In Defense of Moot Court: A Response to "In Praise of Moot Court—Not!"

Michael V. Hernandez*

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* Assistant Professor, Regent University School of Law. Former Litigation Associate with McGuire, Woods, Battle & Boothe and with McSweeney, Burtch & Crump, both in Richmond, Va. B.A. with High Distinction, University of Virginia; J.D., Universi y of Virginia School of Law. I am very grateful for the encouragement and assistance provided by my wife, Laura, for the valuable insights of James Duane and Michael Schutt, two of my colleagues at Regent, and for the editorial work done by the staff of *The Review of Litigation.*

I. Introduction

I doubt moot court has ever suffered a lack of criticism. An imperfect system will always draw critical fire, especially when it involves a competition where there are more "losers" than "winners." As those of us in academia know all too well, practitioners and judges commonly look down on many aspects of law school as impractical and of little use in the "real world." It was hardly surprising, then, that Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit recently published an essay[1] that, despite its veneer of levity, is a scathing indictment of moot court.

When I first read Judge Kozinski's piece, I was slightly tempted to pass it off as the musings of a man with an ax to grind because of his own subjective, bad experiences. After all, distinguished federal judges do not often resort to the colloquial use of "squat" (as in "moot court has squat résumé value")[2] to assess something. But I knew it would be a mistake to give in to this temptation. Anything Judge Kozinski writes warrants serious consideration because of his prominence within the legal profession, and any piece published in the *Columbia Law Review* will undoubtedly attract significant attention. I suspect many lawyers and judges, and even some law professors and students, share some of Judge Kozinski's views. I will readily concede that he has some legitimate insights and suggestions. But I simply cannot idly sit by and let moot court take such a ruthless beating without rising to its (at least partial) defense.

I admittedly bring a certain bias to this friendly debate. I love moot court. I enjoyed participating in both intrascholastic and interscholastic competitions when I was a law student at the University of Virginia. I have served as the faculty advisor to the Moot Court Board at Regent University School of Law since August 1994, and in that capacity I have coached several teams at various competitions and judged numerous rounds of intrascholastic competitions. Unlike the narrow (and unflattering) portrait Judge Kozinski paints of

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1. Alex Kozinski, *In Praise of Moot Court–Not!*, 97 COLUM. L. REV. 178 (1997), *excerpt reprinted in* AM. LAW., Jan.-Feb. 1997, at 91. All cites herein to Judge Kozinski's article are to the *Columbia Law Review*.

2. *Id.* at 181.

faculty involved in moot court, I am not a member of a class of "faculty who have . . . had either no experience as lawyers or unhappy experiences, which caused them to flee into academia."[3] I practiced law for several years with two prominent firms in Virginia before teaching full time, and my mostly federal litigation practice involved a respectable amount of appellate work that I thoroughly enjoyed. I write all of this in the spirit of full disclosure. As Supreme Court Justice Benjamin N. Cardozo once said, "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own."[4] However, due to my experiences as an attorney and as a moot court competitor, coach and judge, my eyes have seen a lot that is relevant to this topic, and that breadth of perspective may put me in an advantageous position.

I wholeheartedly take issue with Judge Kozinski's fundamental thesis that moot court competitions are inherently artificial and thus provide little or no educational benefit to participants. In this essay, I will describe some of the numerous advantages of interscholastic moot court competitions and respectfully but vigorously disagree with many of Judge Kozinski's assertions.

II. In Praise of Moot Court

A. Let Me Be Brief

Moot court provides numerous benefits to participants. One aspect of competitions to which Judge Kozinski devotes little attention is the brief-writing process.[5] Admittedly, the process can be a bit artificial, but that shortcoming characterizes any simulated activity. Despite the common lack of a full trial record, the briefing process in moot court is quite valuable. The hallmarks of good persuasive legal writing, whether at the trial or appellate level, are sound analysis,

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3. *Id.* at 179.

4. Justice Cardozo's statement can be found in BENJAMIN J. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (renewed 1949), a compilation of the Storrs Lectures he delivered at Yale University in 1921.

5. I suspect this is because most of his experience with moot court has been as a judge at oral argument. This experience is valuable but inherently limited.

clarity, and persuasiveness. Moot court competitions give students excellent opportunities to develop and hone these skills. The brief-writing skills of most students I have coached have improved noticeably during the briefing process. The potential for growth is particularly great in competitions such as the National Appellate Advocacy Competition sponsored by the American Bar Association (ABA NAAC), which allows faculty coaches to provide limited assistance on the brief. If a faculty member takes advantage of this opportunity, the experience is similar to a senior partner handing a significant appellate project to a junior associate and then providing oversight. The traditional law school curriculum offers few, if any, similar experiences to law students. Most students work very hard on their brief for interscholastic competitions and thereby enhance the learning process even more.

