The Benefits of Moot Courts

Perspectives of an Arguing Attorney and a Judge

By The Honorable Timothy K. Lewis and Nancy Winkelman

An examination of several key questions about whether, when, and how to hold a moot court.

As the legal community increasingly comes to recognize appellate practice as a unique specialty, and companies increasingly turn to appellate specialists to handle important matters, a number of "best practices" in handling appeals have emerged. Among these is the use of moot courts to prepare for oral argument. We write to express our wholehearted support for moot courts and to offer some ideas, from the perspectives of an oral advocate (Ms. Winkelman) and a former judge (Judge Lewis) for making them even more effective. In the interest of full disclosure, we hasten to note that each of us has been involved in numerous moot courts; in fact, they comprise a substantial portion of Judge Lewis's practice. We also note that most experienced appellate advocates, particularly those with an active U.S. Supreme Court practice, are well aware of the benefits of moot courts. Our discussion is aimed primarily at counsel and companies with cases in the federal circuit and state appellate courts, some of whom appear there frequently and others only occasionally.

Finally, while this article focuses on the use of moot courts to prepare for oral arguments, we also recognize, and express our full support for, the practice of vetting briefs. In most appellate courts, the brief actually carries more weight than the oral argument. Given the importance of the brief in the appellate process, it is often very helpful to have an "outsider" who can view a case most as actual judges will review and comment on the brief before it is filed.

General Observations on the Importance of Moot Courts

Ms. Winkelman

The threshold question for an arguing attorney in deciding whether to hold a moot court is whether you will likely even have the opportunity to make an oral argument. In the federal courts of appeal, not every case is allotted oral argument. In fact, in the Third Circuit, where I primarily practice and where Judge Lewis formerly served, the court heard oral argument in just over 15 percent of the cases in 2009. In

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contrast, in the Pennsylvania state appellate courts, oral argument is held in every case. Obviously, it makes no sense to invest time and money in a moot court unless counsel is fairly certain that the court will hold oral argument.

In making this assessment, you may wish to consider some fairly reliable guideposts. Courts that do not hold argument as of right tend to hold oral argument if:

- The case involves a novel and important legal issue, a complicated commercial matter, or a constitutional issue;
- A criminal case that could result in a significant amount of jail time for the defendant or the defendant faces the death penalty;
- A case raises an issue on which the circuits conflict, and the particular appellate court has not yet weighed in on the matter; The procedural or factual record of a case is complicated, and the judges may have questions of counsel that are not fully addressed by the briefs.

Assuming that it is likely the case will be argued, you next must determine whether to hold a moot court. My personal belief is that moot courts are necessary and important in preparing for every appellate argument, whether the arguing attorney is a sophisticated appellate advocate or a novice. I hold this belief for a number of reasons. For one thing, most appellate courts impose fairly strict time limits on oral argument. That means every word matters, and an oral presentation must be clear and brief. To quote Thomas Jefferson, "Brevity is best because it leaves no room for inattention by the listener." Not to mention that "Brevity is the soul of wit." You need to be exquisitely prepared to answer questions succinctly, concisely, directly, and persuasively. Just as it takes more time to write a short brief than to write a long one, so it takes more time to prepare for a short appellate argument.

Perhaps more important, by the time oral argument approaches, the lawyer handling the appeal has immersed him- or herself in the trial record, in the briefs, in the law, and in the facts. It is the unusual lawyer who, by that point, is not convinced of the soundness of his or her arguments. Good advocates that we are, we become passionate. We become true believers. We become wedded to our arguments. These are all good things. But, as with many good things, our convictions can come with a downside. We can become *too* convinced, *too* passionate, *too* entrenched in our side of the case. We can fail to see the weaknesses in our case—or the strengths in the other side's. Having objective, dispassionate, uninvolved parties conduct a moot court, to test and poke holes in our assumptions and arguments, to enable us to see the case as actual judges will see it and, so, to best prepare for oral argument is an invaluable, indeed, perhaps, the only way around this fundamental problem.

Judge Lewis

During my eight years on the United States Court of Appeals for the Third Circuit, I heard over 500 oral arguments. Some were terrific; some were terrible. The difference was not necessarily manifested solely in the skills of the advocate. Often, it was clear that one side had spent a great deal more time preparing than the other.

