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# Judging: The Missing Piece of the Moot Court Puzzle

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## I. INTRODUCTION

Moot court has long been an integral part of the law school landscape.<sup>1</sup> Moot court exercises are a standard part of first-year legal writing programs,<sup>2</sup> and virtually every law school has a moot

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1. See LARRY L. TEPLY, LAW SCHOOL COMPETITIONS IN A NUTSHELL 19 (2003) (noting that moot court started at Harvard Law School in 1820 and “spread quickly to other law schools”); Darby Dickerson, *In re Moot Court*, 29 STETSON L. REV. 1217, 1223 (2000) (explaining history of moot court competitions).

2. See ALAN L. DWORSKY, THE LITTLE BOOK ON ORAL ARGUMENT 1 (1991) (“If you’re a law student, your first oral argument will come in the spring of your first year, as part of your legal writing course.”); Dickerson, *supra* note 1, at 1218 (explaining that moot court “skills are typically taught as part of the first-year legal research and writing curriculum”). Law school websites explain that first-year moot court requirements exist because of the importance of training in legal writing and advocacy. See, e.g., Boston University School of Law,

court board that runs in-school competitions.<sup>3</sup> Inter-school moot court competitions are popular law school “sports” in which institutions aspire to powerhouse status.<sup>4</sup> There are even guides to aid schools in selecting which competitions to enter.<sup>5</sup> There is also an extensive library of moot court advice—some books geared to the student advocate and others aiming to help both students and junior attorneys face their first forays in front of the appellate bench.<sup>6</sup>

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<http://www.bu.edu/law/prospective/jd/first/court.html> (last visited Sept. 11, 2006); University of Chicago School of Law, <http://www.law.uchicago.edu/academics/Bigelow/html> (last visited Sept. 20, 2006).

3. See Dickerson, *supra* note 1, at 1218 (noting that, in most schools, upperclass students are selected to serve on the school’s moot court board). Almost every law school web site contains a reference to the school’s moot court board. See, e.g., Cornell Law School, <http://mootcourt.lawschool.cornell.edu> (last visited Sept. 11, 2006); George Washington University School of Law, <http://www.law.gwu.edu/stdg/mootct> (last visited Sept. 11, 2006).

4. See Gary Taylor, *School Focuses on “Legal Sport” to Enhance Its Rep*, NAT’L L.J., Sept. 4, 1995 at A13 (discussing the South Texas College of Law’s moot court program). Law school web sites frequently tout the school’s moot court accomplishments. See, e.g., Stetson University College of Law, <http://www.law.stetson.edu/excellence/mootct/national.htm> (last visited Sept. 11, 2006); University of Notre Dame Law School, <http://law.nd.edu/currentstudents/academics/moot.html> (last visited Sept. 11, 2006).

5. See TEPLY, *supra* note 1, at 1–12 (describing major moot court, mock trial, negotiation, and counseling competitions); George Washington University School of Law, <http://docs.law.gwu.edu/stdg/mootct/directory/> (last visited Sept. 11, 2006) (providing online directory of moot court competitions to replace previously-published book). There is also a web log entitled *Mootness: The Moot Court Blog* to report competition results. *Mootness: The Moot Court Blog*, <http://mootness.typepad.com> (last visited Sept. 11, 2006).

6. See, e.g., BOARD OF STUDENT ADVISERS, INTRODUCTION TO ORAL ADVOCACY, at v (5th ed. 1991) (discussing book’s origin as a guide for Harvard Law School students participating in moot court); BRADLEY G. CLARY, SHARON REICH PAULSEN & MICHAEL J. VANSELOW, ADVOCACY ON APPEAL 1 (2d ed. 2000) (stating that book is for “teachers, students, and practitioners of appellate advocacy”); DWORSKY, *supra* note 2, at 1 (saying that book is meant for “students and lawyers who want to do well in oral argument”); JOHN T. GAUBATZ & TAYLOR MATTIS, THE MOOT COURT BOOK: A STUDENT GUIDE TO APPELLATE ADVOCACY 5 (3d ed. 1994) (explaining that the book is designed to help students in moot court); ALAN D. HORNSTEIN, APPELLATE ADVOCACY IN A NUTSHELL, at v (2d ed. 1998) (discussing author’s role in moot court programs).

Moot court is an established part of law school life because it teaches valuable lessons that the rest of the curriculum leaves largely uncovered.<sup>7</sup> Students learn to be advocates, to think on their feet, and to respond to challenging questioning.<sup>8</sup> Moot court gives students a first opportunity to see how the law applies to a client and to discuss the law with a client's interests at heart.<sup>9</sup> Students get their first opportunity to do what lawyers do, instead of just reading and hearing about it. Moot court gives students a taste of real appellate work while teaching skills that will help both in law school and in all areas of practice.<sup>10</sup>

Moot court does, however, have its detractors. In his essay *In Praise of Moot Court—Not!*,<sup>11</sup> Ninth Circuit Judge Alex Kozinski skewers moot court competitions for their lack of realism, lack of helpful teaching, and for inflating the participants' sense of self-importance.<sup>12</sup> Commentators on appellate advocacy note a discon-

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7. See Jennifer Kruse Hanrahan, *Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools*, 2003 BYU EDUC. & L.J. 299, 302–05 (discussing the need for instruction in oral advocacy and arguing that law schools traditionally “focus on research and writing disproportionately to oral argumentation”).

8. See TEPLY, *supra* note 1, at 19 (discussing skills that moot court teaches); Michael V. Hernandez, *In Defense of Moot Court: A Response to “In Praise of Moot Court—Not!”*, 17 REV. LITIG. 69, 71–73 (1998) (discussing benefits of moot court).

9. Judge Kozinski criticizes moot court for failing adequately to align the advocate's and imaginary client's interests. While the client's and advocate's interests are united in actual litigation, moot court advocates must argue both sides of the issue and “cannot become too committed to one side of the litigation because doing so will undermine her confidence when she argues the opposing side.” Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178, 186 (1997). Professor Hernandez responds that arguing both sides of a case helps advocates “maintain professional objectivity” and not become “too emotionally attached to the client's position.” Hernandez, *supra* note 8, at 74.

10. See John T. Gaubatz, *Moot Court in the Modern Law School*, 31 J. LEGAL EDUC. 87, 87 (1981) (describing moot court as a form of clinical education that prepares students for arguments in any court and strengthens persuasive skills); Hanrahan, *supra* note 7, at 299–306 (discussing importance of oral advocacy to all aspects of practice).

11. Kozinski, *supra* note 9.

12. *Id.* at 178 (satirizing moot court critiques which untruthfully say that student advocates are better than practicing attorneys); *id.* at 180 (stating that

nect between moot court and real appellate arguments and explain that arguments that win in actual court would not pass muster in moot court.<sup>13</sup> Others note that law school appellate advocacy instruction often does not teach appellate advocacy as much as “How to Win Law School Moot Court Competitions.”<sup>14</sup> Even professors who support moot court suggest various ways standard moot court programs could be changed to be more realistic and helpful.<sup>15</sup>

One aspect of moot court that is the target of frequent criticism is the lack of competence of many of the individuals who judge the rounds and critique the students’ performance. There is “a fair amount of substandard, even atrocious,” moot court judging.<sup>16</sup> Some of the problems lie with unhelpful critiques in which judges praise nothing more substantive than eye contact while telling students that they are better than most practicing attorneys.<sup>17</sup>

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moot court teaches incorrect lessons that attorneys must unlearn); *id.* at 181–92 (explaining ways in which moot court differs from actual appellate practice).