Law students generally do not have adequate opportunities to sharpen their persuasive writing skills, even at schools where legal writing and skills are more heavily emphasized than under the traditional legal education model. Most law courses are graded solely on a final exam, and exams, of course, do little to improve writing skills. I believe there can never be too many opportunities to obtain experience in writing persuasively. I was heavily involved in the legal writing program at the University of Virginia School of Law when I was a student. In addition to taking the core legal writing class, I was a Dillard Fellow (legal writing teaching assistant) and the Co-Director of the Legal Writing Clinic. I co-wrote three research briefs for moot court competitions (two for an intramural competition, one for an interscholastic competition). I also wrote several memoranda as a research assistant for a professor and as a summer associate at two law firms. These experiences made me a very good writer for a law student, and I thought I was "hot stuff" in the legal writing department when I came out of law school. The notorious free-flowing red pen of the first partner for whom I worked in practice quickly showed me I had much more to learn! And learn I did for several years while working with numerous attorneys. I hope I never get to the point where I think I am so talented and experienced

that my writing skills cannot improve.[6] I always exhort my students to take advantage of every opportunity to improve their legal writing skills. Moot court competitions provide such an opportunity.

B. *May It Please the Court*

Moot court also provides valuable experience in appellate oral advocacy. Moot court oral arguments closely simulate appellate arguments in the real world. Although moot court problems commonly focus primarily, if not exclusively, on pure issues of law,[7] the process of answering questions and reasoning through issues is precisely the same as in practice. Competitors learn how to handle a broad range of questions from a diverse group of judges. The oral advocacy training moot court provides is strengthened when real judges, such as Judge Kozinski, are on the bench.[8] These judges know how to ask realistic questions and are best qualified to give feedback. They also tend to listen more carefully to what the students say rather than solely being swayed by forensic skills.

Unlike Judge Kozinski,[9] I view the practice of arguing both on-brief and off-brief as one of moot court's greatest strengths. Admittedly, this process is not duplicated in practice, although it would certainly be great fun if a court decided one day to require advocates to argue the opposite side! The practice of arguing on-brief

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6. One person who serves as a role model for me in this regard is Senior Judge John D. Butzner of the United States Court of Appeals for the Fourth Circuit. My wife, who is a great legal writer in her own right, had the pleasure of clerking for Judge Butzner. His graciousness and humility in receiving editorial input from his clerks made a lasting impression on my wife and, therefore, on me.

7. This aspect of moot court arguably provides realistic training for the practice of law. *See* RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENTS 4 (Rev. 1st ed., NITA 1996) ("The appellate lawyer deals primarily with law, not facts . . . ."); *see also infra* text accompanying notes 36-39 (explaining why competent advocates rarely raise pure issues of fact on appeal).

8. An excellent competition in this regard is the William B. Spong, Jr. Invitational Moot Court Competition sponsored by the Marshall-Wythe School of Law at the College of William & Mary. Most of the judges for this competition are actual federal and state judges.

9. Kozinski, *supra* note 1, at 185-86.

and off-brief is not just part of the "relentless pursuit of fairness," as Judge Kozinski asserts,[10] but it is also a legitimate teaching tool.

When teaching appellate advocacy and coaching moot court teams, I tell my students that, while preparing their arguments, they should independently and carefully analyze all arguments on the other side. Although a good argument is always predominantly affirmative and not defensive, it is very important to anticipate points of weakness and to take preemptive steps to diffuse the force of opposing arguments.[11] This approach has the added benefit of helping the advocate maintain professional objectivity and avoid losing perspective by becoming too emotionally attached to the client's position. 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. When I have required an off-brief argument in appellate advocacy class, most students have told me the experience strengthened their final on-brief argument. Of course, attorneys generally cannot afford to formulate complete arguments for the other side, primarily because of constraints on time and client resources. Nonetheless, arguing off-brief will help students develop the useful habit of carefully analyzing all sides of an issue before formulating a final argument.

Judge Kozinski is nevertheless highly critical of the standard practice of requiring teams to argue off-brief in moot court competitions. In his view, litigation is a game where the goal is to do what it takes to win. According to Judge Kozinski, first-rate attorneys turn loser cases into winners and passionately identify with their clients:

> No one comes around after you lose a weak case and awards your client damages because you did well with a real dog. What separates a first-rate lawyer from a mediocre one is the ability to take [a] howler and turn it into a diva . . . . A good litigator is not merely an advocate – a totally detached

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10. *Id.* at 185.

11. I once heard my favorite college basketball coach, Mike Krzyzewski at Duke University, explain that he goes through a similar process before each game. Because he has already instilled fundamentals and an affirmative game plan in his players, he begins his pre-game preparation by asking himself, "How can we lose to this team?" He then takes steps to avoid having his opponent exploit his team's weaknesses. Few college coaches have been as successful as "Coach K."

