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Preparing the Fake Judge: How to Write Effective Bench Memos for Oral Argument Exercises

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“Know your audience.” It’s evergreen legal writing advice.² And it’s advice to remember when addressing the very specific audience for the bench memo in an oral argument simulation: a fake judge.³

I’ve served as a fake judge in multiple contexts, from moot court and mock trial competitions to in-office oral argument preparation. So when we ask volunteers to

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² Among many examples, see Chad Baruch, *A Bit of the Ol’ Razzle-Dazzle: Tips to Improve Your Legal Writing*, 33 APP. ADVOC. 77, 81 (2023) (“An important part of legal writing is to know your audience.”); Bryan A. Garner, *Interviews with United States Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING 1, 11 (2010) (interviewing Chief Justice John G. Roberts, Jr.) (“As a lawyer, you need to know your audience....”); Frederick Doherty, *The Headless Snake of Law-Firm Editing*, 7 SCRIBES J. LEGAL WRITING 43, 43 (2000) (“It’s a fundamental rule of persuasive writing: know your audience and write to that audience.”).

³ Real judges’ clerks write bench memos to prepare judges to preside over court proceedings. See Jessica Klarfeld, *The Bench Memorandum*, The Writing Center, Georgetown Univ. L. Center (2011), <https://www.law.georgetown.edu/wp-content/uploads/2018/07/The-Bench-Memorandum-Jessica-Klarfeld-2011.pdf>. In moot court competitions, the bench memo “educates the competition judges about the competition problem and the relevant law so that the judges are prepared to score briefs and hear oral arguments.” JAMES DIMITRI, MELISSA E. LOVE KOENIG & SUSIE SALMON, *THE MOOT COURT ADVISOR’S HANDBOOK* 102 (2d ed. 2023).

preside over our school's 1L summary judgment arguments, I know how useful an effective bench memo can be. The goals for a mandatory 1L oral argument may differ from those of a national competition, but the pool of potential judges generally includes the same people.⁴ Whether the fake judge is a lawyer, a professor, an upper-level student, or even a real judge, a focused and digestible overview of the event will help the judge fulfill the event's particular goals.

In the long tradition of cranky judges dispensing advice,⁵ here I offer five lessons from the fake bench that my colleagues and I have used to develop our 1L oral argument bench memo.

1. Fake judges are nervous.

Fake judges want to do a good job, and they don't do this every day. Even if Learned Hand agreed to judge a 1L oral argument, he'd likely need a refresher on the dog bite law in Montana or the felonious assault elements in Nebraska. And on where to park at the law school. The best thing you can do to soothe nerves and increase the effectiveness of your fake judges' participation is to make them feel smart and prepared.⁶ Key to achieving this is providing an easy-to-read bench memo that realistically describes the event and your expectations, clearly explains the law, and reassures that perfection isn't necessary.

Here are some things we include in the beginning of our bench memo:

Before arguments begin, we will hold a short meeting for judges to summarize the case problem, review argument logistics, and answer questions. If you can't make it, don't worry—this memo should cover the most important information you need.

⁴ See DIMITRI ET AL., *supra* note 3, at 111–12 (identifying judges, appellate attorneys, faculty, practitioners, alumni, and students as possible moot court judge recruits).

⁵ For examples of the genre, see Ross Guberman, *Judges Speaking Softly: What They Long for When They Read*, LITIG., Summer 2018, at 48; Hon. Roger J. Miner, *The Don'ts of Oral Argument*, LITIG., Summer 1988, at 3. I assign both to my first-year students.

⁶ See, e.g., Barbara Kritchevsky, *Judging: The Missing Piece of the Moot Court Puzzle*, 37 U. MEM. L. REV. 45, 53 (2006) (noting that moot court judges may “mask their lack of preparation with aggression”); Michael Vitiello, *Teaching Oral Advocacy: Creating More Opportunities for an Essential Skill*, 45 SETON HALL L. REV. 1031, 1040 n.94 (2015) (confessing that, despite an impressive background of experience, when judging mock oral advocacy “outside my area of expertise . . . I have found myself falling back on stylistic points during post-argument critiques”).

