Thematic Moot Court:

Brief Notes and Materials

Part I (Units 1 to 3)

Elias N. Stebek

St. Mary’s University College, Faculty of Law

Sponsored by Justice and Legal System Research Institute

Addis Ababa, Ethiopia

September 2009
Thematic Moot Court:

Brief Notes and Materials

Elias N. Stebek
St. Mary’s University College, Faculty of Law
## Contents

<table>
<thead>
<tr>
<th>Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>vi</td>
</tr>
<tr>
<td>General Introduction</td>
<td>1</td>
</tr>
<tr>
<td><strong>Part I – Moot Court: Purposes, Preparation and Briefs</strong></td>
<td></td>
</tr>
<tr>
<td>Overview</td>
<td>5</td>
</tr>
<tr>
<td><strong>Unit 1- Learning and Competitive Aspects of Moot Court</strong></td>
<td></td>
</tr>
<tr>
<td>1.1- Specific Learning Outcomes</td>
<td>6</td>
</tr>
<tr>
<td>1.2- Unit Introduction</td>
<td>6</td>
</tr>
<tr>
<td>1.3- Tasks: Week 1</td>
<td>9</td>
</tr>
<tr>
<td>1.4- Readings: Week 1</td>
<td></td>
</tr>
<tr>
<td>Reading 1: Introductory excerpts</td>
<td>10</td>
</tr>
<tr>
<td>Reading 2: Darby Dickerson, “In Re Moot Court”</td>
<td>12</td>
</tr>
<tr>
<td>Reading 3: Michael V. Hernandez, “In Defense of Moot Court…”</td>
<td>17</td>
</tr>
<tr>
<td>Reading 4: Alex Kozinski, “In Praise of Moot Court –Not!”</td>
<td>21</td>
</tr>
<tr>
<td>Reading 5: Graves &amp; Vaughan “The Willem C. Vis ... Moot…”</td>
<td>31</td>
</tr>
<tr>
<td>Reading 6: J. Waincymer “… Legal Education through ... Moot Program …”</td>
<td>39</td>
</tr>
<tr>
<td>Review Exercises</td>
<td>59</td>
</tr>
<tr>
<td><strong>Unit 2- Research and Analysis</strong></td>
<td></td>
</tr>
<tr>
<td>2.1- Specific Learning Outcomes</td>
<td>61</td>
</tr>
<tr>
<td>2.2- Unit Introduction</td>
<td>62</td>
</tr>
<tr>
<td>2.3- Tasks: Weeks 2 and 3</td>
<td>64</td>
</tr>
<tr>
<td>2.4- Readings: Weeks 2 and 3</td>
<td></td>
</tr>
<tr>
<td>Reading 1: Schmedemann &amp; Kunz, The Structure of Legal Rules</td>
<td>66</td>
</tr>
<tr>
<td>Reading 2: Murray &amp; DeSanctis (Readings 2.1 to 2.6)</td>
<td>72</td>
</tr>
<tr>
<td>- Rule of law and legal reasoning (72)</td>
<td></td>
</tr>
<tr>
<td>- Organization of legal writing (75)</td>
<td></td>
</tr>
<tr>
<td>- Editing tips (81)</td>
<td></td>
</tr>
<tr>
<td>- Legislative history (83)</td>
<td></td>
</tr>
<tr>
<td>- Strategies for research and determining when you are finished (85)</td>
<td></td>
</tr>
<tr>
<td>- Adversarial legal writing (89)</td>
<td></td>
</tr>
<tr>
<td>Reading 3: Diane Penneys Edelman, [Research for Jessup memorials]</td>
<td>92</td>
</tr>
</tbody>
</table>
Unit 3- Brief Writing

3.1- Specific Learning Outcomes ................................................................. 102
3.2- Unit Introduction .................................................................................. 102
3.3- Tasks: Weeks 4, 5 and 6 ..................................................................... 104
3.4- Readings: Weeks 4, 5 and 6

  Reading 1: Criteria for judging memorials & briefs (Readings 1.1 – 1.3) ..... 106
  Reading 2: Brian L. Porto, The Art of Appellate Brief Writing .................. 112
  Reading 2: Pregerson & Paiter-Thorne, 7 Virtues of ... Brief Writing ...... 119
  Reading 3: Murray & DeSanctis, Appellate Briefs .................................. 123
  Reading 4: Tips on the Structure of Briefs (Readings 4.1 and 4.2) .......... 126

Review Exercises .......................................................................................... 128

Part II – Oral Rounds

(Weeks 7 to 16)

Overview ....................................................................................................... 133

Unit 4- Oral Augment and Persuasion Skills

4.1- Specific Learning Outcomes ................................................................. 135
4.2- Unit Introduction .................................................................................. 136
4.3- Tasks: Week 7 ...................................................................................... 140
4.4- Readings: Week 7

  Reading 1: Robert J. Martineau, Fundamentals of Modern Appellate Advocacy .. 141
  Reading 2: Graves & Vaughan, Advocacy and the Art of Persuasion .......... 148
  Reading 3: Schmedemann & Kunz, The Science of Advocacy .................. 151
  Reading 4: Michael Vitiello, Teaching Effective Oral Argument Skills ...... 157
  Reading 5: Shepherd & Cherrick, Advocacy and Emotion ...................... 165
Unit 5- Sample Thematic Moot Courts

5.1- Specific Learning Outcomes ................................................................. 173
5.2- Unit Introduction .................................................................................. 173
5.3- Tasks: Week 7 to 16 ............................................................................ 177

   Initial Rounds (Weeks 8 to 14)
   Advanced Rounds (i.e. Semi final and final)
   Semifinal oral contest (Week 15)
   Final round oral contest (Week 16)

5.4- Readings:

   **Section 1- Jessup**
   Reading 1: About Jessup (Readings 1.1 & 1.2) ................................................. 179
      1.1- Oral round grading
      1.2- Frequently Asked Questions about the Jessup Competition
   Reading 2: Jessup Official Rules (2010), Rules 6-8, 10 & 11 ...................... 190
   Reading 3: Harry H. Almond, Jr., “Strengthening … Jessup” ...................... 208

   **Section 2- African Human Rights Moot Court** ........................................ 217
   Reading 4: African Human Rights Competition ............................................. 219
      4.1- About African Human Rights Competition ........................................ 219
      4.2- Official Rules: Instructions to Judges ............................................... 220
      4.3- Sample score sheet .................................................................... 222
      4.3- Sample moot problem .............................................................. 223

   **Section 3- APAP’s Moot Court**
   Reading 5: APAP’s Moot Court Competition ............................................. 229
      5.1- Rules of APAP’s Moot Court Competition ...................................... 229
      5.2- Written pleading score sheet ...................................................... 233
      5.3- Score sheet for the selection of Best Oralist ................................. 234
      5.4- Oral argument score sheet ......................................................... 235
      5.5- Sample moot problem .............................................................. 237

   Annexes (I to IV) .................................................................................. 241

   Bibliography ......................................................................................... 253
Preface

Thematic Moot court is an elective course offered under the designation (… University Moot Court). It has the objective of facilitating the efforts of students to deepen and reinforce the advocacy skills nurtured in other courses that deal with trial advocacy and appellate advocacy. Law schools are expected to design at least one thematic moot court course depending upon legal issues that need to be explored through research and advocacy from the perspectives of a petitioner and respondent. The themes might be Family Law, Successions, Law of Property, Contracts, Criminal Law, Human Rights, etc. based upon the area chosen by the law school.

The other option could be thematic choice based on the law school’s plans to participate in national moot court competitions such as the one organized by APAP (Action Professionals’ Association for the People). The theme of the moot court can also be determined based on a law school’s plans to participate in regional and international moot courts.

This reading material has two parts. Part I discusses the purpose of moot court and it deals with the phases of preparation and brief writing. Part II addresses Oral Rounds with particular focus on the Philip C. Jessup International Law Moot Court Competition which can be used as a sample thematic moot court competition with regard to guidelines and assessment mechanisms.

Ethiopian law schools have been participating in various regional and international moot courts such as Philip C. Jessup International Moot Court Competition held in Washington DC, African Human Rights Moot Court Competition held in various African countries, ELSA (European Law Schools Association) Moot Court Competition (on International Trade) and others. Thematic moot court will indeed create a conducive training ground for students who aspire towards success in such national, regional and international moot court competitions.

Acknowledgement

I am grateful to Ato Gedion Timothewos (AAU Faculty of Law) for his useful comments on Parts I and II of this teaching material.
General Introduction

“Thematic Moot court” is not a title of a course, and it is meant to show that law schools are expected to design an elective moot court course (which can be designated in the name of the University or University College) on a theme that enhances the skills of students obtained in Appellate Advocacy & Appellate Moot Court. Thematic Moot Court course does not involve mock trials and is designed to enhance the brief writing and oral argument skills of students in an appellate court setting or in an international tribunal. The course does not dwell upon competing versions of facts, but instead will involve factual assumptions so that ample time can be availed for oral arguments on legal issues which require identification of issues, analysis and application of the law to facts with a view to solving the problem involved in the moot case.

Law schools may choose specific areas of the law such as Contracts Moot Court, Criminal Law Moot Court, Family Law Moot Court, Court, Property Law Moot Court, Torts Moot Court, etc.. The course is expected to focus on nurturing intramural (in-campus) moots primarily targeting at utilizing them as pedagogical tools rather than as a forum for a (win-lose) competitive game. As stated in the sample syllabus of the course, “Law schools which participate in national or international competitions are required to encourage and involve all interested regular program students and shall conduct an in-campus competition through rounds until the winners are selected to represent the Law School.”

The theme and name of the annual moot court to be conducted in a law school is determined by each law school. Various foreign law schools designate their moot courts in the name of a person based on various factors, while others use the area of the law applicable to the issues in the moot problem. Law schools that opt

---

1 The General Objectives and Specific Learning are taken from the sample syllabus for the course “Thematic Moot Court.”
to focus on a specific area of the law can designate the moot based on the subject. However, changing areas of the law at various times, would entail lack of continuity in the specific name of the moot and create inconvenience related with unstable course title. Ethiopian law schools can thus use the names of the university (or its acronym) in naming annual intramural (i.e., in-campus) thematic moots. For example, a designation such as “2010 X University Moot Court Competition” gives stability to the name to the moot, and the only change required annually would be the particular academic year of the competition.

The advantage of such designation is that a law school can, through the years, freely change areas of the law that govern the legal issues involved in the moot problem. In Appellate Advocacy and Appellate Moot Court, the instructor (or coach) in collaboration with an instructor who specializes in the field, can either prepare a hypothetical case for the appellate moot court or allow students to find judicial decisions that involve arguable legal issues and write appeals from these decisions so that the class can benefit from the diversity of the cases, briefs and oral arguments. In the latter case, the name of parties and some of the issues are expected to be changed and more issues be inserted so that the case can be regarded as a moot problem. A coach who gives primacy to the learning process will not be uncomfortable with the evaluation process owing to the diversity of cases. As long as the grading criteria for briefs and oral arguments are clear and objective, the use of different cases in appellate moot court does not create problems.

In the case of thematic moot court, however, the same moot problem which involves a minimum of two arguable legal issues is used for the competition. The number of issues involved in the case ought to be more than one because each side is expected to have two counsels with a view to enabling them practice team work.

The law school is expected to prepare a moot problem each year (depending on legal issues that are currently susceptible to different lines of interpretation) and avail it to law students at least a week before the date of registration of the
Semester. In case, however, the thematic moot court is an intramural (in-school) moot which serves as a prelude to a national or international moot court competition, the law school is expected to use the moot problem issued by the organizers of the moot subject to the need for verification whether the current moot problem can be used for in-school competition.

Thematic moot court is an elective course and the law school can set a certain level of performance (such as minimum score of C+, or minimum of B-) in the pre-requisite mandatory course, i.e., Appellate Advocacy and Appellate Moot Court. According to the sample syllabus of Thematic Moot Court, the methods, general objective and specific learning outcomes are as follows:

Methods and General Objectives

The method used in the course is active involvement of students in brief writing and oral arguments. Coaches are expected to identify issues that are susceptible to different interpretations in various courts or dissenting opinions. The general objective of the course is to enhance the skills attained in the course Appellate Advocacy and Appellate Moot Court with particular focus to appellate brief writing skills and appellate oral argument skills. No student with prior courtroom experience shall be allowed to take this elective course.

Specific Learning Outcomes

The course creates a courtroom setting and feedback opportunities so that students can be able to:

• practice writing, editing, polishing, and rewriting effective briefs;
• conduct appellate oral arguments in a particular area of the law which has arguable aspects of interpretation;
• practice research, analytic and communication skills that are crucial in appellate oral arguments.

* To this end, this course material envisages the following pace of activities, readings and exercises:

1. Weeks 1 and 2
   a) Distribution of the moot problem;
   b) Unit One of the teaching material (including tasks and review exercises);
   c) Comprehension of the facts in the moot problem and note taking;
2. **Weeks 3 and 4**
   a) Research on the legal issues in the moot problem;
   b) *Unit Two* of the teaching material (including tasks and review exercises);
   c) Individual discussion with the instructor (Continuous individual advising and discussion).

3. **Weeks 5 and 6**
   a) The appellate brief (procedures, faulty samples, good samples, analysis, reflections and critique);
   b) Individual project work: Analyzing an appellate brief (a petition or memorial) and comments thereof;
   c) *Unit Three* of the teaching material (including tasks and review exercises);
   d) Submission of brief or petition or memorial (depending on the moot problem).

4. **Week 7**
   a) Oral appellate advocacy (Revision of issues discussed in Appellate Advocacy/ Moot Court) Content, Structure, Presentation, Response to Questions …
   b) *Unit Four* of the teaching material (including tasks and review exercises)
   c) Formation of teams (pairs in each team)

5. **Weeks 8 to 11**
   *First Round* Oral Contest among a maximum of 24 students (Reading Units 5 and 6) **N.B.** Larger classes will be split into sections.

6. **Weeks 12, 13, 14**
   *Second Round* Oral Debate among a maximum of 16 (sixteen) students; **N.B.-** Students who didn’t pass to the second round will participate in another round and upgrade their grades upon significant improvement.

7. **Week 15**
   *Semifinal* Oral Debate among a maximum of 8 (Eight) students

8. **Week 16**
   *Final round* debate among 4 (Four) students

---

**N.B.**
- The appellate brief shall be given to the respondents before oral debates.
- A moot is not won and lost on the legal merits of a case, but on the written and oral advocacy skills of the participants.
- The team which has the weaker legal argument might be in a better position as students are expected to argue that much more persuasively.
- Teams change sides as appellants and respondents within the same round. Students will thus argue on the side of their brief and off-brief (i.e. against the side they have taken while writing the brief, petition or memorial.)
Part I- Moot Court: Purposes, Preparation and Briefs

Overview

The purpose of moot courts is to enable students to put their subject knowledge and comprehension into practice through the process of analysis, critical synthesis and communication in a simulated courtroom setting. The first part of this teaching material includes tasks and readings on the purpose of moot courts, preparation towards brief writing in moot courts and writing up briefs.

Although moot courts involve competition, it is the learning perspective that ought to be emphasized instead of the competitive dimension. The latter is merely instrumental in the learning process and exaggerated focus on the competitive component adversely affects the interest of most students. Unlike sport games, mooting is an academic exercise with the objective of allowing each student to have a day in a simulated court which would allow him/her to learn from the mooting rounds.

The major categories of activities involved in mooting are preparation, brief writing and oral arguments. These activities have been dwelt upon at length under the course, Appellate Advocacy and Appellate Moot Court. Preparation involves research which focuses on gathering facts, identification of issues, identification and gathering of relevant laws and a coherent analysis of the client’s side of the case. Students are expected to use the research tools they have studied while they were taking courses such as legal research methods.

Where the client has no case, there is no issue for mooting. But where the case involves legal issues that can be resolved in the client’s favour, or that are at least arguable, the lawyer takes up the case and writes a brief and then conduct oral argument. The units covered in Part I of this course material are the following:

Unit 1- Learning and competitive aspects of moot court
Unit 2- Research and analysis
Unit 3- Moot court briefs.
Unit 1: Learning and Competitive Aspects of Moot Court

1.1- Specific Learning Outcomes:

At the end of this unit students are expected to be able to:

a) explain the lawyering skills that can be enhanced by mooting;
b) discuss the purpose of moot court in legal education;
c) explain the pedagogical and competitive elements of mooting as primary and secondary purposes in the competition;
d) critically discuss the importance of requiring students to argue on both sides of a case (on-brief and off-brief)
e) contrast the pedagogical benefits in intramural (in-school) moot court competitions vis-à-vis inter-law school competitions without prior intramural contest;
f) write relevant and organized notes from facts of a case and relevant laws.

Expected number of learning hours (Week 1):

- Class hours: Two Hours
- Student independent workload: Six Hours

1.2- Unit Introduction

Legal Education focuses on various areas of performance in addition to subject knowledge. Analytic and problem solving skills, the competence to undertake independent research of law and facts, the ability to relate facts and the relevant laws to the issue involved in a case and communication skills (both written and oral) are among the skills that are expected to be acquired in due course of legal education. Moot courts primarily aim at nurturing and enhancing written and oral communication of students through enabling them to practice preparation, brief writing and effective oral argument.
These skills are honed and deepened in the course of work experience after a law graduate joins the legal profession. However, the learning process of these skills is expected to begin in simulated courtroom settings at law schools with a view to enabling graduates to join the legal profession with a certain level of knowledge, skills and attitudes relevant to effective advocacy.

Litigation involves two parties, and it is natural that arguments between two parties become indispensable in mooting. However, the competitive aspects of moot court are means towards enhancing the motivation and interest of students and are not the core objective of moot courts. Students are expected to read all articles included in Readings 1 to 6 and reflect upon the purposes served by moot court competitions in their law school.

Readings 1 and 2 address the general purpose of mooting in law schools. As pointed out at the beginning paragraphs of Reading 1.2 (in the form of courtroom argument), mooting has various purposes. First, the Moot “enhances students' research, writing, oral, and analytical skills” and it “teaches students to communicate more effectively and to think quickly on their feet.” Second, it “teaches students the importance of teamwork” in a setting which requires that members of a team “must perform to the best of their ability for the team to succeed.” And third, “it improves students' time management skills” and overall performance in setting goals and priorities and enabling them to “work effectively under pressure, which simulates conditions most attorneys face in practice.”

Readings 3 and 4 involve a discourse between academics who support and criticize the role of moot courts in legal education. In Reading 3, Hernandez points out the benefits of moot court to participants and points out his disagreement with the views of Judge Kozinski (Reading 4) who considers moot court competitions as inherently artificial with little or no educational benefit to students who participate in mooting. Hernandez contends that even though “the moot court process can be a bit artificial, this ‘shortcoming characterizes any simulated activity.’” He admits “the common lack of a full trial record” but underlines that “the briefing process in moot court is quite valuable.” Hernandez also defends the practice of arguing on both sides of a case in moot courts which
Judge Kozinski regards as unrealistic because it does not exist in the real world of appellate advocacy. There are also a number of issues debated upon in the two articles under Readings 3 and 4.

In Reading 5, Graves and Vaughan note that mooting actually involves competition and discuss the extent to which the learning purpose actually predominates in moot courts. They suggest that “the Moot's pedagogical and competitive elements are entirely consistent and mutually supportive.” In Reading 6, Jeffrey Waincymer states that mooting is “essentially a learning experience that merely utilises some competitive elements in aid of that purpose.” He thus believes that mooting “should not be primarily seen as a competition.”

Mooting cannot be conducted without debates among teams. And such debates inevitably involve grading which results in different levels of performance thereby leading to ranking based on memorial and oral argument scores. To the extent that competition becomes the natural corollary of mooting, it becomes natural and inevitable. Mooting is expected to be considered from the perspective of optimizing its positive impact in the learning process. If, however, moots are mechanically considered in light of ‘winners and losers’ (among students), their adverse impact may outweigh its benefits. Nor can moot courts serve their raison d’être or core rationale if law schools pick two, three or four students and coach them to “represent” the law school in national or international competitions.

That is why law schools are expected to devise schemes which encourage broad based mooting. To this end, many law schools require mandatory mooting for all law students in at least one course (i.e. Appellate Advocacy and Appellate Moot Court) and then encourage students to be enrolled in other thematic moot court courses based on their interest and performance during a mandatory course that includes moot court.

Law schools are expected to ensure that mooting is not a forum of embarrassment and ‘win-lose’ games, but rather a pedagogical tool which will give opportunities to students to enhance their research, analytic, writing and
oral skills that are crucial in courtroom settings. In the process of mooting, students exercise these skills and gain lessons from the diligence and strength of every student (including their own) who participates in moot courts.

1.3- Tasks: Week 1

a) Contrast trial simulation and moot court competition.
b) What in your opinion are attributes of good writing?
c) Go through the following six readings (by using the reading techniques of thorough reading for comprehension, taking notes, and skimming where necessary and organize your note in a manner that assists your preparation for mooting.
d) Read the moot problem given by the instructor/coach and:
   i) Write the material facts that are very relevant to the analysis of the case.
   ii) Write a preliminary sketch on the laws which you think are relevant to the case.

1.4- Readings: Week 1

Reading 1: Introductory excerpts
Reading 2: Darby Dickerson, “In Re Moot Court”
Reading 3: Michael V. Hernandez, “In Defense of Moot Court…”
Reading 4: Alex Kozinski, “In Praise of Moot Court –Not!”
Reading 5: Graves & Vaughan “The Willem C. Vis ... Moot…”
Reading 6: J. Waincymer “… Legal Education through ... Moot Program …”

(NB- Some parts of the readings can be skimmed through, and students are expected to revisit the readings as the course progresses.)
Reading 1.1

Moot court is an established part of law school life because it teaches valuable lessons that the rest of the curriculum leaves largely uncovered. [FN7] Students learn to be advocates, to think on their feet, and to respond to challenging questioning. [FN8] Moot court gives students a first opportunity to see how the law applies to a client and to discuss the law with a client’s interests at heart. [FN9] Students get their first opportunity to do what lawyers do, instead of just reading and hearing about it. Moot court gives students a taste of real appellate work while teaching skills that will help both in law school and in all areas of practice. [FN10]

[Footnotes omitted]

Barbara Kritchevsky, “Judging: The Missing Piece of the Moot Court Puzzle”
University of Memphis Law Review (Fall, 2006) p.47
37 U. Mem. L. Rev. 45

Reading 1.2

THE MOOT COURT PROGRAM

The Moot Court Program is one of the important co-curricular activities for [law] students .... This program provides students the opportunity to further develop their appellate advocacy skills through both internal and external competitions. The opportunity to participate in the Moot Court program begins in the Appellate Advocacy course ... 

Members of the Moot Court team ... are required to participate in interschool competition. The six students scoring highest in the Baker Cup Competition constitute the National Moot Court team and participate in the National Moot Court competition. ....

... 

John Fisher, West Virginia Lawyer (March, 1999) p. 10
1999-MAR WVLAW 10
As a noun, a moot is the argument of the legal issues raised by a hypothetical case which takes place in the imaginary setting of a court of law. This argument is highly stylized, since it follows the conventions of argument used in a real court as closely as possible. …

The parties to the case are usually although not always, referred to as Appellant and Respondent, respectively. Since the parties are fictional characters being represented by each of the two moot teams, two of the four members of the teams are styled Appelants, and the other two Respondents. …

The hypothetical case which raises the legal issues argued by … participants is devised in order to highlight particular issues of doubt in the law. These issues of doubt may arise from [the law], and where the moot is set in an appellate court, are referred to as grounds of appeal. … Most moot problems contain two ground of appeal. Each member of each team argues one side of each ground of appeal. In doing so they are described as making submissions on the relevant ground of appeal …

… [T]he noun moot or the verb to moot denotes what a participant in a moot is doing during the moot. Although, strictly perhaps, it denotes only what an individual does in the course of his or her moot presentation, it seems fair to use it as a verb to describe everything that an individual does, throughout the whole process of preparing and performing his or her presentation.

…

The word ‘moot’ even appears in an adjective in some contexts. Thus, it has been said that a case is moot when the issues presented are no longer “live” or the parties lack a legal cognisable interest in the outcome. …

…

A mock trial is an adversarial exercise intended to test the evidence in a hypothetical case set in a hypothetical court. In other words, a mock trial is designed to establish facts of the case. By contrast, with a mock trial, the participants in a moot have to assume that the evidence has already been tested, and that the facts of the case have been determined, as set out in the moot problem. … Rather than being designed to test the participant’s ability to argue a question of law, as in a moot, a mock trial is designed to test the participant’s skills of handling and presenting evidence, and examining, cross-examining and re-examining witnesses.
United States Supreme Court
Washington, D.C.
January 10, 2000

MARSHAL OF THE SUPREME COURT: The Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States. Oyez, oyez, oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. . . . [FN1]

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

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

First, it enhances students' research, writing, oral, and analytical skills. It teaches students to communicate more effectively and to think quickly on their feet.

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

Third, it improves students' time management skills. Because the moot court board is typically a co-curricular activity, students must learn to complete their school work, their moot court work, and fulfill any other obligations. [FN2] Thus, students learn to set goals and priorities and to work effectively under pressure, which simulates conditions most attorneys face in practice.

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

BLAIR BYRNES: Moot court is an activity in which students practice appellate advocacy skills. They write briefs and present oral arguments to appellate courts. [FN3] Because the cases are not real, the term “moot,” which means “hypothetical,” [FN4] is used. Moot court - or appellate advocacy - skills are typically taught as part of the first-year legal research and writing curriculum and are sharpened in some upperlevel electives. [FN5] In most schools, several upperclass students are selected to serve on the moot court board. [FN6]

*1219 JUSTICE KENNEDY: How does a student make the moot court board?

BLAIR BYRNES: Different schools use different selection techniques. Some schools select students based on their performance in research and writing courses. [FN7] A few schools select students based on overall grade point average. Others have a separate competition in which students may be required to write a brief and
to present an oral argument before a panel of judges. Still other schools have one or more intramural competitions, in which students compete for slots on the moot court board, and some schools have a moot court class in which students are selected for the board based on performance in that elective class. [FN8]

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

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

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

BLAIR BYRNES: Moot court students typically do two things: write appellate briefs [FN9] and deliver appellate oral arguments. [FN10]

*1220 In all competitions, students receive an appellate “record,” the hypothetical problem. The problem might consist of the trial court's opinion and the lower appellate court's opinion, a narrative fact pattern, or, in a few competitions, selected documents from the lower courts, such as pleadings, discovery material, motions, judgments, and opinions.

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

Once completed, the students submit the brief to a set of judges selected by the competition. Although some competitions use students on the host school's moot court board to grade briefs, more and more competitions use outside attorneys who specialize in the topic at issue to critique the briefs. [FN11] Briefs are typically evaluated on content, organization, persuasiveness, clarity and writing style, and compliance with competition and controlling court rules.

After submitting the brief, the students begin preparing for oral arguments. In most competitions, each side has two oralists. Each oralist takes one or two issues in the case and has approximately fifteen minutes to present the client's position. Interestingly, each oralist typically must present an argument for each party. This is known as arguing “on brief” and “off brief.” In the first round, the student will represent one side on the issues; in the *1221 next, the student will represent the other side on the same issues.

At many schools, each team practices three to five times a week for three to six weeks, depending on the competition. During practice, the students present their arguments, but are peppered with questions they must attempt to answer. What
Thematic Moot Court: Brief Notes and Materials (September 2009)

many students don't initially understand is that an appellate argument is more like a conversation than a speech. The advocate must present key points to the court, but the judges may ask questions at any time during the presentation. When a question is asked, the student must stop, answer the question, and then transition to a prepared point. That's why advocates must think quickly. Also, because of this give and take with the judges, no two arguments are the same.

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

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

In each round, a panel of two or three judges hears two teams. The competition judges are typically practicing attorneys or actual, sitting judges. The judges listen to the arguments, ask questions, and score the oralists on a variety of categories, such as ability to answer questions, speaking style and poise, knowledge of the law and facts, deference to the court and professionalism, and organization. The judges are instructed not to vote based on the merits of the case. Instead, scores should reflect each oralist's advocacy skills. The oral scores are added to the brief score to determine the winner of the round. Brief scores typically account for thirty to fifty percent of the score, with the oral scores accounting for the remaining percentage.

*1222 After the preliminary rounds, the teams with the best won-loss records advance. Some competitions have octofinal (best sixteen teams) or quarterfinal (best eight teams) rounds, while others cut right to the semifinal round (best four teams). After the preliminary rounds, teams advance in a single-elimination fashion: teams who win advance, those who lose are eliminated.

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

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

With regard to the number of schools who compete, the number depends on the type of competition. Some state and local bar associations sponsor intrastate competitions, in which only law schools in the state or region may compete. Other competitions are rather specialized and draw about a dozen or so schools. In many competitions, however, it's not uncommon to have between twenty-four and thirty-two teams competing. I've even heard of one national competition that draws over seventy schools. [FN12]
Finally, there are three large competitions. The National Moot Court Competition, which is sponsored by the Young Lawyers Committee of the Association of the Bar of the City of New York and the American College of Trial Lawyers, routinely has over 150 schools compete. [FN13] The American Bar Association's National Appellate Advocacy Competition attracts nearly 100 schools. [FN14] In addition, the Jessup International Moot Court Competition is a truly worldwide competition. Over 1500 students from 300 law schools in 50 countries participate in Jessup. [FN15] In these three competitions, teams must first compete and win a regional competition to advance to the national, or in the case of Jessup, the “world,” rounds. [FN16]

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

**BLAIR BYRNES:** The number has increased dramatically over the last decade. Over forty interscholastic competitions currently exist - and this number does not include intrastate competitions. [FN17] The different competitions cover a variety of topics, including administrative law, bankruptcy, civil rights, constitutional law, corporate law, criminal law, criminal procedure, entertainment law, environmental law, evidence, family law, health law, insurance law, intellectual property, international law, juvenile law, labor and employment law, law and economics, medical and legal ethics, national security issues, Native American issues, privacy law, products liability, space law, sports law, tax law, and telecommunications law. [FN18]

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

**BLAIR BYRNES:** No, Your Honor. Moot court has long been a part of legal education. The concept of arguing hypothetical cases originated as early as the fourteenth century as part of the Inns of Court movement in England. [FN19] In the United States, moot court started at Harvard in 1820. [FN20] The University of Virginia offered a moot court program starting in the mid-1840s. [FN21] Students at Northwestern University participated in moot court as early as the 1860s. [FN22] Moot court has been part of Boston University's curriculum since the 1870s. [FN23] The moot court program at the University of Mississippi is over 140 years old. [FN24]

In addition, a few of the interscholastic competitions are several decades old. For example, the Jessup competition started in 1959 [FN25] and the National Moot Court Competition started in 1950. [FN26] The explosion of interscholastic competitions has occurred in more recent years.

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

**BLAIR BYRNES:** Others agree with you. For example, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, has criticized moot court for the fact that most competitions force participants to argue both sides of the case. [FN27] He suggests that teams be required to select one side to represent throughout the competition. [FN28]

*1225* At least one competition has adopted Judge Kozinski's proposal. In 1998, the Stetson International Moot Court Competition began permitting teams to select which side they want to represent. The team then represents the selected side on the brief and in all oral arguments. [FN29]
The traditional wisdom, however, is that by requiring students to learn both sides of the problem, they come to understand each side better than if they had learned only one side. [FN30] As one professor noted, “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.” [FN31]

JUSTICE GINSBURG: But Counsel, doesn't the name “moot” say it all? In addition to “hypothetical,” which is the definition you used earlier, “moot” also means “having no practical significance.” [FN32]

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

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

*1226 BLAIR BYRNES: Traditionally, law review has been a well-recognized credential. Students on the law review were and still are highly recruited. But employers recognize that students on the moot court board are a “double threat”: they must be able to write and to speak effectively. In addition, since students who participate in moot court prepare documents that closely resemble those that attorneys prepare in practice, and spend a lot of time developing other practical skills, employers know moot court students can often hit the ground running. [FN33] Moreover, my review of the most recent National Directory of Legal Employers reveals that a majority of firms lists moot court as an activity ranked equivalent to membership on a law journal. [FN34]

JUSTICE GINSBURG: But what if a student does not want to be an appellate attorney, or even a trial attorney? Should that student participate in moot court beyond what is required during the first year of law school?

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

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

BLAIR BYRNES: Certainly, Your Honor. Moot court is a valuable activity. It helps students to strengthen their writing abilities, their oral abilities, and their analytical abilities. Accordingly, it can help to improve their overall performance in law school and to make them more attractive to potential employers. Moot court *1227 takes a lot of time and hard work. Students who want to participate should be dedicated and should have a strong work ethic. Because they work in a team, each student must also be dependable, must welcome constructive criticism, and should be open to new thoughts and approaches. In the end, the moot court experience can be rewarding because it builds skills, confidence, and character. [FN35]

[Footnotes omitted]

Reading 3: Michael V. Hernandez

In Defense of Moot Court: A Response to “In Praise of Moot Court-Not!”

I. Introduction

…

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. [FN5] 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, 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 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.

…

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, [FN7] 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. [FN8] 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, [FN9] 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 and off-brief is not just part of the “relentless pursuit of fairness,” as Judge Kozinski asserts, [FN10] 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. [FN11] 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.

...  

. . . . 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. [FN17]

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. [FN18] 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. [FN19]

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.

... 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.

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. [FN22] 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.” [FN23] 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.

...

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. [FN27] Experienced judges and practitioners know that in practice the brief is much more important than oral argument. [FN28] 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.

...

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. ...

Judge Kozinski's complaint that moot court problems are not fact-intensive enough [FN36] 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. …

Moot court competitions would certainly be more realistic if, as Judge Kozinski suggests, [FN38] 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…

B. Judge Not, Lest You Be Judged

… 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). …

…

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. [FN42] 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, [FN43] would not improve the quality of judging or of moot court competitions in general. An attorney's ethical duty to raise only meritorious claims [FN44] has no analogue in moot court. Attorneys must also decide which potentially meritorious claims to raise, and the best appellate advocates choose only the strongest issues. [FN45] 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.

…

__________

[Footnotes omitted]
In Praise of Moot Court – Not!

... 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. There is, in fact, such a make-believe quality about the entire process that it would be hard for an experienced advocate to do well.

It's difficult to say exactly why this is so, but I can speculate. Moot court competitions are run by students with the help of faculty who have often had either no experience as lawyers or unhappy experiences, which caused them to flee into academia. Moreover, as a part of the law school curriculum, moot court is subject to the restrictions applicable to all academic endeavors-- fairness, equal access for all who want to try out, avoiding certain topics thought too offensive to the sensibilities of those involved, etc. [FN4]-- which do not constrain real practice.

Students themselves often come to law school after several years of undergraduate and high school debating--at which they likely were successful--so they want to replicate their debate experience in moot court. But college and high school debating primarily serve to develop forensic skills and entertain participants, not to prepare them for professional careers.

There's the crux of the problem. I don't mean to suggest that moot court is not rewarding for those who participate. It clearly is, just as college debating is rewarding. Participants often have a good time doing it; [FN5] and they learn a lot about appearing in public and thinking on their feet. These are important skills and may be of some help in lawyering. But moot court lays pretense to more: It claims to be the preeminent tool for teaching students the skills of courtroom advocacy. [FN6] Unlike many law school endeavors, moot court consciously strives to teach students useful, real-world skills. And this is not an unreasonable goal: After all, law school is a professional school, and students shortly after graduation may find themselves arguing appellate cases. While there are limits on how much real-world experience one can get in an academic environment, moot court falls far short of its potential. By creating a situation where competitions have a distinct air of unreality, far removed from real courtroom experiences, moot court not only fails to teach many of the skills lawyers will need when making appellate arguments, it teaches many wrong lessons that must be unlearned--if at all--by bitter experience. [FN7]

1 Experienced appellate judge; former appellate lawyer; eliminated in first round of moot court competition. I thank my law clerk Harry Susman, who also did poorly at moot court, for his valuable assistance.
The proof of all this is in the pudding—the job pudding, that is. The simple fact is that a student's performance in moot court is seldom a significant factor in gaining legal employment. [FN8] Success at moot court may look good on the resume, but it counts for next to nothing when compared to law review membership, which is especially damning given how little relevance law review work has to practice. [FN9] One might think that the lack of interest in moot court on the part of legal employers reflects the fact that few hire appellate litigators right out of law school. Appellate judges are an obvious exception and could be expected to have an affinity for a clerkship candidate who has done well at moot court. Reality is different. I have never heard of a judge who picked up the phone and hired the winner of a moot court competition, as Judge Skelly Wright would occasionally do with the newly-elected President of the Harvard Law Review. [FN10] Serious clerkship applicants never send me their moot court briefs as writing samples, and success at moot court usually impresses judges more as an index of the student's ability to juggle many activities than as an accomplishment in its own right. [FN11] The simple fact is that when it comes to getting a job, moot court has squat resume value. If moot court actually teaches useful skills to young lawyers, this fact has escaped nearly everyone who is engaged in legal hiring.

What I will discuss below are the ways in which moot court differs from real court, and show how these differences undermine the verisimilitude of the experience. Whether you agree with me as to any particular point, keep in mind the cumulative effect of all these factors, which makes moot court different in material respects from real court. Some differences, obviously, can't be avoided—such as the fact that there is no real client and no real court. But many of the other differences are built into the process out of convenience or complacency, or to serve other values. These differences can be eliminated, but at some cost. Whether that cost is worth the candle is a matter of judgment.

I. Moot Client

Perhaps no rule is more universally accepted among moot court competitions than the rule that winners and losers are judged not on the merits of the case, but on their advocacy skills. This principle is so widely accepted—and with so little question—that no one bothers to offer a justification for it. Yet this is a drastic departure from the way things happen in real life. [FN12] It's as if a medical school held a competition for treating patients, but the contestants were judged on their bedside manner, not on how often their patients survive. [FN13] In real court, the advocate's focus is on winning the case for the client. The client's and lawyer's interests almost always dovetail, so the lawyer isn't happy unless the client wins. No lawyer I know—no self-respecting lawyer at least—is satisfied with praise for a brilliant oral argument if he winds up losing the case.