> mouthpiece for the client's position – but comes to identify with the client. While maintaining a sense of professional distance, a first-rate lawyer spends many of his waking moments thinking about his client's case and trying to come up with better and more convincing arguments in support of his position.[12]

He therefore criticizes the practice of arguing off-brief for allegedly causing students to "[lack] the type of moral commitment and intellectual fervor that one observes among first-rate litigators."[13] Moot court has been a staple of American legal education for generations, and the legal profession is hardly suffering from a lack of passion among advocates! If anything, lawyers often identify *too* closely with their clients and are therefore very likely to push the dog case too far. Arguably, the approach Judge Kozinski advocates is more problematic than any danger of creeping passivity in the legal profession. Attorneys need to maintain more than a "sense of professional distance."[14] Rather, they should never lose their ability to exercise independent professional judgment.[15]

I may be misinterpreting Judge Kozinski's use of "dog" and "howler," but those words usually mean truly bad cases. A truly bad case deserves to lose given the law and facts. It is hardly admirable for attorneys to pursue, much less win, cases that can lead to a miscarriage of justice and ever-increasing cynicism among the public. A first-rate litigator will counsel clients not to pursue a howler and should refuse to continue representing the client who insists on pursuing the claim.[16] If the case actually has hidden merit, then it is in fact a diva and not a dog. A skilled litigator should pursue and win such a case, but the experience of doing so would not fall within Judge Kozinski's description of an excellent lawyer's crowning achievement.

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12. Kozinski, *supra* note 1, at 184-85.

13. *Id.* at 185-86.

14. *Id.* at 185.

15. *See* ALDISERT, *supra* note 7, at 115 ("[As counsel for the appellant, y]ou must be dispassionate, detached and imperturbable. You also must be intellectually objective, in the sense of putting aside emotions and passions that you certainly possess as a result of having lost a case before the trial tribunal."). Many appellate advocates also lose sight of their ethical duties to the court. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.1 & 3.3 (1997) (requiring attorneys to make only meritorious claims and to disclose all material facts and adverse authority).

16. *See, e.g.*, MODEL RULES, Rules 3.1 & 3.3, *supra* note 15.

Far too many attorneys take Judge Kozinski's view to its logical extreme and view themselves simply as hired guns who must take any case and make virtually any argument. Other commentators have aptly and trenchantly criticized this troubling trend in our noble profession. For example, one author writes:

> Unfortunately, the idea that a lawyer as an officer of the court must exercise an independent professional judgment has fallen into disfavor . . . . The relationship of lawyer and client is not that of soldier and general. A much better analogy is . . . to the relationship of parishioner and clergyman, where it is understood that the clergyman is not subservient to the parishioner–even when that parishioner is the largest contributor to the church. Like the ministry, law is a *calling*. As the clergyman advises on the moral nexus of his parishioners' problems, the lawyer tells clients what the law permits them to do . . . . Today the prevailing view in the profession is that what matters in the lawyer's world is "winning." . . . [A] number of lawyers would argue that the lawyer as advocate must do whatever *can* be done to win his client's cause . . . . When I was young at the bar, lawyers who did such things (and there were some) might have been feared–but they were not admired . . . . The profession of law as I recognize it has no place for the lawyer who in the interests of "winning" will seek knowingly to hoodwink the court.[17]

Similarly, appellate judges commonly complain about the tendency of attorneys to shotgun on appeal, making every conceivable argument in the hope of winning on at least one.[18] This is the fruit of the view that litigation is a game where the sole object is to win. Another unfortunate result of this all-too-common approach to litigation is hopeless confusion in the law.[19]

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17. SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 10, 12, 13-14, 14 & 16 (1994) (citation omitted). *See also* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 603 n.48 (1985) ("There is no professional duty . . . which compels an advocate . . . to secure success in any cause, just or unjust; and when so instructed, if he believes it to be intended to gain an unrighteous object, he ought to throw up the cause, and retire from all connection with it, rather than thus be a participator in other men's sins.") (citing for quote G. SHARSWOOD, PROFESSIONAL ETHICS 100-01 (2d ed. 1860)).

18. *See* ALDISERT, *supra* note 7, at 115-18.

19. I have first-hand knowledge of one example. My recent article, *Cost Recovery or Contribution?: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83 (1997), addresses an issue of environmental law that is important but admittedly somewhat arcane. At the time I wrote this piece, approximately sixty cases had been decided on the issue with widely inconsistent results. All but a handful of these decisions were, in my opinion, wrong because they failed to take account of certain fundamental principles of the law of

The legal profession should encourage any instruction that prepares law students to avoid the temptation to become a mere hired gun in practice. By requiring competitors to argue off-brief and thereby thoroughly analyze all sides of an issue, moot court competitions provide such valuable training.

C. *From Quivering Coward to Tower of Strength*

Perhaps the greatest benefit of moot court is intangible but important nonetheless: building character. I have seen people literally transformed for the better by their experiences in moot court. Students who were petrified by the thought of speaking in public, much less making an oral argument before a panel of real judges under adversarial fire, suddenly have come alive in the heat of battle. This transformation does not happen to everyone, but most moot court participants, especially students who receive instruction from coaches, grow noticeably.