It wasn't until I left the bench that I learned that one of the secrets to a well-prepared oral argument is moot courts. Indeed, some of my former colleagues who are still serving as federal circuit court judges are unaware, or are quite surprised to learn, that we are doing this. It is hyperbole to suggest that a moot court will guarantee success at the appellate level; however, it is fair to say that a lawyer who has participated in a moot court is rarely surprised by questions that he or she may receive from the bench during oral argument. Of course, there always can be that "oddball" question, for which no moot court in the world can prepare counsel.

Oral advocacy is an art. But similar to the art of hitting a baseball, it requires extensive practice and some idea of what a pitcher is about to throw. In my judgment, any lawyer who does not take advantage of a moot court to prepare him- or herself has shortchanged him- or herself, the client, and the court.

When Should You Hold a Moot Court?

Ms. Winkelman

Several forces come into play in considering when to hold a moot court. You do not want to hold a moot court too far in advance of an oral argument, when you are not as well prepared or as well-focused as you would be closer to the date of the actual argument. On the other hand, if the moot court is held too close to the actual oral argument date, you may not have sufficient time to regroup, recalibrate, and revise your approach based on the feedback from the moot court. In my experience, the optimal time for holding a moot court is a week to 10 days before the date of the actual argument.

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An additional consideration in terms of timing is that counsel may become aware of the identity of the actual judges on the panel before the argument. In some courts, there is no advance notice, making this an irrelevant consideration. In other courts, however, such as the Third Circuit, counsel typically is advised of the composition of the panel approximately 10 days before the argument date. Clearly, holding a moot court with knowledge of who the actual judges will be is preferable.

Judge Lewis

The optimal time to hold a moot court depends upon the complexity of the case and the number of moot courts that will be held. In general, it is better to proceed closer to the actual argument date. But it is also important to allow sufficient time between the moot court and the argument to thoroughly review so that counsel can tweak the argument, and then, of course, relax on the eve of the argument. The necessity of this last point is often underestimated, but it shouldn't be. After all, the whole point of a moot court is to allow counsel to become comfortable and confident at the lectern.

It is important to recognize that oral arguments are not scripted events. It is rare that counsel can actually present an argument according to an outline or a script prepared in advance. That luxury evaporates with the opening barrage of questions. Oral argument is like sailing in choppy waters, and extensive preparation is required to anticipate and then navigate wave after wave of tough questions. Accordingly, it is important to hold the moot court close enough to the argument so that counsel is comfortable, yet far enough away to allow sufficient time to revise, rethink, reorganize, and relax.

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How Many Moot Courts Should You Hold?

Ms. Winkelman

Typically, cost considerations (discussed further below) will limit the number of moot courts that you can conduct to one or two. More than three moot courts is probably overkill in any event. In a complicated case, two moot courts are advisable—preferably before different panels.

For an inexperienced advocate, holding an initial moot court among "friendly" colleagues is helpful before participating in a more formal moot court with a panel of "outsiders." Sometimes one of the purposes of a moot court is simply to enable an inexperienced lawyer to practice and get his or her sea legs. If that is the case, holding more than one moot court is appropriate.

Judge Lewis

The number of moot courts that should be held depends on the types of issues presented and the complexity of a case. One may be sufficient. On the other hand, two or three, held before different panels, may be very helpful in matters that are extremely difficult and will require a lot of feedback and revision. Remember, you only have one chance to present the argument before a live panel of appellate judges. Indulge the opportunity to try the argument beforehand more than once. But do not overindulge. Holding too many moot courts can dissipate the impact of an otherwise well-crafted, well-thought-out approach. Counsel should be careful in making this assessment, mindful of the benefits inherent in an exposing your arguments to an array of views from experienced judges. Often, more than one moot court panel can provide deeper insight into what a court will focus on at oral argument than one panel alone would. These are all judgment calls driven by some of the factors that we've discussed, which are unique to the case, the client, and the court.

Who Should Attend a Moot Court?

Ms. Winkelman

When thinking about who should attend a moot court, some considerations are obvious. The lawyers who have worked on the appeal should attend. Trial counsel should attend. Co-counsel should attend, if you have co-counsel.

One question that sometimes arises is whether the client should attend. In my opinion, the answer is yes. In fact, it is important that the client attend. Why? For one thing, the client may have practical, on-the-ground insights that the arguing attorney may not possess. For another, it is important for the client to appreciate fully the weaknesses of the case. Sometimes only a moot court can achieve this goal.