Moot court is much different: The advocate has no interest in the outcome of the case; his interest is entirely personal—winning praise for his performance. His interest often differs even from that of his co-counsel, as they may be competing for the best advocate prize. In real life, the game turns on saying—or refraining from saying—what will advance the client's cause. [FN14] 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 from the court. The theory seems to be that, since you're judged on your performance, not on how good your client's case is, extra time at the podium is a good thing because it gives you the chance to show off. [FN15]

Experienced lawyers do, of course, use their wit and charm to win the trust of the judge or jury. But this is not an end in itself; it is a means for winning the case for the client. Personal charm, the ability to give good answers to questions, the subtle art of intimidating judges with veiled warnings that they will look foolish or unprincipled if they reach a particular result--these are merely some of the tools in the advocate's arsenal of persuasion. But persuasion is an art quite distinct from any of the techniques used to persuade; you can master each of the techniques, yet be unable to deploy them in a way that's effective. Thus, I have seen more cases than I can count where the lawyer was witty, charming, direct and forthright-- all the qualities of a Boy Scout or a lapdog--but did not persuade. Similarly, many lawyers think they've won their case when they flawlessly distinguish precedent or make a first-rate policy argument, but they're wrong because the judges just don't think this is a key issue. A lawyer can exercise all the lawyerly skills in a technically flawless fashion and still not carry the day because she didn't figure out what was really important to the judges, or did not manage to gain their confidence. [FN16]

In truth, we know very little about the theory of persuasion--what works, what doesn't, what attracts, what repels. We can judge how well people utilize the various tools by putting them to a variety of hypothetical tests, but can seldom tell how persuasive they are unless and until we subject ourselves to the process of persuasion. A lure may look attractive sitting in your tackle box, but the real test is whether it catches fish. What this means is that we can almost never tell how persuasive an advocate is unless we actually let him try to persuade us.

But this is precisely what moot court judges are told NOT to do: Judge not the merits of the case, they are told, but the effectiveness of the advocates. [FN17] From the start, then, judges are instructed to make themselves impervious to the very process the effectiveness of which they are supposed to judge. It's sort of like being told to judge the quality of a dish by looking at the list of ingredients, asking the chef questions, feeling it with your fingers, sniffing it, considering the fat and carbohydrate content--in short, doing everything EXCEPT tasting it.

Having been given this constraint, participants and judges engage in a minuet that resembles very little the process of deciding real cases. Judges, for their part, try to ask questions that will test the advocacy skills of the lawyers, which are not necessarily the questions they would ask if they were trying to make up their minds about the case. The advocates, for their part, try hard to score points with the judges by giving glib or bombastic answers-- ones that get a reaction from the judges and the audience. 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. This seldom happens in real court because experienced lawyers know that playing to the audience is almost never a good idea, and smart-alecky answers distract from the merits of the case and make the judges impatient. [FN18]

The only way to tell how persuasive advocates are is to ask the judges whether they were persuaded. This is never done, I believe, out of a misplaced sense of fairness: Why should success or failure in the competition turn on how good a case
a contestant happens to draw? But then, why not? Losing and winning in real practice is always affected by how good a case you start out with: 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 that howler and turn it into a diva. The tougher the case, the more it taps the advocate's skills. And no good lawyer ever wins all of his cases. [FN19]

Having moot court judges decide winners and losers based on the perceived skills of the advocates rather than the merits of a case serves academic values--fairness and equality in distributing scholastic honors--which are extrinsic to the litigation process. [FN20] All things being equal, it is a good thing, of course, to have things fair. But things are not equal in the real world. Asking judges to shut their minds to the merits of the case is asking them to engage in a process quite antithetical to that of normal litigation. It does not, as many may assume, result in a fairer decision where the advocates win or lose regardless of the merits of their cases. Rather, it fundamentally skews the competition, making it a contest of personalities rather than of persuasive abilities. It also teaches students the perverse lesson that the strength of the client's case--indeed the fate of the client--is irrelevant, and the only thing that counts is how well the lawyer engages in repartee with the judges. It is this, perhaps more than anything else, that gives moot court its strange air of unreality.

II. Tweedledee and Tweedledum

In their relentless pursuit of fairness, law schools not only insist that moot court cases not be decided on the merits, they also force the lawyers to argue both sides of the case in various rounds of the competition. This is known as arguing on-brief (arguing the same position taken in the briefs prepared by the students) and off-brief. Again, the reasons for this practice are nowhere articulated, but presumably it is meant to ensure fairness--by giving each student a chance to argue the easier as well as the harder side of the case--and to facilitate pairing as the competition progresses. This practice, too, is antithetical to normal litigation where a lawyer always argues only one side of a case. [FN21] Arguing a client's position one day, and the opposing position the next, underscores the notion that the lawyer is not really representing the interests of the client, but pursuing his own instead.

In normal litigation, of course, the lawyer's and the client's interests are closely tied together. A good litigator is not merely an advocate--a totally detached 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. [FN22] To be sure, good advocacy does involve knowing the weakness of your case, but a lawyer is never put in the position of taking the opposing side in public. In moot court, students not only must represent the opposing side, they must win in order to proceed to the next round in the competition. Arguing each round of the competition thus becomes a purely academic exercise, lacking the type of moral commitment and intellectual fervor that one observes among first-rate litigators.

The effect this has on the students' learning process is subtle but very significant. A student who wants to do well in the competition cannot become too
committed to one side of the litigation because doing so will undermine her confidence when she argues the opposing side. A moot court advocate thus typically approaches each round with an unhealthy distance from the side she happens to be representing because in a future round success will turn on defeating the very arguments she is now making. The bond between lawyer and client, which is the essence of first-rate advocacy, is lost. This is an attitude that, if carried forward in practice, can have dire consequences. Having learned from experience not to get too enmeshed in a client's case, a moot court graduate may approach real-life clients with the same degree of detachment.

The practice of arguing both on-and off-brief also makes it difficult for judges to question students about points they have made in their briefs. Many schools do not even provide the students' briefs to the judges as they prepare for the argument, encouraging them to rely instead on a bench memo prepared by a member of the moot court board. By contrast, oral arguments in real cases rely heavily on the briefs. I have participated in many a moot court competition where the judges tried to question the advocates on something they said in their brief, only to hit a brick wall: The briefs, it turns out, were prepared many weeks--and many rounds--before the current oral argument, and the advocates didn't find it necessary to review the briefs and prepare to defend them. [FN23]

III. Speak Easy

The practice of arguing on-and off-brief merely contributes to one of moot court's most notorious shortcomings—the overemphasis of oral argument over brief-writing. Even in competitions where judges have the briefs and parties argue on-brief, the brief plays a very small role in the proceedings. By the time of the oral argument, the brief will have already been graded by someone on the moot court board, and its score usually counts for too small a percentage of the overall score to make a difference. Moot court thus treats oral argument and brief writing as distinct events, with brief writing relegated to the status of an ugly stepchild.

In real life, of course, the brief is the principal advocacy tool, and oral argument is merely a means to clarify and emphasize points made therein. [FN24] Cases are seldom won--but occasionally lost--at oral argument. Indeed, oral argument only makes sense as a supplement to briefing. Judges, in preparing for cases, carefully read and analyze the briefs; they form most of their impressions about the case from the written words, which they can study in greater depth. Oral argument, as it works in practice, is a time to tie up loose ends, to amplify points made in the briefs, and most importantly, to answer the judges' questions--questions formed in reading the briefs. Indeed, so 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. But interrupting a question is a bad idea for a variety of reasons, not the least of which is that it breaks the rapport with the court, making judges reluctant to ask further questions. Thus, your retort to the judge's half-asked question may be brilliant—it may play well with the audience—but the judge may find the interaction so unpleasant he may decide it's not worth his while to ask another question. [FN25]

This is not to say oral argument is unimportant. [FN26] The briefs often raise questions and misconceptions that a skillful lawyer can answer or assuage during a
colloquy with the court. A good lawyer will listen carefully to the judges' questions, keeping clearly in mind what he and his opponent have written in their briefs, and try to figure out which parts of his case the judge is focusing on. He will then concentrate his discussion on those areas, or beat a tactical retreat and try to divert the argument to more fruitful areas. The key point, however, is that lawyers arguing real cases must deal with the reality that the judges' impressions of the case will have been molded by the written words submitted by both sides; the oral argument is merely an extension of the points made in the briefs.

IV. Just the Law, Ma'am

It is a widely-honored myth among lawyers that facts don't matter on appeal, because that's where you argue law. [FN27] It is difficult to blame this misconception on moot court alone, as this is a shortcoming of legal education in general. Law teaching in this country is based largely on a study of appellate opinions where the facts are assumed or given, and the key point is legal or doctrinal. [FN28] Moot court competitions perpetuate this misconception by providing little or no training in dealing with what is normally the most important aspect of any case: the record. A typical moot court record consists of an opinion below, sometimes a concurrence or a dissent, and occasionally a trial court's or administrative law judge's opinion. Never, in my years of judging moot court competitions, have I seen a case which contained the normal accoutrements of an appellate record: a complaint; a summary judgment motion with supporting affidavits; trial testimony and jury instructions; and a docket sheet.

Yet these are precisely the things on which most appellate cases turn. Arguing about the law in the abstract is interesting and fun, but what wins cases is the lawyer's ability to marshal the facts littered over an extensive trial court record in a way that's consistent with favorable controlling authority. It is true that there are some cases where the facts are clear or stipulated, and the law is the only issue. But these are the rare exceptions. In real-life appellate advocacy, the record plays a key role, and a lawyer's mastery of the record--or lack thereof--often makes the difference between winning and losing.

Viewed in the most benign light, the absence of a meaningful appellate record simply denies moot court participants the opportunity to hone one of the key skills of appellate advocacy. But it's likely far worse than that: By failing to provide a meaningful record, moot court boards teach the wrong-headed lesson that cases can be won on appeal by talking about the relevant authorities and policy considerations alone--and that the record doesn't count for very much. In fact, there is relatively little a lawyer can do to sway judges based on caselaw and policy alone. The judges can read the cases as well as the lawyers--often the judges have written some of the opinions themselves--and pretty much know the competing policy considerations. Where the lawyer can really help his client is by pointing to various parts of the record--such as jury instructions, colloquies with the court, arguments to the jury--and showing how they comply (or fail to comply) with the applicable authorities. When there is no record, this is simply not possible. Without a complaint, testimony or affidavits, and without motions and objections below, such key appellate questions as the existence of a material factual dispute or waiver--the kinds of things that regularly make or break real cases--simply are not available for advocates to deal with. This, again, gives moot court arguments a surrealistic,
foreshortened quality, making them poor training vehicles for would-be appellate litigators. They are dress rehearsals for a play that is never performed.

V. Policy, Policy Everywhere
For reasons we can only speculate about, moot courts love to run their competitions around the BIG ISSUE--whatever is the latest hot legal question from around the country. [FN29] And just to add to the pizazz, the case is almost always argued before the United States Supreme Court. [FN30] A worse possible setting, from an educational perspective, I cannot imagine. It suggests that moot court boards have fallen prey to the facile assumption that if a straightforward legal issue is good, a BIG ISSUE is better, and if a court of appeals problem is good, a Supreme Court problem is tops. What those who run moot courts 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; they fundamentally change the scope of the problem.

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. To begin with, something wouldn't be a BIG ISSUE if there were controlling authority on point. Something is a BIG ISSUE because applicable Supreme Court cases are unclear or because the Court has given signals that it is thinking about overruling or cutting back on a particular line of authority. The Court, of course, is unique in being totally free to reconsider any of its precedents, going back to Marbury v. Madison, [FN31] if five of its members choose to do so. While such sea changes are rare, [FN32] more modest swings are relatively common, [FN33] and much of the Court's work consists of fine-tuning its jurisprudence. In carrying out its functions, the Court is constrained by very little other than its own conservative impulses, concern for its legitimacy with the public, and sense of proper policy. Supreme Court arguments thus tend to center relatively little on questions of law and far more on questions of prudence. And this is how most moot court arguments go as well. But because the problem is carefully engineered to avoid hard precedent, the colloquy between court and counsel usually centers on the policy implications or political wisdom of a particular outcome. [FN34] This is great fun, and very heady stuff, but has little in common with what appellate litigators do most of the time.

Most cases, it must be recalled, are decided by courts bristling with controlling authority. State trial courts have two levels of appellate courts above them, plus a supervening layer of federal law. In the federal system, circuit law binds all courts within a federal judicial circuit--bankruptcy courts, district courts, the Tax Court (insofar as the taxpayer is located within the circuit), and administrative agencies (insofar as their decisions are reviewed by the courts of that circuit). One of the courts bound by circuit law is the court of appeals itself, at least insofar as it sits in panels of three judges. [FN35] Lawyers arguing cases in courts inferior to the Supreme Court thus must deal with a very significant concept, and one that does not truly exist in the Supreme Court: binding authority.

Navigating the treacherous waters of binding precedent turns out to be the most common--and at times the most challenging--task of the advocate. Often there will be not one but several cases on point, each presenting slightly different fact patterns, and the lawyer must show how his client's case (as detailed in the record
below) resembles the precedent that is favorable, and is distinguishable from that which is deadly. Or, there may be seemingly binding language in an earlier court of appeals opinion, but it's part of an alternative holding or entirely gratuitous verbiage, in which case it might be ignored as dicta. Favorable controlling authority may have been overruled or modified by intervening Supreme Court or circuit en banc opinions, or by intervening legislation.

To be sure, policy does play a role in many cases, because policy considerations often affect how broadly or narrowly judges read precedent. Or, within the interstices of binding authority, a panel may confront an unconstrained choice and that choice is often made based on policy considerations. But in the inferior state and federal courts, hard law is by far the most potent consideration, and even in the Supreme Court itself hard law plays a much greater role when the Court is not dealing with BIG ISSUE cases.

By perpetually focusing moot court problems on the BIG ISSUE and locating the argument in the Supreme Court, moot 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. [FN36] 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. I can't count the number of times I've seen lawyers come face to face with this reality for the first time during oral argument in our court when a member of the panel is obliged to explain it to them. That's a terrible time to learn such an important lesson; the time and place, it seems to me, is in law school and particularly in moot court.

VI. Divide and Be Conquered

Moot court competitions are generally not between individual contestants, but between teams. Usually, the team consists of two members, although sometimes there are three. The brief writing is divided between the members, with each writing one half of the argument. The oral argument, too, is divided, with separate team members using half the time to address one of two issues. The team concept also drives the nature of the problem, which must be structured so that two, more or less evenly weighted, issues are presented.

It is unclear where this team tradition comes from, but it's certainly not from practice. [FN37] Needless to say, the mine run of cases we see do not have two equally weighted issues. Sometimes there is one issue that overshadows all others; more often there are several issues of differing weight and importance. While counsel sometimes ask for divided argument, appellate judges are generally not too happy about it, [FN38] and it's usually a bad idea anyway. [FN39] For one thing, it takes time for each lawyer to establish rapport with the court; double the number of lawyers and you double the amount of dead time spent introducing counsel, shedding argument jitters [FN40] and getting to the meat of the coconut. For another, legal issues do not always divide neatly into segments: A standing issue may have a lot in common with the merits of the case, for example. Almost invariably, there will be crossover during questioning, and the lawyer must take time explaining that that issue will be addressed by his partner, and by the time the partner stands up, the judge may have forgotten the question.
Then again, the court may not be interested in all issues to the same degree: It's hard enough to get a problem that is evenly balanced between opposing sides, harder still to get one that's evenly balanced among teammates. At moot oral argument, the first counsel may realize that the judges have no interest in what he's there to talk about and are impatiently waiting for his co-counsel to speak. In such a situation, a single counsel could quickly move on to the next issue, but not so if the issue is reserved for co-counsel who is more familiar with the issue.

Dividing argument during moot court thus teaches another very bad lesson—that dividing oral argument is an acceptable advocacy tool. In real life, a good lawyer almost never divides his time with other counsel; rather, he immerses himself in the case and is ready to discuss whatever is on the judges' minds when he stands up to argue.

***

"Picky, picky, picky," you may be thinking. "So moot court is not exactly like real court--how could it be? The name moot court should have tipped Kozinski off that this can't be exactly like real court; surely, we must allow for the fact that this is a competition run as a training vehicle for students, so there will be some differences from real court. After all, medical students operate on cadavers before they're allowed to operate on real patients."

True enough. Some differences between moot court and real court are inevitable, and those differences will diminish the value of the experience somewhat. What troubles me, however, is that many of the differences are avoidable; in fact, they seem to be driven by something other than the necessities of the situation. What it is exactly, I'm not sure; perhaps it's only inertia. I hope it's not a belief that law school cannot teach anything real--i.e., that all law school classes are unrealistic so why should moot court be any different. While law schools may not be equipped to teach, and law students may not have the time to learn, what it's like to try a real case or to put together a real merger, appellate advocacy is one aspect of real-life practice that seems uniquely suited to simulation in the law school environment. To begin with, appellate advocacy is suited to the law student's schedule. Appellate cases, like most law school work, generally proceed in predictable fashion with clear deadlines; they also present fairly discrete problems which students can tackle while still focusing on their other responsibilities. ...

Were I running a moot court competition, I would start with a real case pending in a state or federal intermediate court of appeals, with a real record. I would make a copy of the entire record available to the participants. I would let participants decide which side they want to represent, and also whether they want to work alone or in teams. Once sides were chosen, participants would prepare briefs and excerpts of record (or an appendix). The briefs would not have to be evenly divided in covering the issues presented in the appeal; the students would have to decide how much space, if any, they will devote to a particular argument. ...

At each round of the competition, the court would announce which party won the case, not just who had the best argument. Winning the case would count for at least half the points awarded--preferably much more. Competitors would argue the same side of the case throughout the competition. Because cases are not always equally weighted, competitors would be compared only to others on the same side.
of the case, and thus half the appellants and half the appellees would advance to the next round even if the appellants won most of the arguments. In other words, if twenty teams entered, then the best five appellants and five appellees would advance to the second round, even if all ten cases were won by the appellees--those appellees who didn't win "big enough" would, in effect, have lost. [FN46]

At oral argument, I would let the competitors decide who will argue and for how long. Students who compete as part of a team would have to decide whether to file a motion for divided argument. [FN47] If there is divided argument, I would let counsel decide how much time to allocate to each issue, and to change that allocation even in mid-argument if the exigencies of the case demand it. [FN48] If counsel learn of a new, recently decided case they wish to discuss at oral argument, they would be required to file an appropriate notice with the court. [FN49]

Before oral argument, the judges would be provided with the briefs of the actual lawyers who will appear before them, along with the excerpts of record (or appendix) they have prepared. The record itself, including any transcripts, would also be made available on request and would be fair game for questions at oral argument.

All this would work well enough, one might think, until the final round of the competition. So long as advocates compete only against those on the same side of the case, any unfairness in having unevenly weighted cases would not be material. In the final round, however, the appellants and appellees will be competing directly against each other and there can only be one winner. The difficulty of each side's case will almost certainly determine the outcome. Perhaps so, but I would point out that very good lawyers often make even the easiest case close through forceful advocacy. [FN50] Moreover, some of this unfairness can be avoided by picking the problems carefully; there are certainly plenty of cases in our intermediate appellate courts where there is no clear answer and the outcome can be influenced by the skill of the lawyers.

Still, some unfairness may remain--to which, borrowing a movie title, I say, "Reality Bites." In life, and certainly in litigation, things are not always fair. You take the client you get, and sometimes you lose despite your best efforts. That, too, is an important lesson to learn--a lesson that the current moot court process goes too far in concealing. ...

Change is easy to talk about but hard to implement. This is especially true when law students seem to enjoy the way things are. The problem is that students might prefer a more realistic experience; presumably, that's what they paid for when they came to law school. They deserve better, and it's not difficult to give it to them. As my suggested reforms illustrate, a lot can be done with just a little effort and without much extra cost or time commitment. It's not as if there's some secret formula for real-life appellate advocacy that is costly to copy. Moreover, while moot court may be fun now, there ain't nothing like the real thing.

[Footnotes omitted]
... Making (Moots) an Extraordinary Educational Opportunity

1 INTRODUCTION (Omitted)

2 THE VIS MOOT AND LEGAL EDUCATION

This article focuses primarily on the Moot as a pedagogical tool. However, one might reasonably ask at the outset whether this is in fact the primary purpose of the Moot. The Moot actually represents a competition between teams of students from individual law schools, as well as a competition between individual law students, and one might reasonably suggest that this competitive purpose predominates. This question has been explored thoroughly in a previous article by Professor Jeffrey Waincymer, who makes an excellent case for the predominance of pedagogy over competition. The authors agree with the majority of Professor Waincymer's general conclusions and will, therefore, limit the discussion here to a few of his points. This article will begin by looking, generally, at the educational benefits of the Moot.

Skills training has become an increasingly important part of legal education, and moots, generally, would seem to encompass many of the fundamental skills necessary for a prospective lawyer. The MacCrate Report, produced by an American Bar Association Task Force on Law Schools and the Profession, identified ten fundamental lawyering skills: (1) problem solving; (2) legal analysis; (3) legal research; (4) factual investigation; (5) communication; (6) counselling; (7) negotiation; (8) familiarity with comparative litigation and alternative dispute resolution processes; (9) organisation and management of legal work; and (10) recognition and resolution of ethical dilemmas. Virtually all moots would seem to address some of these skills. However, the Vis Moot addresses almost all of them.

As with most moots, the Vis Moot requires students to engage in (1) problem solving; (2) legal analysis; and (3) legal research in attempting to develop their arguments on the issues arising out of the problem. In the case of the Vis Moot, they do so for both sides of the argument - advocating the positions of both

---

2 Assistant Professor of Law, Touro College Law Center. J.D., University of Colorado School of Law 1994
3 Director of Stetson University College of Law's Tampa Law Center; Co-Acting Director of Legal Research and Writing; Assistant Professor of Legal Skills; Faculty Advisor to the Moot Court Board. J.D., Stetson University College of Law 1991.
claimant and respondent in their written and oral submissions and thereby expanding the educational opportunity. [FN10] Unlike most other moots, [FN11] the Vis Moot requires the students to engage in detailed factual analysis and even allows for (4) factual investigation or discovery in the form of requests for clarification. [FN12]

Students in the Vis Moot generally work in teams, some of which may include many students. [FN13] Working as part of a larger team requires (5) effective communication between team members, as well as (9) organisation and management of the work by individual team members. [FN14] Effective communication is also of course, crucial to effective written and oral advocacy skills; [FN15] each of which the students will have the opportunity to develop while participating in the Moot. The Vis Moot's focus on arbitration exposes students to a form of (8) alternative dispute resolution [FN16] - one used increasingly in both domestic and international commercial transactions and sometimes overlooked in the traditional law school curriculum. At least one Vis Moot problem has presented students with the (10) ethical dilemmas faced when the impartiality and independence of an arbitrator is challenged. [FN17]

In addition to practical skills training, the students have an opportunity to develop their doctrinal knowledge and understanding of international sales law and international commercial arbitration. The Moot has always been intended to promote awareness of the United Nations Convention on Contracts for the International Sale of Goods (the ‘CISG’) and the work of UNCITRAL (including its work in the area of international commercial arbitration) [FN18] and, as such, provides an outstanding educational opportunity in these two important and developing areas of doctrinal international law.

Moreover, the Vis Moot provides this educational opportunity in an international environment. Students are encouraged to employ a comparative perspective in their analysis and advocacy. Through this comparative approach, students arguably gain a better understanding not only of other legal systems, but of their own as well. [FN19] Teams are also paired up in the preliminary rounds so that they meet only teams from other countries, [FN20] and this means that each team will also prepare a written memorandum on behalf of the respondent that is responsive to a memorandum prepared by a team from another country. [FN21] In short, the Moot provides an outstanding introduction to the practice and theory of international commercial law and dispute resolution. [FN22]

Assuming that one accepts the basic premise that mooting, generally, serves a strong pedagogical purpose, and further agrees that this particular international Moot focused on commercial law and arbitration provides additional pedagogical values, we might nonetheless return to our original question about pedagogy versus competition as the Moot's predominant purpose or value. In the case of this particular Moot, one might reasonably ask, ‘Are pedagogical and competitive values necessarily inconsistent?’ Professor Waincymer acknowledges that the two values or goals may not always be inconsistent. [FN23] However, he goes on to suggest that, in some circumstances, the advancement of educational and competitive goals may reach a point of cross-purposes, and their paths may diverge. [FN24] This article will address the latter point and will suggest that an optimal educational strategy will, in virtually all cases, also be an optimal
competitive strategy. This is not to suggest that the two are equally important, but simply to point out that a choice to focus on pedagogy need not make a team any less competitive in the Moot. In fact, competitive elements may serve as fuel to further advance the educational experience.

The Rules of the Moot unequivocally describe the primary goal as educational and relegate competitive elements to a secondary or incidental role. [FN25] These same Rules, however, allow faculty advisors or other coaches to help guide the students’ early efforts at analysis, research, and advocacy, [FN26] and allow teams to engage in practicing oral arguments with other schools prior to the Moot. [FN27] These two latter rules - quite unique in the world of mooting - arguably go a long way towards eliminating any conflict between the educational and competitive goals of the Moot. Instead, the authors suggest that these goals are entirely complementary.

3 MAKING THE MOST OF TWO UNIQUE FEATURES OF THE VIS MOOT

While the Moot includes many unique features to commend it as an educational experience, this part of the article will focus on two of those specific features. First, the Vis Rules allow for interaction between coaches and students while the students are analysing the Moot problem, researching the legal issues, developing their arguments, and drafting the memoranda on behalf of the claimant and the respondent. [FN28] Second, the Vis Rules allow individual teams to engage in ‘Pre-Moots’ in which they participate in practice moots against teams from other institutions prior to the actual Vis Moot in Vienna. [FN29] Each of these unique features provides for exceptional pedagogical opportunities not typically found in other moots. [FN30]

The Moot problem provides an opportunity for students to expand their doctrinal legal knowledge, while developing and applying their analytical, research, writing and advocacy skills. The rules of most moots prohibit or at least significantly limit the involvement of faculty or other non-student coaches until the briefing has been completed, [FN31] thus significantly limiting the educational benefits that might be achieved during this process. While such limits might serve to sharpen the competitive process, they would seem counter-productive when it comes to pedagogy. The early involvement of a faculty member or other coaching mentor in working with the students can serve to improve the educational experience in many of the same ways a faculty member’s involvement serves to improve the educational experience in a traditional law school class taught on the common law model. Moreover, the educational experience provided by the Moot problem can be extended to a larger body of students by using the problem in the classroom. This opportunity is further explored in Part 3.1.

Once the student teams have completed their written submission(s), many moots allow for outside coaching assistance as the teams prepare for the oral competition. However, such coaching assistance is often limited, [FN32] and the rules for most moots do not allow students to practice against teams from other institutions prior to the formal oral competition. [FN33] Again, this might represent a reasonable limit if one focuses on the competitive process, but one that seems to eliminate an outstanding pedagogical opportunity. [FN34] The coaching assistance and Pre-Moots allowed under the rules of the Vis Moot represent further
opportunities for students to extend their analysis of the Moot problem and to develop and practice their advocacy skills - all in an environment emphasising the learning experience. These Pre-Moots can also extend the oral argument experience beyond the limited number of students able to participate in the Moot in Vienna. This opportunity is further explored in Part 3.2.

By making the most of each of these two unique features of the Vis Moot, a participating institution can significantly enhance the overall educational value to its students, as well as the overall institutional benefit. …

3.2 TEACHING ORAL ADVOCACY THROUGH THE VIS MOOT (VAUGHAN)

3.2.1 ADVOCACY AND THE ART OF PERSUASION

[Omitted from this reading and included in Unit 4 as Reading 2]

3.2.2 LEARNING ADVOCACY THROUGH PRE-MOOTING

The Vis Moot is unique in that it allows and even encourages pre-moots, or practice moots against other teams. [FN116] Other moots typically do not allow for such an opportunity. [FN117] By allowing for pre-mooting, the Vis Moot provides for far more opportunities for participating students to develop their advocacy skills than those provided by internal team practices. Pre-mooting also allows for more individual students to share the experience of participating in a moot arbitration with students from other schools, countries, and legal systems. Together, these pre-mooting opportunities expand the educational opportunities astronomically.

A pre-moot, as the term is used here, would include any meeting of two or more teams to conduct moot arbitrations addressing the subject matter of the current Vis Moot, occurring prior to the official oral rounds in Vienna [FN118] and providing for some sort of constructive feedback for the students involved. Our survey indicates that an overwhelming majority of the teams participating in the Vis Moot last year also engaged in a substantial number of pre-moots. Seventy-nine percent of the teams participated in at least one pre-moot. [FN119] Of those teams participating in pre-moots, 78% met at least three other teams, and 41% met at least seven other teams, with 74% attending multiple pre-moot events, and 17% attending five or more such events. [FN120] Eighty-nine percent of these teams met at least one team from another country, thus engaging in an international pre-moot. [FN121] Based on this survey, one can reasonably conclude that pre-mooting has become a very significant element of the overall Vis Moot experience for most teams.

Most of this pre-mooting activity is non-competitive in nature. Sixty percent of the teams participating in pre-moots last year engaged only in non-competitive events. [FN122] However, there are also a significant number of competitive pre-moots. Fifteen percent of the teams participated only in competitive events, and 25% participated in both competitive and non-competitive events. [FN123] Both competitive and non-competitive pre-mooting is undoubtedly valuable from an
educational perspective. However, the distinctions between them are potentially significant, so each will be addressed in turn.

A competitive pre-moot ultimately produces a winning team or teams, whether from paired matches, or individual team scoring, or some combination of the two. In one example, a group of teams might engage in a series of elimination matches, with winning teams meeting other winning teams and losing teams meeting other losing teams. [FN124] In another example, a group of teams might first engage in a series of scored rounds, with the teams receiving the highest scores then moving on to a series of elimination rounds to determine an ultimate victor - much like the oral rounds in the Moot, itself. [FN125] These competing teams are afforded an excellent opportunity to practice and develop their advocacy skills in moot arguments with other teams, often from other legal backgrounds. The teams also have an opportunity to learn how their current level of advocacy measures up against other teams in the views of the participating arbitrators. However, the selection of winners in a head-to-head competition, as well as the scoring of performances to determine which teams advance to the elimination rounds, necessarily involves the implied designation of losers.

One of the challenges in a competitive pre-moot is to avoid the potential negative impact on the students of failing to 'win' - an impact that will of course be felt by all but the victor, and may be felt quite acutely by teams repeatedly failing to win. Failing to win a competitive pre-moot is also quite different from failing to win in the Moot itself. In the pre-moots, the students are attempting to prepare for the oral rounds in Vienna, and the development of their self-confidence is a huge part of that preparation. The implications of failing to win in a pre-moot may harm that self-confidence. [FN126] Nor are the competitive elements of a pre-moot necessary to fuel its pedagogical benefits. The students still have the Moot itself to do that. [FN127] The competitive elements of the Moot itself are an important part of the overall experience, and the sting of defeat is easily overcome in Vienna. [FN128] Thus, one might at least want to consider carefully the value of adding a competitive element to pre-mooting by thoroughly weighing its additional benefits with its additional risks.

In a non-competitive pre-moot, the students present their arguments in the normal fashion, and are provided with a critique after each round, [FN129] but no winner is ever declared. The non-competitive pre-moot essentially provides a forum for participating in a mock oral argument with another team in front of an arbitral panel, receiving constructive feedback, improving ones' arguments, and learning to be a better overall advocate. [FN130] A non-competitive pre-moot may in fact provide an optimal educational environment. [FN131] The students already have plenty of competitive motivation provided by the actual Moot to follow, [FN132] but they are able to focus more squarely on learning to be better advocates during the pre-moot.

The lack of any burning desire to come out ‘on top’ may also help foster collegiality and openness in sharing ideas for making the strongest arguments on various issues. [FN133] This interaction between the students is often one of the most effective educational experiences in the entire Moot - especially when the interaction includes students from different countries and legal backgrounds. A non-competitive pre-moot may also be easier to organise at an earlier stage of the
students' preparation. I think most coaches would be hesitant to bring their teams to a competitive event until the students had spent substantial time preparing and polishing their oral arguments. However, there may be significant learning opportunities provided by practice rounds with other teams held quite early in the process, while the students are still in the process of developing their arguments. A non-competitive early pre-moot may provide such an opportunity. [FN134] Of course each team will need to weigh its own goals in determining whether to participate in competitive pre-moots, non-competitive pre-moots, or both. However, from an educational perspective, it would seem that a non-competitive event provides the greater overall benefits.

Pre-moots also provide some additional valuable opportunities. [FN135] One of the most important benefits of the Moot is the opportunity to meet and interact with other students, faculty and arbitrators from all over the world - all of whom share a passion for international commercial law and arbitration and a common experience of working through the substantial challenges of the current year's Moot problem. [FN136] While the oral rounds in Vienna unquestionably present the broadest and most extensive opportunity for such social interaction, a pre-moot arguably presents the most intimate one. In a pre-moot, students may also have an opportunity to meet and interact with other students, faculty, and arbitrators from other countries and legal backgrounds - but in a much smaller group and perhaps in a more relaxed environment. While the pre-moot experience could never replace the ‘Vienna’ experience, [FN137] it certainly provides a valuable and complimentary one.

Pre-moots can also provide an opportunity for broader participation. [FN138] In many cases, a team will include members that, for various reasons, may not be able to argue in Vienna. [FN139] However, pre-moots are open to anyone. There is no requirement that any individual who participates in a pre-moot must argue in Vienna, and, depending on the location of the pre-moot, the institution may be able to afford to send more students to the pre-moot than it can afford to send to Vienna. Pre-moots can thus be used to extend the full mooting opportunity to a broader number of students.

Pre-moots have unquestionably become an important part of the overall educational process provided by the Moot. They may be used to deepen the educational experience of those who will argue in Vienna, and may also be used to make that educational experience available to a larger group of students. They also undoubtedly help to prepare students for the ultimate competition in Vienna - which brings us finally to the broader question of the interaction between the pedagogical and competitive elements of the Vis Moot.

4 COMBINING PEDAGOGY AND COMPETITION

The authors would submit that the competitive aspects of the Moot are a crucial element of its pedagogical success - much in the same manner that law school exams or other graded performances are a crucial element of the pedagogical success of a typical law school course. While the exam or grade itself may be of questionable value or reliability, [FN140] its role in spurring student efforts in the educational endeavour seems clear. Virtually anyone who has ever taught a law school course has likely heard a student ask the question, ‘Will this be on the exam?’
Whether we like it or not, law school exams provide a significant catalyst in fuelling the efforts of most students to work harder to master legal doctrine than these students would absent such exams. In a similar fashion, the competitive elements of the Vis Moot undoubtedly provide a catalyst in helping to fuel the extraordinary efforts of the students who participate in the Moot. [FN141]

If one wishes to maximise the educational value of such a catalyst, the key is to structure the educational process and the catalyst such that ‘shortcuts’ [FN142] are unproductive. Presumably, an instructor will structure a law school course in a manner to achieve certain pedagogical goals. If the student believes that the most efficient path to exam success is to follow the instructor’s structure, then the student will likely follow that path, hopefully achieving the instructor’s goals. Thus, the best way to achieve the instructor’s pedagogical goals is to structure the course and the examination in such a manner that the latter encourages the sought after behaviour in the former. The structure of the competitive elements of the Vis Moot achieves exactly this purpose, thus arguably ‘mooting’ any debate between pedagogical and competitive strategies.

For example, while examining the facts, students are afforded the opportunity to ask for clarifications. Of course, all students receive the same clarifications, so some might be tempted to ‘shortcut’ the process and simply wait for the answers. However, a team seeking a ‘competitive’ edge, will search the facts high and low, for something subtle that might make a difference in the effectiveness of their arguments, but which might escape the less focused attention of others. Thus, the students are encouraged to engage in a thoughtful and detailed examination of the facts, a valuable skill for any lawyer.

Students are required to submit written memoranda on both sides of the issues. [FN143] This requires the students to analyse the Moot problem in far more depth than if they only had to construct the arguments on one side, thereby encouraging a deeper level of analysis and a deeper level of understanding. [FN144] In fact, this aspect of the Moot provides an incentive for students to look at both sides of the issues very early in the problem. If a team has to do it anyway, better earlier than later so that they can use their analysis to their advantage in the first memoranda.

Once the memoranda are completed, the competitive elements of the Moot also encourage students to prepare to orally argue both sides of the issues. Students that do not are not eligible for individual oral awards. [FN145] As with the written memoranda, this competitive requirement of learning both sides of the issues promotes the pedagogical goal of further developing the students’ analytical abilities. We have watched students as they worked diligently to overcome a particularly challenging argument on the other side of the issue and, as soon as they have succeeded, watched them shift gears and do the same again from the other side. By engaging in this process, the students are learning to perform the sort of ‘in-depth’ analysis performed by the best of the legal profession. [FN146]

Perhaps one might argue that, despite all of this, a team might decide simply to go through the motions during the preparation of the memoranda and focus entirely on polishing their deliveries of scripted oral presentations in hopes of competitive success in the oral rounds. [FN147] If so, then this might be just the sort of ‘shortcut’ that could undermine the value of the competitive catalyst and dilute the educational value of the process. However, there are plenty of arbitrators
during the oral rounds at the Moot that will almost certainly derail such an approach. While some arbitrators are relatively silent during arguments, irrespective of a student's demonstrated oral skills, many others are quite active. A strong oral advocate is often interrupted with increasingly challenging questions, perhaps in an effort to find out just how strong an advocate he or she is. While some such questions might reasonably be anticipated, many will not be. Ultimately, there is really no substitute for a thorough grounding in the facts and the law - not just the specific legal rules at issue, but also a broad comparative understanding of the jurisprudential underpinnings of those rules.

In short, the educational and competitive elements of the Moot are entirely consistent, with the latter supporting the paramount importance of the former. If a student seeks competitive success in the Vis Moot - and I am convinced that most do on some level - then the student must do the necessary work, thereby deriving the intended educational benefits of the Moot. [FN148] The best evidence that this process actually takes place is the legendary efforts of the students themselves, which has recently been celebrated in song. [FN149] The structure of the Vis Moot provides both the educational framework and the competitive catalyst to spark the educational process. [FN150] All we have to do as coaches is to try to make the most of both.

5 A FEW FINAL THOUGHTS

Vis Moot team coaches come in many forms - current and aspiring law school professors, practicing lawyers and arbitrators, and even current law school students. All of us, however, are ultimately acting together as teachers and mentors to the next generation of international commercial lawyers. As such, there is much to be said for an ongoing collaboration with respect to our teaching and mentoring efforts to make the most of the wonderful educational experiences provided by the Moot. In this Article, the authors hope to have made a small contribution to that collaborative effort, and we look forward to continuing collaboration and fellowship with all of you in the months and years to come.