13. Henry D. Gabriel, *Preparation and Delivery of Oral Argument in Appellate Courts*, 22 AM. J. TRIAL ADVOC. 571, 572 (1999) (explaining that an argument that prevailed in court simply based on citation of controlling precedent would not have done well in moot court because it “lacked the polished statement of the facts and the crisp droning on of precedent that marks law school moot court programs”).

14. William H. Kenety, *Observations on Teaching Appellate Advocacy*, 45 J. LEGAL EDUC. 582, 582 (1995).

15. See Gaubatz, *supra* note 10, at 87–88 (discussing problems with moot court); Hernandez, *supra* note 8, at 80–84 (recognizing ways in which moot court could be improved); Kenety, *supra* note 14, at 582 (saying that moot court would “be of greater pedagogical and practical value if the setting were an appeal from a trial court decision”); Frank Tuerkheimer, *A More Realistic Approach to Teaching Appellate Advocacy*, 45 J. LEGAL EDUC. 113, 115 (1995) (suggesting integration of appellate and trial advocacy).

16. Hernandez, *supra* note 8, at 84; see also Kenety, *supra* note 14, at 584 (“Moot court judges are far more likely than real judges to be unprepared or to ask off-the-wall questions.”).

17. See Kozinski, *supra* note 9, at 178 (satirizing moot court critiques); Louis J. Sirico, Jr., *Teaching Oral Argument*, 7 PERSP. TEACHING LEGAL RES. & WRITING 17, 17 (1998) (criticizing student critiques that focus on matters such as pauses and eye contact and “leave the performing student with the idea that appellate advocacy is entirely about technique”); see also Gaubatz, *supra* note 10, at 88 (noting that moot court programs “seem to worship form,” leading students and instructors to worry more “about whether counsel has her hand on

Another problem lies with judges who lack familiarity with the substance of the problem and whose judging rewards cleverness and poise over persuasiveness and sound legal argumentation.<sup>18</sup> The competition aspect of moot court also affects the judging. Moot court judges often engage in gamesmanship and too often see the rounds as a chance for hazing—to toughen the students for what they may face in the real world.<sup>19</sup> Even real judges approach competition judging differently and are often more aggressive than they would be in questioning real attorneys.<sup>20</sup>

A basic problem, probably the most crucial problem in moot court rounds themselves, lies in the questions from the bench. Moot court judges, by definition, do not decide the case they hear argued. This leads moot court judges to ask questions that a real judge would not ask because a real judge would not find the answer helpful to resolving the dispute.<sup>21</sup> Moot court judges instead

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the podium than whether the delivery sounds believable”).

18. See Gaubatz, *supra* note 10, at 88 (noting that debators tend to receive awards over believable advocates, leaving the “unfortunate view . . . that glibness succeeds at the expense of forthrightness”); Hernandez, *supra* note 8, at 86–88 (explaining that moot court judges should assess substantive performance and not reward advocates who engage in improper behavior); Kenety, *supra* note 14, at 584 (stating the focus of moot court “is often on scoring points and displaying verbal brilliance” instead of persuading the court, and saying that “[s]uch nonsense can best be avoided if the participants and judges understand that argument will be evaluated as in a real appellate case”); Kozinski, *supra* note 9, 182–84 (criticizing moot court for rewarding show-offs instead of persuasive advocates).

19. See Dworsky, *supra* note 2, at 5 (noting that student advocates must be prepared for “nasty” judges); Kenety, *supra* note 14, at 584 (stating that students “often feel set upon by judges, some of whom apparently view moot court as some sort of ritualistic law school rite of passage that includes hazing”); Sirico, *supra* note 17, at 18 (noting that moot court judging may lead students to “conclude that making an oral argument is akin to undergoing a hazing and has very little to do with substantive issues”).

20. Randall T. Shepard, *The Special Professional Challenges of Appellate Judging*, 35 IND. L. REV. 381, 391 (2002) (noting that “[t]he impulse toward toughness is difficult to resist” in judging moot court, and judges, who may be trying to put on a show, are frequently more aggressive in moot court than in actual oral argument).

21. See Sirico, *supra* note 17, at 18 (noting that, instead of asking questions that a real judge would ask to resolve the issue, “moot court judges ask

ask questions to help them score moot court rounds, questions that aim to judge a student's familiarity with case law and poise in the face of pressure. Judge Kozinski, describes moot court rounds as:

[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.<sup>22</sup>

One reason for sub-par judging is the lack of appellate experience that most moot court judges possess.<sup>23</sup> In many law school moot court programs, upper-class students judge underclassmen.<sup>24</sup> While some of these upper-class students may have some experience with “real” oral argument through law school clinics<sup>25</sup> or

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scattered questions apparently designed to plumb the student's knowledge on every part of the argument and to see how well the student can take the pressure”).

22. Kozinski, *supra* note 9, at 184.

23. *See generally* Hernandez, *supra* note 8, at 85. While Professor Hernandez is certainly correct when he says that competition administrators should ask judges and experienced appellate attorneys to judge moot court, that is likely to be a practical impossibility for students running a large in-school competition or for administrators of a competition in which thirty or more schools may be competing.

24. *See* Sirico, *supra* note 17, at 17 (describing law school moot court program in which first year students argue before panels that include a student moot court board member). Many law school web sites explain that students act as judges for in-school moot court competitions. *See, e.g.*, Cornell Law School, <http://mootcourt.lawschool.cornell.edu/internal.html> (last visited Sept. 11, 2006); University of Florida School of Law, <http://www.ufmootcourt.org/> (follow “Tryouts” hyperlink) (last visited Sept. 20, 2006); Vanderbilt Law School, <http://law.vanderbilt.edu/student/mootcourt/rules.html> (last visited Sept. 11, 2006).

25. A number of law schools offer appellate advocacy clinics. *See, e.g.*, Georgetown Law Center's Appellate Litigation Clinic, <http://www.law.georgetown.edu/clinics/al/index.html> (last visited Sept. 11, 2006); University of

work, and while some will have more than a rudimentary understanding of oral argument through coaching and participation in inter-school competitions, many know little or no more than what upper-class students told them about their arguments a year ago. Even attorneys who act as judges may know little more. Junior attorneys may have no appellate experience themselves and may approach matters no differently from the average third-year law student. Judges may also be trial attorneys who do not understand the differences between trial and appellate advocacy.<sup>26</sup> Even experienced non-litigators may not understand how to approach appellate advocacy.<sup>27</sup> Indeed, law professors may also lack knowledge of appellate practice and approach judging through the eyes of an academic and not a practicing attorney.<sup>28</sup>

Real appellate judges emphasize that “[t]he lawyer’s job at oral argument is straightforward—to help the judges decide the case.”<sup>29</sup> Real life oral argument allows the advocates to answer the judges’ questions and to help judges explore the issues.<sup>30</sup> Guides to appellate advocacy emphasize the importance of answering the

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California at Los Angeles School of Law’s Appellate Advocacy Clinic, <http://www.law.ucla.edu/home/index.asp?page=1483> (last visited Sept. 11, 2006).

26. See Kenety, *supra* note 14, at 585 (stating that “many moot court judges are trial lawyers” who inappropriately reward flair and mark down “a more proper appellate decorum”).

27. See Hernandez, *supra* note 8, at 85.

28. Judge Kozinski states that “[m]oot 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.” Kozinski, *supra* note 9, at 179; see also Gaubatz, *supra* note 10, at 94 (“Even faculty can be bad [judges], and the hand of exclusion must be merciless”).

29. Hon. Karen J. Williams, *Help Us Help You: A Fourth Circuit Primer on Effective Appellate Oral Argument*, 50 S.C. L. REV. 591, 591–92 (1999).