I count myself among those who have experienced such growth. I was a member of the team that represented the University of Virginia at the Sutherland Appellate Moot Court Competition many years ago. Prior to that competition, I had argued in several settings but only before other students. I knew I would have to argue before judges from the United States Court of Appeals for the District of Columbia in each round, and I was quite intimidated. I had the misfortune of arguing the second issue on behalf of the appellee in the first round, so I had to sit through three other arguments before making my own. To put it mildly, I had never been so nervous. Part of me wanted to get up, announce that I conceded, and run out of the courtroom. But I hung in there, did as well as I could, and fortunately, did not embarrass my partner or myself. When my team advanced to the finals the next day, I was not nearly so intimidated.

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contribution and/or reflected a misunderstanding of important statutory principles. I can only speculate as to the cause of the confusion in the law. My best guess is that attorneys approached the problem motivated only to find ways to win, rather than to analyze the issues carefully, and then crafted arguments that would lead to a favorable result for their clients. Judges, who frequently face overwhelming workloads, might miss subtle mistakes in analysis. Once precedent is established, other courts naturally follow it. If the first court did not catch a flaw in counsel's arguments, then the law can become hopelessly and needlessly confused. This is the unfortunate fruit of "the sole goal is to win" mentality.

In fact, I thankfully have never been that nervous about speaking in public since. This experience certainly makes my "Top Ten list" for personal and professional growth.

I have seen similar results with students I have coached.[20] One student was on a team that represented Regent at the 1996 ABA NAAC. Although this student was bright and articulate, she had academic problems in her first semester of law school and was still struggling with a lack of self-confidence. Less than five minutes into a practice argument a few days before the competition, she said, "I can't do this," and ran out of the courtroom crying. Needless to say, I was slightly concerned about how she would do at the competition. But she did an excellent job, and her team advanced to the regional finals. She was also a member of the team that won the 1997 National Juvenile Law Moot Court Competition, and she received the award for Second Best Oralist for that competition. One student who represented Regent at the 1997 ABA NAAC had come out of an abusive marriage and could be intimidated easily by some men, which could be a problem at moot court for obvious reasons. At the regional finals, a male judge began aggressively questioning this student very early in her argument. She nevertheless made her best oral argument, and her team advanced to the nationals. Both of these students told me they experienced a significant breakthrough in their lives. These are only two examples of students who have grown tremendously, both personally and professionally, during moot court.[21]

There have been many other students who have improved noticeably in brief writing and oral advocacy. Each of these students will be a better lawyer, and a better person, because of the moot court experience. Perhaps most importantly, they grew significantly *before* going into practice, where the interests of a client would be at stake and growing pains are not so readily tolerated.

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20. So that no one will think I am breaching confidences, I should clarify that I obtained permission from the students I describe below to tell the following details about their experiences.

21. The story Judge Kozinski recounts about the nervous Harvard student arguing before Supreme Court Justice Powell and two circuit court judges (Kozinski, *supra* note 1, at 193 n.40) shows that even the "best and the brightest" at the top law schools benefit from moot court. I guarantee that Harvard student found arguing in the real world much easier after this moot court experience.

D. Kozinski v. Kozinski: *The Great Résumé Debate*

Judge Kozinski argues at relative length that the legal profession does not esteem moot court as highly as law review.[22] Although many members of the profession view law review more highly than moot court, not all do. 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. Even if law review experience were universally considered superior to moot court achievements, that point would hardly support Judge Kozinski's assertion that "moot court has squat résumé value."[23] A résumé with moot court achievements is more impressive than an identical résumé without them. Although mere participation in moot court may not greatly enhance a résumé, *success* in moot court certainly will, particularly if the student seeks employment as a litigator.

At least one prominent federal judge agrees with my view. In an essay on the process of selecting judicial law clerks, Judge Kozinski writes:

> [Judges] would all prefer to know *precisely* how a particular law student will do during the full six semesters he spends in law school. If a decision could magically be delayed until after graduation, we would have all of an applicant's grades .... Also, we could be better informed about the student's performance in various extracurricular activities. Did she do an excellent job as a law review editor? Did she publish and, if so, what does the product look like? *Did he compete in moot court and, if so, how high did he place? ... All of these would be mighty helpful hints when picking clerks.*[24]

In fairness to Judge Kozinski, he may have radically changed his mind. But even in his current essay, he implicitly acknowledges that moot court can be quite valuable on a résumé when he notes that graduates of South Texas's highly successful advocacy program are in demand.[25]

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22. *See id.* at 180-81.

23. *Id.* at 181.

24. Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1710 (1991) (emphasis in last two sentences added).