[Appendix and footnotes omitted]
International and Comparative Legal Education through Willem C Vis Moot Program

1- INTRODUCTION & 2- ABOUT THE AUTHOR

... [Omitted]

3- THE ESSENCE OF THE VIS MOOT - A LEARNING EXPERIENCE

Like others before me, I have suggested that learning should dominate over any competitive disposition. To suggest that learning is more important than competing is an assertion of relativity. This can be made up of support for learning per se and/or a critique of competition as a feature. At this stage the article seeks to analyse the first aspect.

It should be reasonably non-controversial to suggest that the primary point of being a university student is to learn. If this is accepted, students might look to the long term with respect to all Law School activities. On this basis they would view events such as moot programs as opportunities to learn further, or at least to learn in different ways from the traditional teaching paradigms operating in their own countries. A moot program is but one form of pedagogical experience, which in part uses some simulations of real legal practice as an aid to learning.

Here the coach’s perspective and support is likely to be most influential. In my view, the primary obligation on coaches is to assist or facilitate that learning experience in all its facets.

It is not only about obligation but also opportunity. Being a unique form of legal training, it provides an opportunity for coaches to learn more about the teaching profession and the diverse needs of students, particularly in view of the fact that we inevitably work very closely and over a long period of time with a relatively small group of students. We therefore come to see more clearly how they learn, how they might differ in that regard and how their learning experience might be enhanced through individual aspects of our relationship with each. [FN5] Being an international event, it also provides all coaches with a unique opportunity for comparative reflection and inspiration as to teaching ideas and methods. In sum, it can be about learning how to teach and teaching how to learn.

There are also related opportunities. For coaches who are merely contemplating an academic career, the process affords a wonderful chance to test their interest and

---

4 Currently coach of the Monash University moot team and Professor of Law elect at that University. Formerly a Professor of Law at Deakin University and the moot team coach since the inception of the Willem C Vis program. …
aptitude for such a vocation, albeit in a medium which they need to understand is quite distinct from the bulk of university teaching.

Yet to merely assert that it should be a learning experience does not prove the point, as there is much legitimate debate about pedagogical styles and methods. In this vein, some question the value of moots as a formal tool of legal education. Others might see fundamentally different educational philosophies between different legal families. This article addresses some of those challenges. It does so in the context of a brief discussion of comparative issues in legal education, after which specific attention is given to the utility of moot programs.

4- COMPARATIVE ISSUES IN LEGAL EDUCATION

Diversity is one of the most valuable aspects of the Vis moot. It brings together students from a range of legal systems and cultures to hopefully learn from the process and from each other. Nevertheless, in an article of this nature which explores the pedagogical utility of moot programs, it should be acknowledged that mooting has been much more prevalent in common law systems. Thus it is desirable to explore a broader utility for such endeavours. This is not the place for a comprehensive analysis of the history and basis for legal education in various jurisdictions. [FN6] The following discussion merely aims to touch on such questions to provide a brief picture of the role of skills training in comparative legal education as a backdrop to the discussion of the breadth of utility of moot programs. The ultimate thesis is that such programs should be of great benefit to students from all legal systems.

An exploration of that thesis must begin with an acknowledgment that there are significant differences between legal systems and their traditions of legal education. As a number of leading comparative law scholars have asserted, the form that legal education takes will generally follow the peculiarities of each particular legal system. [FN7] For that reason it is not easy to compare and evaluate different educational approaches without considering the essential nature of legal systems and their jurisprudential basis.

With that caveat in mind, we may note that in comparing civil and common law legal systems, commentators will often contrast the skills orientation of the common law with the scientific orientation of civilian systems. Some are heard to speak of the common law as judge made through the principle of stare decisis, while the civil law is said to be scholar made, through the role of jurists in the development of the central Codes. The different sources of the law are said to lead to differences in logical process, with the civil law being primarily concerned with deductive conclusions from broad principles, with the common law said to be concerned with inductive conclusions from decided cases.

Common law is also sometimes seen as being about professional training, while civil law is sometimes asserted to be about the higher intellectual analysis of the legal system, on the same par with other academic pursuits of philosophy, sociology and economics. [FN8]

The suggested distinction between the practical and the scientific is seen as explaining the common law’s development of interactive techniques such as the
case method approach in the US and the expository or magisterial style of civilian legal education.

While these distinctions are all accurate to some degree and are certainly important, they do not provide a clear and dynamic picture of legal education in the two systems. Most importantly, they forget that each system has a common aim. As has been suggested, “(w)hile these two systems may differ in the respective emphases they place upon abstract principles and concrete factual observation as systems, they share the same problem-solving epistemology, an epistemology which combines abstract and concrete forms of reasoning.” [FN9] Each system aims at solving real life problems and must therefore consider the relationship between the abstract and the concrete. [FN10]

These observations are borne out by a brief analysis of the development of legal education. While legal education in the modern world tends to take quite distinct forms, this was not always the case. In the early stages in most systems it could generally be described as doctrinal and positivist. For example, in the common law world, legal training began by way of apprenticeship. Even when it became a university discipline, law was primarily taught by practitioners in an expository manner. It is appropriate to speak of the “black-letter” tradition in English legal education.

With the development of the case method approach in the US, that system appeared to diverge significantly. Case method involved the development of casebooks to be used by students to prepare for questions posed by their Professors during lectures. The questions were aimed at developing students’ understanding of the law and their ability to think about it under pressure. That style of questioning resonates with mooting as an educational endeavour.

The advantage of case method, at least in common law countries, is said to be that it trains students to work with the primary legal materials that they will utilise in practice and not simply rely on their professors' expositions of doctrine. The contentious aspects include the fact that its creators saw law as a science, where students could be taught to understand the law, as if there was a clear and objective body to discover. Thus it remained a positivist approach, but one which operated through a different methodology. [FN11] Thus from the outset, the key difference of case method from civilian approaches was about process, in particular, a process of learning by doing. It was not about a fundamental shift from a positivist ideology.

In spite of various criticisms, the case method continues to dominate in the US. It has continued alongside major advances in clinical and skills based education. This is not the place to debate the pros and cons of case method but its role in directing attention to certain forms of skills training should be emphasised. For example, in 1992, an American Bar Association (ABA) Task Force on Law Schools and the Profession published the MacCrate Report. [FN12] This identified what were seen to be ten fundamental lawyering skills. It called on law schools and the profession to ensure that students acquired those fundamental skills before representing a client. The ten skills as identified were (1) problem solving; (2) legal analysis and reasoning; (3) legal research; (4) factual investigation; (5) communication; (6) counseling; (7) negotiation; (8) litigation and ADR procedures; (9) organization and management of legal work; and (10) recognizing and resolving
ethical dilemmas. [FN13] Mooting as an activity has an obvious relationship to a
number of these skills.

These developments reflect the fact that, for much of the time, legal education in
common law countries was dominated by the desire to prepare students for legal
practice in all its facets, whether as advocate, legislator or judge. Many academics
would see their role as training students to “think like lawyers”, whatever that
might mean. Other processes thought to be essential to a skilled lawyer are often
incorporated into the legal curriculum. Mooting becomes an obvious teaching tool
in that regard.

In spite of these ideas and developments, legal education in common law
countries, like much in the way of scholarship, remains contentious. In particular,
the development of skills programs sits at least somewhat uneasily alongside a
growing interest in theory and post-modern perspectives in many law schools. This
article does not seek to enter that broader debate about the proper focus of legal
education. My own immediate reaction is that whatever one’s overriding
preferences, pluralism in approach will often be of value in its own right at the
stage of learning. Yet even if this is so, the distinct and concurrent trends do suggest
some significant differences in attitudes as to the proper basis and content of
modern common law legal education. [FN14] This leads to various challenges to
skills training, some of which are addressed below. It should also remind us that it
would be inaccurate to describe all common law legal education as based on the
case method and concerned with the manipulation of cases. As an Australian
academic, I would assert that expository teaching styles still predominate in my
jurisdiction. The role of cases also varies significantly depending on the subject
involved. In many areas, there has been a very significant growth in statutory
materials and administrative guidelines to be analysed by students in conjunction
with their professors. Hence the role of cases in our legal system is reduced.

Developments in common law countries need to be compared with those in
other jurisdictions. For reasons of space and ignorance, I will confine myself to only
a brief *261 discussion of the civil law tradition. While I have suggested above that
it would be wrong to see all common law legal education as concerned with
practical over scientific considerations, it is fair to say that legal education in Europe
has been moulded by more consistent scientific attitudes to law and legal analysis,
although once again there are significant differences between countries and
significant changes over time. Just as it was inappropriate to consider common law
legal education as homogeneous, the same can be said for civilian legal education.
[FN15] Nevertheless, the *Corpus iuris* of Justinian and other codified principles and
rules have tended to lead to a systematic methodology of teaching and writing. The
systematic approach is broad ranging and can include training in methodologies for
writing judgments as well as for critiquing them. [FN16]

As indicated above, a move to hands-on analysis of cases was at the forefront of
modern approaches to skills training in the common law world. Mooting forms an
important, albeit often ad hoc, part of that development. The same development
could not be expected in the civil law tradition. Without a formal system of *stare
decisis*, there is not the same concern for civilian professors to put cases before
students or at least present them in the same way. In addition, the history of
European legal education saw law as a more general form of intellectual analysis
While this factor may be an important reason for differences in curricula, it should not affect the broad thesis of this article. Moot endeavours such as the Vis program, being optional, may be particularly appropriate ways to encourage skill development in potential European practitioners. Even where the broader development of scientific understanding of law is concerned, it has been suggested that some variation of the case method can be valuable through introducing students to a non-systematised collection of legal materials and encouraging their own search for system and coherence. [FN17] Relying on expository lectures or treatises means that this work is already done for the student. [FN18] Thus case method, and by extension, exercises such as moots, could be supported on the basis of a more recently emerging skills focus in civil law legal education. Even within civil law systems, there are significant movements in practice if not in principle to some degree of acceptance of a variant of stare decisis or at least methodology of utilising of past cases as aids in argument. [FN19]

That is also contentious as mastery of a scientific exposition of doctrine is still seen by many as the essential skill to be inculcated through that system. Nevertheless, in complex commercial fields such as taxation and corporations law, it is as true in civil law jurisdictions as in the ever more inaptly named common law, that the student should presume that the law as practised will look quite different to the law as studied. In this environment, an ability to adapt to such changes without returning to university studies is vital. Here, evaluating skills versus content becomes an important element of pedagogic debate worldwide. There has also been a trend towards discussion of the role of communication in civil law education, which again has much resonance with moot programs. [FN20]

Whatever one's views on these questions, it is true that there is far less in the way of critical challenge to exposition of doctrine in the civil law world, although this is by no means absolute. It is also hard to make direct comparisons as current issues in civil law education are often dealt with in terms of the distinct but related question of European integration. Thus it reflects specific questions as to the need to consider broadening the subject matter of traditional national study to support European wide legal practice.

This also reflects the somewhat related scholarly debate as to whether there is or can be an emerging ius commune in Europe. At the very least, lawyers intending to practice in Europe need to understand different or even converging legal systems. Hence, as just one response, there is an emerging development of casebooks covering a number of European jurisdictions. [FN21] The Vis program calls for students to consider the possible convergence of contract law principles and hence is an excellent support for such developments. [FN22] Students must also consider the differences in style between major legal treatises.

For civilian law students who see law as science, at the very least an introduction to different perspectives should be a valuable means of evaluating what they have learnt. Consideration of factual issues in a moot environment also allows civilian students to consider the limits of useful generalisation. [FN23]

As global legal practice and commercial activity call for responses from all professions and regulators, thought has also been given to the impact that
globalization might properly have on legal education. This goes beyond European integration, although the latter may constitute a subset of the former. Here law schools are asked to broaden the provision of international law training and give appropriate attention to emerging sub-specialities of international human rights, labour law, environment, trade, investment and competition.

That kind of learning can ask students to consider questions of global governance, constitutional laws and institutions, the relationship between international and domestic law and the role of cultural and other perspectives in forming differences between legal systems. This in turn can ensure that students do not presume that their own system has the only natural solutions to complex legal and social problems. [FN24] Another invaluable aspect of the Vis program is its utilisation of international commercial arbitration and the CISG as the basis of analysis. As Berger has pointed out, the “natural comparative orientation and flexible procedural framework” of international arbitration makes it an ideal environment to consider such similarities and differences in legal systems and to gain a richer understanding of our own systems through comparative analysis. [FN25] Here again the Vis program is an ideal learning environment.

It is certainly not the purpose of this paper to make any normative comments about optimal legal education in other cultures. This all too brief digression merely suggests that there is nothing inherent in the civil law educational goals that would make mooting an inappropriate exercise. Taken together, while differences and debates remain, it seems that there would be a growing belief in some pedagogical value in skills programs within the civil law context. Certainly the growing popularity of the Vis program is consistent with that hypothesis. [FN26] The fact that there are remaining significant differences between legal families does not mean that such programs would be lacking in value. Rather, from a pedagogic perspective they might provide different benefits for different groups of students. As discussed below in relation to the development of individual skills in a small teaching environment, pedagogical aims may also differ for individual students.

So far the discussion has looked at education broadly and the growth of some skills focus. I now turn to the specific role and potential of moot programs in legal education.

5 MOOTING AND LEGAL EDUCATION

Merely noting that skills exercises can be useful because they have a relationship to real life activity does not mean that they will be conducted optimally. Nor does it mean that they will be of net benefit in absolute terms, let alone be valuable from an opportunity cost perspective. In the US context, one strident critique of mooting is provided by Kozinski. [FN27] I will not seek to survey the body of educational literature on mooting, but instead, use this critique to spur some personal reflections. In part, this is because I aim to speak about optimising the benefits of a process to those who have in any case resolved to undertake it. Nevertheless, the reader should remain aware of the dangers of this methodology.

Kozinski’s primary concern, which I share to some degree, is that too much emphasis is often placed on the “moot” and not enough on the “court” by coaches with less than appropriate levels of interest or practical experience. [FN28] The same can be said for adjudicators, who may tend to concentrate unduly on style
rather than substance if they do not have the expertise, intelligence or commitment 
to preparation, to allow them to follow sophisticated arguments by students. While 
that is a potential problem with any simulation, it is a challenge that can be 
responded to with appropriate commitment by arbitrators.

A second challenge by Kozinski is one that I am glad to disagree with, namely 
that moot court success has little relevance to hiring decisions. That is not the case 
in Australia and I can even attest to the role that the Vis moot has played in the CVs 
of very worthy students and alumni officials in their successful applications to 
international organisations and multinational and national law firms.

Some suggest that activities such as moots are merely part of the process of “professional socialization” which seeks to influence values and habits rather than 
facilitate learning. [FN29] This flows in part from the post-modern perspective in 
common law critique alluded to above. Again this is a broad challenge that I do not 
wish to debate in so far as it may apply to a diverse range of specific training 
programs. I would merely make the point that a pedagogical approach to mooting 
that is less concerned with style of presentation than intellectual content, should be 
less open to this challenge. That is a pedagogical approach that I advocate below. [FN30]

This suggests that it is important to distinguish between inherent problems and 
avoidable ones. It is certainly true that bad moot experiences will have similar 
problems to other bad teaching experiences. This simply calls for proper attention 
to responsibilities as a coach and to the development of appropriate pedagogical 
techniques. Let me turn to the potential benefits if proper attention is given to these 
issues.

The most obvious skills benefits are in the development of public speaking 
competence and group skills in research, writing and decision-making. Here it 
would be wrong to see a moot as merely about advocacy training. It is about 
effective communication. In the oral phase this entails dynamic and interactive 
communication with a person in authority who has the power to set the agenda. 
While this is of obvious importance in advocacy, it is also a skill needed in most 
aspects of legal practice and most other forms of professional and personal 
activities. The required skills even go beyond moot related issues to sometimes 
encompass fair and efficient co-ordination of travel and leisure agendas! In the 
written phase, the approach needs to be based on special research skills and a 
concern for cultural plurality, given the diverse writing styles in different legal 
systems. Working in a group environment emulates many aspects of real legal 
practice. In larger firms, teams of lawyers are often brought together to work on 
individual matters and are then disbanded, only to be reorganised into different 
groups for subsequent projects.

As indicated above, another key benefit, particularly with the Vis moot, is the 
promotion of an awareness of comparative law and comparative law technique. 
Participants also learn about emerging areas of substantive law, including the work 
of UNCITRAL, and in particular, its development of the CISG and the UNCITRAL 

That benefit goes well beyond merely receiving a new body of knowledge. 
Because there is no doctrine of precedent applied by arbitrators and because 
arbitration and the CISG seek to accommodate a range of traditional legal
perspectives, moot problems that build on grey areas in these fields also help a range of students, coaches and guest arbitrators analyse important current issues. The sheer number of articles published, the very establishment of this journal and the number of participants who do research, honours or post-graduate papers in the field, is a testament to this valuable aspect.

Another valuable aspect of the program is its potential influence on domestic legal education. This may range from the use of past problems in teaching to greater attention to skills training in jurisdictions where this has not been the norm.

A further value of moot programs is that they provide some variety in pedagogy in a discipline that is notorious for its long and repetitive nature. Law students around the world are generally asked to display competency in certain skills over a wide range of substantive areas. Once they know they can do so in one area, they can rightly feel under-stimulated when asked to perform the same essential functions in other areas. In some cases this drags over a five year period, and even longer in some systems with formal placement programs and bar training included. Legal academics would thus be well advised to search out opportunities for more effective learning and teaching. [FN31]

Students also need to be aware that law teachers in most jurisdictions are not systemically encouraged to work to their optimal teaching potential. “Publish or perish” remains the currency of first order to those who follow price signals. If it is ever to be replaced, at least in countries with diminishing public funding models, it is more likely to see a “brave” new world in some cash strapped universities of a reward structure built around monetary earnings in either fee or research income, unless staff and students work together for more meritorious goals. Here students can assist by demanding more attention to innovative teaching strategies. Given that they are usually expensive, and given the lack of sufficient funds in all but the richest schools, demand will lead supply by some distance.

One related challenge not easily met is that to the extent that moot programs are pedagogically valuable, they are inherently elitist as they are only available to a small percentage of the law school student body. The same can be said for Law Review editorships and many clinical programs. One response is that selective external programs such as Vis and Jessup are not at the expense of internal programs, but rather, can be inspirations for broader internal curriculum review. Furthermore, those who control the purse strings can also open further opportunities for wider student involvement in such endeavours.

From my perspective, the most satisfying aspect is the development in general confidence levels, although at times, some participants come to this slowly and only after some troubling low points. As a coach, I would be foolish to ignore my role in unintentionally bringing many students to a position where these concerns are heightened. It is certainly dangerous to be an untrained pop-psychologist and moot coach combined, but psychological issues are inherent in learning and cannot be ignored even by those without formal training. In that regard we should remember that psychological issues are an essential element in most formal systems of teacher training. For civilian law students, this can also provide a unique experience of small group interaction with a professor, where the norm is for extremely large classes.
Finally there are also countless benefits flowing from the development of friendships throughout the world. The reader does not need me to elaborate upon these.

6 THE RELATIONSHIP BETWEEN MOOTING AND REAL ADVOCACY

In order to get the most out of the learning experience, it is important for participants to understand the difference between moot programs and real legal practice, whether in court environments or within arbitration. At the extreme, the differences lead some to call into question the value of the mooting endeavour. [FN32] The differences certainly pose challenges for moot coaches but in my view, do not reduce the fundamental utility of moots as a learning process. Nevertheless, I would agree that a lack of understanding of the differences and lack of discussion and explanation of them with students, may interfere with the learning process.

In one sense mooting and real advocacy are similar in that both can be analysed as games with applicable strategies, although this is not to be taken as indifference to the cultural and psychological aspects of real legal disputes. Peoples' lives should not be destroyed by moot competitions, but litigation can have this effect on a regular basis. That may be exacerbated by the insensitivity of lawyers.

To describe the distinct activities as games is simply to draw attention to the strategic options for pursuing such endeavours successfully. In turn, this requires an identification of the goals of each. This should hopefully cause attention to be given to appropriate moral and ethical dimensions. Just as a key thesis of this paper is that moot court activities should not be about competition and ego, but rather, about learning, so too should litigation not be seen as the pursuit of formal victory by the advocate, but rather, about meeting the reasonable needs of the client.

One obvious difference is that in real legal practice, there must be a separate decision to bring a case. There is also ongoing consideration of whether to pursue it or settle and a consideration of the ambit of the claims and pleadings. [FN33] The moot problem is given and the moot must be held regardless. A moot coach can at least explain and discuss these issues as an additional element of the teaching program.

If the game analogy is acceptable, it is then necessary to identify the different rewards and strategies. Here I address competitive elements simply because one critique is that for those who aspire to do well, mooting might encourage attention to inappropriate skills. This then requires attention to be given to the appropriate attributes of moot advocacy, which in turn calls into question the criteria by which performance in a moot is judged. While there may be legitimate differences of view as to the keys to moot judging, there would be reasonable consensus that analysing advocacy skills entails a consideration of the participants' knowledge of the issues, both legal and factual, their development of cogent and innovative arguments, their manner of presentation and their responsiveness to questions. Critics would point out that these are not the factors being considered by a real adjudicator when deciding the outcome of a case. Nevertheless, these skills should all be relevant to determining whether an advocate has presented the case in a persuasive manner.

Even so, there will inevitably be some tactical decisions that are adopted in a different manner to real litigation. For example, as a moot participant, you may feel
that there was clearly a breach of contract by your client but also believe that it was not fundamental and further that the damages claimed were unsustainable. In the real world, where cost may be an issue and where an adjudicator may be annoyed by undue time spent on weak arguments, an advocate may choose to concentrate on the key elements of the case as identified by research and analysis. This will be even more apparent in inquisitorial systems where the judge gives more direction as to the points of major concern. Conversely, in a moot, an advocate may impress most strongly by the way he or she deals with the weaker parts of the designated case. While some may disagree, most arbitrators would consider that a participant has avoided the central challenge if they conceded issues that were expressly within the terms of reference of the competition rules. Furthermore, if most students can readily identify the strong points, students may stand out more favourably if they identify a unique way to deal with the poorest parts of their case, particularly if they can along the way, cleverly deflect the most obvious probing questions that arbitrators are determined to pose.

*270 These differences are important but if properly understood by coaches and students, should not detract unduly from the learning experience. On the contrary, pointing out those differences and questioning students as to their practical implications can itself be a valuable learning methodology. For example, coming from a country where litigants pay costs on an ongoing basis and where the prima facie rule is that losers pay winners, albeit on a scale well below current commercial rates, I always ask students to tally up their total hours worked on the Vis problem and then present them with one of the many challenges of practice. I suggest that few clients would want them to be any less prepared than they have been, but no client would want to pay a bill wildly out of proportion to the amount in dispute. How a lawyer deals with these conflicting desires and the degree to which she or he seeks to empower a client in that determination, is an interesting practical and ethical question.

Another variable in mooting is the nature and style of questions. Adjudicators in the real world will hopefully confine themselves to questions that will meaningfully assist them in deciding the outcome of the case. The Vis moot rules expressly call for competition arbitrators to do likewise which is highly commendable, but it is impossible to constrain some arbitrators from acting as if they are on some Paper Chase form of legal pedagogy or from testing the limits of knowledge of a particular participant. Even so, if coaches follow the rules and help students understand what is the difference between the two forms of questioning, the students must still learn a valuable lesson even where arbitrators do not adopt a realistic questioning format.

Another obvious difference between the Vis moot and real advocacy is that in the latter, one is not asked to represent both sides on different days. It has been suggested that this is a flaw of mooting, on the basis that it makes the student think of their own interests and not the client's. [FN34] In my view, the opposite is the case as long as pedagogy dominates over competition. Preparing both sides teaches students not to be one-sided in researching real cases. The best arguments of your opponent are the weakest arguments for your side. An advocate is not truly representing the client's best interest and deservedly earning a fee without fully preparing all aspects of the case. Forcing students to take both sides can also challenge presumptions that might wrongly apply and help them develop a more open-minded approach to analysing a problem. Looking at both sides is also good
training for adjudication itself and is directly relevant to the type of problem style examinations that apply in many legal education systems.

Another difference between mooting and advocacy is that regardless of the rules of the competition, the actual oral hearings are likely to depart significantly from the written briefs. This will be so for a number of reasons. First, some busy moot judges may not have carefully read the briefs. The unrealistically short time allocated to oral presentations, necessary for logistical reasons, also makes it impossible for presentations to flow from and refer to those briefs. It certainly precludes close analysis of cases and treatises.

In the Vis moot, where there are separate awards for written and oral stages, many judges would also be reluctant to penalise participants in the oral stage based on limitations in briefs completed months before and often when students had only a rudimentary knowledge of novel legal areas such as conflicts, arbitration and the CISG. A related reason is that the aim is for students to continually learn more and refine their arguments. Nevertheless, these factors put an undue emphasis on oral advocacy, which in the context of any international competition, imposes one of a number of systemic biases in favour of common law style adjudication. It is also unrealistic as even in those jurisdictions, judges usually have a backlog of judgments to write and will concentrate heavily on written material in making final determinations.

Where the written briefs are concerned, a critic could also suggest that the style of presentation adopted in moots will often depart from the approach taken in practice. Even if that is the case, they will at least afford the students a relatively rare opportunity for sustained research and writing on a complex issue in a group format. Furthermore, the particularly strong results of German teams in the written stages of the Vis moot, invites comparative analysis of that system's scientific approach to the development of legal writing competence, hence providing a basis for self-evaluation in other systems. There is no reason why that reflection might not lead to long-term changes in practice in those systems.

One key criticism that pervades much of legal education worldwide is that many moot competitions downgrade the importance of facts, even in appellate advocacy. [FN35] First instance courts or arbitrations in the real world will consider complex issues of conflicting evidence but even appellate decisions will look at the court record, analyse fact/law distinctions and consider reasonableness of fact-finding methodology. [FN36] The criticism is not one which can be legitimately levelled against the Vis moot. It invariably emulates real world situations where conflicting and ambiguous communications must be pored over and debated. The most impressively researched and immaculately delivered legal argument can comprehensively be rebutted by a better argument based on nothing more than a close analysis of the facts. In one year, the essence of the moot was merely a preliminary hearing about a request for discovery. The program also invites participants to make formal requests for clarifications. Students are asked to analyse the Problem at the outset and may seek answers to questions of fact. This is an important element of legal practice not generally addressed in core curricula where facts are usually given.
7. THE UTILITY OF COMPETITION AND ITS POSSIBLE EFFECTS ON THE STUDENT EXPERIENCE

I now turn to the second broad category of reasons for promoting pedagogy over competition, namely, that it is questionable in the context of any student simulation program to put too much store in the results attained. It is true that many aspects of life are competitive. Competitive instincts are also to be expected, particularly among elite students who have competed to get to premier law schools and then to be selected for small group endeavours. Within teams, individuals may be competing for positions as speakers. Students may have already competed locally to enter the program. It is natural for all who enter to hope to achieve a place in the finals at least. It is natural for students who enter the program to aspire to a speaking position. None should feel ashamed of this but, in my view, all should put these feelings in proper perspective.

Before exploring this further, it is worth noting that a comparison of competitive and pedagogical elements presumes that a particular event has features of both. Yet where determination of an optimal learning strategy is concerned, there need be nothing inherently competitive in mooting even though it simulates an adversarial endeavour. [FN37] A moot program could be organised in a totally non-competitive spirit, with personalised confidential feed-back after each presentation. Whatever its relative value as a teaching mechanism, such an event may not have attracted the interest that Vis has attracted. That interest is itself of immense value, bringing so many people together to explore differences and similarities in their legal systems and to learn more about the valuable work of UNCITRAL.

The next general point is that even if a moot is to have some competitive features, there can still be considerable variations in emphasis, both officially and individually. In particular, competitive elements can be arranged so as to minimise the disincentives to learning. This has occurred with the Vis moot. To some extent, it was inspired by experiences of the Jessup Moot. Yet rather than slavishly copying that program, the founders began with one excellent modification by eschewing national play-offs and guaranteeing that all who enter are assured of the benefit of the Vienna experience.

Nevertheless there are at least some competitive elements and participants need to decide how much importance to place on these. [FN38] I would argue that this should be minimal. Undue concern with the competitive elements by coaches or students can too often be largely ego driven or forced on them by others. Such an approach is based on faulty analysis of the process as an indicator of merit. It is also a poor guide to what individual students actually learn. It is an even poorer guide to how coaches actually perform in their own obligations. It must also come at some considerable cost to the potential for learning and teaching for students and coaches respectively.

Dealing with the last issue first, the most crucial reason why an unduly competitive spirit can negate a significant part of the learning experience is that an optimal competitive strategy would rarely if ever be the same as an optimal teaching and learning strategy. For example, an optimal competitive strategy would often be concerned to find and concentrate attention on a small team rather than give the opportunity to moot and learn to a wider group. An unduly competitive strategy would also provide a temptation to some to feed ideas to students and
have them prepare “party piece” speeches honed to perfection over time. This is all far removed from the dynamics of real advocacy and does not allow the students to feel real ownership of the work presented. Such behaviour is not inherent in all forms of competitive spirit and may not be displayed by the majority of, or indeed any, coaches. At the very least, however, these strategies may appeal to some who are most interested in winning a competition and deserve analysis as a result.

I now turn to the reasons why results are questionable indicators of merit or of learning outcomes. Where merit is concerned, one reason for results being a poor guide to relative ability is that the rules cannot be made to be wholly fair to non-homogeneous students. As to fairness, I speak again as an Australian. For example, my students are always allowed to moot in their native language. Yet we struggle to order coffee, tequila or opera tickets in Vienna in a foreign tongue, let alone moot complex international law problems. We are regularly humbled by seeing the many non-native English speakers who work hard to develop their skills in what is at times their third, fourth or even fifth language.

Secondly, as Australians, my students come from a legal tradition where mooting is a respected part of the curriculum. Other students who come from backgrounds where there is a purely expository legal tradition are thus further disadvantaged. Because of the strong moot culture in my jurisdiction and because of a healthily anti-authoritarian disposition of Australian students, our law schools can also readily find at least one or two faculty members who are interested in devoting considerable energy to coaching. We may not be better teachers but we at least operate in an environment where students rightly voice their demand for conscientious and considerate behaviour. In this regard, demand may even have some impact on supply. Once again, there is little fairness in comparison when facing teams who are self-coached or who only have access to recent alumni for that purpose, although many of these are highly committed and extremely able coaches, notwithstanding a lack of teaching or legal experience.

There can also be significant differences in the ages and educational experiences of participants. In most countries, law is a first university degree after high school. This is not the case in the United States. Furthermore, the rules permit LLM and doctoral candidates to participate if they have not been admitted to practice.

Variations in team size can also have significant effects. A larger team might be expected to do more comprehensive research. A smaller team might be expected to have a higher per capita amount of moot practice sessions. Teams in Vienna tend to vary between two and twelve students and between zero and four coaches.

Thirdly, while Australian law libraries are not impressive by US or some continental standards, they compare favourably with those of many Vis participants, particularly those from developing countries. Again, preparation based on an abundance of resources cannot be fairly compared to work produced without such support, although the internet is helping redress this concern, particularly with some of the specialty web-sites that have developed in the field of international trade law, some inspired by the moot itself.

Finally, market principles suggest that a trip to Europe will be a particularly strong incentive for students from such far reaches as Australia, many of whom have not previously travelled overseas. Some European participants on the other hand, merely look forward to a short car trip to a city they have visited many times.
before. I do not find it hard to drum up interest in a trip to Vienna where we might travel via places such as Paris, Rome, Berlin or Tuscany. [FN39]

These factors relate to the disparities in preparation and incentives for different types of student. Once again, it needs to be said that it is impossible to judge fairly non-homogeneous teams in terms of starting attributes.

The next group of issues relate to the inherent subjectivity of moot judging. If it is not possible to judge even homogeneous teams fairly, then it is even less meritorious to put undue emphasis on results. This is not a critique of the Vis or any other specific program, although I do not shy away from reminding any prospective moot judge of the obligations to prepare properly, follow the rules of the competition and give all participants the opportunity to display their true abilities. Nevertheless, just as teachers, coaches and students may have different levels of commitment and ability, so too will arbitrators in the real world and in an event such as this.

Some of these problems of judging can at least be related to aspects of life in legal practice and can hence be inducted into the learning process. Most Vis arbitrators prepare extremely thoroughly and I am pleased to say that this tendency is growing exponentially. Nevertheless, it still remains the case that some students, like many advocates, will find that they are facing a panel with at least one adjudicator with limited knowledge of the issues. In legal practice, this is simply a challenge that needs to be properly understood and prepared for. In that environment, it may be less of a problem in terms of outcome, as long as the adjudicator gives the advocate sufficient time to develop the argument, although this may come at considerable cost to the litigants.

In a moot competition, where it is often the case that there is much to cover in something like a twenty minute period, the less adjudicators know of the issues, the harder it will be for them to judge participants fairly. Advocates will have a difficult choice between “dumbing down” the argument so as to be understood, with the possibility that the arbitrator will see it as superficial, or alternatively, plowing ahead with a sophisticated argument that may fly well over the head of the under-prepared arbitrator. In the Vis moot, where there are three arbitrators who each ascribe their own marks, the problem is often exacerbated because the three arbitrators may have very different attributes. A strategy that will work best for one may be counterproductive for another.

I suggest to my students that, rather than be annoyed by this, they should accept it as a wonderful training exercise in what may be the most challenging form of advocacy in a competitive sense at least. [FN40] In the real-world, adjudicatory panels with multiple members generally follow a majority rules approach to decision making. If one or two judges are clearly against you, you can and should ignore them if you can identify a “winnable” majority. In the Vis moot, where each arbitrator gives their own mark and where finalists are determined by aggregate marks and not win-loss records, an advocate has to try and impress all arbitrators equally.

A related problem is that it is impossible to devise a neutral judging scheme. A system which aggregates marks, as is the case with the preliminary rounds of the Vis moot, is different to a system based on knock-out one on one events, which occurs during the finals. Neither is inherently better as a measure of relative ability.
A knock-out system has problems in treating both sides equally when the facts in the problem are not completely balanced. As balance is often in the eye of the non-homogeneous beholder, I would argue that no hypothetical problem can ever be made truly balanced. If so, this also makes the luck of the draw in match-ups crucial, particularly if used during the preliminary rounds when there are a large number of teams.

An aggregation system also has problems. It relies on the proper application of some common standards among a large number of arbitrators. This is hard to achieve. In addition to the disparities in background, ability and preparation referred to above, there is also the fact that people tend to have fundamentally different views about marking levels. Some judges will tend to award high marks to all, feeling that the loser should not be insulted with a low mark, no matter how low the standard. Others find it hard to ever award close to full marks no matter how good the quality. Both approaches are problematic but observable. In an event that in the past has required something in the order of a 43 average out of 50 over four moots to reach the finals, an aberrant arbitrator can unduly limit a team's results.

The Vis moot wisely seeks to respond to this problem with written guidance to arbitrators as to the standard to be expected within each of a defined series of point ranges. Experienced arbitrators are also placed on each panel wherever possible. That is probably as much as can be done but it will not guarantee consistency. Even with an experienced chair, marks are likely to be most volatile in the first round, as inexperienced arbitrators have little frame of reference for what is essentially a comparative evaluation. Many conscientious arbitrators try and sit in on another moot before their own session to obtain such guidance, certainly a desirable approach, although one session among many may not be a sufficient guide.

If there are problems in trying to identify an optimal approach to marking, there are likely to be additional problems if marking methods change as the event progresses. As indicated, the Vis finals are conducted by way of knockout and any imbalance in the problem is likely to be more influential at this stage. There are a number of reasons for this. Being a knockout stage, it pits claimants directly against respondents for the first time in a results sense. In addition, the adjudicators often are more prestigious and coaches are not involved as arbitrators. This will have many benefits but can have the downside that at times, arbitrators in the finals may lack experience with the standard of the argument overall. An obvious argument to experienced coaches may sound fresh and compelling to a one off participant.

Again this is not a critique of the program as developed. It is an explanation of the many reasons why the competitive determinations are not the best guide to the achievements of participants. Most importantly, however, all of these arguments pale into insignificance if set against a more meaningful set of goals for the program, namely those built around optimal learning for all participants. In this regard, an independent adjudicator cannot possibly tell how much an individual student has learned and progressed throughout the period of the program. For example, how should we compare the outcomes of an excellent student who has learned little, with a moderate student who has learned much? Why would we even wish to make a comparison, other than to determine what might be achievable in terms of learning? If learning is the real goal, only the students and coach can be the judges of the achievement. Results in later law subjects can also be objective
evidence of improved skills, but those results cannot be measured at the Moot itself. The learning outcomes of students who do not speak in Vienna are obviously not capable of measurement by adjudicators.

Once again, I adopt a dubious order by speaking to students first. If the marks are not a fair guide to student performance, they must surely be even less so where coaches are concerned. Even putting aside all the abovementioned factors, coaches should be wary of presuming that results reflect their own abilities when much depends on the levels of ability and motivation of the students themselves, although coaches certainly can influence motivational levels and can hopefully facilitate effective learning. Nevertheless, coaches themselves do not moot and are not judged by arbitrators. Most importantly, we do not generally judge teaching performance by aggregating the marks obtained by our students. If teacher evaluation is part of our educational culture, which I strongly support, we generally rely on anonymous analysis of our teaching abilities by students and peer evaluation of our subject content. Graduate assessment after years of practice is also seen as a particularly valuable guide to educational theorists. Self-assessment is also an appropriate tool when used in conjunction with these other measures.

Finally, if coaches cannot justifiably engage in ego trips based on moot performances, even less so should supervising professors, deans or university rectors and vice-chancellors. Yet I imagine that funding decisions are often taken with prospective glory in mind.

The foregoing discussion has sought to challenge the value of the interpersonal competitive elements of any moot event, particularly the Vis moot. It has asserted that the event should instead be about the opportunities for learning and teaching. I turn now to outline my personal approach to that task.