30. See David M. Ebel et al., *What Appellate Advocates Seek from Appellate Judges and What Appellate Judges Seek from Appellate Advocates*, 31 N.M. L. REV. 255, 260 (2001) (explaining that judges ask questions at oral argument if they are concerned about the point but also to gain the advocate’s help in persuading other judges); Hon. Byron J. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, N.Y. ST. B.J. 346, 383 (Oct. 1982) (saying that advocates are “resources” for the Court); Williams, *supra* note 29, at 596 (noting that judges ask hypotheticals “to test the outer limits of the rule” the advocate is asking the court to adopt).

question the judge asks when the judge asks it.<sup>31</sup> Advocates are told to “[r]ejoice when the [c]ourt asks questions”<sup>32</sup> because it shows that the judges are interested in the case and because it opens the door to persuasion.<sup>33</sup> Moot court guidebooks consistently reiterate this advice, telling students that the first rule of moot court is to respond to the judges’ questions.<sup>34</sup>

This is where the “moot” part of moot court causes problems. When a real judge asks questions in a real case, it is safe to assume that he or she is asking the question to get an answer that will help to resolve the case.<sup>35</sup> But when a judge asks a question in a moot

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31. See, e.g., RUGGERO J. ALDISERT, WINNING ON APPEAL § 24.6 (2d ed. 2003) (“How to Answer Questions”); CLARY ET AL., *supra* note 6, at 116–18 (urging advocates to welcome even the most difficult questions and to answer directly); Myron H. Bright, *The Ten Commandments of Oral Argument*, 67 A.B.A. J. 1136 (1981) (instructing advocates to answer questions directly); Williams, *supra* note 29, at 599 (saying that questions are the most important part of oral argument and that counsel should respond immediately with a direct answer); Joseph L. Yannotti, *How to Succeed in Oral Argument*, N.J. LAW., May–June 1995, at 30, 38 (emphasizing the need to answer questions concisely and without evasion).

32. John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 897 (1940); see DWORSKY, *supra* note 2, at 64 (“Rejoice when you get that first question from the bench. You’re not alone on the dance floor anymore; a judge has asked you to dance.”).

33. See Gabriel, *supra* note 13, at 585 (saying that questions show that the court is interested in the argument and show the advocate the court’s concerns); Alfonso M. Saldana, *Beyond the Appellate Brief: A Guide to Preparing and Delivering the Oral Argument*, FLA. B. J., May 1995, at 28, 32 (calling questions “‘weather-vanes’ pointing in the direction of the court’s reasoning and indicative of what is troubling the judges”); Williams, *supra* note 29, at 598 (explaining that questions are opportunities because they are the best way to let the advocate know what is troubling the judge and because they give a window on the judges’ thought processes).

34. BOARD OF STUDENT ADVISERS, *supra* note 6, at 115–19 (discussing how to answer questions); DWORSKY, *supra* note 2, at 64–71 (including a chapter on questions and how to answer); GAUBATZ & MATTIS, *supra* note 6, at 105–06 (making recommendations on how to answer questions); HORNSTEIN, *supra* note 6, at 277–90 (discussing how to answer questions and emphasizing the importance of responsiveness).

35. See *supra* note 30 and accompanying text. But see Thomas J. Wright & Perry H. Piper, *Oral Advocacy—Some Reminders*, TENN. B.J., Nov.–Dec. 1994, at 28, 29 (“Sometimes appellate judges are simply playing with you when

court argument, the judge may be asking a question that no real judge would ask.<sup>36</sup> The question may be one that the judge thinks will test the student's moot court skills or the judge may be trying to see if the question will stump the advocate.<sup>37</sup> Real judges may lose patience if advocates dodge their questions and they may demand answers.<sup>38</sup> Moot court judges may do the same, but they may also be trying to test how students stand up under pressure, to show what may purportedly happen in "real life," to mask their lack of preparation with aggression, or to act abusively simply because they can do so without challenge.<sup>39</sup> Students certainly should "rejoice" when a judge asks a legitimate question. It is difficult, however, to convince anyone to "rejoice" at trick questions, irrelevant inquiries, or badgering.

Student advocates will not take questions at face value if they learn to expect judges to ask questions to trick and harass, and not because the judge expects a legitimate answer. Instead, students who expect ambiguous questions and gamesmanship will respond in kind. Student advocates will aim to demonstrate their confidence through a clever retort or to distract the judge with rapid-fire citations.<sup>40</sup> Students learn to approach moot court as a verbal joust in which they gain points for witty riposte and for remaining unintimidated in the face of attack, and not as a respectful conversation<sup>41</sup> or as a search for a resolution to a complex problem.

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they ask tough questions, but more often than not, a satisfactory answer can persuade that judge.").

36. See *supra* notes 21–22 and accompanying text.

37. See *supra* note 19 (discussing hazing aspect of moot court).

38. See Gabriel, *supra* note 13, at 585 (stating that counsel should never dodge questions because doing so "will anger the judge," make counsel appear unsure, and because "the court will corner you into answering the question anyway"); Williams, *supra* note 29, at 599 (warning that if counsel is "evasive, the court will quickly lose patience with you, and you will lose your credibility in the eyes of the judges").

39. See *supra* note 21.

40. See *supra* text accompanying note 21.

41. See CLARY ET AL., *supra* note 6, at 97–98 (calling oral argument "a conversation with the court" and a "Socratic dialogue"); Gabriel, *supra* note 13, at 581 (stating, citing Fifth Circuit Chief Judge Henry Politz, that "counsel should approach the argument as if she were going to discuss the case with some senior lawyers in her office" and stating that "[t]he proper attitude is one of re-

Moot court judges who approach the argument as a game or battle tend to reward students who respond in kind, meaning that the students who do the least to aid the court in its resolution of the hypothetical dispute may win in moot court.<sup>42</sup> If these student advocates are then elected to student moot court boards<sup>43</sup> and judge the next generation of aspiring advocates by their standards, the cycle continues. The divide between moot court and real appellate advocacy grows wider.

It is somewhat surprising, then, that the extensive moot court literature says almost nothing about moot court judging.<sup>44</sup> While there are numerous guides for moot court advocates, there is very little advice for moot court judges. Paying attention to the judging side of the equation is a necessary component of improving moot court programs and reducing the gap between moot court and actual appellate advocacy.

In response to this concern, I have spoken to incoming Moot Court boards for the last several years, trying to give student judges some instruction in judging and urging them to take their jobs as judges seriously. All moot court judges “teach” moot court, and it is important that they have some concrete knowledge of the subject they are teaching. Students appreciate the instruction, saying that they otherwise have no idea how to approach judging their first rounds. Ideally, guidance will help other judges, including attorneys, who are new to moot court or who have little appellate experience of their own. I share this guidance here, in

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spectful, intellectual equality—that is, deferential but not obsequious”).

42. See Kozinski, *supra* note 9, at 184.

43. See Dickerson, *supra* note 1, at 1218–19 (discussing methods by which moot court boards select members). A number of law school moot court board web sites state that boards select their members based on the applicants’ success in previous competitions. See, e.g., Duke Law School, <http://www.law.duke.edu/student/act/mootCourt/> (last visited Sept. 11, 2006); The University of Memphis School of Law, <http://www.law.memphis.edu/mootcourt/join.htm> (last visited Sept. 11, 2006); The University of Pennsylvania School of Law, <http://www.law.upenn.edu/academics/journals.html> (last visited Sept. 11, 2006).

44. An exception is Sirico, *supra* note 17, at 17–20 (discussing, among other matters, the importance of critiquing on substance and preparing the bench).

the hopes that it may aid the quality of both intramural moot court programs and inter-school competitions.

## II. THE THREE COMPONENTS OF EFFECTIVE JUDGING

Moot court judging has three chief components: preparing for the argument, judging the round, and critiquing the students' performances. A person who takes the job of judging seriously should pay careful attention to all components.