25. *See* Kozinski, *supra* note 1, at 180 n.8 (citing Todd Ackerman, *South Texas's Success in Moot Court is Indisputable*, HOUSTON CHRON., Feb. 29, 1996, at 31A, which reports that graduates of South Texas's advocacy program are sought after by law firms).

Judge Kozinski claims to have done poorly in moot court,[26] but I think he is just being modest. He obviously has mastered the art of arguing both sides of an issue, a skill he undoubtedly sharpened while arguing off-brief. I think Judge Kozinski on behalf of appellee Moot Court has the better of this debate. A successful moot court record noticeably enhances a résumé and will undoubtedly tip the scales in favor of many job applicants.

III. A Kinder, Gentler Criticism of Moot Court

Moot court, like law professors and judges, is not perfect. There are many ways that moot court can be improved, particularly with regard to brief writing. Judge Kozinski makes some suggestions that are worthy of serious consideration.

A. A "New and Improved" Moot Court

I wholeheartedly agree with Judge Kozinski's suggestion that competitions should emphasize the brief more heavily.[27] Experienced judges and practitioners know that in practice the brief is much more important than oral argument.[28] Most competitions nevertheless count the brief for only one-third or forty percent of each team's score, and I am not aware of any competition that counts the brief as more than half of each team's score. Although I am not sure it is necessary to try to duplicate precisely the relative value of the brief and oral argument, I agree that competitions should count the brief more than is customary.

However, Judge Kozinski is simply wrong when he asserts that the brief "score usually counts for too small a percentage of the overall score to make a difference."[29] Many moot court coaches and participants have learned the hard way that a team has little chance of winning a reputable competition without an outstanding brief. For example, I

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26. *See id.* at 178 n.* (noting that Kozinski is an experienced appellate judge and former appellate lawyer who was eliminated in the first round of moot court).

27. *See id.* at 186-88.

28. *See id.* at 186 & n.24.

29. *Id.* at 186.

coached a Regent team that advanced to the nationals of the 1996 ABA NAAC. On oral scores alone, this team won eight of their nine rounds at the regional and national competitions, losing only to the ultimate national champions, a team from South Texas School of Law. Despite excelling at orals, my team lost all three rounds at nationals, even though their brief was worth "only" one-third of the overall score. The brief is thus quite significant even when it counts less than the oral argument.

Moot court would also provide a better educational experience if the students received significant feedback on the brief. In most competitions, no feedback is given other than a score sheet or summary. Having brief judges give competitors feedback would create certain logistical problems, and the feedback would be helpful only if the judges were knowledgeable about the substance of the law and the art of appellate brief writing. However, by allowing for little or no feedback on the brief, moot court is quite like the real world, where judges do not provide constructive criticism of briefs. Team coaches are in the best position to make up for this shortcoming. Even if the rules preclude coaches from assisting with the brief, coaches can, and should, provide extensive feedback on the brief once the competition is over.[30]

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30. Judge Kozinski might scoff at this recommendation, given his apparent belief that faculty involved in moot court are not competent. *See* Kozinski, *supra* note 1, at 179 ("Moot court competitions are run . . . with the help of faculty who have often had either no experience as lawyers or unhappy experiences, which caused them to flee into academia"), and at 190 ("What those who run moot court don't seem to realize – probably because they've never been appellate advocates themselves – is that the type of legal issue and the forum very much affect the kind of advocacy the lawyers must engage in . . . ."); *but see id.* at 194 ("I suspect that appellate advocacy is the one real-life practice area with which law faculties are generally familiar."). Notwithstanding Judge Kozinski's assertions, I have observed that most schools which do consistently well at moot court have experienced coaches, while the teams without coaches generally do not do as well. By "doing well," I do not necessarily mean that the teams win; rather, they produce high quality written and oral advocacy. Of course, teams that consistently produce high quality advocacy will also be successful. Contrary to Judge Kozinski's view, many coaches of successful teams are experienced appellate advocates. I will provide just a few examples of which I am aware. Teams from South Texas, the "undisputed king of general advocacy" (*see id.* at 180 n.8) and frequent winners of the ABA NAAC, always have coaches, many of whom are seasoned litigators. Robert Galloway, Esq., an attorney associated with Brown, Parker & Leahy, L.L.P. in Houston and the 1996-97 Chair of the Law Student Division of the American Bar Association's Competitions Committee, has coached several South Texas teams. University of Georgia

Judge Kozinski makes an excellent point when he criticizes moot court competitions for focusing on the latest hot legal issue (the BIG ISSUE) and for inevitably placing the case before the United States Supreme Court.[31] Presumably, competition administrators take this approach to make the competition as interesting to the competitors and judges as possible. But as Judge Kozinski explains, "Argument in the Supreme Court on a case raising a BIG ISSUE is a very rarefied form of advocacy, one that only a handful of lawyers engage in each year."[32] Moot court competitions would provide a more practical and valuable learning experience if the problems focused on the typical issues practitioners encounter on appeal.[33] Nevertheless, this shortcoming hardly undermines the importance of moot court. Judge Kozinski believes that moot court teaches students to focus exclusively on policy and that young lawyers accordingly are shocked to learn that appellate courts follow precedent and not counsel's policy arguments.[34] I take a much less alarmist view.