8 A PERSONAL STRATEGY

The foregoing discussion is not intended to suggest that all competitive aspects should be counteracted or ignored. A fair balance can reasonably be struck, although the reader may legitimately take issue with my chosen balance. My approach is to say that if students concentrate on learning, an indirect spin-off is that their performance is likely to be reflected in better results overall. Thus my approach, which I explain to my students at the outset, is to concentrate on treating the event as a subject aimed at benefiting all participants. In my case I take twelve students into the program each year. I suggest my approach will indirectly have them introduced to about 80% of what will make them competitive. I consciously avoid engaging in the other 20%.

I advise them that I am interested in a number of direct goals. The first is to introduce them to various ideas about advocacy and legal argumentation and provide them with intensive training in such techniques. The second is to challenge them to develop an innovative set of ideas and arguments about the problem. While there is likely to be a limit to innovative legal arguments when over ninety excellent teams work on the same problem for five months, in my experience, the same is not true with factual arguments. Here I seek to explain the typical deficiency of legal education in training students to understand and develop factual arguments in the face of conflicting evidence.
I ask the students to self evaluate the quality of their argument against those of other teams. This is not for competitive reasons. It is simply because there is no objective way to determine when a case is fully prepared as you cannot know the arguments you have not thought of. I suggest that completion of the written documents is effectively the start and not the end of the preparation. A client would expect a lawyer to continually assess the quality of argument. Moot practices provide an ideal setting to test how effective particular approaches are likely to be. If the night before a real case you feel that your strategy is wrong, you would change it. I encourage my students to take the same approach in Vienna, subject to their social obligations discussed below.

The third goal is to learn how to work productively and harmoniously in groups, another skill undervalued at university but crucial in most forms of interaction, whether professional or social. A particular benefit is to have students subjected to the scrutiny of peer pressure from their team mates, thus learning the ability to be critical and to accept criticism while still maintaining a viable working relationship. Choosing twelve students is certainly not an optimal competitive strategy. I choose a large team simply to give an opportunity to a wider number of students. While twelve can certainly do more comprehensive research than two, trying to get twelve students to write one common paper leads to some inevitable tensions. There is also the fact that twelve students cannot moot in Vienna. [FN41] I invite the students to make as many decisions as possible collectively. If they wish to do so, they may select the team and determine who speaks and how often, although they are also allowed to delegate this task to me, which unsurprisingly has been the norm.

The fourth aim is to have the students gain the benefits of an intense analysis of the subject matter and comparative technique. The fifth is to learn to overcome feelings of inadequacy and see them as counterproductive. I will often venture to suggest that such feelings are even shameful in the context of the attributes and privileges of virtually all participants. Nevertheless, in writing this piece and receiving comments from one very able student, I have reflected even more than normal on my own contribution to students' insecurities. By continually challenging their reasoning and inviting continuing re-evaluation and analysis, I have come to understand that students will feel that they are further away from the ideal than would normally be the case in an undergraduate law exam. It saddens me that education systems, at least my own, breed insecurity in such circumstances rather than humility. Instead of being in awe of the breadth and depth of knowledge and ideas, we are perpetually in fear of our ignorance.

My primary technique is again to question, hence a recent knick-name as "Professor Why", although I tend to be more tyrannical about the required leisure activities addressed below. Where mooting is concerned, at the elementary level, the questioning technique aims to show students the difference between a reasoned argument and a mere assertion, a common failing in law exams as well as advocacy.

Such questioning also seeks to teach students about the fundamental difference between moot advocacy and debating. In a debate, the student is not interrupted or challenged by the adjudicator. Hence the student is in control over the presentation. In a moot as in real legal practice, the advocate must be ready to discern and respond to the concerns of the adjudicator. This makes it an inherently dynamic...
endeavour. True preparation means appropriate preparation for any reasonable
eventuality, and if the stakes are high enough, even some unreasonable ones.
Students are asked to moot with the aid of their own short outline of issues and not
try and use a prepared speech. This is a clear pedagogy choice as it means students
are encouraged to compose a fresh presentation each time. If they are off balance on
any day, this may lead to lower evaluation so it is not a strategy for those obsessed
with winning.

The dynamic element means that students should be ready to think on their feet,
although this is metaphoric with the Vis moot, where the process might be more
appropriately described as thinking by the seat of the pants (or dress!) That process
of thinking means students should not be frightened of silence. If a question is
challenging, students should be prepared to take a moment to think it through. This
has a significant psychological element. The training process should ensure that
students learn not to feel inadequate and learn not to concentrate on how they are
perceived during such moments, but instead, simply try their best for the party
whose interests they represent.

In terms of speaking styles and skills, I encourage people to essentially be
themselves, save for the fact that most are either predisposed to overstate or
understate in terms of style. Shy students can profit by being encouraged to be
more confident. Brash students can be encouraged to tone down. I reflect on the
possible relationship between moot judging and judging in job interviews. This
limited attention to style is again a conscious choice to reject one aspect of a
competitive strategy. It is also a personal bias about the more important attributes
of good mooting. A related factor is that when I judge moots in Vienna, I try not to
judge English competency, which I know is a great worry for many non-native
English speakers. My strongly held view is that if a participant has presented a
good argument in an understandable manner, no account should be taken of any
fault in grammar or elocution.

I also encourage students to reflect on what they have found to be good and bad
in their legal education to date in preparing them for their own role as oral
communicators in the moot. I suggest that listening is a difficult process. Most
university students actually take in about ten per cent of a lecture, although ten per
cent was well beyond me in my student days and this is still a challenge when I go
to conferences. Any communicator has a responsibility to try and be engaging.
Voice modulation is a start and students need to learn to “underline” words with
their voice and really emphasise and sell their most innovative and compelling
arguments. Students need to learn to judge the body language of arbitrators and
determine as they are speaking whether they are being understood and are being
convincing. If not, they need to adapt their presentation on the spot. Again there
should be no place for prepared speeches.

Many choices are guesses as to what may be more convincing. Should the
presentation outline the facts or at least ask if the arbitrators would like this?
Should it concentrate on doctrine, facts, authorities or practical sounding solutions?
Here I seek to point these choices out to students and let them thrash out the
possibilities, although I see it as my duty to ensure sufficient attention to the
practical and factual, simply because of the students generally poor preparation for

56

Thematic Moot Court: Brief Notes and Materials (September 2009)
this in most forms of substantive legal scholarship, and also because of the strong bias towards the practical in much of modern commercial arbitration.

Whatever one's goals ultimately are, it is worthwhile to assess their degree of attainment. If the formal competitive results are not the best guide to outcomes, what else might be utilised for that purpose? I suggest to my students that they should be the best judges of that more fundamental achievement. For a moot student, I ask them to evaluate what they have learned in terms of substance and self-confidence, and how they rate the quality of arguments they developed in the light of what they have heard from other teams throughout the event, including the finals. For the latter reason, I have strongly, and so far successfully, discouraged all students from listening to any other team until they are knocked out of the competition, even though this is expressly allowed and is rightly stated to be one valuable form of learning. It is another conscious way in which a winning strategy is eschewed.

I also suggest that the ability to judge one's own performance is a very important aspect of legal practice, and hence is a skill worth experimenting with in the Vis moot. This is so for a number of reasons. First, any litigator has the facts and law of the case as given. Both sides are never completely even. Thus win/loss ratios cannot be a clear guide to ability as a lawyer, given that all do not start with equal chances. Secondly, from the client's perspective, not all wins and losses count equally. Many formal winners lose much through the legal process and some formal losers gain. Money earned by the lawyer is also not an ideal indicator of ability even if the client's aspirations are ignored, particularly in terms of its dependence on field of practice and firm within which practice is conducted.

A whole range of issues might need to be considered in determining when a lawyer has done a good job or not. For example, what original advice did the lawyer give? Was the client properly prepared for the events as they unfolded? Was the strategy adopted consistent with the client's wishes and best interests? Did the litigation need to proceed? How were any settlement offers made or responded to? What orders were made by the court or arbitrator? Did the advocate help shape these to the benefit of the client? What costs were born by the client? Were these fair and reasonable? How long did the process take and how disruptive was it for the client? How sensitive and supportive was the lawyer in respect to these aspects? If these factors are vital, accurate self-assessment capabilities are necessary.

9- CONCLUSION

In this article, I have sought to suggest that the Vis program is a unique process with immense potential as a learning, cultural and social experience. No matter what the particular participant's home jurisdiction, the Vis moot provides a wonderful opportunity to learn about important substantive areas, to think about at least some of the issues of globalization and legal systems, to embark upon a comparativist analysis, to develop research skills, group skills, self-confidence and public speaking ability, to learn to respond quickly and effectively to verbal challenges, to integrate issues of fact more fully into legal analysis than is commonly the case with much traditional legal education and to consider the essential attributes of compelling legal arguments.
To optimise the benefits, coaches and students need to consider and respond to issues of optimal teaching and learning respectively. In particular, each must determine how they will respond to the inevitable competitive pressures and opportunities. What is right for one may not be right for all and I have not sought to set out an unduly prescriptive manifesto. In this intensely personal and reflective piece I have merely sought to set out my ideas based on my own experience, in the hope of stimulating thoughts and ideas in others. I look forward to many more years of debate on such issues, particularly if held in the convivial environment that beckons in Vienna.

[Footnotes 1 to 7 omitted.]

[FN8]. One irony is that the supposedly more practically oriented common law education is taught primarily by non-practitioners while the supposedly more scientific approach in the civilian system is commonly taught by professors who spend the bulk of their time in private legal practice.

[Footnotes 9 & 10 omitted.]

[FN11]. That aspect has been criticised from the outset. Joel Seligman, ...

A related contentious aspect of case method is the methodology of questioning applied by many of its proponents. Case method unfortunately came to be known in the US as Socratic dialogue. Yet Socrates would have had little time for the Sophistry and paternalistic and authoritarian modes epitomised in the movie The Paper Chase, based on the novel by John Jay Osborne and Scott Turow's book One L, based on his first year law experience at Harvard Law School. He also had a different aim in his technique, namely to elicit latent ethical beliefs through questions. See Heffernan W C, “Not Socrates but Protagoras: The Sophistic basis of legal education,” 29 Buff L Rev 399 (1980).

[FN15]. Valcke, op cit footnote 5, p 131-2, points to the growing use of Socratic elements in civilian teaching. Merryman, op cit footnote 5, p 865, points to developments in South America through co-operation with US institutions. There is also the particular situation of mixed jurisdictions such as Louisiana and Quebec.

[FN16]. The consistently strong results of civil law teams in the written phase of the Vis program might raise an interesting challenge for common law coaches to learn more about alternative styles of written legal communication, a point repeated below. Common law universities might also seek to introduce legal writing courses if they have not done so.

Footnotes 17 to 30 omitted.

[FN31]. I would admit that this criticism is very much from a common law perspective. If the civilian view of law as coherent science is accepted, analysing a range of legal areas from an identical methodology is not problematic.

Where quality of common law teaching is concerned, some comments in US literature are unlikely to be atypical. For example, Robert M Hutchins a former Dean of the Yale Law School suggested that the typical law professor “has never thought about legal education. He has thought about law.” ...

Footnotes 32 & 36; Footnotes 38 & 41 are omitted.

[FN37]. Here I am using “adversarial” in the sense of contest and not in reference to the common law system.
Review Exercises

1. List down the points stated in Reading 4 regarding the contribution of moot court in legal education and state whether you agree or disagree along with the reasons thereof.

2. Briefly state the arguments raised in Reading 3 against the views of Judge Kozinski.

3. In Reading 5, Graves and Vaughan regard the Moot as a pedagogical tool and state that the article by Professor Jeffrey Waincymer [Reading 6] “makes an excellent case for the predominance of pedagogy over competition.” On the other hand, they hold that the Moot “actually represents a competition between teams of students from individual law schools, as well as a competition between individual law students.” How can you reconcile the statement that mooting involves competition with the position that it is primarily pedagogical?

4. Read the following excerpt from Reading 5:

   The MacCrate Report, produced by an American Bar Association Task Force on Law Schools and the Profession, identified ten fundamental lawyering skills: (1) problem solving; (2) legal analysis; (3) legal research; (4) factual investigation; (5) communication; (6) counselling; (7) negotiation; (8) familiarity with comparative litigation and alternative dispute resolution processes; (9) organisation and management of legal work; and (10) recognition and resolution of ethical dilemmas.

   Which skills, in your opinion, can be considered as lawyering skills that are required in appellate advocacy? State your reasons.

5. Waincymer (Reading 6) states that civil law is “primarily concerned with deductive conclusions from broad principles” while the common law is “said to be concerned with inductive conclusions from decided cases.” He further states that civil law “is sometimes asserted to be about the higher intellectual analysis of the legal system, on the same par with other academic pursuits of philosophy, sociology and economics.” Do you agree with such conception of the common law as predominantly practical and the civil law system as predominantly scientific? Why or Why not? Do you think that there can be variation in the degree of focus given to mooting in the two legal systems?

6. Waincymer (Reading 6) relates “the predominance of the case method approach in the US and the expository or magisterial style of civilian legal
education” in continental Europe with the features of common law and civil law. Comment.

7. In spite of the difference between the common law and civil law systems “in the respective emphases they place upon abstract principles and concrete factual observation as systems,” Waincymer (Reading 6) holds that “they share the same problem-solving” and have common features in the combination of “abstract and concrete forms of reasoning.” He further states that “[e]ach system aims at solving real life problems and must therefore consider the relationship between the abstract and the concrete.” Relate the relationship between the “abstract and the concrete” with the lawyer’s tasks in fact investigation, legal investigation and legal analysis.

8. Relate the Ethiopian legal system and legal education in your law school with the following excerpts taken from Reading 6:

- Civil law is primarily concerned with deductive conclusions from broad principles, and the common law is said to be concerned with inductive conclusions from decided cases.

- Common law is also sometimes seen as being about professional training, while civil law is sometimes asserted to be about the higher intellectual analysis of the legal system, on the same par with other academic pursuits of philosophy, sociology and economics.

- The suggested distinction between the practical and the scientific is seen as explaining the common law's development of interactive techniques such as the case method approach in the US and the expository or magisterial style of civilian legal education.

- The Corpus iuris of Justinian and other codified principles and rules have tended to lead to a systematic methodology of teaching and writing.
2.1- Specific Learning Outcomes

At the end of this unit students are expected to be able to:

a) explain the *legal method* in relation with effective brief writing and oral argument;

b) identify legal issue/s that determine/s the outcome of a case;

c) break down relevant provisions into their constitutive elements (of conditions and consequences);

d) contrast conjunctive, disjunctive, aggregate and balancing structures of legal provisions;

e) identify the facts and the fulfillment/non-fulfilment of the elements of a legal provision to resolve a legal issue;

f) use the elements of a legal provision in writing down the structure of a brief;

g) explain the relationship between syllogism (in logic) and rule-based legal reasoning;

h) explain the usage of logical and coherent formats (e.g- TREAT and IRAC) in the organization of legal writing;

i) discuss weight given to legislative history (legislative intent) in legal analysis;

j) contrast adversarial and objective legal writing;

k) Identify the sources and materials relevant for Jessup memorials.

**Expected number of learning hours (Weeks 2 and 3):**

- Class hours: Two Hours per week
- Student independent workload: Four Hours per week
2.2- Unit Introduction

The following brief description of the legal method by Murray and DeSanctis shows the three categories of functions involved in lawyering, i.e. research, analysis and communication:

“‘Legal method’ is an expression to describe the fact that the practice of law at all levels and in all places of employment requires a methodology whereby each participant in the process must properly research and find the law, interpret the law, explain the law to others, and, if that is your role in the legal process, to advocate a certain interpretation of the law that may require the law to be modified, revoked, or extended. This process fits within the three general terms of the legal method: research, analysis, and communication. …” 1

Although moot courts focus on the third element of lawyering (i.e. communication), the effectiveness if this (third) element is determined by the two elements (i.e., research and analysis) that precede communication. In effect, preparation (which involves research and analysis) is indispensable before a lawyer writes a brief and conducts oral arguments.

Students are expected to revise their readings on legal research methods, legal writing and Appellate Advocacy & Moot Court so that they can have effective preparation and research before they write the appellate brief, cassation petition, etc. as required in the moot case. The required readings included in this unit are thus merely among the readings that students are expected to conduct.

Legal provisions have structure. Setting aside the contextual arrangements of provisions that stipulate principles, details, exceptions, etc. most legal provisions can be dissected into their constitutive elements that state the conditions that must be present or absent for a given legal consequence (such as a claim, sentence, etc.) to follow. Such analysis is not discussed in detail in this unit (beyond a brief revision) because earlier courses and case analyses during the preceding semesters are believed to have given students the opportunity to have mastered the art of

analyzing elements of legal provisions and relating these elements to the facts of a case so that a given legal issue can be resolved. Elements of legal provisions determine the structure of legal writing because in the course of exposition and argument regarding the fulfillment or absence of the elements of the legal provision under given factual circumstances, we are expected to follow the structure of the legal provision as discussed in Reading 2.2.

A rule, as defined in Reading 1, is “an abstract or general statement of what the law permits or requires of classes of persons in classes of circumstances.” Moreover, rules stipulate predictable consequences of given actions. We can thus rephrase and analyze legal rules by identifying the factual conditions that must exist and the legal consequences that follow if these conditions exist.

In Reading 1, Schmedemann and Kunz discuss the structure of legal rules and state techniques that can be used to identify the factual conditions and legal consequences embodied in a provision. The reading further indicates how we can connect the elements to each other, which may be “conjunctive, disjunctive, aggregate, balancing – or a mixture of these.” The reading also analyzes legal consequences. These concepts are not addressed in detail (beyond a brief revision) because earlier courses and case analyses during the preceding semesters are believed to have given students the opportunity to have covered the skill of analyzing elements and relating them to the facts of a given case so that a legal issue can be resolved.

The elements of legal provisions determine the structure of legal writing because in the course of exposition and argument regarding the fulfillment or absence of the elements of the legal provision under given factual circumstances, we are expected to follow the content of the legal provision. Reading 2.1 discusses the need to use the elements as outline in the formulation of the structure of the brief. Moreover, the Reading briefly highlights rule-based reasoning without going to other forms of legal reasoning (i.e. analogical reasoning, policy based-reasoning, etc.).
In “analogical reasoning” the case is compared with another case which involves similar issues, comparable facts and factual circumstances. This can, for example, be used forward arguments that invoke earlier interpretation in a decision of the Federal Supreme Court Cassation Division on similar issues. Analogical reasoning may also take the form of “converge analogical reasoning” which aims at indicating significant differences between cases with a view to seeking a different relief from a case decided earlier and that has a binding or persuasive authority. Policy-based reasoning is “most often used to buttress an argument that already is supported by primary authorities” and shows that the argument is not only based on the law but also because “the result satisfies public policies” that are important to the area of the law that governs the case.

Reading 2.2 (organization of legal writing) introduces the format known as TREAT: i.e. Thesis (a lawyer’s position on an issue), Rule, Explanation of rule, Analysis, and Thesis as conclusion. It also introduces another structural format IRAC (Issue, Rule, Analysis, and Conclusion). The readings on editing tips (Reading 2.3) and legislative history (Reading 2.4), research strategy and determining the adequacy of the research conducted (Reading 2.5) and the contrast between adversarial and objective legal writing (Reading 2.6) are intended to be used by students in the course of their research, analysis and brief write up.

2.3- Tasks: Weeks 2 and 3

a) As a follow-up activity from Task 4 of Week 1, identify the legal issues of the case.

b) Relate the elements of the relevant provision/s with the facts of the case.

c) Team-up with another student so that you can split the issues between two of you and start preparation for writing the brief.

---

2 Michael D. Murray, Ibid, page 10
3 Ibid
4 Ibid
2.4- **Readings: Weeks 2 and 3**

Reading 1: Schmedemann & Kunz, *The Structure of Legal Rules*

Reading 2: Murray & DeSanctis (Readings 2.1 to 2.6)
- Rule of law and legal reasoning
- Organization of legal writing
- Editing tips
- Legislative history
- Strategies for research and determining when you are finished
- Adversarial legal writing

Reading 3: Diane Penneys Edelman, *[Research for Jessup memorials]*
The Structure of Legal Rules

A. Introduction

The law is formed of rules. A rule is “an abstract or general statement of what the law permits or requires of classes of persons in classes of circumstances.”5 …

Rules of law … specify predictable legal consequences of particular actions; this predictability allows people and other legal entities … to plan and order their affairs in reliance on the law. Rules of law give guidance to disputants and judges as to how to resolve disputes, so that similarly situated disputants obtain similar outcomes.

B. Stating Rules in If/Then Form

Even though legal rules may come in many forms, they all can be rephrased in an If/Then statement as follows:

IF the required factual conditions exist

THEN the specified legal consequences follow.

The IF-clause contains words or phrases describing a class of situations law makers wished to address. Typically, the IF-clause refers to one or more actors (whether individuals or legal entities such as [companies]6), one or more actions [acts or omissions] and circumstances under which the actions occur.

The THEN-clause identifies the legal consequence that follows when the factual conditions are met. The consequence may be a benefit to or burden on a specified party and it may be multi-faceted. Often a benefit flows to one party, and a burden is imposed on another, as when one is ordered to pay monetary damages to the other.

The analytical task of the lawyer is first to discern the IF/THEN statement from the legal provision, and then determine how the client’s facts fit the factual conditions set out in the IF-clause. Because lawmakers do not always phrase the law according to this pattern, often you will need to distill your own IF/THEN statement. …

1. Separating Factual Conditions from Consequences

Stating a rule of law in if-and then-clauses is an important step in legal analysis. If you do not know what factual conditions are required, you might apply an inapplicable rule to your facts. Or you might misperceive the legal consequences of a client’s situation.

5 Steven J. Burton, An Introduction to Law and Legal Reasoning 13 (1985)
6 “… corporations” in the original
Sometimes the rule as originally stated consists of two clauses. If so, evaluate whether the factual conditions and legal consequences are in separate clauses; the words “where” and “when” often mean “if.” If the rule is not so constructed, you will need to identify each concept as a factual condition (actors, actions, and circumstances) or legal consequence, and group them accordingly.

For example, consider the following rule:

“If a person not admitted or licensed to practice law in this state renders legal advice or counsel to another, the unlicensed practitioner generally shall be guilty of misdemeanor, upon the charging of fee, and punished therefor.”

This rule has two clauses, suggesting an if/then structure.

IF a person not admitted or licensed to practice law in this state renders legal advice or counsel to another,

Then the unlicensed practitioner generally shall be guilty of misdemeanor upon the charging of fee, and punished therefor.

But the then-clause contains a factual condition (charging of a fee), which needs to be moved to the if-clause. The result is as follows:

IF a person not admitted or licensed to practice law in this state renders legal advice or counsel to another and charges a fee,

Then the unlicensed practitioner generally shall be guilty of misdemeanor and punished therefor.

Some legal rules are stated in complex and wordy sentences. Thus, the next step may be to carefully paraphrase the rule, making sure that you do not remove meaning from the rule, in an effort to make it easier to work with.”7 A legal dictionary can help you to determine which words carry legal meaning, what that meaning is, and which synonyms you can safely use in your paraphrasing. Where the if-clause is long and cumbersome, you may find the sentence easier to read if you place the then-clause before the if clause. This rewording may clarify the rule for you.

In the example, you could delete “admitted” or “licensed”; you also could delete “advice” or “counsel.” The then-clause refers to both guilt and punishment; it also uses a legalese term (“therefor”). One simpler paraphrasing reads as follows:

IF a person not licensed to practice law in this renders legal advice to another and charges a fee,

Then the unlicensed practitioner generally commits a misdemeanor.

2. Dealing with Rules Exceptions

Some rules state not only factual conditions necessary for the legal consequence to follow, but also factual conditions that render the legal consequence inapplicable. These rules take the following form:

IF some factual conditions exist

---

7 See generally Richard Wydick, Plain English for Lawyers (4th ed.) 1998

Unit 2: Research and Analysis
THEN the specified legal consequences follow,
UNLESS other factual conditions exist.

The UNLESS-clause contains exceptions to the IF-clause. Fortunately, a rule in IF/THEN/UNLESS form can be stated in a simpler IF/THEN form in the following way:

IF some factual conditions exist
    and other factual conditions do not exist,
THEN the specified legal consequences follow.

For example, consider the following sample rule and elaboration:
If a person not admitted or licensed to practice law in this state renders legal advice or counsel to another, the unlicensed practitioner generally shall be guilty of misdemeanor, upon the charging of fee, and punished therefor. However, where the legal advice is incidental to another legitimate professional service and addresses only settled legal points, the unlicensed practitioner shall not be guilty of misdemeanor.

The second sentence introduces an exception, an idea that could be expressed in the unless-clause. Note that the exception clarifies why the first sentence includes the word “generally.” He is a simplified restatement of the more complete rule, using an extensive if-clause, rather than a second sentence or an unless-clause:

IF a person not licensed to practice law in this state renders legal advice to another and charges a fee, and the advice is not incidental to another legitimate service and confined to settled points,
THEN the unlicensed practitioner commits a misdemeanor.

C. Deriving Individual Elements and Consequences
Some factual conditions in IF-clauses are complex, giving rise to more than one element. An element is a factual condition that can be analyzed as a unit. Most elements can be stated in a simple clause, and some have sub-elements. Thus, once you have developed your IF/THEN statement, your next goal is to restate the IF-clause so that each element (with or without sub-elements) is stated separately.

For example, the if-clause of the rule developed above can be dissected into the following elements and sub-elements:

IF (1) a person is not licensed to practice law in this state, and
(2) that person renders legal advice to another, and
(3) that person charges fee, and
(4) the advice is not
    a) incident to another legitimate service, and
    b) confined to settled points.

Then that person commits a misdemeanor.

Then-clauses also can be broken into parts if the rule contains more than one legal consequence. For example, if the rule developed above also indicated that an injunction could be brought, against the unlicensed practice, the resulting then-clause would look like this:
Then (1) that person commits a misdemeanor (2) the unlicensed practice may be enjoined.

D. Analyzing the Rule’s Elements
The elements of a rule must be connected to each other in some discernible way. Virtually every rule follows one of four patterns—conjunctive, disjunctive, aggregate, balancing—or is a mixture of these. [The following table] summarizes the four patterns:

<table>
<thead>
<tr>
<th>Rule Structure</th>
<th>Linguistic Concept</th>
<th>Applicability of Rule</th>
<th>Characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conjunctive</td>
<td>and</td>
<td>must satisfy all elements</td>
<td>- predictable; easy to apply - relative lack of discretion in application</td>
</tr>
<tr>
<td>Disjunctive</td>
<td>or</td>
<td>need satisfy only one of the multiple elements</td>
<td>- predictable; easy to apply - relative lack of discretion in application</td>
</tr>
<tr>
<td>Aggregate</td>
<td>Some but not all of the listed elements</td>
<td>depends on weight accorded to various factors</td>
<td>- vests considerable discretion in judge; - potentially inconsistent application; - unpredictable; difficult to apply</td>
</tr>
<tr>
<td>Balancing</td>
<td>- If [x] outweighs [y], then … - Balance [x] against [y] to determine whether …</td>
<td>depends on weight accorded to each side</td>
<td>- vests considerable discretion in judge; - potentially inconsistent application; - unpredictable; difficult to apply</td>
</tr>
</tbody>
</table>

Some rules have multiple elements connected by the word “and.” The “and” connector tells you that all of the elements of the if-clause must exist in order for the legal consequences of the then-clause to apply. This kind of rule is a conjunctive rule (“conjunctive” meaning joining or coming together). Conjunctive rules are fairly simple in structure and relatively predictable in application because courts have relatively little discretion in applying them. The major rule discussed [above] … is the conjunctive rule. Note that the consequence applies only when all of the … elements are met … .

A second type of rule contains multiple elements connected by the word “or.” The “or” connector tells you that only one of the alternative elements of the if-clause must exist in order for the legal consequences of the then-clause to apply. This kind

---

8 “Exhibit 2.1” in the original
of rule is the disjunctive rule ("disjunctive" meaning separating or presenting alternatives). For example, consider the following rule:

IF the parties form a contract  
(1) involving fraud in the inducement, or  
(2) involving mutual mistake, or  
(3) contravening public policy,

Then the contract is unenforceable against the disadvantaged party.

Note that the consequences of unenforceability can occur when only one of the disjunctive elements is met.

Few rules are completely disjunctive, but many are conjunctive as to the major elements and disjunctive as to one or more subelements. For example, consider the following rule:

IF  
(1) a person is not licensed to practice law in this state, and  
(2) that person  
   a) renders legal advice, or  
   b) prepares legal documents, or  
   c) appears in court for another, and  
(3) that person charges a fee

Then that person commits a misdemeanor

The second element has disjunctive subelements, and the three elements are conjunctive. For there to be a misdemeanor, (1) and (3) must occur along with 2(a) or 2(b) or 2(c).

The third and fourth types of rules are similar in that they state factors for the court to consider; no specific factor is necessarily critical by itself. An aggregate rule requires a determination whether enough of the suggested factors have been met to justify applying legal consequences. A balancing rule requires you to balance factors favoring either outcome in order to determine whether the legal consequences apply. A rule may be purely aggregate or balancing, or it may be a mix, for example, aggregate and conjunctive. Aggregate and balancing rules are difficult to apply. Court may come to varying holdings on similar facts, so that parties seeking to order their behavior in reliance on these rules may have a difficult time in trying to predict the rule’s impact on their conduct. The advantage of these rules is that the courts have discretion to come to results called for by particular circumstances.

For example consider the following rule, which covers the same topic as the other examples presented ...[earlier]:

IF  
(1) a person is not licensed to practice law in this state, and  
(2) that person engages in significant legal advising, as determined by:  
   a) the difficulty of the legal issue,  
   b) the impact of the advice on the client,  
   c) the duration of the relationship, and  
   d) the charging of the fee,

Then that person commits a misdemeanor
This rule is aggregate as to element (2). That is factors (2)(a), (b), (c) and (d) are all to be considered together; the absence or presence of any one is not dispositive. (The rule’s overall structure is conjunctive.)

As an example of the balancing rule, consider the following example:

IF (1) a person is not licensed to practice law in this state, and (2) that person renders legal service to another, and (3) a) The harm caused by that advice – measured by any cost to the client, other loss suffered by the client, loss suffered by third parties, and fraud perpetrated on the client or others -, b) outweighs the benefits of the advice – measured by any advantage received by the client and the person’s interest in practicing a related profession -

Then that person commits a misdemeanor

This rule is balancing as to element (3). That is, the factors in (3)(a) are to be balanced against those in (3)(b) to determine whether element (3) is met. (This rule’s overall structure is conjunctive.)

E. Analyzing the Legal Consequences

Just as if clauses merit careful analysis, so too should you analyze the then-clause carefully to discern the number and nature of the legal consequence(s). Many legal rules state a clear legal consequence. In the latter situation, you must discern the relationship between those consequences. Some rules provide for plural consequences; they have conjunctive then-clauses. For example, a rule may provide for fines and imprisonment. …

Other rules provide for alternative consequences; they have disjunctive then-clauses. For example a rule may provide for a fine or imprisonment. …

Some legal rules identify the ultimate practical consequences of conduct fitting within the if-clause; that is they directly state the impact on the people involved. An example of this sort of rule is a rule providing for fine or stating that damages may be recovered.

IF unauthorized practice of law

Then fine (ultimate practical consequence).

Other rules identify and intermediate legal consequence of conduct fitting within the if-clause; that is, they affix a legal label to the conduct, which then must be linked to an additional rule which in turn determines the ultimate practical consequence. …

…Careful attention to these dimensions of the then-clause will permit you to identify properly the significance of a legal rule for your client’s case. …

… [E and G are omitted.]
Reading 2: Murray & DeSanctis


Reading 2.1- Rule of Law and Legal Reasoning

(Pages 5 - 9)

I. A Rule of Law

A process of law involves the research, analysis, and communication of a rule of law. [Rule of Law] may be defined as ... “a statement of legal principles and requirements that govern the analysis of the legal issue at hand.” ... Legal issue [is] “[a]n individual legal question implicated by a problem (a set of facts) that needs to be answered in order to render advice concerning the problem.”

Each legal issue has a rule of law that governs the analysis of the issue. You must find the correct rule and apply it to the facts of the problem to answer a legal issue you are analyzing.

II. Finding, breaking down, and outlining a rule of law

A) Sources of the law

You find rules of law ... both primary and secondary sources. As an example, if a client has a question about dog bite liability – his dog bit a Girl Scout after she rang his door bell and shouted at the dog – you would look for the rule of law that governs liability of the dog owners for the dog’s bites. The legal issue is: Will my client be liable for this dog bite injury? ...

B) Breaking down a rule of law into its parts

The first thing to do when you find a rule of law is to break it down into its parts. The elements of a rule are those facts that must be present in the case or the separate factors or conditions that must be considered and satisfied in order for the rule to be triggered. If the rule requires three facts to be present, it has three elements. If you are an advocate in lawsuit seeking to apply the rule in your client’s favor, the elements are the facts that you have to prove in order for your client to prevail. The opponents of the same suit must try to disprove (or prove the absence of) one or more elements that must prevail.

In the example above, the rule ... can be broken down into three elements: (1) a dog that is owned by the person from whom the victim seeks recovery, (2) an injury caused by the dog, and (3) a lack of provocation by the victim.

Some rules are not phrased in a form with one or more required elements. Rules can be states so as to require the consideration of a number of factors or considerations, all of which do not have to be present for the rule to be triggered as...
long as some of the factors are satisfied. Other rules are phrased as a balancing test wherein a certain number of factors are balanced against other factors to determine the outcome. You must read the authorities carefully to determine what form the rule is taking, but no matter what the form of the rule is, it is still possible to break it down into the separate parts that must be considered (or balanced) in the application of the rule.

c) Outlining the parts of a rule

The parts of a rule are often listed in outline form. One of the purposes of this is to create a ready made organizational structure for discussion of the rule in writing. The three required elements you found for dog bite liability … may be outlined as follows:

1. Ownership;
2. Injury;
3. No provocation.

… If there were a different rule … that incorporated a balancing test, for example, balancing the amount of the provocation, if any, against the viciousness of the dog’s attack, you might outline the rule as follows:

1. Ownership;
2. Injury;
3. The severity of the attack was disproportionate to the provocation.

The outline of the rule still can be stated in three parts even though this rule would work differently than the first rule because of the balancing test in the third part of the rule. You would consider whether the dog was provoked into attacking but even if provoked, the victim might still recover if the attack was disproportionately severe compared to the provocation. … If you decide that the analysis of severity and provocation is complicated enough to warrant a further breakdown of the rule into subparts, you might outline the rule as follows:

1. Ownership;
2. Injury;
3. Balancing of:
   a) the severity of the attack and
   b) and the provocation of the dog.

As will be seen below, the outline you come up with merely should be an aid to help you with your analysis and explanation of the rule. …

D) Use the outline of parts for structure

… [Y]ou could outline a memorandum about the dog-bite liability in the following way:

Thesis: The Homeowner will be liable for the injuries to the Girl Scout caused by his dog.

1. Ownership
   Sub-thesis: It is undisputed that the Homeowner owned the dog.
2. Injury
Sub-thesis: It is undisputed that the Girl Scout was injured by the dog.

3. No provocation
   Sub-thesis: The Girl Scout did not do anything to provoke the dog within the meaning of this element under the law.

III. Legal Reasoning

Legal reasoning requires a logical and orderly construction. An explanation of legal principles whether it be an informative memorandum to a client or an advocate’s brief to the court, generally requires the use of the following type of reasoning:

<table>
<thead>
<tr>
<th>Rule based reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>The answer is X because the authorities establish the rule that governs this situation, and the rule requires certain facts to be present and these facts are present, so the application of the rule to the facts produces X result.</td>
</tr>
</tbody>
</table>

This type of reasoning reflects a simple logical syllogism:

- The answer is X if there are certain facts present
- All the required facts are present
- Therefore, the answer is X.

The Converse is also true;

- The answer is X if there are certain facts present
- Not all of the required facts are present
- Therefore, the answer is not X.

Using the dog-bite example, the syllogism would be:

- The owner will be liable for his dog’s bit if he owned the dog, the dog caused the injury to the plaintiff, and the plaintiff did not provoke the dog.
- The facts indicate that the owner own owned the dog, the dog caused the injury to the plaintiff, and the plaintiff did not provoke the dog.
- Therefore, the owner will be liable for the dog’s bite.

Rule-based reasoning is the most is the most common form of reasoning in legal writing because legal analysis basically is the analysis of the applicable legal rules and how they apply to the situation at hand. The organizational framework for legal writing... - TREAT- is derived from this type of legal reasoning. TREAT stands for Thesis, Rule, Explanation of how the rule works in various situations, Application of the rule to the facts of the present situation, Thesis restated as a conclusion.

... [Students are expected to revise analogous reasoning, policy reasoning and narrative reasoning through independent reading.]
... The format [known as TREAT] discussed herein addresses the discussion of a single issue – it will be duplicated one or more times in each piece of writing to address each individual issue you are analyzing. The format is derived from the rule-based reasoning syllogism and it instructs you to introduce your Thesis on the issue in the form of a heading, provide the Rule or rules that address the issue, Explain each rule and instruct the reader about how the rules are to be interpreted and applied, Apply the rules to your client’s situation, and restate your Thesis as a conclusion.

I. Thesis writing

The TREAT method begins when you have done all of the research and analysis of an issue and are ready to report your conclusions. Your discussion of an issue will begin with your position on the issue, called your thesis. The thesis almost always is written in one sentence, and it states what the issue is and how the issue should come out based on your analysis of the issue. In legal writing, you will start off your discussion of the issue by putting your thesis in a heading.

Presenting your thesis on the issue first brings to the front the most important part of the discussion: your answer to the legal question posed by the issue. Your readers will appreciate not having to wait for your answer. Putting your thesis on the issue in a heading that precedes the analysis and discussion of the issue further highlights this critical information for the benefit of the reader. When you consider that most of the writing you will do will discuss a number of issues in the same documents, you can begin to understand that separating and highlighting your conclusions by use of thesis headings will help even the busiest reader to pick up the most important parts of your discussion quickly and efficiently.

... When drafting the discussion of an issue, the thesis is stated as the heading of a section and the paragraph that follows the heading will state the rule.

... Many practitioners, judges, or professors would prefer that your repeat or rephrase your thesis as the first sentence of the text in the section. This practice is particularly helpful if your thesis heading was a brief recitation of the points that are covered in the section rather than a more detailed summary of your conclusions. Restating your thesis as the first sentence of the section will benefit those readers who routinely skip reading the heading of a document.