### A. Preparation

Moot court judges owe it to the competitors to prepare to the best of their ability.<sup>45</sup> Careful preparation takes time, and a person who agrees to judge should be willing to make that commitment. Moot court judges, however, cannot prepare in the same manner as real judges do. Real judges receive a certified record on appeal and the attorneys' briefs and they have law clerks with whom to discuss the case.<sup>46</sup> Moot court judges rarely see the briefs that the advocates have prepared. The judges cannot receive a complete record as there is generally no appellate record aside from the problem.<sup>47</sup> Most moot court judges, however, receive something

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45. See Hernandez, *supra* note 8, at 84 ("Failure to prepare is inexcusable").

46. See Ebel, *supra* note 30, at 260 (noting that Tenth Circuit judges will have read the briefs and have had their clerks study the cases before oral argument); Albert J. Engel, *Oral Advocacy at the Appellate Level*, 12 U. TOL. L. REV. 463, 465 (1981) (emphasizing that he, and other Sixth Circuit judges, read every brief and reply brief); Gabriel, *supra* note 13, at 575 (explaining that judges will have read the briefs before oral argument and their law clerks will have summarized the briefs and arguments in a bench memo); Mark R. Kravitz, *Oral Argument Before the Second Circuit*, 71 CONN. B.J. 204, 204 (1997) (saying that before oral argument the judges will have read the briefs, thought through the issues, and discussed the case with their clerks).

47. This is one of the major criticisms of moot court. See Kozinski, *supra* note 9, at 188 (arguing that moot court perpetuates the myth that facts do not matter on appeal "by providing little or no training in dealing with what is normally the most important aspect of any case: the record"); see also Gaubatz, *supra* note 10, at 87 (saying that moot court problems are too often unrealistic and the "records are often worse"); *infra* note 50 (emphasizing the importance of knowing the record on appeal).

vaguely similar to the materials that guide judges. They receive a packet with the problem (the moot court record) and a bench brief, a document that the competition organizers prepare to outline the arguments that judges can expect to hear from advocates on both sides. Ideally, the bench brief covers the ground that attorneys would have covered in their briefs and explains the background and case law that a law clerk would have discovered. Judges may also receive copies of key statutes or cases.<sup>48</sup> They also generally receive oral or written instructions cautioning them not to decide the case on the merits but to score based on the advocates' performance.<sup>49</sup>

Some moot court organizers may include a statement of facts in the bench brief and neglect to provide judges with the problem. Judges should insist on seeing the problem even if the bench brief contains a recitation of facts. Judges can only fairly assess the issues a problem raises if they see the raw materials with which the advocates work. Additionally, judges cannot teach one of the key lessons of appellate practice, the importance of knowing the record,<sup>50</sup> if they do not know the "record" themselves. A judge who is not intimately familiar with the record will not be able to catch an advocate who invents facts or one who omits facts that are crucial to the argument.

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48. Professor Hernandez notes that a simple step that competition administrators can take to increase the quality of judging is to give judges copies of important cases. See Hernandez, *supra* note 8, at 84. This will allow the judges to catch mistakes in the bench brief and to know who is correct when students in a competition interpret a case differently. *Id.* at 85.

49. For example, the instructions to judges in the National Moot Court Competition note that their "evaluations of the oral arguments presented should not be affected by their personal views of the merits of the case at bar." The Association of the Bar of the City of New York, Fifty-Sixth Annual National Moot Court Competition 4 (2005).

50. Advocates must "know[] the record cold." Gabriel, *supra* note 13, at 575. See also Williams, *supra* note 29, at 596 (emphasizing the importance of knowing the record); Yanotti, *supra* note 31, at 30-31. The moot court record will not duplicate the record on appeal, but a focus on the record can help to disabuse advocates of any assumption that facts are irrelevant. See *supra* note 47.

To prepare to judge, moot court judges should assume that they will actually have to decide the case.<sup>51</sup> This kind of preparation requires careful study of the problem and the issues it raises. The judge should think of the policy questions that both sides of the problem raise and the obstacles that both sides face. The judge should try to think of hypothetical questions that help to test the limits of the arguments.<sup>52</sup>

The judge will benefit from reading as much of the primary authority that underlies the problem as possible: the governing statutes, key Supreme Court opinions, and leading lower court opinions on each side of each issue. A judge may find the bench brief helpful against this backdrop, but judging often suffers when the judge prepares by only reading the bench brief or by reading the bench brief first. Judges who read the bench brief first risk allowing it to define the problem and may fail to see the broader issues. Judges who focus their attention on the bench brief tend to ask questions that are based on the bench brief and to expect students to adhere to the arguments that the drafters of the bench brief had anticipated. This runs the risk that judges will not fully appreciate creative arguments or recognize the validity of persuasive points that the drafters of the bench brief did not anticipate.

Student judges will never be as well prepared to judge as will real judges who are familiar with the issues the problem raises or attorneys or professors who specialize in an area. It will also be hard for student judges to identify all of the side issues that a problem raises.<sup>53</sup> Moot court judges should strive to be aware of these issues, but at a minimum thoughtfulness is crucial. Thoughtfulness can go especially far when judging cases that rest on the big-

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51. See Sirico, *supra* note 17, at 18 (“We should encourage the moot court judge to role-play the real judge”).

52. See Williams, *supra* note 29, at 596 (discussing why judges ask hypothetical questions).

53. Moot court problems often raise procedural, administrative law, and statutory construction questions that are not the focus of the argument. Problems often also raise questions of Supreme Court practice, such as the scope of the grant of certiorari, with which students may not be familiar. See *infra* note 66 (noting types of background questions that advocates should be prepared to answer).

picture issues that form the basis for many moot court problems.<sup>54</sup> Judges who may be unprepared to ask helpful questions about a technical environmental law or securities issue should be able to identify and explore the major concerns underlying a constitutional dispute.

### B. Judging the Round

The role of the judge in a moot court round is to judge the round, pretending that he or she will be deciding the case.<sup>55</sup> A real judge trying to resolve a dispute on its merits will have particular issues that he or she is trying to explore and will ask questions about those issues.<sup>56</sup> Moot court judges who approach rounds with the mind-set of a judge will ask similar questions on the issues that concern them.<sup>57</sup> Asking these types of questions will allow the judges and advocates to explore substantive issues and will teach student advocates that judges ask questions to help them reach conclusions. Students will learn that "appellate advocacy is about persuading judges on substantive issues."<sup>58</sup> Many problems of moot court judging would disappear if moot court judges approached the round as would a real judge.

#### 1. The Moot Court Judge's Role

Moot court judges should not attempt to act. The only role moot court judges should play is the role of judge. The argument will not be a genuine dialogue if the judge is trying to act a part. More importantly, the judges on a panel should never collude and

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54. Judge Kozinski criticizes moot court for involving "big issues" before the Supreme Court. Kozinski, *supra* note 9, at 189-92. These big issues may lend themselves to better judging than do the fact-intensive issues with layers of controlling authority with which attorneys generally deal. While such policy-heavy topics may well not be the best preparation for the day-to-day work of the average attorney, they can still teach students the skills of argument with which moot court programs are most concerned.

55. See *supra* note 51 and accompanying text.

56. Sirico, *supra* note 17, at 18; see authorities cited *supra* note 30 (explaining why judges ask questions).

57. Sirico, *supra* note 17, at 18.

58. *Id.*

plan their approach to judging the round. The success and legitimacy of a moot court round rests on having prepared judges who are each trying to decide how to resolve the problem being argued.

