year Ames Moot Court* (last modified Dec. 10, 1999) <<http://www.law.harvard.edu/students/catalog/cdescrip/1yr-req/ames.html>>.

21. See JOHN RITCHIE, THE FIRST HUNDRED YEARS: A SHORT HISTORY OF THE UNIVERSITY OF VIRGINIA FOR THE PERIOD 1826-1926, at 34 (1978).

22. See JAMES A. RAHL & KURT SCHWERIN, NORTHWESTERN UNIVERSITY SCHOOL OF LAW - A SHORT HISTORY 10 (1960).

23. See Boston University School of Law, *Moot Court Program* (visited Aug. 5, 1999) <www.bu.edu/law/academics/jd_program/difference/litskill/moot.html>.

24. See University of Mississippi School of Law, *Moot Court* (visited Nov. 30, 1999) <http://www.olemiss.edu/depts/law_school/moo.html>.

25. See *Jessup Competition*, *supra* note 15.

26. See NATIONAL MOOT COURT, *supra* note 13, at iii. The competition started in 1947 as one between Columbia and Yale, with the winner facing Harvard. See *id.* In 1948, the competition was opened to all schools in the area. See *id.* In 1950, the competition went national. See *id.*

27. See Alex Kozinski, *In Praise of Moot Court - Not!*, 97 COLUM. L. REV. 178, 185 (1997). Judge Kozinski stated his objection as follows:

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. . . .

1 teams be required to select one side to represent throughout the
2 competition.²⁸

1 At least one competition has adopted Judge Kozinski's proposal.
2 In 1998, the Stetson International Moot Court Competition began
3 permitting teams to select which side they want to represent. The
4 team then represents the selected side on the brief and in all oral
5 arguments.²⁹

6 The traditional wisdom, however, is that by requiring students to
7 learn both sides of the problem, they come to understand each side
8 better than if they had learned only one side.³⁰ As one professor noted,
9 "This approach has the added benefit of helping the advocate maintain
10 professional objectivity and avoid losing perspective by becoming too

To be sure, good advocacy does involve knowing the weakness of your case, but [in the real world] a lawyer is never put in the position of taking the opposing side in public. . . . Arguing each round of the competition thus becomes a purely academic exercise, lacking the 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.

Id. at 185–86.

28. *See id.* at 194–95 (suggesting that participants be allowed to select which side they want to represent and that competitors argue the same side of the case throughout the competition).

29. Until the final round of the Stetson competition, teams "compete" only against those on the same side of the case. In other words, an applicant team will argue respondent teams. But to determine who advances, the won-loss record of each applicant team is judged against those of other applicant teams. The respondent teams' records are also compared against each other. *See Rules of the 1999 International Environmental Moot Court Competition* §§ D(1), (2), F(1)–(4) (last revised Aug. 1999) <<http://www.law.stetson.edu/mootct/rules99.htm>>.

30. In response to Judge Kozinski, Professor Michael Hernandez wrote:

An advocate who does a good job of anticipating the other side's arguments is in a much better position to articulate his affirmative points in a way that undermines opposing counsel's arguments. Being forced to argue both sides of a case often helps law students see this advantage and develop this habit. . . . [A]rguing off-brief will help students develop the useful habit of carefully analyzing all sides of an issue before formulating a final argument.

Hernandez, *supra* note 2, at 74.

1 emotionally attached to the client's position."³¹

2 **JUSTICE GINSBURG:** But Counsel, doesn't the name "moot"
3 say it all? In addition to "hypothetical," which is the definition you
4 used earlier, "moot" also means "having no practical significance."³²

5 **BLAIR BYRNES:** Yes, Your Honor. But the point is not to solve
6 real cases; the point is to train students to write and to orally express
7 themselves more clearly. Moot court also helps students gain
8 confidence in their abilities

9 **JUSTICE BREYER:** Sorry to interrupt, Counselor. But isn't the
10 conventional wisdom that employers prefer to hire students who serve
11 on the law review?

12 **BLAIR BYRNES:** Traditionally, law review has been a well-
recognized credential. Students on the law review were and still are
1 highly recruited. But employers recognize that students on the moot
2 court board are a "double threat": they must be able to write and to
3 speak effectively. In addition, since students who participate in moot
4 court prepare documents that closely resemble those that attorneys
5 prepare in practice, and spend a lot of time developing other practical
6 skills, employers know moot court students can often hit the ground
7 running.³³ Moreover, my review of the most recent *National Directory*
8 *of Legal Employers* reveals that a majority of firms lists moot court as
9 an activity ranked equivalent to membership on a law journal.³⁴

10 **JUSTICE GINSBURG:** But what if a student does not want to
11 be an appellate attorney, or even a trial attorney? Should that student

31. *Id.*

32. BLACK'S LAW DICTIONARY 1024 (Bryan A. Garner ed., 7th ed. 1999).

33. *See Hernandez, supra note 2*, at 79 ("Some employers, such as firms specializing in trial and appellate advocacy, would surely prefer a moot court champion with a solid academic record to an editor-in-chief of a law review with poor advocacy skills.").

34. *See NATIONAL ASSOCIATION FOR LAW PLACEMENT, NATIONAL DIRECTORY OF LEGAL EMPLOYERS* (1999 ed.). *But see Kozinski, supra note 27*, at 180 (opining that "a student's performance in moot court is seldom a significant factor in gaining legal employment"). In response to Judge Kozinski's article, attorney Bruce R. Pfaff wrote: "Judge Alex Kozinski . . . is dead wrong when he says that moot court competitions are not useful, and 'don't help students in the job market.' My first job as a law clerk . . . came 20 years ago when my moot court judge . . . hired me after arguments." Bruce R. Pfaff, *Judge's Verdict on Value of Moot Court Is Against the Manifest Weight of Evidence*, CHI. DAILY L. BULL., Feb. 27, 1997, at 2, available in WL, LEGALNP Database, 2/27/97 CHIDLB 2 (letter to the editor).

1 participate in moot court beyond what is required during the first year
2 of law school?

3 **BLAIR BYRNES:** Yes, Your Honor, those students still should
4 consider moot court. All attorneys must think clearly and must
5 communicate with clients, other attorneys, and judges orally and in
6 writing. Moot court hones these skills, which can be transferred to
7 almost any kind of practice.

8 **CHIEF JUSTICE REHNQUIST:** Counsel, you have less than a
9 minute left. Why don't you quickly sum up?

10 **BLAIR BYRNES:** Certainly, Your Honor. Moot court is a valu-
11 able activity. It helps students to strengthen their writing abilities,
12 their oral abilities, and their analytical abilities. Accordingly, it can
13 help to improve their overall performance in law school and to make
14 them more attractive to potential employers. Moot court
15 takes a lot of time and hard work. Students who want to participate
should be dedicated and should have a strong work ethic. Because
1 they work in a team, each student must also be dependable, must
2 welcome constructive criticism, and should be open to new thoughts
3 and approaches. In the end, the moot court experience can be
rewarding because it builds skills, confidence, and character.³⁵

35. See Hernandez, *supra* note 2, at 78; M.A. Stapleton, *Mootness the Issue in Student Court Contests*, CHI. DAILY L. BULL., Feb. 21, 1997, at 3, available in WL, LEGALNP Database, 2/21/97 CHIDL3 3 (quoting one faculty advisor as saying that moot court "is a real educational advantage" and "is as intense as it gets," and also quoting a third-year law student as saying that moot court "allows you to test your skills. You have to learn the substantive areas of the law and the rules of the court, and it lets you test it against the other students.").