...
II. Rule section

A. Statement of legal principles and requirements that govern the issue

The rule section follows the thesis, and states the rule or rules that govern the legal issue. You will recall that a rule of law is a statement of the legal principles and requirements that govern the analysis of the legal issue at hand. …

… [While formulating the rule (rule synthesis), there are steps that can help you in] putting together the rule from multiple authorities and performing a “rule synthesis.” …

- Start with the highest and most recent controlling authority. …
- Reconcile differing statements or phrasings of the rule from controlling authorities, and attempt to synthesize the material into one coherent statement of the legal principles that govern the issue. …
- Write the rules first, interpretative rules second, and exceptions to the rule third.
  - Write interpretive sub-rules on elements of the rule in the section or subsection of the discussion that discusses the element of the rule.
  - Write exceptions to the sub-rules after you lay out the sub-rules themselves.
- Do not write a rule with inherent contradictions.
- Do accept the remote possibility that two competing rules on the same issue might exist in the same jurisdiction.
  - When this happens you may have to analyze the facts under both competing sets of rules.

Your findings now have to be reported to the rule section. Occasionally, your rule section might be as small as one paragraph long, but infrequently, you will wind up with two or more paragraphs if you have several accounts of the rule or more than one rule to present on the issue. The format of the rule section does not change whether you are talking about an elemental rule (a rule with required elements) or a rule with factors that must be evaluated or balanced.

B. Interpretive rules

The rule section also will present interpretive rules from primary and secondary authorities. Interpretive rules are actual statements from legal authorities that instruct lawyers and judges how to interpret and apply the rule on the issue at hand. They are not elements or factors of the rule, and they are not the same as the principles of interpretation and application … . Instead, these are individual statements phrased in rule language that you will lift from the authorities that have discussed and applied the rule.
... These interpretive rules belong in the same section as the actual statement of the rule and its elements or factors, but you should state interpretive rules in one or more paragraphs after you have laid out the elements of the actual rule. ...

III. Explanation section

A. Purpose of the explanation section

In the explanation section, you will use some or all of the legal authorities you have found in your research to explain the rule and to show how the rule operates in various situations. ... You will spell out the legal standards that govern the issue in the rule section. A law-trained reader can review the rules you lay out in the rule section and make an educated guess as to how these rules should work in actual situations, but this only will be a guess. Your job as the author of a piece of legal writing is to confirm or rebut that guess by explaining how the rules work in actual situations, which in most instances ...

... The goal is to illustrate how the rule is to be interpreted and applied based on how the authorities have applied it in actual concrete factual settings, and on how commentators have interpreted the rule.

... The explanation section also may include discussion of secondary authorities – scholarly works that interpret or explain the law. These authorities cannot control the outcome of your case, but they can be used to help persuade the reader that you are on the right track with your thesis.

... It is important to support every statement about the law by referring to authority, even if you are talking about public policy.

...

IV. Application section

Application is the section where you apply the rule to your client’s facts and show how the rule will work in your client’s situation. ...

... In the application section, you must make the connection between your client’s situation and the situations in the authorities you are relying on in support of your thesis. ...

...

V. Thesis restated as conclusion

You should finish your discussion of an issue by restating your thesis as a conclusion. This is not the most critical part of the discussion, but we find that it makes a difference to the reader of legal writing to have one sentence at the end that brings closure to the discussion.
The conclusion you make can be one sentence, and it can come at the end of the last paragraph of your application section. As an example, the thesis as conclusion might be:

| Therefore, the defendant will be required to compensate plaintiff for the injuries in this case. |

We do not intend to imply that the thesis restated as conclusion has to be a throwaway. It often is a single sentence, simply there to say this section is completed. But you can spend more time with a conclusion and use it to advance your argument one more step, or to make a smooth transition to the next topic. You only are limited by your own creativity.

VI. Other structural formats

You may encounter in your studies a legal writing method of organization known as IRAC, pronounced “eye-rack,” which stands for Issue – Rule – Application – Conclusion.

<table>
<thead>
<tr>
<th>IRAC terminology</th>
<th>TREAT terminology</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issue</td>
<td>Thesis</td>
</tr>
<tr>
<td>Identifies the issue to the reader</td>
<td>Identifies the issue to reader and states your conclusion on the issue</td>
</tr>
<tr>
<td>Rule</td>
<td>Rule</td>
</tr>
<tr>
<td>States the legal principles that govern the issue.</td>
<td>States the legal principles that govern the issue.</td>
</tr>
<tr>
<td>A good IRAC writer also will explain and illustrate how the rule works in actual situations.</td>
<td>Explanation</td>
</tr>
<tr>
<td></td>
<td>Explains and illustrates how the rule works in actual situations.</td>
</tr>
<tr>
<td>Application</td>
<td>Application</td>
</tr>
<tr>
<td>Applies the rule to the facts of the case at hand.</td>
<td>Applies the rule to the facts of the case at hand.</td>
</tr>
<tr>
<td>Conclusion</td>
<td>Thesis</td>
</tr>
<tr>
<td>States your conclusion on the issue</td>
<td>Restates your conclusion on the issue</td>
</tr>
<tr>
<td>Thesis restated as conclusion</td>
<td></td>
</tr>
</tbody>
</table>

IRAC is taught in many legal writing courses, and there is nothing inherently wrong with the method as long as you are clear that the “Issue” item would state your position on the issue, which we call your thesis, and the “Rule” item should not only state the rules but explain them, and provide principles of how the rules should work in various situations based on a synthesis of earlier authorities. Some legal writing authors change the IRAC designation to IREAC for this reason. ⁹ If you do all of the above using IRAC or IREAC, you are essentially doing the same thing as we are telling you to do in the TREAT format. We simply believe it is easier to remember to do all those things if they have their own reference letters.

⁹ Another version of the format is CRAC, pronounced “see-rack” … which stands for Conclusion – Rule – Application – Conclusion. …
VII. Identifying Multiple Issues

We have been discussing the treatment of an individual issue within your client’s case. The dog bite example with which we have been working boils down to one issue – whether the plaintiff provoked the dog. We mentioned in the application section the other two elements, but only so far as to point out that they are not in dispute, so there is no need to have a separate discussion of each element. We did not ignore them, because you must include in your writing some discussion of each required element or factor of the rule that applies to the case. But a single sentence is all the treatment these elements required.

In real life, this is an unusual position in which to be. More often than not, you will have more than one issue to write about. In the real world, a “client” … will come to your office with a problem, and you will have to identify what issues are implicated by the facts of the situation the client is in. Each problem that reaches your desk probably will raise more that one issue, and each issue will have at least one rule that applies to it. Each rule that applies can and often will have multiple elements or factors, each of which can present additional issues. An element or factor of a rule can have a sub-rule that has elements or factors, some of which will require separate treatment. It can get fairly complicated, but the TREAT format is flexible enough to accommodate that much complexity.

In order to determine the number of issues you have to treat, consider:

[a) the separate legal questions you have to answer; and
b) the elements or factors of the rules that are at issue.]

A. What are the separate legal questions you have to answer?

Most problems your client will bring to you will present more than one legal question to answer. If the client literally asks two questions, or one question that will involve the discussion of two unrelated legal issues – such as what separate causes of action might the plaintiff bring against the client based on the facts – then each question presents a major issue in your discussion. In an outline, the answers (theses) to these questions will appear as the major headings because you will state a thesis concerning each major issue as the heading of the discussion on that issue.

In the single issue discussion above, the major issue was, “Is the dog owner liable for plaintiff’s injuries?” which was translated into the thesis heading, “The dog owner will be liable for plaintiff’s dog bite injuries.” If there were two or more different claims that the plaintiff might bring against your client, your writing would have two or more major issues, and major theses on these issues. …

A. Which elements or factors of the rules and sub-rules of the rules are at issue?

A separate TREAT discussion is required to address each separate legal question, meaning each part of the problem that is in dispute and thus “at issue.” If the rule that governs the issue at hand has one basic requirement, and thus one element, it may be handled in a single discussion of Thesis, Rule, Explanation, Application and
Thesis as conclusion. If the rule has multiple elements or factors, but only one is in dispute, you also may discuss the entire rule in one TREAT discussion, as in our dog bite example above, where provocation was the only element of the rule that was in dispute. But if the rule itself presents multiple legal questions to answer, it will require more than one TREAT discussion. If the separate questions that must be answered are all based on elements or sub-parts of a single rule, we will refer to the treatments of those questions as sub-TREATs.

For example, if there was a serious question whether or not the defendant “owned” the [dog] … within the meaning of the law … you would have a separate issue that would have to be answered in a separate sub-TREAT discussion, which would then be followed by the sub-TREAT discussion that addresses the issue of whether the plaintiff provoked the dog or not.

We emphasize that you must cover every element or factor of a rule in your discussion, but if the element or factor is established without question in your case because you are told that by person assigning the project or because your opponent specifically admits it, the discussion of that element or factor does not require a full-blown TREAT format. A thesis or sub-thesis heading and one sentence can convey the required information.

1. Defendant is the owner of the dog.

   Defendant conceded that he is the owner of the dog that injured the plaintiff on August 12, 2005.

When multiple elements of a rule are in dispute and present a separate issue for sub-treatment, you should research … authorities discussing that one element and show how that element works in various situations. That is how a sub-TREAT discussion is developed. In addition, a single element of a rule can present multiple issues for discussion because the element is to be applied, and the sub-rule itself may have multiple elements, each of which might be in dispute and require an answer. Since the questions suggested by the elements or sub-parts of a sub-rule are all based on the same sub-rule, we will refer to the treatments of these questions as sub-sub-TREATs. The same process occurs with a multi-factor rule that has at least one factor that has multiple sub-parts all of which raise separate issues to address.

   ...
A. Write early, rewrite often

The mantra of great authors is that there is no such thing as good writing, only good rewriting. Editing and rewriting takes time, and you cannot do a good job if you do not leave yourself the time. The mere act of writing forces you to get organized in your thinking and your argument. Whenever you sit down and actually write a draft of the work, the drafting process will reveal defects, gaps, quirks, and problems in your research or analysis. It may change your mind about your legal conclusions. Therefore, leave time for this to occur. The Sunday before the Monday the paper is due is too late.

Rewrites have a similar function to get the argument in order, correct mistakes, fill in the gaps, beef up the weak areas, and prune the bushy areas. There is a law of diminishing returns at play here; the eighth rewrite will not fix as many errors as the third, but given that each rewrite can improve the work, it is worth doing as many rewrites as you can.

B. Employ more than one editing and proofreading technique

There is more than one way to edit and proofread your own work. Simply reading through your work from start to finish is one way, but you probably have observed that you still miss typographical errors and other spelling, citation, and grammatical errors using this method. The problem is that your brain becomes accustomed to the passages you have written and skips ahead saving time but not actually reading each word and sentence. In order to avoid your brain’s built in capacity to skim text, you should try reading your work word for word and then sentence by sentence. [...] You may] create a paper mask that only allows you to see a few words of text a time, and then use it to read your paper slowly, word for word. Denying your brain the right to familiarize words in familiar sequence helps to slow it down so that you can look harder at the actual text.

When you are editing and rewriting for general flow and readability [...] [use a technique that] forces your brain to slow down [and controls the brain’s tendency to skip errors].

C to F (Omitted)

G. Editing the discussion section

1. Side issues, interesting questions

We assume you will not be spending a lot of time (and space) writing about topics that are not part of the argument. Do not do it. No one will get brownie points for
pointing out the most side issues that may affect the case as a whole, rather than resolving the research topic at hand. Remember: the presumption is that you should answer any legal question that you raise. …

2. Redundancy is bad

Repeating yourself is a vice. It does not pay the same thing two or three times. …

Lawyers are prone to redundancy. Many must think, if I say it twice, that is twice and good. This idea may exist because repetition is a good technique in oral advocacy – but save it for that context. …

We are not saying that you should not make your point clearly, or that you shouldn’t explain yourself fully even if that takes two or three sentence on one point. You should explain the same point or the same conclusion in a different way if there is something to be revealed through that second exposition. Clarification of legal principles is no easy task; don’t make it harder by trying to adhere to some rule of no repetitions ever. Repeating things two or three times is not good if the second and third times do not shed new light on the principles you are exploring.

3. Too many authorities

It does not pay to cite dozens of authorities if you cannot synthesize them properly or discuss any of them in enough detail to make your point and explain your conclusions. Do not drown out the best controlling and persuasive authorities in a sea of “also runs.” …
I. What is legislative history?

Legislative history is a term used to designate the documents and materials that contain the historical and background information generated while a bill or other legislative action is on its way to becoming a law. It includes draft versions of the bill, redrafts, testimony at various hearings on the bill, committee reports, studies, legislative floor debates, executive messages, and other materials generated in this process.

II. For what purpose is legislative history used?

Legislative history is used to monitor the progress of a bill or other action to determine its status (prior to enactment into law), and to determine “legislative intent” – trying to figure out what the legislature meant when they wrote or rewrote the bill (and eventually the law) a certain way. This is used to further argue an interpretation of the law or to attempt to resolve ambiguities created by the words of a statute.

As a bill is amended and rewritten during the legislative process, each version is reprinted. The theory behind the usefulness of legislative history is that these progressive additions, deletions, and alterations in the language are direct evidence of deliberate thinking on the part of the legislators who contributed to the creation of the law. …

The reports generated by committees and conferences, and the floor debates where questions about the statute and explanations of the meaning of the terms are discussed, are also taken to be evidence of legislative intent. …

III. For what purpose is legislative history used?

Legislative history is not a source of the law and it is never to be considered primary controlling authority. The terms of the statute itself are the only primary, potentially controlling legal authority regarding the law created by statute.

However, legislative history is not simply commentary. It is not simply secondary persuasive authority such as treatise or law review, that discusses the meaning of a statute. It is evidence of legislative intent prior to the fact of enactment that goes beyond the realm of interpretations by third-parties after the fact. Thus, in most instances, it carries more persuasive weight than even the commentary and interpretation of a great scholar.

As the goal of statutory interpretation always is to determine the meaning of the statutory text, oftentimes evidence of the authors of that text is relevant and helpful to finding the meaning of difficult or ambiguous terms. In a situation where one particular piece of legislative history directly answers a question or resolves an ambiguity in the absence of other pieces of legislative history that produce contrary inferences, then the use of the uncontroverted legislative history to discern the meaning of the text seems imminently prudent and appropriate.
However, there is a basic tension created by an attempt to use legislative history in litigation or other legal fora: there is a long-standing and strongly supported school of thought that believes that statutes should be interpreted on the basis of the terms of the statute alone. … Ambiguities in statutory language are to be resolved textually (the logical meaning of the terms used in the statute) and contextually (the logical meaning of the statute as a whole and its meaning in the context of the existing law on the topic), not by resorting to evidence of the drafters’ intent. But advocates are not always pleased with the way the terms of a statute are likely to be read and applied. Their clients may be on the short end of that equation. So, it is common for good advocates to search for support for a beneficial interpretation amidst the legislative history. …

IV. What documents and materials make up legislative history?

…
As a bill progresses through the legislative process, it may generate several different kinds of documents. Note well that not every bill generates the same number and type of legislative history documents – it all depends on how complicated or troublesome the legislation was or how it was handled by the two chambers prior to enactment.

After a bill is introduced and numbered, it is assigned to a committee. Committees produce four different types of documents: Committee Prints [statistical data and background information], Committee Documents [facts and information regarding the subject matter of the bill], Hearings [interrogative hearings on important issues which are not the subject of pending legislation, but which may lead to legislation in the future], and Reports.

…
Committee Reports are written by the members of the committee and contain recommendations on why the bill should be passed. The report usually contains the text of the bill, an analysis of its content and meaning, and the committee’s rationale for its recommendations. There may also be a minority statement if there was a disagreement among the committee members. Of all the documents to come out of the committee, the Committee Report generally is considered to be the most important in establishing legislative intent, because it contains the legislator’s own words and contemporaneous construction of the meaning of the legislation and it is intended to guide the thinking of the entire legislature on the meaning of the legislation.

…[Other reports have been omitted]
I. Initial assessment of the problem

Your first job is to assess the problem so as to identify the issues – the specific legal questions that need to be answered – and then to determine if additional facts are needed from the client or other sources, and then put together the plan of the action to find the legal sources necessary to answer the questions.

A. What is the issue?

You may have an idea about which areas of the law are implicated by the problem (e.g. – this sounds like a fraud case, or this is probably a copyright case), but you will not necessarily know enough about these areas and their fundamental background principles, claims, defenses, and policies to be able to determine the specific legal questions you will need to answer. You may not even know the general area of the law implicated by the problem. Assuming the assigning attorney or the client cannot shed any light on this, you will need to do background research into the law.

B. Background research into the area of law

When you have a background resource, you will read it to answer the following questions:

- What are the major issues in this area of the law, both old and new?
- What are the kinds of claims, injuries, damages, causes of action, or defenses that are brought or claimed or asserted in this area?
- What constitutional issues are implicated in this area?
- Are there statutes, rules or administrative regulations that typically are found in this area?

The information that you find in a dictionary or encyclopedia may help you get your feet wet, but you may exhaust what they have to say on your matter without determining the actual issues that are implicated by your facts. If you cannot do this, return to the background material. You might also discover the need for additional factual information.

C. Background research into the facts

If you determine that your boss or the client did not give you enough factual information to answer the issues intelligently, go back and ask for more information. Assuming the well is dry, or the professor who assigned the work will not tell you
anything else, you will perform your research with what you already know, or turn to
alternative sources of factual information.

D. Background information of the “how to do it” kind

The background information you need may be simply “how to do it” information in
this area of the law. “How to” sources include your colleagues and other attorneys (in
real life, not law school), practice guides and CLE [Continuing Legal Education]
materials, the actual agency or court involved, or pleading and practice form books.

II. Planning the research

After formulating the questions you must answer, you must come up with a plan for
finding the sources to answer each issue. You should divide your plan into categories
– how are you going to find:

- Primary controlling authorities
- Primary persuasive authorities
- Secondary authorities
- Sources for checking and validating your authorities.

It is advisable actually to write up a plan of action and follow it. Write down the
sources you will use and the order in which you will use them. Leave space in your
plan outline to make notes on what you checked. Keep a good record of every item
(every individual authority) that you find. …

A well prepared record of the findings also can be used as a skeleton outline of
your written work product, which you later can flesh out and turn into proper
TREATment of the issues. For example, as you research, you probably will learn that
there are X number of required elements for the issue, and 2 or 3 exceptions to the
rule, and X number of defenses to the rule. Writing them down in your notes on what
you are finding will create a skeleton outline of the Rule section of your written work
product. As you find authorities that provide the sub-rules, factors, policies,
considerations, or simply provide explanation or clarification of any of the items in
the outline, you can fill in information in the proper section of the TREATment of the
main issue and elements as you proceed along in your research. Then, when you
stop you will have a fairly complete skeleton outline of the actual work product you
will draft. …

III. Performing the research

A. What determines the scope of the research

You cannot always adopt a “leave no stone unturned” plan in which you will try to
completely exhaust every possible source for the law. Sometimes the deadline set by
your boss or the court is too short for that; other times, the client simply cannot and
will not afford that level of research. So time and money are important factors in
actual practice.
Another factor is your knowledge of the area of the law. If you know the area well, you will have to look for authorities in as many places, and you can zero in on the sources you know are likely to lead you directly to the answer. When you are familiar with the area, you will feel more confident when you think you have found the right answer and can stop. The converse is true when you are less familiar with the area of the law – you will need to look to more sources to find authorities and may not be as confident that you are done with the research.

B. Sample research plans

There is not perfect research plan, but some plans are better than others. If you have endless amounts of time and no money issues to constrain you, you could spend weeks and often months researching almost any issue of law. The more time you spend, the more likely is that you will find, review, and analyze every important source on the law in the area. But no one – no law student, no law professor, and certainly no practitioner – has unlimited time for research. Accordingly, the advice below is directed toward helping you put together a practical research plan, not a perfect plan. The sample plan here will guide you through the steps of your research and refer you to the sources you should consult along the way. By following an appropriate plan for the time frame (or money constraints) of your situation, you will allow yourself the greatest opportunity to find all of the relevant authorities and not miss something important.

Research is broader than writing. Every plan … below will ask you to look at the greater number of authorities than you will wind up writing about in your office memorandum or court brief. You must read broadly and check and recheck your findings in a variety of ways in order to determine what the law is; than you present it in writing using the most authoritative, most telling and most indicative authorities.

…

… When a Statute, Rule or Administrative Regulation is involved …:

a) When a statute or rule or regulation applies, you must start with the statute, rule or regulation in you research. Read what it says.

b) …

c) Research the administrative regulations, the sub-regulations and administrative rules that implement the regulations, and “official” and unofficial interpretations by administrative and executive entities charged with implementing the regulation (the agency itself, the attorney general, a regulatory body or commission).

d) If there appear to be divergent opinions in the authorities you are reading about the meaning or application of certain provisions of the statute or regulation, then research the legislative history of the statute or drafting and ratification history of the rule or regulations.

e) Then move on to cases, treatises, restatements, … law reviews …
IV. How do you know when you are finished?

Follow this rule of thumb for determining when you are finished with your research:

1. If you have found several … controlling authorities that agree with each other as to the legal issue at hand …;

2. If you also found several good persuasive authorities that support your controlling authorities, including a treatise or other secondary authority that supports your findings;

3. If you have reconciled or distinguished all contrary controlling authorities and any important persuasive authorities; and

4. If you do not have any nagging questions that you know should be answered before you move on to writing.

Then you are finished.

This is only rule of thumb. It is not going to hold true in every research problem you will encounter in law school or in actual practice. But having some guidelines is better than having none.

One guideline for applying the rule of thumb is to look to see if the sources you are finding all start to agree with each other and all wind up citing each other, and you no longer are finding new authorities in your searches. If your on-line searches fail to turn up new authorities and your searches in secondary authorities are referring you to sources that you already have read, then you should be finished. You still will have to read and analyze the authorities you found, but you will not need to keep searching for more authorities to add to your collection. By the same token, if each search turns up new and unfamiliar authorities, you most likely are not finished.

...
2.6- Adversarial Legal Writing

I. Differences between and objective and adversarial legal writing

Objectivity is required in order to render appropriate legal advice to your colleagues and clients. The office memorandum as the paradigm of objective informative legal writing is designed to be read by people who are working for the client and are presumed to be friendly to the client or who at least owe a duty to the client to keep its confidence. Office memoranda must reflect a critical appraisal of the client’s situation and not just engage in cheerleading to pump up the team. An internal office memorandum must be informative of the good and the bad facts of the case and present the blemishes along with the beauty marks of the client’s legal position.

Adversarial legal writing is different. It is not the opposite of objective writing – it is an honest and truthful presentation of the merits of the client’s case that is crafted so that it supports the client’s position … in the best possible way. A good advocate does not abandon her objectivity concerning the blemishes and beauty marks of her client’s legal position when she is evaluating her client’s case. But the work product of an advocate emphasizes the strong points and does its best to mitigate the effects of bad points. Adversarial writing takes sides and advocates for one outcome – the outcome favoring the client.

Adversarial legal writing does not engage in fraud or obfuscation about the facts and the law concerning the matter – nothing can be gained from lying and cheating except defeat and disbarment. The briefs and memoranda that you will file with the court and serve on your opponents will not lie about the facts and misstate the law. Rather, you must use your skill to present the facts and argue the law in a way that best favors your client. The facts that support your client will be front and center, and negative facts will be explained and defused. The applicable law will not be distorted or outright misstated by you, but to the extent that statutes, cases and other authorities allow you to emphasize and interpret the law in a way that better supports your client’s position, it is your job as an advocate to make the most of these opportunities.

Lawyers wear several hats in contested matters. They are an officer of the court, bound to uphold the law and promote justice. Attorneys who lie and cheat about the facts and the law certainly violate their duty. Lawyers must also be counselors, seeking the best pathway to the best outcome for the client, whether that means cooperation and concession or more aggressive action. Attorneys whose motto is to fight every case to the bitter end violate their obligations. Lastly, lawyers must be advocates who play a role in the adversarial legal system … by promoting the interests of their client in every stage of the matter in order to allow the court to reach a just result. Proper adversarial legal writing is one of your duties as an advocate.

...
III. Strategies and Goals for zealous representation in adversarial context

A. ... Write clearly and concisely

... Judges everywhere believe that they have more than enough cases to work on and too much material to read and digest in any given case. They will not tolerate complex, cumbersome, redundant, and overly verbose writing in briefs and memoranda to the court. ... Imagine the attitude of the typical judge with hundreds more cases pending on his docket when he receives your complex, prolix work. A judge is not going to suffer through this kind of work for very long.

... But if you draft and edit your work so that a busy judge can capture the best parts of your entire position and argument on a given motion or appeal in fifteen minutes or less, you will have served your client and the court very well.

There are several ways to accomplish this in writing:

• Front load your best material. Write an introduction to your brief that tells the court enough facts, law and argument that you can convince the judge that your client should prevail, all in roughly half a page of text;
• Use the statement of facts to advocate your position;
• Use meaningful ... thesis headings throughout the discussion or argument section;
• Draft the discussion or argument action in as clear, concise, and direct a manner as possible;
• Use the conclusion solely to request your relief, not to summarize or rehash your arguments and not to make a new point in support of your case.

B. Know your audience and write with your audience in mind

This is a general principle of legal writing, but reaching this goal is even more difficult in a litigation context. With objective writing, you will tend to know your immediate audience very well, whether they be your colleagues or your clients, because you will have worked with them for some time, or at least you will have access to people who know them well and can tell you pointers on how to draft your work to better satisfy them. With litigation, you often are writing to a judge before whom you have never appeared prior to this case, and with whom on one in your office has had much experience. At the appellate level, depending on the shuffle of panels and assignments of cases in your jurisdiction, you may never get two of the same judges on a panel more than two or three times in your career. All of this leads to uncertainty in knowing exactly who your audience is.

Simply living with the uncertainty as inevitable kismet [fate] is not good enough. You should make (efforts to get information from those) who have tried any number of cases (even one) before the judge. ...

C. Concede facts and give up arguments when it will benefit your client to do so ...

Let us disabuse you of the notion that we think lawyers should never concede facts or abandon arguments. Not so. The value of concession depends on the state of the dispute and the nature of the dispute. Early in a contested matter, it may not benefit
your client to reveal all the facts your client knows to your opponents until you
discover what your opponents know and what their version of the facts is. On the
other hand, early in the dispute may be a good time to reveal or stipulate to certain
facts because it will save your client the time and energy in responding to discovery of
this facts. …

In litigation, give up a legal argument if it advances your cause with the court.
Do not brief an argument if the chances that it will make you look foolish and
obstinate are greater than the chances that any legal decision maker will agree with
the argument and rule in your favor. Your best argument will look better if it is not
seen in the vicinity of two other terrible arguments. Judges never make their
decisions based on the number of arguments you raised.

On the other hand do not arbitrarily limit the number of arguments you will
make. Do not get stuck on one complicated argument, putting all your eggs in one
basket, when you can raise one or two less complicated arguments in addition to the
complex arguments. …

D. Know the facts and the law, and know your options

You cannot help your client if you do not learn the facts of your client’s case. In order
to know which facts are likely to be important, you have to know the law. Naturally,
knowing the law and the facts is required if you are going to give advice and
represent your client in any way or shape or form.

A doctor would not prescribe medicine without listening to the patient’s
symptoms first and determining what illnesses might be present and what side-effects
might affect the patient if they take a certain medication. Similarly, a lawyer who
does not know the facts and the law sooner or later will take an action that is directly
against her client’s interests.

Knowing the facts and the law also will enable you to know your options. If you
do not know your options you will miss something important. If you do not know
the facts or law, you could inadvertently close off one or more of your options and
eliminate otherwise perfectly acceptable forms of relief for your client.

One of the main problems with lawyers is not that they do not know the law, but
that they are too busy to be prepared. The do not take the time to figure out what
they are doing or should be doing in a case. They lose sight of the big picture or never
see it in the first place, and chase leads down one rabbit trail of facts or law after
another without taking the time to think the case through, forming decisions on what
needs to be done; planning the tactics and strategies that will get the job done, and
then doing it.

The law is not one of the disciplines where 90% of the battle is just showing up.
You must be prepared for the setting in which you are about to engage you lawyering
skills. …

__________
I. Introduction

Specifically, Section II of this Article will introduce the sources of international law with which students must become familiar. Section III describes how to select students, develop course materials and provide basic and supplemental instruction for the persuasive writing or moot court.

II. The Sources of International Law

Rather than using a domestic appellate court, the international law moot court problem is set before a panel of the International Court of Justice (“ICJ”), which, in the real world, sits in The Hague, The Netherlands. [FN11]

Consequently, the greatest challenge to a law student who elects to participate in an international law moot court program - whether by enrolling in a legal writing course or participating in the Philip C. Jessup International Law Moot Court Competition (“Jessup”) as an upper class student - is mastery of the sources of international law that are applied by the ICJ. Unlike domestic law, where the student must grapple with the constitution-statute-case law hierarchy, the student of international law must become comfortable with treaties as well as the more amorphous concepts of “customary international law” and “general principles of law.” [FN12] These are the primary sources of international law, just as constitutions, statutes and cases are the primary sources of both federal and state domestic law. When it comes to secondary means for determining rules of domestic law, students in a traditional moot court class look to law reviews, treatises and digests. In contrast, the international law moot court student looks to both scholarly works and case law, both international and domestic, as secondary means for determining rules of international law. [FN13] Thus, it is crucial for the international law moot court professor to spend sufficient time at the beginning of the semester making sure that students have a comfortable grasp of the following basic concepts before starting their research and writing project.

The sources of international law are defined in Article 38(1) of the Statute of the International Court of Justice (“ICJ Statute”), which lists the sources applied by the ICJ in deciding matters before the court. [FN14] Although the ICJ Statute does not specifically address whether the sources have a hierarchic value as listed, scholars and the ICJ itself apply the sources in descending order. [FN15] Students should be made aware that in international law there are both primary and secondary sources of law, just as there are in domestic law. The primary sources include international conventions, [FN16] international custom and the “general principles of law.
recognized by civilized nations.” [FN17] The secondary means of determining international law include the “judicial decisions and the teachings of the most highly qualified publicists of the various nations.” [FN18] It is also important to remind students that the ICJ does not follow the concept of stare decisis as do domestic courts, so that the ICJ does not regard its own prior case law as binding precedent. [FN19]

A. Conventions

International conventions or treaties [FN20] are the sources students most easily comprehend, as students have heard of treaties before, and they are most like a traditional domestic legal device - a contract. [FN21] Just as a contract codifies the agreement of parties, a treaty memorializes the agreement between two or more states. [FN22] International conventions bind both the states party to them, and those states that are not parties, but which nonetheless accept their provisions as law. [FN23] Parties to a convention must abide by the terms of that instrument based on the principle of *pacta sunt servanda*, namely, that “(e)very treaty in force is binding upon the parties to it and must be performed by them in good faith.” [FN24] According to Article 38(1) of the ICJ Statute, conventions may be “general or particular,” meaning that they can be bilateral or multilateral, specific or comprehensive. [FN25] And, although a convention provides the strongest evidence of international law, a convention which seems to contradict or modify established international custom should be interpreted so as to best conform to established custom, rather than deviate from it, unless the convention was intended to change the existing custom. [FN26] International conventions can also be evidence of established international custom. [FN27]

B. Customary International Law

International custom, or customary international law, is one of the most widely cited, and yet most elusive concepts found in international law. International custom must be distinguished from what is thought to be a state's “customary behavior.” [FN28] For a state's practice to become binding customary international law, the state must engage in the particular practice because it considers itself legally obligated to do so, rather than out of compassion, convenience or friendship. This sense of legal obligation to referred to as *opinio juris sive necessitatis* or simply, *opinio juris*. [FN29] Generally, a state must also engage in a particular practice for a significant period of time for that practice to be considered binding customary international law. [FN30] Once a practice has become customary, and thus a recognized form of international law, all states that have not objected to the custom are bound by it. [FN31]

In addition to those practices recognized by states as customary international law, treaties between various states can also be evidence of international custom. [FN32] Treaties often codify rules that states believe have become international custom through constant and uniform usage over a long period of time. [FN33] Evidence of international custom can thus be found by analyzing international conventions and other legal instruments, and determining how these instruments are interpreted and implemented by the various states. [FN34]
C. General Principles of Law

The final primary source of international law is the “general principles of law recognized by civilized nations.” [FN35] Nowadays, the phrase “recognized by civilized nations” has virtually become obsolete, in recognition of the valuable contributions to international law by countries that may not, at some earlier time in history, have been considered “civilized” nations. [FN36] The general principles of law is yet another difficult source for students to grasp because of the lack of a clear scholarly definition. In general, a legal principle becomes a binding general principle of law if states independently apply similar legal principles in a domestic setting. [FN37] The theory is that if states independently apply these similar legal principles in settling domestic matters, they impliedly consent to be bound by those legal principles on an international level. [FN38] For example, one may argue that if many countries initially permit circumstantial evidence to be admitted in judicial proceedings, this practice has been accepted as a general principle of international law. General principles are generally used as “gap filler” when there is no applicable treaty or customary law on a given issue. [FN39] This source of law is analogous to a United States state court using judicial decisions from other states because those decisions are not binding as precedent on the court, but have some persuasive value. [FN40] The best documentation of the general principles of international law are scholarly writings, treatises and legal encyclopedias. [FN41]

D. Secondary Means of Determining International Law: Judicial Decisions and Teachings of the “Most Highly Qualified Publicists”

The final means for determining international law are the “judicial decisions and the teachings of the most highly qualified publicists of the various nations.” [FN42] Just what is meant by secondary means, and how does this differ from conventions, custom and general principles, which are considered sources of international law?

In essence, the categorization of judicial decisions and scholarly writings as secondary means indicates that these two types of materials do not, in and of themselves, constitute sources of international law. [FN43] Rather, we can use decisions and scholarly writings to determine whether concepts of customary international law or general principles exist. [FN44] For example, suppose a student wishes to argue that a treaty requires a country to act in a certain manner. The student may use the treaty text and negotiating texts to develop his or her argument. Suppose, however, that the student wishes to argue that an international custom or a general principle requires a country to act a certain way. Because there is no single source that lists all of the customary international concepts or general principles, must the student (or international lawyer) research the practice of every nation or examine the legal systems of numerous nations? This would be a daunting, if not impossible task. Instead, however, the student could look to the secondary means - judicial and scholarly opinions - as evidence of either customary or general principles of international law. The international law moot court student, in fact, will often cite judicial and scholarly materials to develop and support a customary or general principles argument.
The international law moot court student must become comfortable with another way in which judicial decisions perform a different function in the international legal arena than they do in the American legal system. Although American courts acknowledge the precedential and persuasive value of court decisions, the ICJ does not follow the principle of stare decisis. \[\text{FN45}\] The U.S. Supreme Court described the role of judges and scholars in creating international law in The Paquete Habana:

(We turn) to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. \[\text{FN46}\]

Thus, the ICJ’s function is to apply the law, not to make new law, and the works of publicists are a means of ascertaining the applicable law. \[\text{FN47}\] Researchers will use publicists' works and judicial decisions to interpret the various treaties and customs, and therefore define and argue points of relevant international law. \[\text{FN48}\]

In short, because the sources of international law are usually unfamiliar to the first-year law student - who may at best be only somewhat confronted with American legal hierarchy - it is crucial to develop a curriculum that will introduce students to the basics of these concepts without overwhelming them with the complexities of international law that they would encounter in an upper level introductory public international law course.

III. Institution and Administration of an Academic International Law Moot Court Program

A. The Student Selection Process

... Selection of students for an optional international law \textit{moot court} program can also work well at a school that operates, in whole or in part, on an adjunct system. In that situation, the school may hire one or more adjuncts who teach only during the semester when \textit{moot court} is required. \[\text{FN53}\]...

B. Course Materials

As mentioned previously, the field of international law is distinct from domestic law in its hierarchy of law, research materials and court procedures. Before those students enrolled in international law moot court can begin to research and draft writing assignments effectively, they must become familiar with the basic concepts and structures of international law. Toward that end, the professor should compile an international law supplement to the students' traditional legal writing test. \[\text{FN54}\] A useful supplement might include materials on practicing international law, structures of international \textit{courts} and organizations and basic readings on the sources of international law. Additionally, the supplement would contain a list of web resources \[\text{fn55}\] AND A VARIETY of research and writing exercises.
Development of moot court problems is, of course, a crucial portion of designing a successful international law moot court course. One does not have to start from scratch, however. Since several law schools have instituted international law moot court programs, the opportunity to share problems makes problem development relatively painless. In addition, once a class of first-year moot court students graduates, a problem may be modified and “recycled.” Once a professor develops a successful problem, he or she may also modify it as the law changes over the years, i.e., if a relevant treaty is terminated or enters into force, or a new area of law (such as cyberlaw) emerges.

On a cautionary note, the international law moot court professor should avoid using or modifying previous Jessup or other official international law moot court competition problems in class. Not only may this raise copyright issues, but several of these competitions publish their best briefs on-line or in print, thus subverting the professor’s ability to have the students research their problems independently and tempting students to plagiarize. [FN56]

C. Supplemental Instruction

Mastering the basics of international law also requires additional class sessions. Students will discover that these sessions are valuable because they lay the informational foundation upon which they will build their working knowledge of international legal concepts and structures.