Successful advocacy is tailored to the audience: “To achieve a successful result, it is vitally important to consider who these judges are and what their particular problems may be in deciding the appeal.”<sup>59</sup> While a moot court advocate can rarely tailor an argument to a bench in the way an experienced practitioner who knows the appellate judges and their past decisions can, a successful moot court advocate will tailor the argument to the extent possible.<sup>60</sup> Thoughtful questioning that shows that the person judging cares about the resolution of the case at bar is likely to elicit thoughtful answers, just as a judge who plays games is likely to prompt an advocate to respond in kind. Oral advocates should “[c]hange places (in [their] imagination of course) with the court.”<sup>61</sup> Student advocates, perhaps unwittingly, follow this advice and respond to judges who are playing a game with answers that aim to do no more than win.<sup>62</sup>

Moot court judges inevitably play an additional role, however, that of teacher. Students often receive academic credit for participating in moot court.<sup>63</sup> Even if credit is not at stake, moot court

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59. See Engel, *supra* note 46, at 467.

60. See Gaubatz, *supra* note 10, at 94 (encouraging moot court organizers to disclose the members of final benches in advance. “A good lawyer will attempt to ‘psyche out’ a bench, and the student should not be denied the chance.”).

61. Davis, *supra* note 32, at 896; accord Bright, *supra* note 31, at 1137.

62. See *supra* text accompanying notes 21–22.

63. Many law school web sites state that students receive academic credit for participation on a moot court competition team or for Moot Court Board membership. See, e.g., Seton Hall University Law School, [http://law.shu.edu/administration/registrar\\_bursar/courses/course\\_groups\\_pages/moot.html](http://law.shu.edu/administration/registrar_bursar/courses/course_groups_pages/moot.html) (last visited Sept. 11, 2006) (noting credit awarded for participation on the moot court board and in competitions). The University of Arkansas—Little Rock, <http://www.law.uarl.edu/coursedescriptions.html> (last visited Sept. 11, 2006) (explaining credit awarded for participating in moot court competitions); Some commentators argue that granting academic credit can strengthen moot court programs. See Gaubatz, *supra* note 10, at 105. The American Bar Association recently increased the number of credits required for graduation in part due to “the awarding of academic credit for many activities that historically

purports to teach students how to engage in an appellate argument. The judge can only teach this if the judge is willing to model the role of judge, to ask realistic questions, and to listen to the answers.

Teaching through moot court does not include modeling the worst types of irresponsible and bullying behavior that lawyers might encounter in practice. Most judges show counsel courtesy and respect. While there certainly are appellate judges who disrespect and browbeat counsel,<sup>64</sup> that is not a lesson that moot court can or should teach. It certainly is not a lesson that student judges can teach. The advocate knows that the student judge is neither a real judge nor an attorney who has argued before such a judge. The “some judges do that” justification is simply a poor excuse for bad behavior. Even practicing attorneys who encounter such treatment from actual judges teach nothing by acting that way in moot court. The lawyer simply comes across as a bully. Perhaps student advocates will learn something if a competition invites judges who regularly bully litigants to bully students; at least then the judge is not acting. The judge, however, is representing the school that hosts the competition, and one hopes that the organizers want to project a better image.<sup>65</sup>

## 2. Asking Questions

Moot court judges should try to act like real judges who will have to decide the case. Many student judges and others with no appellate experience, however, have not heard a judge ask questions and have not really thought about what a judge would want to

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were not credit-earning (e.g., law review and moot court).” A.B.A SEC. LEGAL EDUC. AND BAR ADMISSION, COMMENT ON THE CHANGES TO THE STANDARDS FOR THE APPROVAL OF LAW SCHOOLS AND THE WORK OF THE STANDARDS REVIEW COMMITTEE, <http://www.abanet.org/legaled/standards/standardsdocuments/august2004commentarychanges.DOC> (last visited Sept. 11, 2006).

64. See Shepard, *supra* note 20, at 390–91 (describing instances). Judge Shepard notes that “[o]ral arguments can easily exceed the boundaries of civility” and urges judges not to “tolerate such excess[.]” *Id.* at 390.

65. See Gaubatz, *supra* note 10, at 94 (explaining how bad benches leave a “bitter taste” and saying that moot court organizers should monitor the quality of judging and strive to use only the best judges).

know.<sup>66</sup> Instead of asking questions that help decide the case, the moot court judge tends to ask questions about the one thing that he or she does know: the bench brief. This leads the judge to pick a case out of the bench brief and ask the advocate to distinguish it or state the facts. Just as bad movies make Socratic education out to be nothing but a quiz on the minutiae of assigned cases,<sup>67</sup> bad judging makes oral advocacy a quiz on the minutiae of lower court decisions.

A judge who thinks through the problem carefully will naturally go into the round with some questions that he or she wants the advocates to answer. And there is no reason why a judge who fears forgetting the questions should not write them down before the round. Judging suffers, however, when a judge goes into a round with a list of canned questions for all parties. A judge with a list of questions tends not to listen carefully to what the advocates are saying but to listen only to gain an opening for the next prescribed question. These judges, in turn, fail to ask questions that the student advocates' arguments genuinely raise.

For the same reasons, judges should avoid focusing on lists of sample questions that the drafters of the bench brief may prepare. Although sample questions may help to let a novice judge know the sorts of issues that the argument is likely to cover or the types of questions that the competition organizers envision, a judge who approaches the argument with a pre-arranged line of questioning in mind is unlikely genuinely to respond to what the advocate says.

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66. Guides to oral argument note that counsel should be prepared to answer background questions regarding procedure and jurisdiction, must know what concessions the judges may want, and must be able to state the desired relief. *See Gabriel, supra* note 13, at 577–79.

67. In the movie *Soul Man*, James Earl Jones plays a Harvard Law School professor who reduces a student to tears by asking: “Ms. Zindell . . . Can you cite for us the precedent for that decision?” He eventually calls on a Ms. Walker, who answers:

Walker: Uh . . . Rhode Island versus Calitano.

Professor: What YEAR, Ms. Walker?

Walker: 1969, Sir.

Professor: Anyone else here agree with Ms. Walker’s citation?  
(Silence)

That’s unfortunate . . . it happens to be correct.

SOUL MAN (New World Pictures 1986).

A judge reading pre-scripted questions is unlikely to have a genuine conversation, the hallmark of a good oral argument.<sup>68</sup> A judge who relies on questions that someone else has drafted is trying to mimic a conversation that someone else finds interesting and that the judge might not even want to have. A good oral argument is supposed to be a dialogue or conversation with the bench,<sup>69</sup> and it is impossible to teach the student advocate to be a good conversationalist if the judge is not one. In a good conversation, both parties listen and respond to what the other says.

This does not mean that the judge should not tell the advocate what to talk about. If the judge is convinced that the problem hinges on a question of statutory interpretation, the judge should certainly direct the advocate to address that point. And if the judge thinks that the advocate's argument is irrelevant or unhelpful, the judge should tell the advocate to move on. There is no reason why moot court judges should waste their time listening to irrelevant arguments any more than real judges would. But, when the advocate is discussing the point the judge wants discussed, the judge owes it to the advocate to listen and to respond to what the advocate says.

It is imperative that judges allow advocates to answer the questions asked.<sup>70</sup> Too many judges cut off advocates before the advocate can give a complete answer or ask such rapid-fire questions that the advocate can never explain a point. This is not how to conduct a conversation. The judge should be asking a question because he or she wants an answer; the judge cannot tell if the answer is satisfactory if the judge refuses to listen. One of the most important skills for a good oral advocate is to listen to the question and to address the judge's concern.<sup>71</sup> It is difficult to teach a stu-

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68. See *supra* note 41 and accompanying text.