As an oral advocate, I can and do share my forthright view of the strengths and weaknesses of a case with a client, as well as with trial counsel. However, as noted above, we can become somewhat "blinded" by the force of our own arguments. Moreover, it often has more impact for the client to hear about the weaknesses a of case from an objective, third-party, moot court judge—either through the questions that arise during the moot court or during the debriefing session that follows. To the extent that moot court judges will think about a case as actual judges will, the client will obtain an important and realistic assessment of its chances of success on appeal. A rigorous moot court can have the salutary effect of putting everyone's expectations in line.

Judge Lewis

As a judge on a moot court panel, I prepare for oral argument just as if I were preparing for the real thing. For example, I always have an associate who clerked for an appellate judge prepare a bench memo, which will be very similar to the bench memos that the judges presiding at the argument will have. After the moot court, I turn the bench memo over to counsel and the client. Many of my colleagues do the same. Still, some issues may not occur to us, we simply may miss them, or an interested party may hear them differently than someone else who is seated in the moot court audience. I, therefore, always ask for comments from such persons during the debriefing session. I have been amazed, as has counsel, by how much can be revealed through these observations. All interested parties should attend and should actively participate. This obviously includes the client; after all, the client has a vested interest in the outcome and should know and have an opportunity to weigh in on the strengths and weaknesses of the case.

Who Should Serve on a Moot Court Panel?

Ms. Winkelman

The composition of a moot court panel may well be the most important aspect of the entire exercise. The best panel is one that most closely approximates the actual court. Generally speaking, the best way to accomplish this is to find retired judges from that very court and retain them as members of your moot court panel. Those former judges will know the court, its culture, and its predilections, and they may well know the individual judges before whom you will appear. Without revealing their former colleagues' confidences, these judges naturally will offer unique—and invaluable—insights and perspectives.

In addition to asking former judges from the specific court that will hear your case, it is often helpful to engage appellate attorneys who have experience before the particular court, particularly if you cannot engage former judges. Those attorneys, too,

are uniquely positioned to know the perspectives, culture, and predilections of the court and of the individual judges. In addition, subject matter experts, including law professors, can be important additions to a moot court panel.

What is *not* helpful is to have the moot court panel consist exclusively, or even primarily, of colleagues in your law firm who worked on the case, or even of colleagues in your law firm who did not work on the case. Colleagues who worked on the case have "drunk the Kool-Aid" and may not bring the fully neutral and objective viewpoint that is so vital. Even with colleagues who have not worked on the case, there may be a comfort level that can detract from the formality and the realism necessary in a moot court exercise. Also, your colleagues may not be as critical or tough on your argument, particularly in the presence of the client, as outsiders would be.

Judge Lewis

If the argument is going to occur before a three-judge panel, it is best for the moot court panel to be comprised of three judges. If counsel will argue before a panel of seven, eight or nine judges or justices, or an *en banc* court, then the number of judges on the moot court panel should approximate—if not replicate—that number.

Because most arguments in federal appellate courts are before a three-judge panel, I will focus my observations there. It is best to find three former circuit court judges to preside. This allows for important insights into the proclivities and the decision-making processes of the court, based on those judges' experiences. These insights are authentic—they are as real as it gets—and they can be invaluable.

That said, in certain cases it is important to find an expert in the subject matter of the appeal. For example, a panel consisting of two former judges and an expert in complex financial instruments may be very helpful in a securities case involving debentures or other matters judges do not typically handle. By the same token, an antitrust professor or practitioner can nicely complement two former judges if a case involves some arcane or complicated area of antitrust law.

When I was on the Third Circuit, it was an article of faith that each judge would be better prepared for oral argument than the lawyers were. The Third Circuit has always been known as a "hot bench," meaning that the judges are extremely well prepared and will have a number of questions for counsel from the outset. The judges will pursue their lines of questioning aggressively and relentlessly. The same is true of many other courts. Therefore, it is important that the moot court experience anticipate the actual court experience with some degree of precision. For example, if counsel knows the identity of the actual appellate panel members in advance, the judges on the moot court should assume their roles by portraying the styles and tendencies and, to the extent possible, the jurisprudential leanings of the panel members. At a minimum, counsel should retain former judges or practitioners who have some familiarity with the methods and functions of the court that will decide the case.