At the outset of the term, class discussions should focus on the nature of international law, including its sources, principle concepts and governing bodies. First, the professor should explain the sources of international law discussed above. Attention should focus on the hierarchical structure of the sources of international law and the weight placed on these sources by international institutions such as the ICJ. [FN57] Second, the professor should introduce students to the guiding principles of international law, such as *jus cogens*, [FN58] *opinio juris*, [FN59] and *pacta sunt servanda*. [FN60] Because these and other important international principles are unknown to new students of international law, they generally require a thorough explanation. Finally, it is important for students to understand the role played by international institutions such as the United Nations and the ICJ, two of the primary mechanisms for international dispute resolution. Once students begin to understand how these principles and institutions interact in the international arena, their research will progress much more effectively. There are numerous texts that can serve as a basis for discussing these and other international law concepts. [FN61]

Students exploring the field of international law for the first time are generally unfamiliar with the wide variety of resources available to the international law researcher. For most second-semester law students, familiarity with library resources is limited to domestic sources, such as case reporters, statutes, encyclopedias and digests. Although students may have been given a glimpse of international research materials during their first semester of law school, international research resources remain largely undiscovered to first-year students.
Before students delve into the research phase of their writing assignments, their legal writing professors should provide them with a general introduction to the variety of international law sources available both in print and electronically. Texts on legal research can provide students with the background necessary to begin a fruitful research process, [FN62] and on-line resources abound. [FN63] After assigning these informational texts, professors should schedule a library tour so that the students can see first-hand the sources discussed in the texts. …

… On a practical level, the tour acquaints students with the physical location of the resources and other tools, such as computerized databases, necessary to access the information. During the tour, a law librarian should briefly explain the type of information contained within each resource and how the students can effectively access the information. For general background information on international law, the law librarian should point out texts such as international treatises, encyclopedias and law journal articles. [FN64] Of particular importance to the students during the research phase of their writing assignments will be the international treaty collections, such as the United Nations Treaty Series, the League of Nations Treaty Series, the Consolidated Treaty Series and the Treaties and Other International Agreements Series. The law librarian should point out these and other valuable resources such as ICJ decisions, UN documents, and other organizational charters throughout the tour, and may introduce students to electronic resources as well.

The school’s Jessup International Law Moot Court Team and any other international law moot court teams are other valuable resources that can provide students with additional background on the concepts and mechanics of international law. Mandatory attendance at an international law moot court team practice round, considered invaluable by Villanova students, [FN65] will assist students as they begin to formulate arguments for their writing assignment. Witnessing a practice round brings into focus elusive concepts such as customary international law and general principles of international law, which are often initially difficult for students to grasp. Actually hearing a participant explain customary international law to a judge during a practice round, for example, reinforces the information digested by students as they review introductory materials, begin their research and take part in classroom exercises. Finally, the team’s practice round tends to quell feelings of anxiety experienced by students as they progress toward preparing for their own oral arguments. The practice introduces the students to the format of oral arguments and the types of questions they may be asked.

D. Classroom Exercises

While learning how to research international law, international law moot court students must also prepare to face the challenge of writing a formal, persuasive brief, which in international lingo is called a “memorial.” [FN66] Persuasive writing may come more naturally to some students than the rigid objectivity required in traditional first-semester legal writing assignments. On the other hand, many students are unfamiliar with the subtleties of persuasive writing and may therefore need some instruction. Regardless of their background, classroom exercises on the techniques of writing persuasive briefs are a useful tool to sharpen the skills of all students.
Legal writing professors should design exercises that teach students the basics of constructing persuasive arguments. Again, the type and content of the exercises is limited only by the professor's imagination. In a typical exercise, the professor might provide the students with a packet of information that describes a hypothetical international legal dispute, a list of relevant international legal principles and sample memorial abstracts relating to the dispute. The professor should then divide the students into small collaboration groups, with each group representing a different country in the dispute, to help the students learn to identify international legal issues and the key facts and arguments that relate to them. The groups may meet outside of class to discuss how the facts and international principles can be effectively molded into persuasive arguments for their side of the dispute. Students should come to the next class prepared to discuss their group's findings.

Questions for the students to consider might include: what facts do we emphasize to make our arguments more persuasive; what facts should we de-emphasize; and what international principles support our country's position? In addition, the students can draft different parts of their memorials - facts, summary of argument, point headings and the like - before completing a full draft of their memorials.

In-class discussion of the arguments formulated during collaborative, out-of-class sessions can develop into a lively debate as the students set forth persuasive arguments to further the interests of their assigned country. Discussion of the issues can focus on how the different groups chose to shape the facts in favor of their countries.

E. Citation Methods

An additional challenge confronted by students who choose to study international law is how to cite international legal materials properly. To prepare a thorough memorial, students typically will have to cite treaties, UN documents, decisions of international courts and tribunals and law review articles. Generally, during their first semester of law school, students learn only the basic rules of proper citation for domestic materials such as cases, statutes and law reviews. ...[T]here is a large body of international materials available to researchers, many with unfamiliar and often complicated citations. Spending some time reviewing the most commonly cited international materials, such as treaties, constitutions, statutes and UN documents aids students in their research and improves the accuracy of their citations. Citation forms for these types of materials can be found in both The ALWD Citation Manual: A Professional System of Citation [FN67] and The Bluebook: A Uniform System of Citation (commonly known as the “Bluebook”). [FN68] Either of these reference texts may be used to develop sets of legal citation problems to teach students how to cite previously unfamiliar international research materials. [FN69]

IV. & V. [Omitted]

[Footnotes omitted]
Review Exercises

Exercise 1

- The following excerpt is taken from Goldblatt’s *Introduction to Legal Method in Ethiopia*: ¹⁰

Relate the theme of the excerpt with the use of legislative intent in arguments:

a) where literal reading seems to be inconsistent with legislative intent;

b) where there are two or more possibilities of interpreting a given operative word in a legal provision.

... Before you can handle a rule of law efficiently you must understand it fully. That involves understanding two basic things: the language of the rule and its function.

... You must, of course, know the dictionary definition of every word in every statute you ever are called upon to handle. But ... the crucial words of a statute sometimes called the ‘operative words’ may require careful analysis before you can properly apply them.

Besides understanding the meaning of the words of a statute, it is vital to understand what the statute does, that is, what kind of rule it establishes, what the legislative or other promulgating authority intended to accomplish by it. We may call this the function of the statute.

Exercise 2

Read the following summary of a *compromis* and identify the issues that can be raised by the applicant state.

**Synopsis of the Compromis for the 2009 Philip C. Jessup International Law Moot Court Competition**

Source: Synopsis (*International Law Students Association*, ILSA)

Attempt to identify issues before you read the brief statements about issues (inbox) at the end of the fact summary.

The dispute at the heart of [the 2009] Jessup Problem involves two states – Alicanto, whose population is composed of two large ethnic groups in tension with one another (the Dasu and Zavaabi); and Ravisia, a former colonial power that establishes a military operation in Alicanto, without the consent of the Alicantan government, in order to prevent what Ravisia characterizes as an impending campaign of ethnic cleansing.

The population of Alicanto is 30% Dasu and 50% Zavaabi. Both groups espouse the Talonnic religion – the Dasu subscribe to a moderate version of the faith, and the Zavaabi to a more orthodox version. The Dasu enjoy a higher standard of living and have historically occupied more influence in government and business.

In the mid 90’s, a Zavaabi political movement gained momentum. Called the Guardians, the group aimed to revive the orthodox Talonnic faith and incorporate its tenets into Alicantan law.

In December 2005, the Security Council of the United Nations established a peacekeeping mission, called UNMORPH, in Alicanto to maintain a ceasefire agreement between Alicanto and its neighbor New Bennu. The two countries had been involved in a conflict that arose concerning rampant smuggling of illegal arms and drug activity over their shared border. Ravisia was the largest contributor of troops to UNMORPH.

Frustrated with the way the Dasu-led government handled the conflict with New Bennu, new elections were called. The results installed a Zavaabi-led government, which put in place Prime Minister Simurg, the leader of the orthodox Zavaabi movement.

During the period of UNMORPH’s 2.5 year operation, the conduct of the mission’s peacekeeping troops came under criticism by human rights observers, who discovered a pattern of sexual exploitation by the troops against local young girls. UNMORPH also came under fire by Alicantan government officials for broadcasting radio programming targeted at educating women and children about health, education and human rights. Religious leaders protested, claiming the broadcasts to be offensive and inconsistent with orthodox teachings of the Talonnic faith.

By the end of 2007, the objectives of UNMORPH had been met, and in February 2008, the Security Council passed Resolution 1650, calling for the gradual draw down and termination of UNMORPH by 31 July 2008.

Although the conflict with New Bennu had quelled during this time, tensions between the Dasu and Zavaabi within Alicanto increased. The Zavaabi-led government rolled out plans to incorporate orthodox Talonnic beliefs into Alicantan law – laws which favored Zavaabi over Dasu. Initially, members of the Dasu group reacted by protesting. Sporadic riots turned into significant violence and NGOs began reporting ethnically charged violence. Later on, many Dasu reacted by fleeing the country.

On July 3, 2008, the Security Council adopted Resolution 6620, noting its concern about the escalating violence in Alicanto, and urging the government of Alicanto to “to take immediate steps to improve the humanitarian situation.”

On July 7, 2008, Prime Minister Simurg was assassinated, allegedly by a Dasu-man. The assassination was followed by renewed violence between the groups. Six Dasu villages were burned, thousands were killed, tens of thousands of Dasu fled the country, and a weapons cache was discovered.

Ravisia called upon the Security Council to either (1) renew and expand the UNMORPH mandate; or (2) to authorize a collective humanitarian intervention led by Ravisia. The Secretary-General reported to the Security Council that a campaign of systematic violence was impending. The Secretary-General reported that his conclusions were supported by classified raw intelligence that Ravisia delivered to the Secretary-General.
Alicanto demanded that it have access to the intelligence, but the Secretary-General refused to hand it over, citing the promise he made to Ravisia to keep it confidential. After long debate, resolutions in support of Ravisia’s recommended action failed.

On July 31, 2008, UNMORPH terminated, but the Ravisian peacekeeping troops remained. The next morning, 6000 additional Ravisian troops arrived in Alicanto and the Ravisian Army declared the beginning of “Operation Provide Shelter.” Alicanto protested their presence but did not launch any operation to remove OPS troops. OPS was involved in a number of operations in Alicanto, and effectively extinguished a number of uprisings.

In August 21, the Alicantan government convicted and sentenced to death a man named Piccardo Donati for the assassination of Prime Minister Simurg after a trial in absentia. Later, it was discovered that Donati had been granted asylum by Ravisian forces in Alicanto. The Alicantan government demanded that Donati be handed over and that Ravisian forces leave immediately.

Alicanto informed Ravisia of its intention to pursue legal action before the International Court of Justice. Alicanto and Ravisia later agreed to submit the dispute to the ICJ by special agreement.

The 2009 Jessup] Compromis focuses on the legal issues that arise when members of the international community, either collectively through the United Nations, or individually through unilateral action, intervene in the affairs of a state on humanitarian grounds. Among the many legal issues addressed in this Compromis are the following: prohibition against the use of force; responsibility to protect; role of the Security Council in authorizing humanitarian interventions; fact finding power of the International Court of Justice; role of the ICJ in matters taken up by the Security Council; restrictions to be applied to humanitarian interventions; international standards of due process; death penalty under international law; and political asylum.
3.1- **Specific Learning Outcomes:**

At the end of this unit students are expected to be able to:

a) identify the elements of effective briefs;

b) explain sample criteria used in the assessment of memorials;

c) identify the elements and the form of the brief, petition or memorial that will be submitted to the court or tribunal envisaged in the moot court competition;

d) offer comments on shortcomings and merits of briefs, petitions and memorials;

e) draft a brief or memorial.

<table>
<thead>
<tr>
<th>Expected number of learning hours (Weeks 4, 5 and 6):</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Class hours: <em>Two Hours</em> per week</td>
</tr>
<tr>
<td>• Student independent workload: <em>Four Hours</em> per week</td>
</tr>
</tbody>
</table>

3.2- **Unit Introduction**

Moot courts involve submission of briefs before participants conduct oral arguments. The brief\(^1\) may be an appellate brief, petition to the Cassation Chilot of the Federal Supreme Court, the Respondent’s brief, or they may be the briefs that are expected to be submitted in national or international moot courts. As this course is an elective offered to students who have very good performance in an

---

\(^1\) The term ‘brief’ in this teaching material refers to appellate briefs, petitions, etc … to courts or tribunals. The term ‘brief’ may also be used in ‘case briefs’ or ‘student briefs.’ The latter usage of the term refer to briefs written by law students or others to summarize cases. Case briefs include title, procedural posture (history of procedure), facts (short summary of events), issues (legal questions the determination of which will decide the outcome of the case), relevant legal provisions, holding of the court, reasoning of the court and dissenting or concurring opinion if any.
earlier mandatory course which involves moot court (i.e. *Appellate Advocacy and Appellate Moot Court*), the readings of the earlier course are expected to be thoroughly revised because they are relevant to this course as well.

The only types of brief that are not expected to be used in moot courts are statements of claim and statements of defence, because they are used in trial advocacy which involves mock trials. An Appellate or cassation litigation involves an appeal from (or support to) the analysis and decision of a lower court and seeks reversal (or affirmation) of the reasoning of the lower court/s. The litigation predominantly involves legal issues in appellate litigation, and it purely involves legal issues with fundamental error of legal interpretation in the case of cassation litigation.

Briefs are expected to be not only informative but also persuasive. The information expected in briefs involves laws, facts and issues which need to be synthesized and concisely presented with clarity and coherence. A brief becomes persuasive when the information therein is accurate and where the analysis and reasoning logically lead to the conclusion of and the relief sought in the brief.

The readings in this unit are top-up materials that presume adequate comprehension of the readings in Chapter 2 of the teaching material for Appellate Advocacy. Students are thus expected to revise the readings on Appellate Briefs in Chapter 2 of the teaching material entitled “*Appellate Advocacy: Brief Notes and Materials.*” The readings herein supplement the revision of these readings.

The preliminary consideration before the preparation of appellate briefs, petitions or memorials is whether the court or tribunal to which the lawyer plans to submit the brief has jurisdiction. Porto (Reading 2) points out this preliminary consideration and the manner in which statement of issues, statement of the case, summary of argument, persuasive argument based on careful research and valid reasoning and a conclusion can be written, edited and polished.
The readings in this unit begin with *memorial grading criteria* used in the 2009 Philip C. Jessup International Law Moot Court Competition (Reading 1.1, 1.2) and Guidelines prepared by *Witkin Legal Institute and Thomson/West*. Students who prepare briefs for other international moot court competitions can request the grading criteria from organizers of the mooting and can make sure that they take the elements of evaluation into account during the preparation, research, write up and editing phases. The criteria can also be useful inputs for moot courts on domestic laws with some adjustments in light of the formats that are appropriate for our courts.

Readings 3, 4 and 5 forward technical tips towards writing effective briefs and they are meant to provide readings for conceptual framework on appellate brief writing because this has already been addressed in an earlier course, i.e. Appellate Advocacy and Appellate Moot Court. Reading 3 suggests seven virtues that can help lawyers in writing effective briefs. Reading 4 points out some skills and approaches that can be used in drafting briefs and finally, Reading 5 includes two short readings that can be used as tips for the structure of briefs. It is, however, to be noted that the brief should pursue the particular form that is required by the court or tribunal envisaged in the moot court competition.

3.3- **Tasks: Weeks 4, 5 and 6**

a) Contrast sample appellate briefs and cassation petitions (for moot courts on domestic laws);

b) Read Jessup or other memorials (depending upon the type of the moot court);

c) Comment on the merits and shortcomings of sample briefs, petitions or memorials;

d) Prepare an appellant brief, a cassation petition, memorial or respondent’s brief.
3.4- **Readings: Weeks 4, 5 and 6**

Reading 1: Criteria for judging memorials & briefs (Readings 1.1, 1.2 & 1.3)
  - Guide for Judging Memorials (Jessup)
  - Grading Instructions for Memorials (Jessup)
  - Grading Guidelines for Briefs (*Witkin Legal Institute and Thomson/West*)

Reading 2: Brian L. Porto, *The Art of Appellate Brief Writing*

Reading 3: Pregerson & Paiter-Thorne, *7 Virtues of Appellate Brief Writing*

Reading 4: Murray & DeSanctis, *Appellate Briefs*

Reading 5: Tips on the Structure of Briefs (Readings 4.1 and 4.2)
**Reading 1: Criteria for Judging Memorials and Briefs**

**Reading 1.1**

Source: 2009 Philip C. Jessup International Law Moot Court Competition, Guide for Judging Memorials (with omissions)

---

**Guide for Judging Memorials**

...  

**What you will be evaluating**

Six general evaluation criteria have been identified on Memorial Scoresheet [see Reading 1.2 below]. Please note of the following with respect to four of the criteria:

- **Extent and use of research**
  Teams are required to include footnotes and an Index of Authorities in their Memorials to identify the authorities that support their legal arguments. The Index of Authorities is intended to be useful to judges. The content of the Index may be considered by judges to help evaluate the extent of research conducted.

  The quantity of authorities should be carefully examined. Judges should consider whether each listed authority was necessary, or whether the Index has been ‘padded’ to give a better impression of the research effort.

  Judges should also consider the quality of each authority. In international law, the various weights of different legal authorities are different than in most domestic legal systems, particularly as compared to common law systems that place authoritative value on legal precedents. For more background, please refer to the section of the Bench Memorandum that provides a general overview of International Law.

- **Clarity and organization**
  Judges should look at the general use of headings, paragraph structure, logical placement of arguments, location of constituent parts, etc. Please remember, though, that typeface and other formatting features are evaluated and penalized by the Administrator, and thus should not factor into your score.

- **Citation of sources**
  Judges should evaluate the use, format, and content of citations. Teams are required to cite all authority in footnotes, and to list all sources in an Index of Authorities.

  In their citations, teams must provide a “description of each authority adequate to allow a reasonable reader to identify and locate the authority in a publication of general circulation.”
ILSA has recommended the following list of standard systems of citation: the Canadian “McGill Guide,” the ALWD Citation Manuel, the Oxford Standard, the Harvard Bluebook, and Peter Martin’s Basic Legal Citation. Proper use of any of these systems reflects that a team has complied with the citation format requirements. However, teams do not have to choose one of these systems; they may adopt a local system or any other system that provides adequate information to allow a reasonable reader to locate the authority.

**Grammar and style**

If you are judging an International Competition, you may receive Memorials in which it is very clear that English was not the first language of the authors. Students are required to submit the final work for the International Competition in English, but are allowed to use paid translators as long as the translation does not change the substance of the Memorials. Not all teams, of course, can afford this option. The Administrator is allowed to reveal, upon a Judge’s request, whether or not a team consists of native English speakers. Judges may take this factor into consideration in evaluating the grammar and language of a team’s memorials.

…

**Checklist for scoring memorials**

1. **Table of Contents**
   1.1. Do the headings and sub-headings in the Table of Contents lay out a readily understandable, clear structure of the arguments on each of the issues?
   1.2. Is each heading and sub-heading forceful and affirmative?

2. **Index of Authorities**
   2.1. Does it contain all legal authorities cited in the Memorial?
   2.2. Are the citations adequate to allow a reasonable reader to locate the authority?
   2.3. Does each entry reference the memorial page were it is cited?

3. **Questions Presented**
   3.1. Do they clearly and accurately set out the legal issues?
   3.2. Are the questions drafted in a neutral but persuasive manner?

4. **Statement of Facts**
   4.1. Is it limited to the stipulated facts from the *Compromis* and its Corrections and Clarifications and necessary inferences from those facts?
   4.2. Does it draw any unreasonable inferences?
   4.3. Does it contain any unsupported facts, distortions of stated facts, argumentative statements, or legal conclusions?
5. Summary of Pleadings
   Does it coherently tie together the most important arguments of fact, law and policy?

6. Pleadings, including Conclusion and/or Prayer for Relief
   6.1. Is the organization of the arguments under each section clear and logical?
   6.2. Do alternative arguments contain an independent basis for deciding the issue?
   6.3. Do the pleadings focus primarily on the main arguments critical to the case?
   6.4. Does it contain legally correct arguments that nevertheless are not relevant?
   6.5. For each issue – is there a clear statement of the rule(s) relied upon?
   6.6. Is there an appropriate amount of authority with appropriate explanations in support of the existence of the rule(s) relied upon, including examples of actual state practice, judicial and arbitral decisions, opinions of leading publicists, etc.?
   6.7. Is the cited authority of sufficient weight within the confines of Article 38 of the Statute to support the advocated conclusion?
   6.8. Does it adequately apply the facts to the rule relied upon or just argue by assertion?
   6.9. Does it use policy arguments to reinforce the arguments based upon legal authority?
   6.10. Does it openly confront and deal with weaknesses on the law and on the facts?
   6.11. Does each citation contain adequate information to locate the authority?
   6.12. Are the arguments clear and easily understandable?
   6.13. Overall, are the arguments persuasive on the facts, law and policy?

7. General
   7.1. Is the Memorial well written, well edited and professional in appearance?
   7.2. Does the Memorial demonstrate extensive research and a sound understanding of the applicable law?
   7.3. Overall, is the Memorial persuasive?
Reading 1.2

Source: 2009 Philip C. Jessup International Law Moot Court Competition, Memorial Worksheet (with omissions)

Instructions:
For each criterion, a score must be given within the range indicated. For example, a Memorial with adequate Grammar & Style should receive a score of “6”; good Grammar & Style “7”; very good Grammar & Style “8”; excellent Grammar & Style “9”; perfect Grammar & Style “10”; poor Grammar & Style the minimum “5.” There are lines provided under each category and an extra sheet on the back to include additional commentary. This feedback is extremely valuable to the teams. When finished, add the scores in the right-hand column to determine the total score.

Criterion:
1. Knowledge of facts & law. (Minimum: 10 pts; Maximum: 20 pts)
2. Proper & articulate analysis. (Minimum: 10 pts; Maximum: 20 pts)
3. Extent and use of research. (Minimum: 10 pts; Maximum: 20 pts)
4. Clarity & organization. (Minimum: 10 pts; Maximum: 20 pts)
5. Citation of sources. (Minimum: 5 pts; Maximum: 10 pts)
6. Grammar & style. (Minimum: 5 pts; Maximum: 10 pts)
GRADING GUIDELINES FOR BRIEFS

Briefs will be scored on the basis of quality of presentation and arguments, not on the merits of the case. The maximum possible score is 100 points.

I. Introduction and statement of the case: 0-20 points

• Does the brief frame the issues concisely and intelligibly?
• Does it summarize the argument persuasively?
• Is it well written?
• Does it create interest?
• Does it lead the reader to want to keep reading?
• Does it present a credible position?
• Does it make the reader want to rule in favor of this side?

II. Statement of facts: 0-30 points

• Does the brief make good use of facts?
• Does it [deal with] bad facts?
• Does it faithfully cite to the record?
• Is it well organized?
• Does it tell a compelling story?
• Does it have a theme?
• Is it persuasive in its own right?
• Does it include only relevant material?
• Does it foreshadow the legal arguments?
• Is there too much editorializing?
III. **Legal Argument**: 0-40 points

- Does the brief make good use of the relevant (laws)?
- Does it work with (specific laws) or just state abstract principles?
- Does it make appropriate references to (specific provisions)?
- Does it make reasoned argument or bald, unsupported conclusions?
- Does it weave the facts of the case into the argument?
- Is the organization logical?
- Do the headings advance the argument?
- Is it persuasive?
- Is it accurate?
- Does it account for the weaknesses in the case?
- How does it handle unfavorable authorities?

IV. **Style and professionalism**: 0-10 points

- Does the brief use proper grammar, sentence structure, spelling, and punctuation?
- Does it set the right tone?
- Is the overall presentation clear?
- Is it respectful?
- Does it correctly cite the decisions and the record?
- Is it neat?
- Is it technically precise?
- Does it comply with the Competition rules?
Reading 2- B. L. Porto

29-SUM Vt. B.J. 30

The Art of Appellate Brief Writing

... [A]nyone who aspires to be a successful appellate advocate must write briefs that are logical, clear, concise, and, above all, persuasive. Persuasive briefs begin with an appreciation for the value of the author's craft, but they take shape only after careful study and frequent practice. Think of this article as your “textbook” in a short course. Study its tips, practice them frequently, and let me know whether they help you.

The Essentials of an Effective Appellate Brief

A. Preliminary Considerations
The first subject that a brief writer ought to think about is whether the court to which appeal will be or has been made has jurisdiction to hear the case because this is the first subject that the court considers when it receives the case. ... The first query prompts additional questions. Have all the parties been named or identified in the appeal papers? Is the order or judgment below final or an interlocutory order that one can appeal? Have all time deadlines been met? Have events since the decision below made the whole case moot? [FN11] Brief writers must anticipate these questions, and, if necessary, address them in writing. The failure to do so will make painstaking research and careful drafting on other issues all for naught if the court bases its decision on the threshold jurisdictional issue.

The second subject that a brief writer should ponder is the rules of the court that will hear the appeal. [FN12] If you do appellate work infrequently, take particular care to review pertinent court rules, as they may well have changed since you last wrote a brief. ...

B. Statement of the Issues
A successful appellate brief begins with a statement of the issues that helps to convince the court to decide the case in your client's favor. Brief writing is persuasive writing, so the statement of the issues is an opportunity to begin convincing the court of the correctness of your position. Therefore, your statement should not be merely informative; it should be influential too. [FN13] This advice applies equally to Appellant and Appellee. Therefore, the Appellee's counsel should almost never accept the issues as they are framed in the Appellant's brief, but instead, should rework them to favor the Appellee. State the issues as questions to which the only reasonable response would be: “Well, yes, of course.” [FN14]
It is not easy to produce a question that both informs and influences the court while using relatively few words. [FN15] Therefore, do not try to do so until you are certain that you understand the pertinent issue and the standard of review that the court will apply to it. If you represent the Appellant, satisfy yourself that any claimed error by the trial court was harmful to your client's case. Otherwise, you may waste time raising an issue that the court will dispatch quickly as harmless error. [FN16] Besides, appellate courts look askance at briefs that present more than four issues, often assuming that the more issues raised, the less merit each one has. [FN17] Therefore, you cannot afford to argue marginal issues when you also have real issues to argue; a good brief usually argues between one and three real issues.

If you represent the Appellant, state first the issue that is most likely to trigger a reversal of the judgment below. This will ensure that the court regards your claims as worthy of the most careful consideration. [FN18] The only exception to this rule applies when, logically, a weaker argument must precede a stronger argument. For example, a procedural issue about the appellate court's jurisdiction should precede a substantive issue about the trial court's construction of an ambiguous statute or contract. [FN19]

The statement of an issue should include both facts and law, and it should identify the appropriate standard of review by the appellate court. [FN20] Ordinarily, it should include no more than seventy-five words. [FN21] Three methods of stating an issue are available to the brief writer. One method is the incomplete sentence that begins with "whether." An example is "whether the trial court erred in holding that the Smiths (Appellees) acquired a right-of-way over the Joneses' (Appellants') lot when the Smiths purchased their own lot, even though the Smiths' grantor did not own the right-of-way when it conveyed to them, which error violated the common-law rule against conveying a greater interest in property than one owns." The second method is the full-sentence question. For example, "Did the trial court err in denying Appellant Acme Motor Company's motions for J.N.O.V. and for a new trial, respectively, because the ... verdict was against the weight of the evidence, as the Appellee, Mr. Jones, failed to prove by clear and convincing evidence that Acme defrauded him when it sold him a truck?" The third method is the multi-sentence question. It identifies pertinent facts and legal principles in one or more declarative sentences, then, as the following example shows, it concludes by asking the court a question.

The Appellant, Mr. Jones, who is estranged from the Appellee, Mrs. Jones, has harassed her verbally, entered her residence without her permission, intimidated her physically, and threatened to retaliate against her if she filed for divorce. Under these circumstances, did the Family Court act within its discretion when it granted Mrs. Jones's Complaint for Relief from Abuse?

There is no compelling reason to favor the second method over the first, so one's choice is a matter of personal taste. I prefer the second method because a question tends to arouse my curiosity, hence, command my attention, more than an incomplete sentence does. So I often present issues as questions in hopes that this format will arouse the curiosity and command the attention of judges, too. On the other hand,
there is a compelling reason to prefer the multi-sentence format in a case so complex or fact-laden that one cannot present each issue in a full sentence without writing sentences that are as long as paragraphs. William Faulkner notwithstanding, paragraph-long sentences inhibit understanding and prevent persuasion. Faulkner did not have to persuade; you do. So, if your issue questions are unwieldy, abandon the single-sentence format, and use the multi-sentence (with concluding question) format instead.

Whichever method you use, present each issue in a way that suggests how you want the court to resolve it. Do not be satisfied with asking, “Did the Family Court abuse its discretion when it concluded that Mr. Jones had the present ability to meet his spousal-maintenance and child-support obligations?” Instead, ask, “Did the Family Court abuse its discretion when it concluded that Mr. Jones had the present ability to meet his spousal-maintenance and child-support obligations, despite his showing that his only source of income was his wages and tips from tending bar, and that his income was substantially less than the total amount of his monthly support and maintenance obligations?” The first question fails because counsel for either side could have written it. Nobody can say that about the second question, which is why it is better than the first one. [FN22]

Do not expect to be satisfied with your statement of the issues on the first or second draft. It may require considerable rewriting to produce an issue statement that is narrow, clear, and focused. Do not fear or bemoan rewriting, though; it is the birthplace of understanding, and without understanding, there is no persuasion.

C. Statement of the Case

The path from understanding to persuasion runs directly through the statement of the case. ...

Your statement of the issues got the court's attention because it was clear, concise, and direct. The statement of the case offers you an opportunity to hold the court's attention and to persuade it that your client is entitled to relief. Seize this opportunity whether you represent the Appellant or the Appellee. ... Influence the Court in your first sentence by identifying plainly the subject of your case. For example, “This case is about statutory construction. More precisely, it is about which of two alternative constructions of 12 V.S.A. § 3170(b) is correct.” Then weave facts and procedural history into a balanced and fair account of the events that led up to the appeal. [FN25] ...

... Judge Aldisert ... advises brief writers to tell the court “who, what, when, where, and how.” “Who” means who won in the trial court and who is appealing? “What” means what is the area of law that is involved in the appeal, and what are the specific issues in the case?” “Where” means where was the case previously? Was it in a trial court or an administrative agency? “When” means when did the alleged error occur below? Did it happen during pre-trial, at trial, or post-trial? “How” means how was the case resolved below? ...
The easiest and clearest way to relate facts and procedural history is chronologically. Identify the subject of the case, note what the Appellant is appealing from, then proceed to describe pertinent facts and procedural history, beginning with the event(s) that spawned the litigation and ending, if you represent the Appellant, with a brief indication of what your client will argue on appeal. If you represent the Appellee, summarize the Appellant's main argument accurately, then indicate briefly how you will refute it. The following example illustrates.

On appeal, Mr. Smith argues that the Family Court abused its discretion when it issued its final order because the evidence did not show that his conduct placed Mrs. Smith ‘in fear of imminent serious physical harm’ within the meaning of 15 V.S.A. § 1101(1)(B). Mrs. Smith rejects this view of the evidence, and will argue that she is a victim of ‘abuse’ under that statute because Mr. Smith's conduct toward her has indeed placed her ‘in fear of imminent serious physical harm.’ Thus, Mrs. Smith contends that the Family Court acted well within its discretion when it granted her petition for relief from abuse. Her argument follows.

Notice that this example names the parties instead of referring to their legal status (i.e., Appellant or Appellee). This reminds the lawyers and the court that the parties are human beings who deserve a fair and expeditious resolution of their dispute, and it makes your narrative more enjoyable to read. [FN28] Notice, too, that the example signals to the court the essence of the legal argument to follow, namely, that the trial court properly granted Mrs. Smith's petition for relief from abuse because Mr. Smith's conduct made her a victim of abuse within the meaning of the governing statute. The argument is more likely to succeed if the statement of the case “sets it up” by identifying Mr. Smith's conduct and by describing how it frightened Mrs. Smith. The key to setting up the argument is to write a statement of the case that emphasizes the facts that support it best. [FN29] Still, you should address the facts that favor your opponent because they will hurt you more if the court learns about them from opposing counsel. [FN30]

Regardless of how well you set up your argument, your credibility will suffer if you fail to support statements of fact and procedural history with references to the pages in the [record]. …

D. Summary of the Argument

…
A summary might be necessary in a multi-issue case with complicated facts; ... so every lawyer should know how to summarize an argument effectively. The most important things to remember are what not to do. Do not address in the summary subjects that the argument does not address. Do not write a summary until after you have written and edited the argument. It is difficult and dangerous to summarize that which is incomplete and/or not fully understood. Therefore, even though you should write most sections of a brief in the order that they will appear in the final product, it is best to write the summary and the argument in reverse order. Then you can construct your summary easily by stitching together introductory and concluding sentences from the argument, using its underlying rationale (expressed in one or two sentences) as your thread. Identify a controlling statute, but exclude citations. Repeat
this process for each argument in the brief. Alternatively, draft the summary, followed by the argument, then return to the summary and, if necessary, modify it to conform to the argument. [FN34]

E. Argument

Appellate brief writing, especially the writing of the argument, is an art, not a science. [FN35] There are no “iron laws” that, if followed scrupulously, will make your argument a winner every time. Yet, helpful hints, which follow, can improve the quality of briefs and the odds of victory considerably.

A persuasive argument is the product of careful research. ... Begin constructing an argument in your mind as your research proceeds, and write the gist of it down so that you will be able to make a smooth transition to writing when your research is finished. Do not try to make this transition, however, until you have unearthed at least some legal authority to support each argument that you plan to write. [FN38]

The transition should begin with a heading that sums up the argument that follows it. A heading should include facts, law, and a conclusion. [FN39] It should not be merely topical or even assertive; instead, it must be argumentative. “The question of laches” is a topical heading. “This suit is barred by laches” is an assertive heading. Neither one will make an appellate court want to rule in your favor. So convert them into an argumentative heading, namely, “This suit is barred by laches because it was filed 25 years after the issuance of the original certificate.” [FN40] If you do this properly, a judge can glean the essence of your argument merely by glancing at the headings that appear in the table of contents. [FN41]

Begin with your best argument - that is, the one that is most likely to persuade the court to rule in your client's favor. [FN42] A topic sentence should lead off, and should encapsulate, the argument without, of course, repeating the heading that preceded it. For example, “[t]he trial court misapplied the established standards ... for granting motions for a judgment notwithstanding the verdict and for a new trial, respectively.” ...

If you represent the Appellant, you have the advantage of being able to introduce the court to the case. [FN51] Use this opportunity to explain how the rule that you propose will affect society. Do not make emotion-laden ... arguments, and avoid writing in what one commentary calls “emphatic, unequivocal, and conclusory terms.” [FN52] You also have the burden of showing the appellate court how the trial court erred, which you should do as early on as possible. [FN53] If you represent the Appellee, you have two advantages; first, the Appellant's brief may offer a large target at which to shoot, and second, a trial court or administrative agency has already agreed with your position. [FN54] The second advantage means that your client will usually win if the decision below was reasonable (i.e., neither clearly erroneous nor an abuse of discretion).

The brief will be a large target if the Appellant failed to preserve below each of the arguments raised on appeal. Consider whether the Appellant objected properly at trial ... that are at issue on appeal, and whether the reasons that the Appellant cites
for overturning *35 evidentiary rulings by the trial court were the same reasons cited in timely objections at trial. [FN55] If not, you have a potential winning argument; namely, that the appellate court lacks jurisdiction to consider one or more claims because the Appellant waived them by failing to preserve them for appeal. After addressing jurisdiction, proceed to rebut the Appellant's substantive arguments. Either attack the reasoning of his authorities directly or show that they do not apply to the facts of the case at hand. [FN56] “If you have trouble thinking of a good response” to the Appellant's arguments, writes one commentator, “think harder. You must address those issues.” [FN57]

Whether you represent Appellant or Appellee, direct the court's attention to inconsistencies between the documentary and testimonial evidence that your opponent offered below. [FN58] Confront adverse authority directly; do not try to hide or to avoid cases or statutes that run counter to the rule that you propose. [FN59] Finally, indicate the result that you seek. For the Appellee's counsel, this may be simply an affirmance of the trial court's decision. For the Appellant's counsel, it may include a request beyond reversal, such as to release the client from custody or to dismiss an indictment. [FN60]

**F. Conclusion**

In brief writing, less is more and small is beautiful. Small words, economical sentences, and short briefs are generally advisable. The exception to this rule is the conclusion, where lawyers' custom is to write less than they should. It may not be sufficient, especially in a complex or fact-laden case, to limit the conclusion to a sentence such as, “For the reasons cited, this Court should reverse the trial court's order and direct the trial court to grant Acme Motor Company either a judgment notwithstanding the verdict or a new trial with respect to its liability for compensatory and punitive damages.” Instead, begin with two or three sentences that remind the judges of your reasoning and of why it should prevail. Make the request for relief the last sentence of the conclusion, not the first.

**Editing the Brief**

If you are satisfied with your brief after the first draft, your standards are too low. No lawyer ... writes briefs that are ready to be copied and filed after one draft. Therefore, good editing is as important to the success of your brief as good legal research is. Plan to edit, for both style and substance, at least twice. I routinely find small, annoying errors in draft briefs, even when reading them for the third time. Bryan Garner advocates letting your draft sit for a few days before you begin editing it. I rarely have this luxury, and I suspect that you do not have it either. [FN61] If you do, take Garner's advice, and see if a brief hiatus enables you to view your work with a fresh eye.

Whether your eyes are fresh or bleary, though, the editing process is the same. As you edit, do not just shorten wordy sentences; try to replace clumsy or dull prose with sharp prose that is likely to hold the reader's interest. [FN62] Persuasive writing must pack a powerful punch, especially when there is stiff competition for the audience's
attention. ...[T]he Court does not have time to decipher ponderous prose; your writing must grab the Court's attention and hold it for the duration of your argument.

... Omit surplus words. You can accomplish this by writing in the active voice instead of in the passive voice. ... Avoid compound constructions too. Do not use “at this point in time” when “now” will suffice. [FN66] Other common word-wasters include “the fact that” and “the question as to whether.” [FN67] Replace “the fact that the defendant was young” with “the defendant's youth,” and “the question as to whether” with “whether.” [FN68] Do not have the parties “take action” or “make an assumption” in your brief; have them “act” and “assume.” [FN69] Write short sentences that use short words; use “use,” not “utilize.” ... By and large, confine your sentences to one main thought, and try to keep average sentence length under twenty-five words. [FN70] Avoid dreadful “lawyerisms,” such as “hereinafter,” “heretofore,” “on point,” and “on all fours.” Shun double negatives too. There is no excuse for, “It shall be unlawful to fail to stop at a red light,” when you can write, “You must stop at a red light.” [FN71]

Not all “lawyerisms” are figures of speech. ...

Last but not least, remember that there is no law against writing an interesting brief. Reject sarcasm, vitriol, and hyperbole, but look for opportunities to grab the court's attention with an interesting turn of phrase or an offbeat word that makes your point in an engaging way. This article used the “offbeat-word” technique earlier, when it advised you to “marry” law to facts in writing your argument. ...