69. *Id.*

70. Judges should also ask questions. It is virtually impossible to engage in a dialogue with a judge who simply makes statements about his or her view of the law, expecting the student to respond. Judge Engel notes, however, "If the judge merely makes a statement instead of asking a question, the lawyer should treat it as a question and respond appropriately." Engel, *supra* note 46, at 470.

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

dent to listen to questions if he knows that the judge will not listen to the answer or even be able to assess whether the answer is responsive.

A judge, of course, does not have to listen to whatever irrelevant rambling a student may give in response to a question or allow the argument to run off track. And certainly judges should encourage advocates to give clear, precise answers that respond to the questions asked. But the fact that a student advocate may not have mastered the skill of answering clearly does not excuse a judge who refuses to listen to the responses.

Moot court judges who approach the case from the viewpoint of appellate judges will also naturally resist arguments that are better suited to juries or that rest on ungrounded policy. Appellate courts generally do not want to hear the sort of emotionally-laden factual presentations that might sway a jury.<sup>72</sup> Similarly, policy arguments should have some basis in law and not rest on counsel's mere preferences.<sup>73</sup> A judge who has thought about the legal issues and the precedent is likely to grow impatient with such tactics.

The advocate's job is to convince the court that, based on precedent, policy, and logic, the court should decide in her favor.<sup>74</sup>

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72. See Gabriel, *supra* note 13, at 581 (explaining how doing so may lose a case); Yannotti, *supra* note 31, at 38 (saying not to "harangue" the court; an appellate panel is not a jury and appellate judges "are generally not susceptible to blatant appeals to their emotions"). But see GAUBATZ & MATTIS, *supra* note 6, at 91 (suggesting that counsel focus on the facts); Wright & Piper, *supra* note 35, at 30 (saying that appellate counsel should make emotional appeals but noting that counsel will first have to "make a good, sound legal argument").

73. See Gabriel, *supra* note 13, at 578 (saying that responses "must be grounded in an explainable policy"); Kozinski, *supra* note 9, at 192 (criticizing moot court problems for overemphasizing policy and giving students the mistaken impression that policy, not law, determines most cases).

74. "The appeal must be addressed to the judges' good sense, logic, and sense of what is correct as a matter of law and social policy." Gabriel, *supra* note 13, at 581. Gabriel also explains that advocates should "give the court a common sense, simple reason why all the technical stuff in your brief makes sense," should emphasize the equity of their positions, and should "show the court why those areas they thought were problems are not." *Id.* at 484-85; see also Bright, *supra* note 31, at 1138 (noting that "at the heart of every important issue are legal, factual, and equitable or policy reasons that support, explain, and strengthen the advocate's position and demonstrate the illogic or injustice of any

To do this, the advocate should have a well-organized argument that explains how authority leads the court to her conclusion, how that conclusion squares with the policies the authority supports and the court follows, and how the pieces fit logically together. The judge should be interested chiefly in these matters. A judge should not accept arguments based on circuit counting or a factually-identical lower court case without requiring the advocate to explain why the court should follow that authority.

Here, as in so many other aspects of in-school moot court, bad arguing and bad judging often combine to perpetuate a vicious cycle. First-year students often rely on favorable circuit splits and factually-similar precedent as a safe haven from having to venture into the uncharted territory of convincing a court that one side of the split is right. Judges who ask advocates to “distinguish” non-binding precedent and who are preoccupied with circuit counting and the facts of lower court cases encourage this style of arguing. Counsel will only learn not to argue in a way that would never persuade a real court when judges stop asking questions that no real court would ask.

Student judges and junior attorneys sometimes ask very few questions because they are afraid that their questions will sound silly or not make sense. That fear is a symptom of a judge who is approaching the argument as something other than a genuine conversation.<sup>75</sup> It is hard to imagine a participant in a conversation being reluctant to ask a question if he or she truly cares about the subject and wants to know the answer. Asking questions should come easily if the judge is prepared, has thought about the issues, and is engaged in the argument.

Some judges ask if they should try to ask more challenging questions in later rounds of a competition than at the beginning. The answer is no. A judge who is trying to be easy or hard is try-

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contrary view”); *cf.* Engel, *supra* note 46, at 473 (noting that judges want to follow the law, support the lower court when possible, and do justice in each case).

75. The individual may be afraid of who is watching or otherwise worried about putting on a “good show” as a judge. This sort of posturing is not unique to student judges. Real judges may do the same thing, but a judge’s desire to show off may result in added aggression. Shepard, *supra* note 20, at 391.

76. See *supra* note 46 and accompanying text.

ing to do something other than judge the round.<sup>76</sup> The judging will generally be more challenging in the later rounds of a competition than in the early rounds, but that is not because the judge is trying to act that way. As a competition progresses the advocates should become more sophisticated and better able to articulate the limits of their arguments. It may take five or more minutes of questioning in an early round before the advocate clearly articulates the holding he or she wants.<sup>77</sup> In a later round, the advocate should be able to state the desired holding clearly on the first pass, allowing the argument to concentrate on the implications of that proposed holding. Even at that stage, the advocate may struggle to answer a hypothetical that tests the reach of that holding. By a final round, the advocate should be able to answer the hypothetical and defend the answer.

Moot court aims to teach students how to be good advocates. Good advocates answer questions clearly and directly,<sup>78</sup> tell the court exactly what it should do,<sup>79</sup> and are prepared to answer hypothetical questions.<sup>80</sup> These are not skills that come naturally. Students need to learn these skills and can learn them from a well-structured moot court competition in which moot court judges act like real judges.

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77. One of the questions that an advocate should anticipate is “[s]tate the rule of law as you would have us make it.” Gabriel, *supra* note 13, at 578.

78. See Kravitz, *supra* note 46, at 212 (advising advocates to answer questions immediately with direct answers such as “yes” or “no” and to follow with a short explanation and reference to authority); Williams, *supra* note 29, at 599; Yannotti, *supra* note 31, at 38 (emphasizing the importance of giving concise answers and not avoiding questions).

79. See Gabriel, *supra* note 13, at 577–79 (listing questions that advocates should be prepared to answer and emphasizing the importance of knowing the specific relief requested); Kravitz, *supra* note 46, at 210 (providing a list of questions that an advocate should be prepared to answer, including “[w]hat holding do you want?” and “[h]ow would your rule work?”).

80. See Kravitz, *supra* note 46, at 210 (saying that advocates must think of potential hypothetical questions); Williams, *supra* note 29, at 596 (explaining that answers to hypotheticals are significant and that attorneys who master the context of a case “will be able facilely to answer hypothetical questions posed from the bench”).

If judges in moot court competitions asked questions in order to help them understand how to decide a case and rewarded advocates who gave sound answers, many of the problems with moot court competitions would disappear.<sup>81</sup> Judges would not ask questions to “test the advocacy skills of the lawyers”<sup>82</sup> or “just for the sake of testing the advocate,”<sup>83</sup> but to reach a conclusion.<sup>84</sup> Judges who are trying to reach a conclusion will not engage in gamesmanship and hazing.<sup>85</sup> A judge who rewards answers that help resolve the issue will penalize the “glib or bombastic answers” that now score points.<sup>86</sup> Advocates will focus on substance if they understand that “appellate advocacy is about persuading judges on substantive issues”<sup>87</sup> and that they will succeed if they do so.<sup>88</sup>

### C. The Critique

Student advocates will improve only if they receive meaningful critiques that point out the strengths and weaknesses of their arguments and presentations. An inexperienced judge, however, must learn to give an effective critique. An inexperienced judge usually approaches a moot court round the way a casual fan approaches a basketball game. The judge can tell who scored the most points, and may be able to note missed opportunities or obvious mistakes, but she cannot analyze the performances in the manner of an experienced coach dissecting a game. Judges can only give effective critiques when they are students of the game and know the rules and the reasons they exist.