I suspect most law students are quite capable of understanding the role of *stare decisis* in judicial decision-making. Moreover, I am confident that the relatively few students who compete in interscholastic moot court competitions are sophisticated enough to understand that they will probably never argue the BIG ISSUE before the Supreme Court and that their appeals before other courts will differ from their moot court experiences. If young lawyers are often surprised to discover that courts follow precedent, I suspect culprits other than moot

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moot court teams have won several significant competitions recently, including the 1996-97 National Moot Court Competition sponsored by the Committee on Young Lawyers of the Association of the Bar of the City of New York Bar and the 1997 William B. Spong, Jr. Invitational Moot Court Competition. Richard L. Ford, Esq., an attorney associated with Fortson, Bentley & Griffin, P.A. in Athens, Ga., coached the Georgia teams at both of those competitions and at several others. During the 1995-96 and 1996-97 school years, teams from Regent won four competitions and several individual and team awards. I mentioned my practice experience above. *See supra* note * and text following *supra* note 3. Three other professors have coached Regent teams while I have served as faculty advisor to the Moot Court Board. All three professors have significant litigation experience, and one spent seven years clerking for Judge Daniel A. Manion of the United States Court of Appeals for the Seventh Circuit.

31. *See* Kozinski, *supra* note 1, at 189-92.

32. *Id.* at 190.

33. *See id.* at 191-92 (explaining how a typical appeal differs from cases heard by the United States Supreme Court).

34. *Id.* at 192.

court are to blame. For example, some law classes focus almost exclusively on policy issues, filtered through the professor's subjective views, and not on the substance of the law. Also, despite Judge Kozinski's suggestion that precedent is virtually insuperable,[35] many courts have developed a well-deserved reputation for activism in recent decades. In this context, it is not surprising that lawyers, both young and old, often believe their brilliant policy arguments will persuade a court to abandon or significantly alter its precedent.

Judge Kozinski's complaint that moot court problems are not fact-intensive enough[36] is curious. Although moot court problems typically do not duplicate an ordinary appellate record, they all include some factual material. While this approach does not test the student's ability to parse through a complicated record, it does provide ample opportunity to compare and contrast the facts of the given problem with existing cases. Competitors who cannot do that task well will not succeed at moot court or in the real world. I assume Judge Kozinski does not mean to suggest that moot court problems should often include issues of fact. Including pure issues of fact would teach students the wrong lesson. Competent appellate advocates rarely raise issues of fact on appeal because the standard of review is generally very difficult to overcome.[37]

Moot court competitions would certainly be more realistic if, as Judge Kozinski suggests,[38] the problem included a full trial record. This experience would give students the opportunity to learn how to find and analyze important record material. Nevertheless, the adoption of this suggestion could inadvertently contribute to the development of bad habits by students. Attorneys sometimes miss the distinction between facts argued, which are mere *evidence*, and facts found, which are the true *facts* in the record. Attorneys who do not understand this distinction can make the mistake of rearguing the facts on appeal rather than confining argument to the facts found below.[39] Judge Kozinski's

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35. *See id.* ("The young lawyers then have a rude awakening when they discover that the precedent they were hoping the court would ignore or overrule turns out to be pile-driven into the bedrock of the circuit law.").

36. *See id.* at 188-89.

37. *See* ALDISERT, *supra* note 7, at 158-59.

38. Kozinski, *supra* note 1, at 194.

39. *See* ALDISERT, *supra* note 7, at 159-61. This practice is only appropriate when counsel is challenging the factual findings below, which, as I have just explained, should rarely happen.

suggestion would be beneficial only if students were taught this distinction well and if the judges consistently required them to know this distinction during argument. It would also only work if the judges know the record very well, which brings me to a topic that was conspicuously absent from Judge Kozinski's essay.

B. Judge Not, Lest You Be Judged

On balance, the quality of judging in most moot court competitions is good. The best judging occurs when the competitions use actual judges. Many practitioners also do a very good job judging, despite not bringing judicial experience to the moot court bench.

Nevertheless, I have witnessed a fair amount of substandard, even atrocious, judging. Some judges are completely unprepared and spend the first several minutes of the argument flipping through the problem and bench brief (usually to the detriment of the first advocate's score). Thus, I am skeptical that Judge Kozinski's recommendation of providing a full trial record would work. Indeed, it could be counter-productive. I fully understand that many moot court judges do not have much time to prepare, although *failing* to prepare is inexcusable.[40] Increasing the work for judges strikes me as a questionable idea at best. Judges who do not have, or do not take, the time to read a mere bench brief will certainly not master a full record. If the judges are not adequately prepared, the time students spent learning the record will be wasted, and the students will understandably be very disappointed and frustrated. Moreover, the cost of duplicating an entire record for each judge could be prohibitive.