Importance of Staying in Role

Ms. Winkelman

In my experience, in the best moot courts both the judges and the arguing attorneys stay completely in role. It is easy to digress; however, allowing yourself to do so decreases the value of the moot court exercise. Obviously, it is a "moot" court, so to the extent that you cannot answer a question, you can make a note and move on so that will not happen during the actual argument. But to the extent possible, staying in role will greatly enhance the value of the experience.

One question that frequently comes up is whether to conduct a moot court in "real time" or not. "Real time" is often 10, 15, or 20 minutes. Having a "real-time" component to a moot court is essential for an inexperienced advocate just learning the necessary time-management skills in the appellate forum. However, a moot court should then extend past the allotted time, both to give the judges the opportunity to ask as many questions as possible and permit the arguing attorney to practice addressing them.

Another question that often comes up is whether to have someone argue the other side of the case. In my view, this is not a particularly useful expenditure of time or money. The moot court judges will have read the other side's brief. They will be familiar with the other side's arguments. If properly prepared, they should not need to hear the other side's argument. Sometimes a counsel for an appellee will want another lawyer to present the appellant's side of the case as a starting point for the appellee's argument, but even in that situation, it seems preferable simply to jump into the appellee's argument based on the arguments in the appellant's brief.

> **The client has** a vested interest in the outcome and should know and have an opportunity to weigh in on the strengths and weaknesses of the case.

Judge Lewis

Most federal appellate courts allocate 15 minutes per side for oral arguments. That is a very limited amount of time to summarize a position and answer questions about a complicated matter. For that reason, during the moot court it is very important that counsel be made aware when 15 minutes has elapsed. However, it should not end there. I have participated in moot courts that have lasted well over an hour before we broke for a debriefing session.

The advantage of a long question and answer session is that it allows the judges to deeply probe the issues, and it forces the arguing attorney to endure a far more grueling experience than the real thing. And that is good; that's one of the goals. It also allows counsel to try a number of different approaches to answer questions that judges will surely ask during the oral argument, and to discard those responses that just don't work. So it is best for everyone to stay in role for at least an hour. This makes for a well-honed presentation and builds confidence for the real event.

The Key to Moot Courts: Tough Questions

Ms. Winkelman

The most important aspect of a moot court

is to give the arguing attorney the opportunity to face the hardest questions that he or she will face when it comes to the actual argument. Hearing a moot court's questions sheds light on problems with a case. Responding to those questions concisely and succinctly gives you the best opportunity to persuade. Even if you have anticipated those very questions and practiced the answers in your head, the answers often sound different when said out loud.

In the best moot courts both the judges and the arguing attorneys stay completely in role.

Therefore, the best moot courts are those in which the judges will have anticipated nearly every question that you will face during the actual argument. That will give you the chance to practice answers, hear feedback, ascertain what resonates and what does not, and continue to hone, synthesize, and prepare the most effective responses possible.

Although you would not necessarily use a moot court for this purpose, it also is important to prepare your argument with one particular contingency in mind: that the court asks no questions at all—because sometimes, in some courts, that will be the case.

Judge Lewis

As mentioned earlier, except for its length, it is very important that a moot court experience anticipate the actual oral argument as much as possible. And as also mentioned, some courts have reputations as "hot benches." Accordingly, it's very important that the questions the moot court judges ask are as tough, probing, and challenging as they would be in an actual oral argument. In fact, I prefer to make my questions even more challenging than I would at an actual oral argument so that the arguing attorney is even better prepared for the most difficult questions a panel is likely to ask.

The Feedback and Debriefing Session

Ms. Winkelman

After holding the actual moot court, the arguing attorney, other counsel, the judges, the client, and the rest of the audience convene for a feedback and debriefing session. At this time, the judges react to the argument. This can take many forms and can encompass all aspects, from demeanor to pace to substance. Obviously, the less experienced the appellate advocate, the more important the demeanor and pace issues will be.

The best feedback and debriefing sessions, in my experience, involve a free, open, and direct flow of reactions by the judges and by members of the audience, including the client and other lawyers involved with the litigation. Often, as a result of the debriefing session, you will completely revamp your approach to the argument. Themes will emerge. Unforeseen weaknesses will become apparent. You will need to address issues that have not been anticipated.