**Parting Thoughts**

After drafting and editing your brief, ask a colleague to check citations, quotations, and references to the record for accuracy, as your eye is likely to see what you intended, not what is actually on the page. [FN74] If you practice alone, you will have to perform these tasks yourself, but other people can help you assess the clarity of your arguments. Explain them to a nonlawyer orally; if you stumble through the oration, you do not understand your case as well as you should, and the brief will reflect that. [FN75] Alternatively, ask a nonlawyer to read the brief and assess its clarity. Partners and spouses perform this role well because they are secure enough to offer honest critiques. ...

...
III. The Seven Virtues of Appellate Brief Writing

Drafting a virtuous brief is not simply a matter of avoiding grammatical mistakes and typographical errors. Rather, a virtuous brief should demonstrate to the court the correctness of the advocate's position by showing that the writer has diligently and carefully researched the legal issues and is thoroughly acquainted with the record in the case. The writer should also consider the court's heavy workload and craft a brief to assist the court to review the merits of the case and the legal issues presented. Below, are seven traits that mark virtuous brief.

A. The First Virtue: Brief Tells the Client's Story

A virtuous brief tells the client's story in a compelling way that holds the reader's attention.

Crafting a good story requires several key components. First, the story must have a strong opening. The reader is most attentive at the beginning of the brief and the opening sets the tone for the way the reader will approach the rest of brief. The opening is the place to grab the reader's attention and make the reader want to continue reading.

Second, to write a good story, avoid irrelevant or random facts--just because something is true does not make it relevant to the matter before the court. This does not mean that every fact included must be legally relevant. It is appropriate, and necessary, to include those facts that help the narrative make sense by providing the context. But, including wholly irrelevant information can interrupt narrative flow and make a statement of facts seem garbled and disjointed.

Third, the facts argue the case. Thus, the recitation of facts should naturally lead to the conclusion the brief advocates. Make it easy for the reader to follow the narrative by placing the facts in a logical order. Furthermore, anticipate questions that are likely to arise in the mind of the reader and present the facts in a way that answers those questions. [*FN8*] Ultimately, the statement of facts should so naturally lead to the outcome being advocated by the brief, that by the time the reader reaches the argument, the desired result seems inevitable (you hope!).

Finally, consider borrowing techniques that writers in other fields, such as journalism, use to craft compelling stories that make the reader want to continue reading. But, bear in mind that drafting a compelling story is a balancing act. A legal
writer must disclose all relevant facts, including those that are unfavorable to the client.

B. The Second Virtue: Brief Is Clear and Concise

A virtuous brief is clear, concise, and persuasive. It should be free from muddy arguments and dense prose. A brief should help the court resolve the legal dispute before it.

First, present a straightforward argument designed to convince the court that the result you advocate is fair, legally correct, and factually supported. Start out by honestly explaining the applicable state of the law. Discuss precedent from other circuits when there is a circuit split.

Second, provide a thorough analysis. Explain all the steps in the analytical process. The brief should explain how the facts fit with the law in easy-to-follow steps that support the conclusion being advocated. The brief ought to anticipate and resolve questions that are likely to arise in the reader's mind to minimize any doubts as to the brief's accuracy or veracity.

Third, write for clarity. Clear writing is essential to making a brief easy to read. Avoid cluttering the brief with unnecessary words. A brief is easier to follow when written in plain English, using common words and short declarative sentences. Convoluted sentences that require a reader to struggle to determine their meaning impairs the reader's confidence in the brief.

Similarly, avoid using unnecessary jargon, uncommon acronyms, or unpronounceable clusters of initials. Insider jargon or acronyms well-known within a particular field can be confusing when read by those--e.g., judges--outside that field. [FN9] Their use can render a brief incomprehensible, and waste the reader's time by forcing the reader to refer back to earlier text to decode the acronym's meaning. A brief is easier to read when the judge does not have to create a glossary of acronyms to decipher what the brief is referring to. [FN10]

Finally, be concise. The argument should be short, uncomplicated, logical, and written in clear language that is easy to read. A brief loses its effectiveness the longer it gets. Thus, do not try to provide analyses for fifteen different issues, but focus on those issues vital to resolving the case. Generally, avoid a lengthy discussion of the general legal issue or facts of the precedential cases. Instead, discuss only the aspects of prior cases that are specifically relevant to the issues presented by the case at hand.

C. The Third Virtue: The Brief Only Addresses Issues Properly Before the Court

A virtuous brief is one that articulates or responds to only those issues properly before the court. Do not burden the court's time by including non-issues that may obscure the issues the court must resolve.

Although the court generally has discretion to consider issues of law raised for the first time on appeal, [FN11] it is unusual to do so. [FN12] The reason for this is simple—the reality is that issues not resolved by the district court usually lack sufficient
factual development for the court to fully consider the issue on appeal. [FN13] Moreover, it is generally unfair both to the district *228 court and to the parties to address an issue before the district court has had an opportunity to consider it and to develop the record. [FN14]

Additionally, issues raised for the first time in an appellant's reply brief are considered waived. The court routinely refuses to consider them. [FN15] The reason for this is fairness. When an issue is raised for the first time in a reply brief, it means that the appellee has not had an opportunity to respond to that issue. [FN16]

D. The Fourth Virtue: Argument Responds to Opposing Party's Arguments

A virtuous response brief is one that does in fact respond to opposing counsel's brief. Responding to the other party's argument helps the court discern the precise points of conflict between the parties.

It is frustrating to read a brief that is a “response” in name only. A responsive brief should refute those arguments that may hurt the party's position. Thus, an appellee's reply brief should raise the appellee's best arguments, but also address the credible arguments raised by the appellant. Similarly, appellant's answer brief should not simply rehash the opening brief's arguments as if nothing has been said in response.

That being said, it is not necessary to discuss every possible argument raised by the opposing party. Rather, the response brief should focus on the opponent's arguments that are relevant, particularly compelling, or that might lead the court to a contrary conclusion. Focus on what is relevant and avoid losing the strongest argument in a fog of words and unnecessary counter-analysis.

E. The Fifth Virtue: Includes a Complete Excerpt of Record

Virtuous brief writers file a proper excerpt of record. Ninth Circuit rules require that parties prepare and file excerpts of record in all cases before the court. [FN17] Only the excerpts are before the court, not the whole *229 record. Court rules specify the required contents of the excerpts, [FN18] and require that the excerpts include any part of the record cited to in the appellant's briefs and necessary to the court's resolution of the issues. [FN19] An improper excerpt of record places an unnecessary burden on the court.

For example, an incomplete excerpt of record creates delays because the clerk of our court must then request that the district court clerk submit the entire record. It may take up to three weeks to receive the district court record. This means the court may not have the record in sufficient time to prepare for oral argument.

Additionally, when the court does get the full record, it must spend an inordinate amount of time combing through the district court record, which generally consists of multiple boxes of material. Much of that material may be irrelevant to the issues on review. Further, because there is only one copy of the district court record, but three judges on a panel, the court must then expend valuable resources to ensure that all judges have available relevant parts of the record.
Bear in mind, however, that the excerpt of record should be limited to those parts of the record necessary to the resolution of the issues before the court. [FN20] An overly voluminous and repetitive record burdens the court with irrelevant material. [FN21] Indeed, circuit rules provide for sanctions against an attorney who “vexatiously or unreasonably increase[s] the cost of litigation by inclusion of irrelevant materials” in the excerpts of record. [FN22]

F. The Sixth Virtue: Brief Complies With Court Rules
A virtuous brief follows the court's local rules to the letter and to the spirit. [FN23] These rules were not adopted to vex the litigants. Rather, they provide some uniformity and fairness to the process. …

The rules stipulate typeface requirements, the parts of the brief, the order in which each part should occur, filing deadlines, and page limits. [FN24] Rules requiring that briefs have certain margin widths, typeface, and font size are designed to make briefs more uniform, thereby making court operations more efficient so the court can focus on the substance of the briefs. These rules also ensure that each brief writer has the same amount of space within which to present their argument. Finally, typeface requirements are also designed to make reading a brief easier. …

G. The Seventh Virtue: Abides by Filing Deadlines
Finally, the most virtuous brief-writers abide by filing deadlines. These deadlines help ensure efficiency and fairness to the parties. Failing to adhere to them is a serious transgression.

At a minimum, comply with the rule's form. With the exception of briefs or appendices, all papers a party is required or permitted to file with the court must be received by the court clerk by the filing deadline. [FN26] This means that anything other than a brief sent to the court (e.g., documents a party has been ordered to produce), must be in the court's hands on the deadline or it is late. Circuit Rule 42-1 provides for dismissal if records, docket fees, or appellant's briefs are not timely filed. [FN27]

To ease the court's workload, abide by the spirit of the rule. For instance, do not wait until the last minute to ask for more time to file. The court is likely to deny a last minute request to file a late document or to reschedule oral argument.

Likewise, do not file a Rule 28(j) letter citing to new authorities two days before oral argument. [FN28] The only time doing so is appropriate is when the opinion cited in the letter was actually announced two days before oral argument. Springing new authority on the court at the last minute results in unnecessary disruptions to oral argument preparation and potential delays to the resolution of the case. If the case is critical to the outcome, it should be brought to the court's attention promptly so that it can be discussed at oral argument.

…
[Footnotes omitted]
IV. Drafting the argument

The TREAT format (discussed earlier) applies in the argument section [of the appellate brief], and you should use your questions presented or Points of Error Thesis headings to guide the reader through the sub-issues that require separate TREAT. …

Thesis headings should be meaningful so that they can provide a useful summary of your argument to a judge that is skimming your argument section. A good thesis heading not only reveals a conclusion but provides the “because” part – the legal principles and facts that lead up to the conclusion. …

…[Y]our search for broader principles [in statutes] focuses on what you claim is the statute’s objectives. Use legislative history to illustrate it. Buttress your construction with interpretations or applications by the implementing agency, and look to the commentators in treatises and law review articles. …

Too many briefs just try to take pot-shots at the trial judge and the opponents. Even if the judge or opposing counsel have made blatant errors, you first should focus your efforts on what legal principles should apply to the case and only second on what the trial judge or your opponent did wrong. The judges on appeal are far more interested on how to reach and justify the right result. In fact, ad hominem attacks easily can turn the court against you.

You must deal fairly but convincingly with unfavorable authority. … [W]hat is truly “adverse [authority] can be a matter of interpretation. You really need to consider whether the authority is controlling (or just persuasive) and whether your facts are in some way distinguishable. …

Although there is no limit to the number of good arguments you raise (within reason), alternative arguments that simply crowd the brief with imaginative possibilities choke off the best arguments and drown your better arguments in a sea of words. Such scattergun tactics rarely are effective and can dilute your major points. Your time, energy, and space is better spent bolstering your main arguments. …

Do not stress (underline, bold, italicize) too much in your text – you will stress out the judges! … Sparing use of underlining or italicizing is useful to highlight key words, but effective emphasis depends on the content and arrangement of your text.
Shorten your quotes. No one likes long quotes for at least three reasons: (1) long quotes are too boring and many readers skip over them; (2) the reader knows you are going (and should) explain the significance of the quote anyway; (3) readers want to hear what you have to say. So, distill long quotes down to their essential point and avoid long description of your case.

V. Drafting an answering brief

The most important point for appellee is to make your affirmative case first before you start attacking the appellant’s. The same points made in discussing appellant’s strategy fits here, too; fit your case into a broader framework. You want to set the playing field rather than accept the one set by your opponent. If you do a better job of that than your opponent, then when you start responding to specific arguments you can do so from a position of strength.

Storytelling in the statement of facts is as important for appellee as it is for appellant, and more so if the appellant has done a good job getting out its side of the story. If your opponent told a good story in her opening brief, acknowledge it, but immediately turn the tables around to your side: “Appellant told a good story about XYZ. Now here is the rest of the story.” At best you will pull the court’s attention and concern away from your opponent and on to your client. At least you should make sure the court is returned to the middle ground, neutral territory, not swayed by the sympathies of either side. This task will be difficult enough if your opponent was an excellent storyteller.

In developing your analytical framework, it will help if you can synthesize the broad principles ….

When you start responding to specific arguments, you have the option to follow the sequence of issues used by appellant but you are not bound to follow the structure. Courts appreciate the simplicity of this structure, but you should consider the possibility that this structure might not be the most effective way to structure your arguments. Appellant’s third best point might be our best point, and appellant’s best point is likely to be your worst point. It is more important to present your best point first and next best point second that it is to limit your brief to the order picked out by your opponent.

What is the most important is to make sure you answer all of the appellant’s arguments. Even if your opponent has raised an argument that obviously lacks merit, you should explain why. Do not leave the court guessing whether you intended to concede something, or force the court to undertake independent research on why appellant’s last two arguments should fail, simply because you failed to address them.

In addition:

➢ Never assume that appellant has laid the necessary foundation for its argument. Go through a mental checklist on each argument. …

➢ If the appellant seems to have scored points by showing defects in the trial court’s approach, remind the court of appeals that it is reviewing the lower court’s result not its reasoning. It can affirm on any basis supported by the law. If you have
focused your brief on what should be the controlling principles, you need not worry about defending the lower court’s faulty reasoning.

Appellees have the opportunity to call the court’s attention to shortcomings in appellant’s brief … . The tendency is to overdo these comments as if an appeal were a debate where you are scoring points. Keep these comments to a minimum, and stress only those that are substantial. Your goal is to affirm the [lower court’s decision]. …

You are not required to prove that appellant’s statements are wrong before you can write your own. The rule allows you to rewrite whenever you are dissatisfied with one or more of appellant’s statements. … Whether you submit the entire statement or portions of one will depend on how much needs restating. … If your opponent’s facts section was mundane,… you need not go to great lengths to correct the record, but you should take advantage of the situation and tell your own story. Do not miss out on the chance to get the court to care about your client so that it will be happy to listen to your legal arguments that provide the means to the end of victory for your client.

V. Drafting the reply brief

Appellant’s right to reply is a valuable right. Do not squander it by rehashing or repeating arguments already covered in your opening brief. Having the last word, as such, does not necessarily have a tremendous effect on the appeal because the judges are likely to wait until the parties have filed all their briefs and then read them all together. Appellant should use its right of reply to focus the appeal to its core. You know what you said in your opening brief; you now see what appellee has said as a response. Refine the issues in light of both. A reply brief is the best vehicle for narrowing the true issues, so sharpen the focus. Now is your chance to tell the court what this appeal is really all about. If appellee did not answer all the issues raised in your opening brief, make the most of that. The reply is your chance to put the issues in their starkest terms that are favorable to your client.

Sometimes, you also must use your reply for damage control. If appellee has hurt your position, you must do what you can to repair it. Whatever you do, do not try to interject new issues in your reply. Not only will the court likely ignore them, the judges also will be irritated that you tried to sneak something in without giving your opponent a chance to respond. If something new (… a statute, regulation, etc.) has come up that the court should know about, use the procedure for submitting supplemental authorities rather than putting it in your reply brief. This way you do not co-mingle the separate functions of replying and submitting supplemental authorities.

A reply brief is optional. However, it is hard to imagine a situation whose appellant would not exercise its right to reply where the local rules permit it.

...
Reading 5: Tips on the Structure of Briefs

Reading 5.1

Writing Appellate Briefs

cjwww.csustan.edu/cj/courses/writing/appellate.html
Accessed 11 Jun. 09

... The key to a good brief is organization! Before you begin writing, think out your arguments and write a detailed outline.

... Your brief should follow the appropriate formatting rules.

- **Title Page**
  The Title Page contains the full names of the litigants, the docket number, an indication of whether it is the appellant's or appellee's brief, the name of the appeals court, the name of the lower court, and the names of the attorney(s) who wrote the brief.

- **Table of Contents**
  The Table of Contents lists the page numbers of each of the other parts of the brief (except the Title Page and the Table of Contents itself), including the pages on which the main and sub arguments can be found. Obviously, you will probably write this part after the rest of the brief is complete.

- **Table of Authorities**
  The Table of Authorities lists every page number on which each case, statute, constitutional provision, law review article, or other authority is mentioned. Give the full and proper citation for each authority.

- **Questions Presented**
  The portion should contain a concise (usually one sentence) statement of each of the legal issues that is being appealed. A good attorney should be able to word these issues so as to subtly favor his or her side. The questions usually begin with "Whether," "Is," or "Does".

- **Statement of Facts**
  This section presents a relatively detailed description of the events that led to the case. The detail here is much greater than would be given in the "Facts" section of a student brief. Again, a good attorney should pay attention to structure and word usage so as to subtly favor his or her side.

- **Summary of the Argument**
  Your arguments for each issue should be summarized in a paragraph or two. Make sure your summaries are in the same order as the Questions Presented.

- **Argument**
  This is the main text of your brief. You should present your arguments in order. Each section should be preceded by a brief, one sentence statement of
the argument. That statement should be numbered so as to coincide with the Questions Presented, and should be underlined. If your issues are complex, you might want to summarize subarguments as well.

Your arguments should be well-thought-out, well-written, and supported by authorities (usually other cases). Use quotations sparingly. Give proper citations to the sources of all authorities.

- **Conclusion**
  This is usually a single sentence, which clearly states what outcome you desire. For example, "For the foregoing reasons, the opinion of the Court of Appeals should be overruled, and a new trial ordered." Below this, write "Respectfully submitted,". Then you and your co-counsel should sign the document.

7. **Revise, rewrite, and proofread your brief**

   Very few people write a perfect brief on their first try. Don't be afraid to make changes. Revise several times, if necessary. It's often helpful to ask a friend or classmate to read and critique your brief; other people will often notice problems that the author has overlooked. Check your brief for grammatical and spelling errors (and beware!: spellcheckers won't catch all mispellings). Nothing makes a worse impression than these kinds of mistakes.

   When you're satisfied with your brief, double-check that all your case citations are current.

...
**Reading 5.2**

**The Appellate Brief**

©2009 SparkNotes LLC


Accessed: June 11, 2009

---

**In General**

1. **Purpose**
   
   The purpose of an appellate brief is explain why the lower court’s decision was erroneous (for the petitioner/appellant) or why it was correct (for the respondent/appellee). It is an advocacy paper, so it must be persuasive on every issue of fact and law.

2. **Audience**
   
   The audience is one or more judges who are informed and intelligent. Judges have a support staff of clerks and staff attorneys who research the issues fully and provide independent analysis, so the brief must address every issue.

3. **Approach**
   
   When approaching an appellate brief, use the same general steps as outlined for the legal memorandum … . However, focus on the following areas in greater detail:

   1. **Determine the standard of review**
      
      Every appeal must have a standard that the appeals court reviews the decision from below. …

   2. **Identify the necessary conclusions**
      
      Determine what conclusions of fact and law the court must reach to rule in your client’s favor. These determinations will provide an outline of the structure of the brief.

4. **Notes on the appellee’s brief**
   
   The appellee’s goal is to affirm the correctness of the decision below. The appellee’s brief is written only after the appellant’s brief is submitted to the court.

   1. **Address the same issues the appellant addresses**
      
      Raise new issues only if the appellant so fundamentally misunderstands the case or misrepresents the issues that you cannot brief the case without raising new issues.
2. **Draft a new statement of facts**
   1. Do not rely on the appellant’s statement of facts. Draft your statement based on the record.
   2. The differences between the appellant’s and appellee’s statement of facts should be subtle, unless there are incorrect facts in the appellant’s brief that require correcting.
   3. Emphasize areas favorable to the appellee that the appellant may have glossed over.

3. **Write affirmatively**
   Do not write defensively simply because your goal is to defend the decision below. For example:
   - **Defensive sentence:** “The record does not demonstrate the errors of law alleged by the appellant.”
   - **Affirmative sentence:** “The record supports the Court’s conclusion.”

**Formatting**
Always [follow appropriate] … formatting.

**General tips**

**Brief means brief**
Write as concisely as possible. Judges are not impressed by length. In addition, key arguments will be lost in myriad words. …

**Maintain the same train of thought**
Think of a brief like a math problem. A mathematician would say “1 plus 2 equals 3,” not “1, the first positive whole numeral, as opposed to a fraction or negative numeral; plus, a word representing . . .” Likewise, a brief must read like a math problem and follow each point to completion with logical simplicity.

**Transitions**
Each paragraph should have relevance to the prior thought. Include signal words such as “First,” “Therefore,” “In addition,” “Similarly,” “However.” …

**Jurisdictional Statement**
The Jurisdictional Statement should provide the [legal] authority and any essential facts that grants the court the jurisdiction to hear the case.
Sample Jurisdictional Statement:
Petitioner seeks review of … . This Court has jurisdiction to hear an appeal of a decision of …

Statement of the Issues
The Statement of the Issues serves the same purpose as the Questions Presented in the legal memorandum. Therefore, use the same rules and take the same approaches in framing the issues.

Statement of the Case
The Statement of the Case should summarize the procedural details and any relating facts. Summarize only those procedural details that are relevant and material to the appeal.

Sample Statement of the Case:
On April 9, 2002, Petitioner, being accused of Conspiracy to Commit … . On April 30, 2002, Petitioner pled guilty to … . It is from that final order and judgment that Petitioner appeals to this Court.

Statement of the Facts
Like the Statement of the Facts for a legal memorandum, the Facts in a brief should tell a story to a reader unfamiliar with the events in question.

1. **Provide an introductory paragraph**
   The first paragraph should outline the facts to follow.

2. **Include the page in the record**
   After each sentence, include the page in the record where the fact is stated (e.g., R. 4).

3. **Minimize, but do not exclude, negative facts**
   Mention both favorable and unfavorable facts. When presenting the facts, take special care to prevent these facts from taking precedence in the Statement. Always surround unfavorable facts with favorable ones.

... Summary of the Argument
The Summary of the Argument should provide a concise summary of the factual and legal arguments contained within each heading and subheading. Although the Summary of the Argument appears before the Argument section, it should be written after the Argument is completed.

... Argument
Like the Discussion section of a legal memorandum, the Argument section makes up the heart of the brief. This is the persuasive section of the brief, so every word should function persuasively.

1. **Analogize favorable law; distinguish unfavorable law**
   
   Explain to the court why law that assists your case applies. Explain why law that hurts your case does not apply. For example, if a prior judicial decision is legally identical but unfavorable, explain why the facts are distinguishable. If the bulk of existing law is against your side, attempt to distinguish your case as unique and worthy of an exception.

2. **Point and subheadings**

   Each point heading should be in ALL CAPS and centered in the page. Subheadings should be underlined or italicized.

**Sample Argument:**

... [Omitted]

**Conclusion**

Use the Conclusion section as another opportunity to persuade. Do not simply state “for the foregoing reasons, the decision below should be upheld [or reversed].” Instead, in three to five sentences, reiterate the key reasons why the decision should be upheld or reversed.
Review Exercises

1. Depending upon the moot court competition, state your comments on a sample brief, petition or memorial of both sides. The sample may be provided by the instructor/coach or be gathered by the student.

2. State the extent to which you can use the brief writing skills and approaches suggested in the readings above in:
   a) appellate briefs to Ethiopian courts
   b) petition to the Cassation Division of the Federal Supreme Court.
Thematic Moot Court:
Brief Notes and Materials

Part II (Units 4 and 5)

Elias N. Stebek
St. Mary's University College, Faculty of Law

Sponsored by Justice and Legal System Research Institute
Addis Ababa, Ethiopia
September 2009
Thematic Moot Court:

Brief Notes and Materials

Elias N. Stebek
St. Mary’s University College, Faculty of Law
# Contents

**Part II – Oral Rounds**  
(Weeks 7 to 16)

<table>
<thead>
<tr>
<th>Overview</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>133</td>
</tr>
</tbody>
</table>

## Unit 4- Oral Augment and Persuasion Skills

<table>
<thead>
<tr>
<th>Specific Learning Outcomes</th>
<th>135</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unit Introduction</td>
<td>136</td>
</tr>
<tr>
<td>Tasks: Week 7</td>
<td>140</td>
</tr>
</tbody>
</table>

| Reading 1: Robert J. Martineau, *Fundamentals of Modern Appellate Advocacy* | 141 |
| Reading 2: Graves & Vaughan, *Advocacy and the Art of Persuasion* | 148 |
| Reading 3: Schmedemann & Kunz, *The Science of Advocacy* | 151 |
| Reading 4: Michael Vitiello, *Teaching Effective Oral Argument Skills* | 157 |
| Reading 5: Shepherd & Cherrick, *Advocacy and Emotion* | 165 |

## Unit 5- Sample Thematic Moot Courts

<table>
<thead>
<tr>
<th>Specific Learning Outcomes</th>
<th>173</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unit Introduction</td>
<td>173</td>
</tr>
<tr>
<td>Tasks: Week 7 to 16</td>
<td>177</td>
</tr>
</tbody>
</table>

| Initial Rounds (Weeks 8 to 14) |
| Advanced Rounds (i.e. Semi final and final) |
| *Semifinal* oral contest (Week 15) |
| *Final round* oral contest (Week 16) |

| Reading 1: About Jessup (Readings 1.1 & 1.2) | 179 |
| 1.1- Oral round grading | |
| 1.2- Frequently Asked Questions about the Jessup Competition | |
| Reading 2: Jessup Official Rules (2010), Rules 6-8, 10 & 11 | 190 |
| Reading 3: Harry H. Almond, Jr., “Strengthening ... Jessup” | 208 |
Section 2- African Human Rights Moot Court .................................................. 217
Reading 4: African Human Rights Competition ............................................... 219
  4.1- About African Human Rights Competition ........................................... 219
  4.2- Official Rules: Instructions to Judges .................................................. 220
  4.3- Sample score sheet ............................................................................. 222
  4.3- Sample moot problem .......................................................................... 223

Section 3- APAP’s Moot Court
Reading 5: APAP’s Moot Court Competition .................................................. 229
  5.1- Rules of APAP’s Moot Court Competition ............................................ 229
  5.2- Written pleading score sheet .............................................................. 233
  5.3- Score sheet for the selection of Best Oralist ........................................ 234
  5.4- Oral argument score sheet ................................................................. 235
  5.5- Sample moot problem .......................................................................... 237

Annexes (I to IV) ............................................................................................... 241

Bibliography ..................................................................................................... 253
Part II- Oral Rounds

Overview

Thematic Moot Court envisages Initial (First and Second Rounds) and Advanced Rounds (Semifinal and Final Rounds) of oral arguments among students who are registered for the elective course. Under such circumstances, the rounds can be classified into Initial Rounds and Final Round so that students with the highest score in the Initial Rounds can participate in the final round. If, for example, eight students are registered for an elective thematic moot, they can be encouraged to submit (applicant or respondent) memorials in pairs and to conduct oral contests among four groups in rounds (each group conducting three contests in the initial round). Two to four students with the highest score can then be selected to represent the law school in interschool competitions.

As highlighted in Part I of this course material, the course involves an intramural (in-school) moot court and may also include inter-school competitions. Moreover, it can be part of a law school’s preparation towards a national or international moot court competition. Law schools that participate in the national moot court competition annually sponsored by APAP (Action Professionals’ Association for the People) can designate the thematic moot court course as 2010 X University Moot Court Competition and then use the moot problem sent by APAP in the competition. The winners of the in-school competition can then represent the law school in the national competition. The same can be done with regard to Philip C. Jessup International Law Moot Court Competition, African Human Rights Moot Court Competition, ELSA Moot Court Competition (EMC2) and others subject to the need for prior permission from the organizers if there are restrictions against using current moot problems.

It is to be noted that in some moot courts (including Jessup), the organizers do not allow the moot problem of the year to be used in in-school moot courts.

1 European Law Students Association
unless there is a prior notification and permit. In such cases, the coaches/instructors can use moot problems of earlier years for team selection rounds after which they can form the law school’s Jessup Team which prepares briefs and conducts practice rounds.

In case the number of students registered for the course is less than eight (for example, four), memorial submission will be individual, and there will only be practice rounds (or ranking rounds) among the students without the need to classify the contest into initial and advanced rounds. As long as the mooting is open to all students who have good performance in Appellate Advocacy and Appellate Moot Court, the law school can offer thematic moot court to students no matter how few they might be.

The generic term “… University Moot Court Competition” will enable the law school to use the same course title in its curriculum and to be flexible in changing its contents which can be shown in transcripts and certificates for semi-finalists and finalists. Although the workload involved in preparation for and participation in moot courts far beyond the credit hours designated for the course, the benefits are worth the effort. In fact, there is interest on the part of students to involve themselves in moot courts as co-curricular activities even where no credit hours are attached to them. It is also possible to attach credits to the memorials of students who represent the law school in national rounds because there is much research involved in such memorials.

Part II of this teaching material focuses on Oral Rounds. It covers the following Units that are expected to be covered from Week 7 to Week 16 during which the Initial and Advanced Rounds of the moot court takes place:

Unit 4- Oral Argument and Persuasion Skills
Unit 5- Sample Thematic Moot Courts
4.1- Specific learning outcomes

At the end of this unit, students are expected to be able to:

a) explain the pre-argument tasks of research and brief writing and their impact on oral presentation;
b) explain the informative and persuasive aspects of oral argument;
c) discuss the notion of preparation and flexibility in oral argument;
d) contrast formal written speech and extemporaneous presentation based on an outline and notes that can be glanced at without losing adequate eye contact with the judges;
e) discuss content, structure and style as elements of persuasive oral presentation;
f) contrast merits and effectiveness of arguments in the context of evaluating moot court briefs and oral contests;
g) explain the significance of the three elements of Aristotelian rhetoric in persuasive argument;
h) discuss the need to focus of strengths and also address weaknesses in a case;
i) discuss the balance between reason (logic) and emotion in oral advocacy.

Expected number of learning hours (Week 7):

- Class hours: Two Hours
- Student independent workload: Six Hours (excluding rehearsal for oral arguments)
4.3- Unit Introduction

Thorough research and brief writing enable attorneys to grasp the details of facts and laws that are crucial during oral arguments. It is against this backdrop that an attorney organizes his/her grounds of appeal, petition or memorial which serves as the conceptual foundation for informative and persuasive oral arguments. Some benches raise questions at the end without interrupting the presentation. In moot courts, however, students are expected to prepare themselves for challenging questions in the midst of an oral presentation.

Most judges read briefs before the session of oral argument. There can also be judges who come to the session without having read (or adequately) read the brief/s. The counsel is expected to be prepared to clarify all queries and doubts from the judges in that particular bench. That is why knowledge of the audience becomes crucial. Such knowledge enables the attorney to have important information whether the practice of the bench is to assign one judge to handle details of a given case or whether each judge thoroughly reads the details in every case.

If the latter is the case, the presentation during the oral argument does not need to dwell upon facts, and can highlight legal issues with due attention to the ones which determine the outcome of the case and the ones on which the judges can possibly have doubts. In case there are judges who come to the session without having adequately read the records, the lawyer should lay down some foundation about the core aspects of the case and swiftly go to the legal arguments.

An attorney is expected to be prepared for both extremes, i.e. a bench that likely asks many questions or, on the contrary, the one that raises only few questions. The first possibility consumes the attorney’s time and preparation for oral argument must enable the counsel to be flexible and address the issues he/she has planned to present. He/she should respond to the questions and then put the responses within the framework of the oral presentation outline. In other words, the counsel can still pursue the outline and then state that an issue
has been addressed while responding to a given question and then proceed with the structure in the roadmap of the presentation.

In the event of few (or extremely few) questions, there is the advantage of ample time for oral presentation. Such events may also bear the risk of turning oral arguments to non-spontaneous formal lectures that usually are not effective. In such cases, the attorney is expected to make use of this opportunity (i.e., the adequacy of time) to make full presentation which not only informs but also persuades the court. This requires thorough preparation and effective communication skills with utmost brevity and flexibility as discussed in the readings of earlier courses and the ones included in this unit.

Students are expected to revise the readings (on oral argument) in the teaching material on Appellate Advocacy and Appellate Moot Court. This unit also includes some readings. In Reading 1, Martineau points out factors involved in effective oral arguments. He states that oral arguments are effective when the attorney can “eliminate any doubts that the judges may have about the validity of the points made in his brief.” This requires preparation (complete mastery of records, i.e. having the facts of the case at fingertips and thorough knowledge of the law). Martineau warns lawyers against “writing out a complete statement and memorizing as much of it as possible” and points out that this detracts from the spontaneity that makes an oral argument interesting and persuasive.

Attorneys are expected to “prepare an outline or some other listing of the principal points” which are designed to facilitate a presentation in logical sequence without overlooking any of the critical points and possible questions from the bench in the course of the presentation. Martineau states that the various skills of public speaking will be of much help and underlines that “the most effective type of [oral presentation] is the one that has everything worked out in advance except the precise words to be used in the speech. This type of speech, which is termed extemporaneous, is precise in its organization and thought content, but flexible in word choice.” He suggests that “[r]ather than preparing a manuscript, all that is necessary is to prepare notes on the key words and phrases of the speech and the authorities cited, and to arrange them
in the proper order.” Moreover, the reading forwards various factors of effective oral arguments that include audience contact by exercising careful control over body movements, voice control and eye contact.

Martineau notes that questions from the bench “should not be viewed as an interruption” but “as an important part of the presentation” and that responses “should not be just a repetition of what has already been said, but should provide additional information or different emphasis.” He also suggests that the presentation should focus two or three points which make use of the prime time of effective presentation which is usually at the beginning and at the end.

In Reading 2, Graves and Vaughan state that law students “can and should learn the art of persuasion - an art that must be used in any venue, in any country, and before any tribunal if one is to serve as an effective advocate for one's client.” Persuasion, according to Graves and Vaughan, involves clear articulation of a position in a “respectful conversational style than by a monotonous and perhaps demeaning lecture.” They explain the three aspects of communication: namely, content (“the substance of the advocates' argument - the facts and the law”), structure (“use of roadmaps and signposts to inform the listener about what to expect and how to expect it”) and style (delivery of the communication which involves not only verbal communication but also “body language, facial gestures, speech inflections, pace, and eye contact, to name just a few.”)

Graves and Vaughan note that mooting must focus on both style (or style and structure) and substance (or content) although “the arguments of the students are judged not on the merits, but on their effectiveness, given the substantive circumstances presented.” To this end, they make a distinction between the external end of litigation (i.e., winning a case) and the internal end of an oral argument which involves the submission of “the best possible argument on behalf of a particular position.” As Graves and Vaughan observed, “mooting serves a valuable educational purpose even if it does focus predominantly on the internal end of rhetoric rather than the external result.”
Schmedemann and Kunz (Reading 3) relate persuasive legal arguments with the principles of Aristotelian rhetoric, which regards persuasion as the “function of three elements: *logos*, *pathos*, and *ethos*.” These elements “[i]n simple translation … are appeal to logic or proof, an appeal to emotion, and reliance on the writer’s good character.” Schmedemann and Kunz underline that an argument “must be logically sound, it must appeal to the reader’s sense of what is right on the facts, and the advocate must appear credible and trustworthy.” They note that a convincing legal argument requires credible arguments and presentations with regards to facts and the law which *inter alia* include the interpretation of facts fairly yet persuasively, selection of legal topics that need to be covered and assertions that are well grounded in the law and facts, coherence in the presentation, and developing a theory of the case based on adequately assessed strengths and weaknesses in which strengths are stressed and weaknesses are meanwhile addressed.

Vitiello (Reading 4) states that oral argument is the forum which helps the attorney to clear doubts and questions judges might have after having read the brief. He underlines the significance of eye contact and the ability of the attorney to answer questions from the bench. Vitiello lists the “components of good oral argument” as “a clear opening, providing a roadmap of her argument, including signposts that signal the different components of the argument” after which the counsel should develop the theme smoothly and coherently and “should aim for a flexible style that allows her to move to the part of the argument that most concerns the court.” He also points out the significance of skillful response to questions “a compelling conclusion that summarizes the most persuasive points in the argument” and “the ability to deliver an effective rebuttal.” The reading also includes an appendix which shows elements of evaluation of oral arguments.

In the last reading, Shepherd & Cherrick address the relationship between reason (logic) and emotion in oral arguments with particular focus on emotion. They relate the role of emotion in oral arguments with Aristotle and Quintilian’s teachings of classic oratory and rhetoric (*Ethos, Pathos* and *Logos*) and stated that
“emotion and reason are necessary elements of all persuasive arguments.” The reading gives focus to factors of effective oral augments, such as the need to know the audience and the art of using emotion as a powerful tool of advocacy “with delicacy and subtlety” that can “portray sincere feelings of love, of grief, and of empathy with pain.” The authors of the reading also indicate the approach that is usually pursued in response to an adversary that makes an appeal to the emotion of the bench, because there is, under such circumstances, the need to seek dispassionate reasoning from the court.

There is however, the risk of failure to persuade the court if there is exaggerated effort to address the emotion of judges rather than logical reasoning. The Ethiopian legal regime does not have a jury, and our courts determine questions of fact as well. Apparently, judges are not as strongly persuaded by emotion as jurors. The theme of the last reading (of this unit) should thus be interpreted with utmost caveat against reliance on emotion if is not accompanied by reason. There is thus the need to interpret the theme of the reading from the perspective of its concluding words which underline that the “power of persuasion depends upon a melding of the heart and the mind.”

4.3- Tasks: Week 7

1. Summarize the core points in Readings 1 to 5.

2. Form a team of two students and rehearse your presentation and arguments as a pair, and then in the presence of two or three friends who can offer feedback.

Use Appendix A of Reading 4 to evaluate your performance during rehearsals of oral argument.

4.4- Readings

Reading 1: Robert J. Martineau, Fundamentals of Modern Appellate Advocacy
Reading 2: Graves & Vaughan, Advocacy and the Art of Persuasion
Reading 3: Schmedemann & Kunz, The Science of Advocacy
Reading 4: Michael Vitiello, Teaching Effective Oral Argument Skills
Reading 5: Shepherd & Cherrick, Advocacy and Emotion
Oral Argument

[Sections 8.1 to 8.3 are omitted]

§ 8.4. Effective oral argument, generally

Justice Robert Jackson before he was appointed to the Supreme Court served as Solicitor General of the United States and in that capacity participated in many oral arguments. Looking back on his experience he concluded that for each case he made three oral arguments. “First came the one that I had planned—as I thought, logical, coherent, complete. Second was the one I actually presented—interrupted, incoherent, disjoined, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.” Justice Jackson’s experience is common to most veteran appellate attorneys. The validity of his description is even greater today in an era of very short oral arguments before a busy but well prepared panel of judges.