There are simple steps that can be taken to increase the quality of judging. Competition administrators should provide the judges with copies of the most important cases to supplement the bench brief. The

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40. Of course, moot court is very realistic in this regard. Judges, like attorneys, vary in competence and diligence. I will never forget my first oral argument in practice. Representing a well-known Japanese corporation, I moved for dismissal of the complaint because my client had not been served in conformity with the Hague Service Convention. My position was technically correct but not entirely palatable. The judge began oral argument by saying, "What is this case about anyway?" He then started furiously flipping through the pleadings. Unfortunately, I began my career as an oral advocate 0-1.

judges who prepare will appreciate having such important information readily available, and they will be positioned to catch any mistakes in the bench brief. Nothing is more frustrating to a competitor than sensing the judges know nothing about, or have a superficial or mistaken understanding of, the relevant cases. I know this from personal experience. In the finals of the interscholastic competition in which I competed as a law student, I was very confident because a Supreme Court opinion directly supported my position. In my opening argument on behalf of the appellant, I relied upon the opinion to argue "X." My opponent very articulately argued that the opinion held "not X," which was simply not true. On rebuttal, I explained that opposing counsel had misrepresented the opinion. The first thing the judges did was compliment us both on how well we knew the law. Although I was not surprised my team lost, I felt "robbed" by the experience. But, as Judge Kozinski says, "Reality bites."[41] Judges, like attorneys, law professors, and moot court competitors, do not always do the right thing. Moot court helps to prepare students for this reality.

Administrators should, whenever possible, ask actual judges and experienced *appellate* litigators to serve as moot court judges. Many trial attorneys and non-litigators do not make good moot court judges because they often do not have adequate appellate advocacy experience.[42] If it is not possible to get experienced judges, the competition administrators should give the judges a brief instruction sheet on the rudiments of good appellate advocacy to compensate for the judges' lack of experience.

However, allowing judges to decide cases on the merits, as Judge Kozinski suggests,[43] would *not* improve the quality of judging or of moot court competitions in general. An attorney's ethical duty to raise only meritorious claims[44] has no analogue in moot court. Attorneys must also decide which potentially meritorious claims to raise, and the

41. Kozinski, *supra* note 1, at 196.

42. My concern is not about trial attorneys as a whole but only about trial attorneys who are not experienced appellate advocates. Trial attorneys with substantial appellate advocacy experience can make excellent moot court judges. For a detailed description of common mistakes some trial attorneys make on appeal, see ALDISERT, *supra* note 7, at 3-6.

43. *See* Kozinski, *supra* note 1, at 183-85 & 195-96.

44. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1997).

best appellate advocates choose only the strongest issues.[45] The decision whether to raise an issue is therefore a fair measure of an attorney's competence. By contrast, moot court administrators select the issues for competitors. Judges are instructed not to score the competitors on the merits of the case because the strength of the issue argued does not reflect the advocate's performance. This of course does not mean that judges must *ignore* the merits. Rather, the judge should assess how well each advocate does *given* the merits without rendering a decision *on* the merits. Allowing judges to decide competitions on the merits would unfairly assess competitors on matters over which they have no control and would make competitions mere platforms for judges to express their political preferences and biases. Such politicization would undermine, not enhance, the educational benefit of moot court.

IV. Would the Real Moot Court Competitor Please Stand Up!

So no one will think I am misrepresenting Judge Kozinski's assessment of the current state of moot court instruction and performance, I will let his words speak for him:

> Moot court advocates don't sound and act like real lawyers because they are not taught to act like real lawyers. At most – perhaps all – law schools, there is too much emphasis on the "moot" part of moot court and not nearly enough on the "court." Moot court programs teach the wrong lessons and create the wrong incentives, and thus help develop the wrong skills .... In moot court, the game consists of making yourself sound clever. This means that each advocate desperately wants the maximum time at the podium and is jealous of any extra time taken by opposing counsel, even when the time is spent giving damaging answers to questions for the court. The theory seems to be that... extra time at the podium is a good thing because it gives you the chance to show off.... The advocates, for their part, try hard to score points with the judges by giving glib or bombastic answers – ones that get a reaction from the judges and the audience. It is not at all uncommon, for example, for moot court advocates to give smart-alecky answers that elicit a laugh from the audience, and maybe even the judges, and thus score debater's points .... A moot court advocate ... 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.

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45. *See* ALDISERT, *supra* note 7, at 118-21 (exhorting appellate advocates to be very selective when raising issues on appeal).