And later:

Please don't worry if you're not fully familiar with the area of law related to the case;⁷ responding to straightforward questions will give students valuable practice, and it's also great to have students explain the bases for their responses (e.g., "Do you agree with your opponent's argument that...? Why not?").

2. Fake judges need context.

By the time oral argument nights roll around, our faculty have drafted student instructions, created detailed schedules, and fielded questions about everything from rebuttal time to wardrobe. Our students have been thinking about the relevant legal issues for months and practicing for days.

Fake judges don't have this kind of context. Remember to explain, in a basic way, what's happening here. "This is a simulated appellate argument," "This is a pass/fail assignment," "You will be on a panel of two or three judges," "Today is round one of an intramural competition." The purpose of the event, the mechanics of how it will run, and what the fake judge is expected to do are contextual details that you may take for granted. Your fake judge does not.

Here's a version of the context we give our judges:

These oral arguments are a required, but ungraded, component of our mandatory legal writing course for 1Ls. Tonight, you will serve as the presiding trial court judge hearing arguments from opposing student advocates on a motion for summary judgment in a fictional case. Your role will be to ask questions and provide feedback to the advocates. Students have been working on briefs that they will hand in for a grade a week after arguments; you will not read the students' briefs. Students were randomly assigned to the party they represent.

⁷ How deeply a fake judge needs to understand the substantive law will, of course, differ for different events. Candidly assess in advance just how expert the judge needs to be for advocates to have a successful experience based on the goals of the event, then clearly convey that expectation. I have fake judged for competitions involving sophisticated legal issues where the excellent administrators offered remote CLE training before the event to conveniently get judges up to speed. See Susie Salmon, *Reconstructing the Voice of Authority*, 51 AKRON L. REV. 143, 186 (2017) (noting that moot court administrators who offer CLE sessions, webinars, or online courses "may find that [they] are actually able to recruit more judges and that those judges will be better prepared to assess and score the arguments and provide good, substantive feedback").

The arguments are scheduled in 25-minute blocks, with each student allotted eight minutes of argument time. Defendant, as the moving party, will argue first. Defendants may reserve one minute for rebuttal if they choose.

Context helps relieve nervousness (see #1).

3. Fake judges want to help.

Your fake judges appreciate any pizza and CLE credit you have to offer, but at the end of the day, they primarily want to contribute to the students' learning experience. Let them. Tell them the goals for the event, the goals for the students, and what judges can do to help achieve those goals.

Our bench memo says:

Our goal for these oral arguments is to allow students to practice oral advocacy skills in a formal, adversarial setting that requires them to prepare thoroughly, present an organized and persuasive analysis of the facts and law, and maintain composure and professionalism when asked to support their clients' positions. Overall, we want this to be a positive learning experience that encourages students to continue developing oral advocacy skills.

Be mindful that fake judges may have minimal experience in giving on-the-spot performance critiques. If feedback is part of the expectation for the event, explain what form it will take and provide some concrete guidance on what type of feedback is most valuable.⁸ In addition to providing a blank evaluation form that judges can digest in advance, we describe how long they will have to offer verbal feedback and give examples of the types of comments that we've found resonate with students. Our bench memo says:

Our schedule provides approximately nine minutes after both students argue to provide verbal feedback and then complete the short, written feedback form shown in Appendix B. Both positive and constructive comments are most helpful when they relate to the substance of the advocates' arguments and skills that they can work to improve. We have

⁸ When developing guidance for judges, it is important to consider how implicit bias can shape feedback, Rachel Stabler, *All Rise: Pursuing Equity in Oral Argument Evaluation*, 101 NEB. L. REV. 438, 474 (2022); how feedback can reinforce stereotypes, Salmon, *supra* note 7, at 145; and how it can prioritize style over substance, *id.* at 185; Stabler, *supra* at 474; Vitiello, *supra* note 6, at 1040 n.94.

found that framing comments in terms of how you received the argument (e.g., “I felt persuaded when you quoted specific language from the case that your opponent summarized” or “I lost track of your rebuttal argument because I got distracted by your clicking pen”) helps avoid giving students seemingly conflicting blanket advice (e.g., “Always use direct quotes” v. “Never read directly from a case” or “Keep your hands still” v. “Judges like natural hand gestures”). Please avoid commenting on physical appearance or qualities about advocates that they cannot change.