This does not mean that inexperienced judges are reluctant to critique. Instead, critiques degenerate into scripted comments,

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81. See text accompanying notes 17–22.

82. See Kozinski, *supra* note 9, at 184.

83. See Sirico, *supra* note 17, at 18.

84. See *id.*

85. See *supra* note 19 and accompanying text.

86. See Kozinski, *supra* note 9, at 184.

87. See Sirico, *supra* note 17, at 18.

88. See Kenety, *supra* note 14, at 584 (stating that the “nonsense” of focusing moot court “on scoring points and displaying verbal brilliance” instead of persuading the court “can best be avoided if participants and judges understand that arguments will be evaluated as in a real appellate case”).

such as “[y]ou all had really good eye contact,” and such meaningless directives as “[y]ou use your hands too much.”<sup>89</sup> Inexperienced judges tend to critique on technique because they can identify forensic problems more readily than substantive ones and because it is easier to tell advocates how to act than it is to explain how to argue and answer questions. But even forensic critiques tend to be unhelpful and misleading because student judges tend not to give the reasons for their instructions and tend not to note that their preferences are not rules.

The starting point for a good critique is understanding what an excellent argument should look and sound like. Ideally, the student judge will have analyzed tapes, or at least seen excellent arguments to use as a model. Failing that, the judge should understand that an argument is a conversation<sup>90</sup> and make comments with the idea of conversation in mind.

The few forensic rules of moot court make sense against this backdrop.<sup>91</sup> Advocates should not read their arguments.<sup>92</sup> Not only do court rules counsel against reading,<sup>93</sup> but a participant in a conversation does not read a script.<sup>94</sup> Eye contact is important be-

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89. See Sirico, *supra* note 17, at 17 (noting that student critiques almost always focus on matters such as eye contact, leaving the student advocate with the impression that “appellate advocacy is entirely about technique”).

90. See *supra* note 41.

91. As Professor Gaubatz explains, a great deal goes into developing a good advocate beyond simple instruction in the “do’s” and “don’ts” of advocacy, such as not reading the argument. Gaubatz, *supra* note 10, at 103–04. Students must understand what the case is about from different perspectives, fully prepare, and listen well. *Id.* at 104.

92. See Kravitz, *supra* note 46, at 213 (emphasizing that counsel should not read to the court); Yanotti, *supra* note 31, at 32.

93. The Supreme Court Rules are explicit: “Oral argument read from a prepared text is not favored.” Sup. Ct. R. 28(1).

94. See DWORSKY, *supra* note 2, at 41 (stating that reading prevents the advocate from forming a relationship with the judges, keeping eye contact, or being conversational); Davis, *supra* note 32, at 898 (“The eye is the window of the mind, and the speaker does not live who can long hold the attention of any audience without looking it in the face.”); Rehnquist, *supra* note 71, at 300 (noting that a person who was discussing vacation plans with his or her spouse would not read his arguments); Yannotti, *supra* note 31, at 32 (explaining that counsel should not read because “your argument is not a speech to the judges. It is more in the nature of a conversation.”).

cause a good conversationalist looks at the persons with whom he or she is speaking.<sup>95</sup> The advocate should speak in a clear voice, and neither shout nor mumble.<sup>96</sup> The advocate should speak slowly enough to be understood.<sup>97</sup> Certainly the advocate should vary intonation and be deliberate yet passionate, but should not yell or lecture.<sup>98</sup> Counsel should never talk over the bench<sup>99</sup> and should always be polite and deferential, but not obsequious or intimidated.<sup>100</sup> The advocate should, in other words, converse with the bench.

Moot court judges should encourage advocates to follow the rules of practice to the furthest extent possible. Judges, for example, should emphasize the importance of good time management. Literature on appellate advocacy emphasizes that it is crucial that counsel pay attention to the available time and stop when time is up.<sup>101</sup> Courts generally will not let counsel wander on when time

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95. See DWORSKY, *supra* note 2, at 41 (explaining that eye contact helps “keep the listener’s attention”).

96. See Engel, *supra* note 46, at 469 (cautioning advocates to “speak up” and noting that “[t]he court may not need oratory, but it does need audibility”).

97. See DWORSKY, *supra* note 2, at 42 (saying that advocates should “speak at a controlled speed”); Kravitz, *supra* note 46, at 214 (counseling advocates to avoid rapid-fire presentations).

98. See DWORSKY, *supra* note 2, at 43 (stating that counsel should “use vocal dynamics”); Bright, *supra* note 31, at 1139 (explaining that “[e]ffective advocacy also calls for a natural and sincere style of speaking” and that, while an “impassioned oration” will not persuade experienced judges, counsel must believe in the case); Davis, *supra* note 32, at 896 (“[T]here is no surer way to irritate the mind of any listener than to speak in so low a voice or with such indistinct articulation or in so monotonous a tone as to make the mere effort at hearing an unnecessary burden.”); Kravitz, *supra* note 46, at 214 (advising counsel not to speak in a monotone).

99. See DWORSKY, *supra* note 2, at 64–65 (explaining that counsel should stop talking immediately when a judge asks a question).

100. See Kravitz, *supra* note 46, at 214 (explaining that counsel should be respectful and show deference but not be pushed into concessions); Saldana, *supra* note 33, at 34 (saying that an argument “is most persuasive when the advocate strikes a balance between being overly assertive and overly deferential”); Yannotti, *supra* note 31, at 38 (advising counsel to “[b]e respectful but don’t toady”).

101. See DAVID C. FREDERICK, SUPREME COURT AND APPELLATE ADVOCACY 260 (2003) (explaining that while some appellate courts are more

is expired, and moot court judges should enforce the same rules. Beginning student advocates tend to ignore time limits, thinking that they are there to give the court a lecture and that the time it takes to do so is irrelevant.<sup>102</sup> A judge who recognizes that courts grant oral argument so that the advocate can help them understand the case and that real courts will hear several arguments in a day and need to move on<sup>103</sup> will identify and explain the error of the student advocate's approach.

It is also important that student advocates recognize that they do not have to use all their allotted time. Advice on appellate advocacy emphasizes the virtues of arguments that are brief and to the point. Advocates should sit down when they have said what they need to say and not waste their and the court's time.<sup>104</sup>

Beyond these general guidelines, there are few rules. Moot court critiques can, however, help advocates by pointing out mannerisms that judges find distracting. There are some mannerisms, such a jiggling coins or keys, that would distract almost any judge, and judges may safely tell advocates to stop the behavior.<sup>105</sup> Beyond the obvious, judges should tell advocates which mannerisms they find distracting and phrase their criticisms in that light. If

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lenient, the Supreme Court watches time carefully); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 690 (8th ed. 2002) (stating that counsel should stop at time unless answering a question and cease arguing immediately after answering).

102. Moot court advice that students ask for extra time to conclude when the court has asked frequent questions only fuels this problem. See DWORSKY, *supra* note 2, at 61–62 (noting that counsel should not run out of time but suggesting that counsel ask for extra time to conclude if time expires while answering a question).

103. See Engel, *supra* note 46, at 466–67 (“The biggest problem all judges have is time.”).

104. See DWORSKY, *supra* note 2, at 62 (explaining that counsel does not need to fill the allotted time and that judges appreciate brevity); Timothy A. Baughman, *Effective Appellate Oral Advocacy: “Beauty Is Truth, Truth Beauty,”* 77 MICH. B.J. 38, 40 (1998) (urging counsel to be concise and to sit down when the argument has been made); Saldana, *supra* note 33, at 34 (saying that counsel should not pad the argument but should ask if the court has questions before stopping with time remaining).