Needless to say, it is important that you listen carefully to and take the advice of the panel seriously. This does not mean that you must incorporate every suggestion into the argument. Indeed, that sometimes is a difficult, even impossible, task. Members of a moot court panel may have different and, in some cases, conflicting reactions and advice. However, you have the responsibility, in consultation with your colleagues and the client, of attempting to synthesize the feedback and adjust the argument accordingly. As Benjamin Franklin said, "Those who won't be counseled can't be helped."

Judge Lewis

The debriefing session is the most important aspect of a moot court. It should last as long as it takes to address all issues and approaches so that, at the end, no questions linger about how to best fine-tune the argument. This is done in a number of different ways, but my preference is that one of the judges begin by summarizing his or her reflections on the argument, followed by summaries from the co-panelists. This is followed by reactions from the arguing attorney, as well as other observers. Then, I like to pursue an informal, wide-ranging give and take among the gathering because the informality encourages candor, and the back and forth allows the greatest opportunity to address issues that may otherwise be left on the table.

Candor is critical in this phase. If the argument did not go well, it is my job to point that out and to explain, in detail, why. This is no time for false praise or ego-stroking. If the gathered participants can find better, shorter answers to some of the more difficult questions posed by the moot court panel, this is the opportunity to find them and practice them. If there are areas that the arguing attorney should avoid, traps that he or she walked into during the argument, the debriefing session should address those, and we should come up with options for handling them in court. In other words, the debriefing session is when we do the real post-mortem and reconstruction. When we are finished with this phase, counsel should be far better prepared, and far more comfortable and confident, than when we started.

Cost Issues

Ms. Winkelman

The cost of a moot court is obviously an important consideration. Some clients who have engaged appellate counsel specially to handle an appeal may feel that a moot court is an unnecessary expense. However, as noted, moot courts are a best practice for even the most experienced appellate lawyer. Consider, for example, none other than the current Chief Justice, John Roberts, Jr., who, as a practicing lawyer, never appeared before an appellate court without holding at least one moot court!

One factor that can greatly affect the cost of a moot court is the composition of the panel. Former appellate judges are ideal, but their hourly rates can be high. Colleagues who have worked on a case will not need to spend much time preparing, but for the reasons noted, their input is not as meaningful as that of outsiders. Obviously, the more that is at stake, the more it makes sense to spend the money on the best moot court panel possible.

However, even if a client is not willing to invest in the cost of a moot court, you still should hold a moot court if at all possible. In my firm's Appellate Practice Group, we often moot each other as a matter of course—regardless of whether we bill the client for the time.

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Judge Lewis

Counsel should be prepared to make a significant investment in a moot court experience if it is going to be done right. This is very important because often millions or even hundreds of millions of dollars are on the line. The fee for most former judges is relatively high, but there are obvious reasons why that is so. In engaging former judges, counsel draws upon a very special sort of expertise that is difficult to find elsewhere. Very few people have sat as federal or state appellate judges, left the bench, and are available to serve as moot court judges for private clients.

Countervailing Considerations

Ms. Winkelman

Moot courts are not for everyone. There are some highly skilled, highly effective appellate advocates who eschew moot courts. Some say that moot courts detract from the spontaneity and authenticity of actual arguments. To that I say, there is a difference between mere spontaneity and effective spontaneity. The latter only comes with thorough preparation.

I accept that people have different preparation styles. But even those advocates who don't hold a formal moot court should have preparation sessions with colleagues who have not worked on a case and can bring that all-important objective, impartial perspective to the table.

Judge Lewis

There are some who believe that a fresh, spontaneous presentation is actually the best kind of presentation. Thelonius Monk used to record his albums that way, to the consternation of his fellow musicians. Monk used to say, "Look, we do everything in one take. If you make a mistake on my record, you're just going to have to listen to that mistake for the rest of your life."

That may have been fine for Thelonius Monk, but finding just the right rhythm and tone in music is different from accomplishing that feat while getting peppered with tough questions at an oral argument.

There is no substitute for extensive preparation, and that includes rehearsal. So, while some have enjoyed wonderful success as oral advocates without ever holding a moot court, for most advocates, the failure to do so risks too much. It is better to be safe than sorry when the stakes are so high. And besides, moot courts are the fun part of preparing for oral argument. At least for the judges!