> . . . [S]o strong is the drive to talk that moot advocates are notorious for cutting judges off in the middle of a question. This, of course, is perfectly understandable if one is taught that your job is to show off your speaking skills . . . . [M]oot court boards teach students the wrong lesson that policy, not law, plays the key role in arguments in most of the courts where they will appear. The young lawyers then have a rude awakening when they discover that the precedent they were hoping the court would ignore or overrule turns out to be pile-driven into the bedrock of the . . . law.[46]

I am really upset about Judge Kozinski's assessment, but not for the obvious reason. He has unwittingly revealed most of my secrets of success! Yes, this is exactly what I teach my students: be sophomorically clever; stretch out your oral argument as much as possible, even if it means rambling on when you are really done; show off; be glib, bombastic and smart-alecky; never display any passion or enthusiasm (the later rounds are at stake, after all); cut off judges as much as possible; and *never, ever,* argue the law! My only solace is that he has not yet discovered my three most treasured secrets: chew gum in court; dump the "Your honor" stuff and just say "Hey, you" or "What's it to ya, buddy?!"; and make an insulting comment about each judge's spouse and/or mother at least once.

Seriously, I have no idea where Judge Kozinski got these ideas, but after observing countless rounds of competition, I am not aware of anything that justifies such sweeping, negative generalizations. Admittedly, anyone who judges enough rounds of competition is bound to see many mistakes. I have, however, never seen competitors do the wildest things Judge Kozinski describes. Many students (and attorneys)[47] have a tendency to cut off judges, but even a minimally competent coach knows to nip that habit in the bud immediately. Certainly, the best teams *never* do *any* of these things. Judge Kozinski has apparently observed a disproportionate number of poor advocates who either have received no instruction or have ignored the instruction they have received.

Even if his assertions are true, the question must be asked: who is to blame? Of the obvious potential culprits, I would place most of the blame squarely at the judges' feet. After all, the judges decide the

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46. Kozinski, *supra* note 1, at 178, 182, 184, 186, 187 & 192 (footnotes omitted).

47. I recently attended a continuing legal education seminar that included a mock argument by an experienced appellate advocate before a panel of state appellate court judges. I was shocked to see the attorney repeatedly interrupt the judges. Obviously, moot court participants are not the only advocates with bad habits.

outcome. They are ultimately the ones who can, and should, call the malfeasants to task for their misbehavior. If judges reward such outrageous conduct, then they are the ones who are truly teaching wrong lessons.

I think Judge Kozinski sells himself short. Federal judges will command the attention of students and thus can have a lasting impact on them. If the judges are foregoing that opportunity and merely offering false praise, as Judge Kozinski suggests,[48] they are throwing away a valuable opportunity to impart wisdom. Although no one likes to receive harsh criticism, most students are receptive to constructive criticism offered in a good spirit. I hope Judge Kozinski and other actual judges will make the most of the opportunity moot court presents to instruct and encourage students.

V. The Grand Finale

I prefer to view moot court from the perspective of an optimist. In my view, the proverbial glass is much more than half full. But whatever one thinks of the current state of moot court, there is reason to believe that appellate advocacy in the "real world" is not in such a great state itself. As Senior Judge Ruggero Aldisert of the United States Court of Appeals for the Third Circuit has written:

> Certainly most advocacy by brief or by oral argument cannot be rated as "good," let alone "excellent." A substantial amount of "poor" advocacy hangs out there, too much for judges to be lackadaisical about, and too pervasive for the American Bar Association or state bars to do much about, because many of the firms represented by national and state bar leaders are themselves guilty of sloppy appellate practices.... [T]here is a vast wasteland of mediocrity out there.... The problem is extensive.... When working on their first assignments in chambers, [my clerks] immediately note the poor quality of many briefs, even those from prestigious law firms with which they had summered or interviewed.... I see so many dangerously incompetent appellate lawyers, I would like to see an immediate emphasis on improving professional competence....[49]

I doubt Judge Aldisert is alone in his assessment. Given the "vast wasteland of mediocrity"[50] Judge Aldisert describes, it is hardly

48. *See* Kozinski, *supra* note 1, at 178.
49. ALDISERT, *supra* note 7, at 6-7.
50. *Id.* at 6.

surprising that moot court judges often praise competitors as superior to many real world advocates. I suspect many of these judges, unlike Judge Kozinski,[51] give this praise sincerely, simply because many moot court competitors are more diligent than some practicing attorneys.

If Judge Aldisert's bleak assessment of appellate advocacy in the real world is correct, I do not think moot court is to blame. The problem is that law schools give too little, not too much, attention to moot court. Far too often, law schools leave students to their own devices in moot court without providing adequate instruction. Even the brightest students cannot be expected to write an outstanding brief and give an outstanding oral argument without any instruction.

We need more moot court, not less. With the full, enthusiastic support of qualified teachers, coaches, and judges, moot court can play an important role in training future lawyers to do excellent, ethical work. Although Judge Kozinski and I disagree on many issues, I am sure we can agree that the legal profession needs more excellent, ethical attorneys.

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51. *See* Kozinski, *supra* note 1, at 178.