105. See Gabriel, *supra* note 13, at 589 (noting that judges find such habits distracting).

judges tell advocates never to do whatever it is that distracts the judge, the student will almost inevitably hear contradictory advice and begin to believe that judging is arbitrary.

Student critiques, for example, often attach a great deal of importance to hand gestures. This is probably because many student advocates use their hands in distracting manners; they make repetitive and wild gestures. The judge should certainly point out the distraction, but should not tell the advocate not to “use his hands.” A student advocate who hears such advice tends to keep his hands glued to the podium in the next round, only to be told that he looks like a stick figure and should relax and use his hands. The student hears contradictory information and finds the process arbitrary. Instead, both judges are probably giving the same advice: that natural hand gestures help an argument but that too much motion becomes distracting.<sup>106</sup> The problem would not occur if the first judge identified the gestures that distracted her from carrying on a conversation and the second said that a conversation works better with a person who is relaxed and acts naturally.

This same dynamic is responsible for moot court filler words such as “petitioner contends” that litter so many moot court arguments.<sup>107</sup> Beginning advocates tend to speak in the first person, saying “I’m arguing that . . .” or “I believe.” Judges tend to respond by telling the advocate not to use the first person, leading the advocate to begin labeling himself as petitioner or respondent and saying things like “petitioner contends . . .”<sup>108</sup> This unnecessary filler would be avoided if the first judge recognized that the real problem was not the use of the first person but a failure to

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106. See DWORSKY, *supra* note 2, at 40 (saying that advocates should use natural gestures, but keep hand motions under control); Ronald J. Rychlak, *Effective Appellate Advocacy: Tips from the Teams*, 66 MISS. L.J. 527, 535 (1997) (giving the same advice).

107. See Rychlak, *supra* note 106, at 538 (explaining that such filler diminishes the impact of the argument).

108. Some moot court boards give just such advice. The Duke Law School Primer to Oral Argument directs advocates not to say “I believe” and says that “[i]t is more appropriate to say ‘Petitioner argues that . . .’ or ‘Respondent would contend . . .’” Duke University School of Law Moot Court Board, *A Primer to Oral Argument*, Feb. 5, 2003, <http://www.law.duke.edu/student/act/mootCourt/pages/primer.html> (last visited Sept. 11, 2006).

make direct assertions, a failure that is equally noticeable when couched in labels. The dictate against using the first person also makes advocates reluctant to simply use the clear term “I” in situations which actually call for a first-person answer.

Judges who recognize that their role in critique is to help the advocates identify what the judge believes are their strengths and weaknesses and not to hand down pronouncements on oral argument may find it easier to give helpful commentary. The judge should be willing to explain his or her preferences and why he or she recommends a certain approach to advocacy.

This does not mean that judges will never give contradictory information. The literature on moot court and appellate advocacy contains a considerable amount of contradictory information. Some commentary tells counsel to “[a]bsolutely” take notes to the podium.<sup>109</sup> Others suggest that teams do better in competition if they work without notes, while recognizing that doing so might not be advisable in court.<sup>110</sup> Guides to moot court frequently tell the petitioner to state the facts of the case.<sup>111</sup> Other commentators tell advocates to “[b]egin by going right to the heart of your first issue. Do not state the facts or the procedural history as they taught you in law school.”<sup>112</sup> Student critiques are likely to reflect this disagreement and the inconsistent comments the student judges have heard themselves.

This inconsistent advice will be less troubling, however, if judges are careful to explain that they are stating their preferences and not absolute rules. A student advocate will also be better able to determine what path to take if the judge explains the reasoning behind the advice and why he or she believes an argument that

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109. Gabriel, *supra* note 13, at 582.

110. See Rychlak, *supra* note 106, at 537.

111. See DWORSKY, *supra* note 2, at 59 (instructing advocates to discuss the facts after the introduction); Rychlak, *supra* note 106, at 530–32 (giving the same advice). Some commentators give appellate advocates the same advice. See Saldana, *supra* note 33, at 32 (advising appellant to present a factual overview).

112. Gabriel, *supra* note 13, at 583. Here, as in so many areas, the proper course of action is likely to hinge on the court. See *infra* text accompanying note 114.

follows that course will be stronger and more persuasive. Apparently contradictory advice can often be reconciled when the reasons for the suggestions are clear. Former Chief Justice Rehnquist explained that counsel wastes his time giving a detailed factual presentation to a court that has studied the briefs, but should develop the facts if the court has not read the briefs before argument.<sup>113</sup>

Judges should critique primarily on substance. A judge's ability to give a helpful critique on substantive matters depends largely on whether the judge has approached the job of judging correctly. Moot court judges who approach their job as if they will have to decide the case will give helpful critiques if they comment on how effectively the advocates aided their understanding. Moot court judges should let student advocates know whether their arguments were logical, organized, and persuasive. A judge who asks questions because he or she really wants answers will naturally notice who answers the questions most directly and helpfully. The judge should let the advocates know when the answers were helpful and when advocates appeared to be dodging the questions. A judge who asks questions exploring the meaning of statutory language will be able to identify whether advocates are familiar enough with the statute to provide helpful responses. A judge who is familiar with the record will be able to identify whether advocates used the record effectively and accurately. A judge who asks hypothetical questions to probe the limits of an argument will be able to tell whether the advocate thought through the argument and understood its implications.<sup>114</sup>

Moot court judges who take the job seriously will remember that they are teaching when they critique. They owe it to the student advocates and the legal profession to counsel students to behave 'ruthfully and ethically. It is crucial for advocates to be honest with the court.<sup>115</sup> An advocate who does not know an answer

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113. See Rehnquist, *supra* note 71, at 296–97.

114. Moot court competition organizers can help judges by providing detailed score sheets that ask for rankings in various substantive categories, explain the categories in detail, and give detailed ranking scales.

115. See DWORSKY, *supra* note 2, at 69 (emphasizing that counsel should never bluff and should admit if he does not know an answer); Gabriel, *supra*

should say so and not try to pretend.<sup>116</sup> Moot court judges must insist on the same standards and never reward students for evasive and unresponsive answers.

The critique is in many ways the most important aspect of the moot court round because it is where teaching takes place most directly. Judges who take their jobs seriously will give advice that will help students in law school and in their future careers. Judges who approach moot court as a game and as an excuse for hazing not only poison the pool of future moot court judges but also teach those students lessons that will haunt them in practice.

### III. CONCLUSION

Moot court is an established part of legal education. At its best, it teaches students advocacy skills that will help in all aspects of practice. At its worst, it is an exercise in how to outsmart an opponent by giving clever retorts to irrelevant and hostile inquiries. It is the judges' responsibility to determine which direction an argument takes. Law school students, like lawyers, will argue to impress their audience. If a person treats moot court judging as a power-trip or game, counsel will learn to respond with clever nonsense but to remain unintimidated before the barrage. If a person approaches a moot court round as an opportunity to engage in a conversation about how to resolve a difficult legal issue, counsel will learn to give thoughtful conversational answers and to help the court understand why it should resolve the matter in the advocate's favor.

Moot court programs should focus on teaching judges as well as advocates. They should teach moot court judges to approach a round as if they would have to decide the case, to ask questions that would help a judge to understand the advocates' arguments and limits of those arguments, and to engage in a respectful conversation with counsel. Judges should reward a natural demeanor, clear presentation, and thoughtful and honest responses. Judges should give advocates fair and helpful feedback. Advocates will

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note 13, at 586–87; Kravitz, *supra* note 46, at 213 (stating that counsel must “[b]e honest with the Court”).

116. See *supra* note 115.

only learn excellence in advocacy from judges who approach their jobs seriously and dedicate themselves to teaching the right lessons.