4. Fake judges are busy.

Chances are, no one coming to your oral argument is a full-time fake judge. Real jobs and other obligations will limit the time that volunteers can devote to preparing for oral argument. Decide what’s essential to include in a bench memo, eliminate everything else, and format the document to make it easy to read and reference during the argument. Our memo includes five pages that cover the argument context and goals, logistics, case overview, and description of the legal issues and parties’ anticipated arguments. We also include a three-page chart of optional, sample questions judges can use as a cheat sheet. Some softball questions on the cheat sheet look like this:

<i>Question</i>	<i>Potential Answer/Follow Up</i>
<i>What’s the standard for granting summary judgment?</i>	<i>Granted when movant can demonstrate entitlement to judgment as a matter of law on undisputed facts. N.Y. C.P.L.R. 3212(b).</i>
<i>Is there a New York statute governing defamation?</i>	<i>No, it’s a common law doctrine.</i>
<i>What’s the best case to support your point?</i>	<i>Open-ended, but regardless of answer, you may ask what court decided the case and press the advocate on whether it’s controlling. In our case, New York Court of Appeals opinions and published Appellate Division opinions are controlling. New York trial level or federal cases are not.</i>

Try to factor in the likelihood that at least some fake judges won't carefully read the bench memo. Have a backstop in mind. We hold a short meeting for judges before arguments begin to cover the broad strokes of the event and the legal issues to be argued. We have an even shorter elevator pitch prepared for judges who arrive late. Something like this can generally be delivered while run-walking with the volunteer to the argument room:

This is a defamation case. The defendant argues that the statement can't be defamatory because it's opinion, not fact. Each advocate gets eight minutes, and the defendant can reserve one for rebuttal. Your bailiff has all the materials you need, including some sample questions. Call if you run into issues!

In deciding to have outside judges, we've also asked ourselves: do the benefits outweigh the possibility that a judge may be a little clueless for the first round or two? For our purposes, the answer is yes. We've found that inviting practitioners to act as judges adds a level of formality and realism that is hard to replicate in the classroom and gets students to prepare seriously for an ungraded assignment. It also makes for a fun couple of evenings that feel like a capstone to 1L year and help the law school connect with the community.⁹ Those benefits don't necessarily require the world's most incisive legal questions. So, we do the best we can to prepare our judges, knowing that they want to help (see #3), trusting they'll put in what time they can, and accepting that (not unlike real judges) they won't be perfect.

5. Fake judges aren't real judges (even when they are).

Remember that your event is a simulation for the advocates, not for the fake judge. The bench memo should not strive to mimic what a clerk would prepare in a real court proceeding with a truth-finding purpose.¹⁰ It should simply cover the essential information your judge needs to run an argument that meets the needs of the event. It's

⁹ There are other benefits. For example, feedback from a judge without previous experience with an advocate may reduce the "halo effect" and confirmation bias that can affect the judgment of a teacher familiar with the student's work more generally. See Stabler, *supra* note 8, at 448–52. Realistic practice scenarios also help develop professional identity; Professor Ryburn even recommends holding 1L oral arguments in a real courthouse. Carolyn Ryburn, *Developing Professional Identity in First-Year Law Students Through Oral Arguments in the Courthouse*, 38 SECOND DRAFT, no.2, 2025, at 2.

¹⁰ For help preparing a real-world bench memo, see Klarfeld, *supra* note 3.

likely unnecessary to describe procedural history, recommend an outcome, or capture every nuance of the law.

Also, fake judges don't have the same responsibilities or authority as real judges, and the bench memo should tell them so. Fake judges won't be offended; they'll be relieved. Our memo conveys that our volunteers do not need to decide the case, give the final word on feedback, or handle unexpected situations on their own:

The bailiff will collect your completed feedback forms and deliver them to us at the end of the night. We will review them before distributing them to students in class. You will not make a ruling, and the arguments are not graded or ranked If you encounter any issues before or during the arguments, please feel free to call or text any of us: [list of names and numbers]

In short, use the bench memo to help your fake judge help you. Their titles may be fake, but their capacity to elevate an oral argument exercise is real.