To be effective in this situation means to be able to provide the court with the answers to the questions that it has about the case. As it has evolved, oral argument is now an exchange between the judges and the attorneys for the parties. An effective oral argument is one in which the attorney participates in such a way as to eliminate any doubts that the judges may have about the validity of the points made in his brief, the justice of his client’s cause, or the effect of a decision in his client’s favor upon the state of the law and future cases.

§ 8.5 - Preparation

A complete mastery of the record is a prerequisite to preparing an effective brief and equally as important in preparing for the oral argument. The only difference is that oral argument requires a far more complete knowledge of the record because of the difference in the circumstances under which the appellate attorney will be asked to demonstrate that knowledge. The appellate attorney writes the brief while sitting in his own office with the record before him. He can spend as much time as necessary checking the record to find a statement of witness or a sentence in a document. At oral argument, while he may have a copy of the record with him, he cannot leisurely search out the exact language with which to respond to a question. If he does not have the fact at his fingertips, he is forced to say he will provide the answer in a letter to be submitted later. A delayed letter is a poor substitute for an immediate response. In addition, the attorney must have a thorough command not only of his own brief but also that of his opponent because he may well be asked about a statement or argument in either and must be able to respond intelligently and immediately.
The attorney must, of course, also have a thorough knowledge of the ... law ... He must know the facts of the pertinent cases and be able to argue factual similarities and differences. This ability presupposes complete mastery of the facts of the case being argued. Despite the fact that cases get decided on the basis of the law and the facts lack of familiarity with the record is the most glaring weakness in most oral arguments. ... Whether the result inadequate preparation time, misdirected moot court programs in law schools, or laziness, most appellate attorneys are simply not sufficiently grounded in the facts of their own cases to respond adequately to questions from the bench about the facts and their relationship to the facts of cases relied upon as precedent.

Many appellate attorneys appear to think that preparation for oral argument means writing out a complete statement and memorizing as much of it as possible. This is the worst type of preparation possible because he is preparing an oral argument that will not be given and will detract from the spontaneity that makes an oral argument interesting. This is not to say that no preparation for what will be said is necessary, only that writing out a formal statement is a waste of time. The appellate attorney should prepare an outline or some other listing of the principal points he wishes to make so that his remarks are in logical sequence and he will not overlook any of the critical points. He should attempt to anticipate the questions he may be asked by the judges and be prepared to answer them.

If brevity is the single most important quality of an effective brief, flexibility is the most important element of preparation for oral argument. The appellate attorney must be prepared to give a full presentation because the court may ask few or no questions, although this situation is unlikely. He must also be prepared to spend much if not all of his time, responding to questions. Typically, the attorney’s presentation is interspersed with questions and dialogues with the judges, but the possibility of no questions or of many questions cannot be disregarded. All the attorney can do is be prepared to deal with any of the three types, and to make an effective argument no matter what develops.

These same principles are true for appellate moot court competitions. The problem is, however, that most moot court competitions do not include a realistic record. The type of preparation for oral argument essential in modern appellate practice is, consequently, not the type of preparation engaged in by law student for oral arguments in moot court competitions. They spend their time making practice argument after another, usually with a prepared text devoted primarily to discussing the cases cited in their brief. In so doing, they are not learning skills necessary for an effective oral argument in a real appellate court. It is the facts that determine the result of real cases and they are what an appellate court is concerned with during an oral argument. Only when appellate moot court competitions are structured to include a realistic record can the preparation for a moot court argument begin to simulate preparation for an oral argument in an appellate court.

§ 8.6. - Applicability of principles of public speaking, generally
An oral argument in an appellate court is a special type of public speaking, but it is nonetheless public speaking, and most of the principles of effective public speaking are applicable to it.
These principles are reviewed here in substantial detail because many law students and appellate attorneys have not been exposed to them previously or, if they have, may not remember them or may not understand their relevance to oral argument in an appellate court.12

§ 8.7. - Written preparation

In preparing for oral argument, the law student or appellate attorney is first faced with the question of the desired form of delivery. The options are: (1) to read form a manuscript, (2) memorize a manuscript, (3) speak without written preparation, or (4) use notes to provide organization and aid memory but speak without a written text. Of these four types, authorities on public speaking are unanimous that the first three types have major defects. Both the read and memorized texts bore the listener, lack sincerity, reduce audience rapport, and most importantly, inhibit the flexibility essential to an effective oral argument. …

At the other end of the spectrum is the impromptu delivery where the speaker makes no advance preparation of what to say. This type of delivery is suitable only when the speaker need only respond to questions and has no responsibility to take the initiative. Notwithstanding the fact that oral argument in a modern appellate practice has become primarily a forum for the judges to ask questions of the attorneys …, the extent to which judges ask questions varies from court to court, judge to judge, and case to case. The appellate attorney must always be prepared to speak on his own without the aid of questions, and it would be very difficult to make a logical argument without having worked out carefully in advance the points to be covered.

Public speaking authorities are also agreed that the most effective type of delivery is the one that has everything worked out in advance except the precise words to be used in the speech. This type of speech, which is termed extemporaneous, is precise in its organization and thought content, but flexible in word choice. It combines the best features of all of the other forms of delivery but does not suffer any of their drawbacks. It permits good audience contact and a feeling of sincerity and spontaneity while at the same time allowing the speech to have a logical organization and smooth progression. Rather than preparing a manuscript, all that is necessary is to prepare notes on the key words and phrases of the speech and the authorities cited, and to arrange them in the proper order. These notes can be typed or printed on cards or sheets of paper so that they can be glanced at briefly during the course of the speech, but not used so much as to interfere with good eye contact with the audience. For oral argument, this type of delivery is ideal because it gives the flexibility so essential to an effective oral argument. The attorney is prepared to speak until a question is asked, to respond to the question immediately, and to resume with the notes when the question has been answered to the judge’s satisfaction. Any other type of delivery is certain to create problems and not be as effective as the extemporaneous.

§ 8.8. - Audience contact

It is essential in public speaking for the speaker to acquire and maintain contact with the audience. This is achieved in part by the speaker exercising careful control over his or her body, movements, and voice. Particularly important is eye contact.
The speaker must look at individual faces of the audience. If the speaker looks over the heads of the audience or at notes, this essential contact is lost. One of the many drawbacks of reading a prepared text is that it makes good eye contact difficult. Eye contact is important not only because it helps keep the attention of the audience, but it conveys the attitudes of sincerity and sureness—two important attributes of any speaker but especially the courtroom advocate. When speaking to a multi-judge appellate court, eye contact should be divided between the judges.

The speaker must also control his or her body so as not to make movements that distract the audience. The effect of the body on the message communicated by a speaker has recently come to be known as “body language.” Under this theory, we communicate as much with our bodies as with our voice. There is no doubt that this theory is as applicable to public speaking as it is to private conversation. Body control is achieved by standing evenly on both feet, avoiding rocking, swaying, shifting back and forth from one foot to the other, or leaning on the table or lectern.

A major problem for most speakers is what to do with their hands. Some speakers, in an artificial attempt at casualness, put their hands in their pockets. This creates an impression of indifference or even disrespect for the audience. Other speakers use their hands for gestures in an effort to add emphasis. Gestures can be effective, but only if used very sparingly, and only if they appear natural. If used too often, or if awkward or nervous, they only distract from the content of the speech and interfere with the contact between the speaker and the audience. The best thing to do with hands is to keep them loosely on the lectern, ready to adjust the notes or to make gestures, but not gripping the lectern so tightly that it appears as a means of support.

§§ 8.9. - Voice control

Equally as important as eye contact and body control is control of the speaker’s voice. It is, of course, crucial that the speaker be heard, so the speaker must use the volume necessary for the audience to hear without strain. Usually this calls for a volume somewhat above a conversational level, but this will vary depending upon the acoustics of the room and whether there is a sound amplifier system. The only standard is one of comfortable listening for the audience. If possible, the speaker should test the acoustics and sound system first so that the volume level most appropriate can be anticipated. The speaker who cannot do this should be sensitive to the problem at beginning of the speech and make any adjustments which are thought to be necessary. The worst thing is for the audience to have to indicate in some way that the speaker’s volume is either too low or too high.

Voice pitch can also affect the attention given by the audience to the speaker. A monotone pitch is boring to listen to, and conveys a lack of interest or sincerity. Some speakers also have a pattern to their pitch, with it rising and falling at regular intervals. This also is distracting to the audience. Both the monotone and pattern tone can be avoided by giving emphasis to certain words, phrases, or sentence. Emphasis is a change in both volume and pitch to give added meaning to the words being used. Often, it is as important as the words themselves.

Additionally, the speaker must be concerned with the pace of his delivery. Too slow a rate will permit the attention of the audience to wander, while too fast a rate will make it difficult for the audience to absorb the content of the speech. The
proper rate of delivery is probably somewhat faster than ordinary conversation, but not too much. The rate also can be slowed down as a means of emphasis.

§ 8.10. - Questions form audience

Questions form the audience should not be viewed as an interruption to the speech but as an important part of the presentation. Questions are used by the audience to clarify their understanding of the speaker’s position and to obtain additional information. Responses to them thus should not be just a repetition of what has already been said, but should provide additional information or different emphasis. Questions are important because they identify the difficulties the audience is having in accepting the speaker’s position and enable the speaker to address directly those problems.

A speaker should always anticipate questions and be prepared to answer them. This can best be done by thinking through the objections likely to be raised by the opposing view and mentally preparing responses to them. The matter of questions is, of course, particularly important in oral argument before an appellate court. The opportunity for the judges to ask questions is the principal purpose of oral argument in modern appellate practice.

§ 8.11. - Limiting number of points raised

In a speech of 20-30 minutes, authorities suggest that an audience will retain only a small part of a speech. It is recommended that the speaker attempt to make only two or three points. An audience is also most likely to remember what is said at the beginning of the speech and at the end; interest likely to lag in the middle. With these factors in mind, it is recommended that the main points be repeated for emphasis during the course of the speech. It is also helpful to identify the principal points with phrases that highlight their importance such as “this case turns upon” or “the heart of dispute between the parties is.” This emphasis should also be made by changes in the voice pitch and volume and gestures.

Limiting the number of points raised has special significance in appellate practice. This principle has even greater application to oral argument given the minimum amount of time available for oral argument, often only 15 or 20 minutes per side. When this time is even further reduced by questions from the bench it is obvious that oral argument can be used to urge only the strongest and most basic points in support of the attorney’s case. If anything more is attempted, the oral argument will have little or no effect or may even be counterproductive.

§ 8.12. - Know the audience

A speaker, in order to have the greatest effect on the audience, should try to become familiar with the makeup of the audience. No matter what general type the audience falls into, it is necessary to understand that the audience is plural and thus will hear the ideas conveyed by the speaker differently and will make judgments about the speaker and his cause depending upon the outlook and frame of reference of the individual listener. The speaker must thus view the speech from the perspective of the audience. The speaker should ask himself, “What am I asking of the audience, and what do they need to know to do it.” The answer to this question will depend on the cultural, economic, and political background or the audience.
The more the speaker knows about these aspects of his or her audience, the more likely the speaker will be able to frame an argument to appeal to that audience.

The speaker also must show respect for the audience. The speaker must neither speak down to it, nor be obsequious. Respect for the audiences also means not being overzealous in attacking opposing ideas or persons, particularly not on a personal basis.

As with all of the preceding points, the principle of knowing the audience is relevant to oral argument. Judges are as different from one another as any other individuals. Fortunately, it is usually possible to review opinions of the judges prior to the argument, as well as their judicial, legal, and social philosophies. Above all, it is important to remember the two basic interests of the judge: to do justice between the parties, but in accordance with the law.

The appellate attorney must also be clear what he is asking the court to do. In one sense this is dictated by the request for relief stated in the conclusion of the brief and the standard of review. The whole point of the brief and the oral argument is to give the court the “why” it should rule in favor of the attorney’s client and the wherewithal to do it.

§ 8.13. -Special rules of oral argument

No matter how primed the appellate judges are to ask questions, almost invariably the appellant’s attorney will have the opportunity to give an opening statement. He should first identify himself and his client, then tell the court as succinctly as possible just what the case is about. The description of the case should not be as structured as the first sentence of the statement of the case in the brief. In fact, it is seldom desirable to recite that this is an appeal form the X court. Stating the central issue in the appeal is far more effective. How the issue is stated varies. The important thing is to frame the opening so that it catches the attention of the judges and focuses on what the attorney considers the main point.

After opening, the appellant’s attorney is responsible for presenting those facts about the case which put the argument in context. It is usually most unwise to devote any substantial portion of a short 15 or 20 minute oral argument to a recital of the facts. Nevertheless, the appellant’s attorney should be sure to relate those facts he thinks crucial to the outcome of the case because the facts control the outcome.

The attorney for the appellee can be somewhat more flexible in his opening statement. He need not tell the court what the case is about unless he disagrees with the opposition attorney’s description of the case. He should not give a formal statement of facts, but he should correct any misstatements of fact by the appellant. He may also want to add facts omitted by the appellant.

The body of the argument is devoted to discussing the relationship between the facts and the law, implications to be drawn from the facts, and the most relevant statutes and cases. The traditional advice has been to limit oral argument to only one or two issues each supported by the one or two most relevant cases. This advice has risen to the level of an imperative in the abbreviated oral argument of today. Fifteen or twenty minutes is simply no sufficient time to do more.
Another item of traditional advice that has been reinforced by changes in the appellate process is that questions form the judges indicate interest and should be welcomed and answered as thoroughly as possible. Resentment of questions from the bench because they interrupt the flow of a prepared oral argument has always reflected a failure to understand the role of an appellate judge in oral argument. Today the principal object of oral argument is to give the judges the opportunity to ask questions. An appellate attorney who resents questions misunderstands the purpose of oral argument and is thus unlikely to make an effective presentation.

Every question asked must almost always be answered when it is asked. It is seldom wise to put off a judge with the comment that the question will be answered later. The judge may infer this failure to answer immediately that the attorney cannot answer the question, or worse, that the attorney fears that a candid answer will be damaging. There is also the possibility that through an oversight the attorney may neglect to answer the question. In short, the possible results of delaying an answer may harm the effectiveness of the oral argument.

For various reasons many appellate attorneys divide their oral argument between two or more attorneys. This is almost always harmful, particularly in modern practice. An oral argument of 30 minutes or less cannot be divided into neat packages, one per attorney. Such a division will almost inevitably result in less effective or even no answers to questions form the judges. The exchange between the judges and the attorneys is clearly hampered if the attorney arguing must tell the judge asking the question to wait until his partner argues because the latter is responsible for that portion of the case.

The common practice in most moot court competitions of having two person teams on each side with the members of the team sharing the oral argument is highly undesirable. It is exactly contrary to a basic principle of effective advocacy. Unless otherwise directed by a judge, the attorney should never interrupt the other side, but should wait until the other side is finished to provide the correct information. The appellee’s attorney, who does not have a right of rebuttal, must request permission of the court to correct a statement made by the appellant in his rebuttal.

Almost all appellate courts have some means of keeping track of the time used by each side, usually warning lights that signal when the time is elapsed. The appellate attorney must not presume upon the good will of the court or the other side by going beyond the allotted time. Some presiding judges are more generous than others in allowing the attorney to finish his remarks, but unless invited by the presiding judge to continue, the attorney should end his argument as soon as he sees the signal that his allotted time is up.

The oral argument should end in the same manner as the brief—with a short statement of the relief that the party seeks. Not only is such a statement a simple way to end the argument, but it reminds the appellate court why the party is before the court. If the party’s time has expired, however, it is better to leave out the final statement than to go over the time.

[Footnotes omitted]
3.2.1 ADVOCACY AND THE ART OF PERSUASION

Law students can and should learn the art of persuasion - an art that must be used in any venue, in any country, and before any tribunal if one is to serve as an effective advocate for one's client. To persuade, effectively, is to clearly articulate a position. To be persuaded, a tribunal must of course understand the advocate's position and cannot do so unless it is clearly stated. Effective persuasion before a tribunal is also more like a conversation than a speech. [FN90] A tribunal may ask questions, requiring a dialogue between counsel and tribunal, and even a silent tribunal is more likely to be persuaded by a respectful conversational style than by a monotonous and perhaps demeaning lecture.

Of course one also requires an effective delivery vehicle for this clear, conversational persuasion, and perhaps the single most effective vehicle is the presentation of one's advocated position as a story. [FN91] The advocate pleads his or her client's cause by presenting the most interesting and compelling story to the audience [FN92] - in this case, the tribunal. [FN93] Thus, in order to persuade, the student must learn to tell a complete and compelling story of the case. However, 'the tongue cannot paint what the eye cannot see.' [FN94] The only way to tell such an effective story is, first, to know and understand the law and, second, to know, and almost live, the facts of the pending case. [FN95]

This persuasive, clear, and conversational story does not simply recite the law and facts - the idea is to wrap the law around the facts. One begins by explaining in simple terms the underlying business transaction and laying a basic, common sense foundation for the story. [FN96] Upon this solid foundation, the story gains traction with the addition of interesting and important details, as well as relevant legal authority explaining why such details favour the advocate's cause. [FN97]

It often helps to begin with the least controversial points of the argument, building rapport and trust with the tribunal before moving on to the more controversial points. Of course, controversial points cannot be avoided for long and must be addressed directly and confidently, or the failure to do so may cause an advocate to lose this same rapport and trust. A successful advocate must learn to develop and maintain credibility with the tribunal, whether it is in a moot or in a real case.
Persuasion, advocacy, and lawyering are all ultimately about communication. Moot court programs in law schools have roots in debate, which is all about communication, and mooting is a classic way of teaching students these essential skills. [FN98] The majority of the institutions participating in the survey provide some form of academic credit in recognition of the educational value of the Vis Moot experience and mooting, generally. [FN99] Among those institutions providing academic credit, two-thirds provide credit for the students' participation in the Moot, separate and apart from any formal or structured class. [FN100] Over half of these institutions provide credit for a course focused specifically on the Moot problem, and almost half provide credit for a course in mooting or advocacy generally. [FN101]

There are three aspects of communication: content, structure and style. [FN102] Content includes the substance of the advocates' argument - the facts and the law. When many of us think of legal argument, it is content that first comes to mind. In fact, it is the content of the communication that will typically decide real cases. [FN103] However, content may be misunderstood or lost without structure and style.

Structure includes the use of roadmaps and signposts to inform the listener about what to expect and how to expect it. Without structure, the importance or relevance of a particularly important detail may be completely lost in the torrent of information provided to the listener. Style, or non-verbal communication, may be the most significant of all three. [FN104] Style involves the delivery of the communication - body language, facial gestures, speech inflections, pace, and eye contact, to name just a few. If an advocate's body language is distracting, or pace of speech too rapid, then again the content, no matter how sound, may be lost. However, a well-structured argument, complete with clear and distinct signposts, delivered with appropriate pace and emphasis, while engaging the eyes of the listener, will almost certainly convey the content of the argument to the mind of the listener.

Some have suggested that mooting may focus too much on style (or style and structure), as opposed to substance (or content). [FN105] In deference to competitive fairness, the arguments of the students are judged not on the merits, but on their effectiveness, given the substantive circumstances presented. [FN106] At least one critic has suggested that this approach to competitive judging completely disconnects - the mooting process from the real world and renders it largely ineffectual in teaching students practical advocacy skills. [FN107] One problem with this argument is that it may prove too much. If the complete substance of a dispute were easily apparent to all, then we would have no need for advocacy or advocates. However, substance is often subject to reasonable debate, and it is often the 'close cases' that end up before real *194 tribunals. [FN108] In close cases, style may very well matter - not because it is more important that substance, but because style is the communications vehicle through which the tribunal comes to understand the substance.

Moreover, success in real world advocacy is not measured simply by winning and losing on the merits. Success in rhetoric includes two measures: (1) victory, the external end of rhetoric; and (2) ‘whether the rhetorician makes the best possible argument on behalf of a particular position’, the internal end of rhetoric. [FN109]
This internal end may be important, in and of itself, particularly when one considers the fact that ‘victory’ may take various forms and over various time frames. A judicial dissent generated as a result of the effective rhetoric of a ‘losing’ party may eventually become a majority position - in effect, a delayed victory. [FN110] In addition, the very foundations of common law jurisprudence depend on effective advocacy on the part of both sides - the winner as well as the loser. [FN111] In short, mooting serves a valuable educational purpose even if it does focus predominantly on the internal end of rhetoric rather than the external result.

In mooting, students must focus on both substance and style. The substantive content of the presentation is course crucial. [FN112] Without content or substance, structure and style cannot carry the day - not even in mooting. [FN113] While the decision on the merits is not controlling in mooting, the students' use of the available facts and law will be - just as it often is in a real life close case. Once the student has marshalled the relevant facts and law, he or she must communicate them effectively. ...

For example, one of the most obvious style issues involves speaking pace. ... Another favourite topic of advocacy coaches is ‘eye contact’. While we may often joke about this, its importance is arguably quite real. From the arbitrator's perspective, it is simply easier to remain engaged and focused on the argument of a person with whom you are making eye contact. When following a complex argument, perhaps in a second or third language, such an engaged focus may make the difference between understanding and missing the student's point. Eye contact may also enhance a student's credibility with the arbitrators. [FN115] From the student's perspective, it is important to look the arbitrators in the eye for signs of understanding or confusion, so that the student may attempt to adjust his or her presentation accordingly.

In each of these examples, the style of communication may substantially affect the substance of what is communicated to the listener. In evaluating the effectiveness of communication, we know that what the listener hears is far more important than what the speaker says - whether in the Moot or in front of a real life court or arbitral tribunal. The elements of style cannot and should not be eliminated from the criteria for judging student performance in the Moot, because they are an important part of real life communication and an important part of the educational benefits of the Moot.

Ultimately, all of the students' efforts to prepare for the oral rounds in Vienna are likely to provide these students with an important educational benefit. However, the extent of this benefit is significantly enhanced when these efforts are aided by a coach or faculty member, who can provide guidance in advocacy and the art of persuasion. A brief article such as this one cannot hope to provide an extensive treatise on advocacy, but instead serves simply to suggest its importance as a legal skill to be learned and some of the opportunities for such a learning experience provided by the Moot. The Vis Pre-Moots substantially enhance and expand these opportunities.
The Science of Advocacy

(Pages 175- 186)

A. Introduction
In all settings, successful legal advocacy involves careful selection and development of points to be made on the client’s behalf and then artful presentation of your points.

... The topics discussed [hereunder] are applicable to all advocacy settings, including appellate arguments.

B. The Bases of Persuasive Legal Argument
According to principles of Aristotelian rhetoric, persuasion is a function of three elements: logos, pathos, and ethos. In simple translation, these three elements are appeal to logic or proof, an appeal to emotion, and reliance on the writer’s good character. An argument must be logically sound, it must appeal to the reader’s sense of what is right on the facts, and the advocate must appear credible and trustworthy.

... 

C. An Analogy: Photography
Photographers and lawyers share this task: to present what exists or has happened in a way that informs the observer about the subject and generates a particular response. For the photographer, the subject is the scene, and the goal is to produce the desired response in the viewer. For the lawyer, the subject is the case, and the goal is to convince the reader to assign to the case the legal meaning the client desires.

Both the photographer and the lawyer must accept their subjects as they are. For both, the subject has features that will incline the observer toward the desired response and features that may produce the opposite response. Both the photographer and the lawyer have the opportunity to set boundaries, to decide what is included in the photograph or memorandum and what is not. And both can choose what aspects of the subject to bring onto focus and what to leave in the background.

D. Interpreting the Facts
Rarely are the facts fixed. Rather, most records consist of bits of information that suggest a set of relationships and series of events. The information requires interpretation. Judges expect you to help them understand the facts from your client’s perspective.

You must of course, fully and fairly inform the court. The court needs to be apprised of all relevant facts and necessary background facts. You may include
persuasive residual facts, as long as you do so judiciously. Keep in mind that ethical obligations require you to present unfavorable facts as well as favorable facts.

One situation compelling interpretation is inconsistency, which may arise between the statements of two observers, between the early and later statements of the same observer, or between a document and a witness, among other possibilities. Some inconsistencies are not significant, because, for example, the fact is not relevant or the inconsistency relates to detail while the general fact is all that matters. Other inconsistencies are significant and can be handled in various ways. You may be able to show that the two sources are only apparently, not truly, in conflict, or you may be able to show that one source is the more credible, based on capacity to perceive the events or lack of bias. In other situations, you may have to discuss both ways of seeing the fact in your analysis. In yet another situation, a legal rule may dictate how you handle an inconsistency. …

Often, seemingly fixed facts can give rise to various inferences, depending on whose perspective is taken, and the inference may be as important as the known fact itself. In such situations, you must take care to delineate what the record itself says. You may go on to present the inference favored by your client if it is an absolutely reasonable one or you can explain it well. You should incorporate opposing reasonable inferences onto your analysis, as you would incorporate reasonable opposing legal arguments into your analysis.

Finally, it may be significant that evidence of a specific fact does not appear in the record. If it is to your advantage, you may wish to note its absence and who could have testified to it, were the fact true. Of course, absent “facts” are not as weighty as facts that are stated in the record. …

E. Selection of Legal Topics and Arguments

As you research and reason through your client’s case, you are apt to develop a long list of legal topics that could be discussed and points that could be made. It may be tempting to include all items on your list, lest you omit the winning argument. However, succumbing to this temptation is dangerous. If you try to develop too many points, you are unlikely to develop any fully, and you may seem to be relying on quantity, rather than quality, of argument. As judges know, one convincing argument suffices; no number of unconvincing arguments suffice.

To identify the topics you need to address, consider the structure of the various rules involved in your case, for they impose requirements and offer options to you. For example, if the rule governing the plaintiff’s claim is conjunctive, as plaintiff’s counsel. You must present an argument for each element; as defendant’s counsel, you need only prevail on one element and could omit discussion of one or possibly more elements. As another example, if the situation is governed by an aggregate or balancing rule, both plaintiff and defendant may select the factors to be discussed.

Generally, the court must explore the substantive law in combination with a procedural rule. Thus, in determining the topics you must or may discuss, you should consider the requirements and options of procedural law. …

Once you have selected the topics to cover, you should consider the various assertions to make on each topic. If you have more than one argument to make on each topic, think first about the relative power of each. A legal argument derives its
power from the law, the facts, and the strength of the link between them. Ask yourself: Does the law unambiguously say what I am asserting, or is some interpretation necessary? Is the link between the law and the facts obvious, or is there some murkiness? Would I be convinced if I were the judge or opposing counsel?

Consider as well each potential argument’s utility as a response to the arguments likely to be made by your opponent. Legal advocacy entails rebutting your opponent’s arguments as well as successfully stating your own. ...

F. Arguing in the Alternative

Ideally, your best assertions will form a coherent whole argument. Each legal and factual assertion will flow smoothly from the previous assertion and lead naturally into the upcoming assertion.

Not infrequently, however, your best assertions will not be consistent with each other. There may be a break, but not a conflict, between two assertions, that is: “X is true. Whether X is true or not, Y is true.” Or there may be a conflict between two assertions; that is: “X is true. Even if it is false, Y is true.”

Although it may seem intellectually dishonest to make such arguments, lawyers commonly argue in the alternative. Arguing in the alternative is common in the law because both facts and the law are malleable enough that more than one legal meaning may reasonably be ascribed to a situation. One of the two rules may apply to a situation. For example, a statute may be amenable to two interpretations, both of which call for analysis; ... Another possibility is that a rule may apply in more than one way; for example, a fact may be unknown or ambiguous, and both possibilities merit exploration. As these examples suggest, arguments in the alternative can occur at the topic level or within the topic. Judges are accustomed to arguments in the alternative; indeed they use reasoning in the alternative to justify some of their own decisions.

Argument in the alternative does have its drawbacks. It entails complexity and risks confusing the reader. The initial assertion or argument may seem weakened by the presence of the alternative, which suggests that the initial assertion or argument is not strong enough to stand on its own. In general, alternative arguments involving breaks are more convincing than alternative arguments involving conflicts.

The key to a successful argument in the alternative is clarity of presentation. You should begin with a clear roadmap, and you should introduce each assertion or argument with a signpost calling attention to the alternative relationship, such as, “Even if the Plaintiff’s conduct were covered by the statute, it nonetheless would be permissible because ...”

G. Accounting for Your Opponent’s Arguments

Legal advocacy has both offensive and defensive aspects. Not only should you convince the court of the merits of your argument; you also must deflect your opponent’s arguments. Thus, an important step in developing your argument is to take stock of your opponent’s argument.
Often this entails anticipating your opponent’s argument… . Ask yourself: What would I argue if I were counsel for my client’s opponent?

Next, compare your opponent’s probable or actual arguments with your own. You very probably will discern both points of concurrence and points of clash. Points of concurrence are propositions on which you and your opponent do not differ; points of clash are propositions on which you and your opponent disagree. Both may involve various matters: You may agree or disagree as to what the governing legal rule is on a topic, how (or whether) to fuse a given set of cases, how to interpret a statute. You may agree or disagree about what the relevant facts are. You may agree or disagree about how the rule applies to the facts, how policy analysis plays out … .

H. Assessing the Strengths and Weaknesses of Your Case

Once you have sorted through the assertions, both legal and factual, that you wish to make, you should assess the overall strengths and weaknesses of your case. Every case in litigation has its strengths and weaknesses; truly one sided cases generally are resolved before litigation by the parties or their attorneys. Of course, one side’s strength is usually the other side’s weakness.

Some cases are said to be “strong on the law,” while others are “strong on the facts” or “strong on policy.” A case is strong on the law when the rule is well established, clearly addresses the client’s situation, and calls for the client’s desired outcome. A case is strong on the facts, or equities, when the client’s situation draws understanding on the part of a reasonable observer and the client’s desired outcome seems sensible and fair. A case is strong on policy when the client’s goals reflect an important societal interest.

Determining the overall strength of your case may not be a simple matter. If the case raises multiple issues, the strengths and weaknesses may vary across issues. For example the plaintiff may have the stronger legal position on one claim, while the defendant has the stronger position as to another. Or, the plaintiff’s case may be strong on facts as to liability but weak on facts as to damages. Moreover, one party may have the advantage on the substantive law, while the other may have the advantage on the procedural law. Even if this analysis does not yield a unitary impression of your case, it is an important step in your analysis. …

I. Developing Theory of Your Case

Once you have assessed the strengths and weaknesses of your case, you should have in mind some key ideas about the case. The next step is to distill these ideas into your “theory of the case.” The theory of the case is what the case is about, in simple (but not simplistic) terms. If you were to write a newspaper article about your case, the headline or the first paragraph would state the theory of the case.

Because a case meshes facts, substantive law, procedural law, and policy, the ideal theory of the case partakes of all of these. One or the other may dominate, however. For example, your central concept may be a key factual detail or a phrase representing the pertinent legal rule. Less commonly, a public policy may be your central concept. Whatever your central concept, the court’s appreciation of your theory should lead inescapably to the outcome desired by your client and away from the outcome desired by your opponent.
The significance of a theory of the case is that it provides a theme for your argument, indeed for your entire memorandum. A theme is important for you as a writer and for your readers. For you the theory of the case suggests language to use throughout your memorandum, provides a basis for ultimately deciding which assertions to make or emphasize and which to exclude or downplay, and constitutes a way of unifying what might otherwise seem to be desperate assertions. For the reader, who is unlikely to be able to truly absorb and recall all the distinct assertions of the memorandum, a well communicated theory of the case provides an idea about the case that can be easily grasped and adopted. …

J. Strengthening Your Strengths

As you draft your argument, you should hone in on your theory of the case and stress its strengths. …

If your case is strong on the law, overall or in part, emphasize on the legal rule. Present the strongest authority possible, and develop it fully. If the rule emanates from a statute, quote or paraphrase the statute, discuss its underlying policy, and provide and illustrative case. …

If your case is strong on facts, overall or in part, emphasize the facts. Quote from the record. Stack evidence on the key fact by showing that it appears in multiple sources. Note not only what the evidence shows, but also what it does not show. …

If your case is strong on policy, overall or in part, quote … a statutory purpose section, or commentary that states the policy clearly. Show how the policy plays out in the facts of your case. Refute any opposing policy statements by your opponent by citing authority that downplays that policy, showing its inconsistency with your policy, or demonstrating its irrelevance to the case.

These methods may be used in various parts of your memorandum. You likely will seek to emphasize favorable law or policy in the introduction of summary, issues, and argument. In all these areas, and also in the fact statement, you will seek to emphasize favorable facts. …

K. Working Around Your Weaknesses

You cannot simply wish that your case’s weaknesses will go away and ignore them; they certainly will appear in your opponent’s memorandum. On the other hand, you should not dwell on the weaknesses, lest the court also do so. Rather, dispel the weaknesses, even as you make the points you want to make. How to do so depends on the nature of the weakness.

Some weaknesses may be matters of law. If the authority is not mandatory, you should downplay it as merely persuasive and nonbinding; you also should criticize any weaknesses in its reasoning and policy. …

If the adverse mandatory authority is a statute or procedural rule or regulation, you have several options. Argue that your case falls outside the scope, based on definitions or other scope sections. Demonstrate that the law is ambiguous given the facts of your case; then provide a favorable interpretation based on legislative history or intent, canon of construction, or policy. The most difficult option is to establish that the law is unconstitutional or outside the power of the lawmaking
body; a less radical form of this option is to argue for a limiting interpretation that would avoid unconstitutionality and favor the client.

Some weaknesses are matters of fact. If there is conflicting evidence on the fact, emphasize the helpful evidence. Where possible, discuss other facts that put the unfavorable fact into context, without altering the unfavorable fact. For example, if the client acted unwisely, show why the client did so. Alternatively, you may show that the record does not present an even worse scenario.

Some weaknesses may be matters of policy. Again, you have several options. Show that your case does not truly implicate the policy. Show that the policy is outdated or needs re-evaluation. Shift the focus to a competing policy that is well served by the outcome your client seeks. If the law is clear and favors your client, point out that the law must be followed even if the court would favor a different policy.

These methods for handling weaknesses may be used as follows: the law and policy methods in the introduction or summary, issues, and argument; the fact methods in all those components of the memorandum and additionally in the fact statement. …

L. [Summary]

To write a convincing legal argument, a lawyer must both argue the facts and present the law in a credible manner. To assure that your memorandum reflects these principles and is therefore convincing, you should:

1) Interpret the facts fairly yet persuasively;
2) select legal topics that you need to cover and assertions that are well grounded in the law and facts;
3) present arguments that form a coherent whole or are clearly understandable alternatives to each other;
4) take into account the points of concurrence and points of clash;
5) assess the strengths and weaknesses of your case;
6) develop a theory of the case based on those strengths and weaknesses;
7) as you draft your memorandum, stress your strengths; and
8) work around your weaknesses.

By following these steps, you will carefully select and develop the arguments to be made on your client’s behalf. …

__________

3 The original reads “Review of Chapter 16”
B. Effective Oral Advocacy and the “Kinder,” Gentler Law School

Understanding the inverse correlation between effective advocacy skills and today’s kinder, gentler law schools requires an examination of what judges and critics of traditional moot court programs find objectionable about the canned, slick presentations that so many advocates give and that often lead to success in competitions. To make the point, one must ask why oral advocacy matters and then compare moot and real arguments to see how different they are.

Oral advocacy matters because it is the only opportunity that counsel has to talk directly to the decision-maker in the case. In many courts, judges have read the briefs submitted by counsel and may have prepared a tentative ruling. Often, attorneys read the court’s opinion and are frustrated that the judges misunderstood the case. Oral argument is the opportunity to correct misunderstandings and to address the judges’ concerns.

Prior to oral argument, judges have had the chance to read counsel’s brief, in which she should have developed her best arguments. As a result, oral argument may influence the court’s decision in relatively few cases. But the way in which an advocate can change the court’s mind is by going to the heart of the case: recognizing the weaknesses in the advocate’s position and the judges’ concerns about the case. The advocate’s role is to help the judges resolve those difficulties.

Style may help an advocate by demonstrating that she is open to questions from the court. Thus, eye contact and other principles of good speaking will invite questions from the bench. But a nice style is only peripheral. What matters is the attorney's ability to answer the court's questions thoroughly.

Commentators are uniform on the components of good oral argument: counsel needs to present a clear opening, providing a roadmap of her argument, including signposts that signal the different components of the argument. Counsel should develop a theme wherever possible that unites her several arguments. The attorney should aim for a flexible style that allows her to move to the part of the argument that most concerns the court. Real judges want help writing their opinions and need to understand, if they are leaning towards the attorney’s position, how to overcome legitimate weaknesses in the case.

---

4 Professor of Law, The University of the Pacific, McGeorge School of Law
Counsel must prepare in advance to answer hard questions about her position. Counsel must never put off answering the court's questions; instead, she should give a direct “yes” or “no” answer and then seek to elaborate on her answer. Failing to do so causes counsel to miss the opportunity to persuade the court. Further, counsel must be fully candid with the court. Misstating the facts or the law leads to a loss of the credibility that is so invaluable in getting the court to accept one's legal position.

Successful oral advocates should try to use the court's questions to their advantage. In that sense, an oral advocate should try to control the argument; if an advocate can successfully understand the weakness of her case and thus anticipate the judges' concerns, she can explain why her case can win nonetheless. She can do so only if she listens carefully to the questions and understands the law and the facts. Undoubtedly, counsel cannot anticipate all of the judges' questions; however, through preparation counsel should be able to anticipate most questions and have thoughtful answers. If counsel's argument really has fatal flaws to which she cannot respond, one wonders why the case is before the court at all. On the premise that the case is not frivolous, successful counsel should be able to deal with the weakest part of her case.

No doubt, effective oral argument includes other skills. Developing a compelling conclusion that summarizes the most persuasive points in the argument is one such skill, as is the ability to deliver an effective rebuttal. But engaging the court in a dialogue during which counsel effectively addresses the court's concerns is the primary tool of the successful oral advocate.

Implicit in the discussion above is the fact that success in moot court differs from success in real arguments. Style counts too much in moot court arguments, whereas the ability to answer hard questions counts most of all in real arguments. Student advocates often believe that controlling the argument means avoiding hard questions and getting back to their canned arguments. Grading criteria in student competitions may even reward an advocate's ability to get through major arguments. Student advocates avoid making concessions, despite the fact that real judges expect sensible concessions.

Student advocates may fall back on style, apart from the lessons that they are taught in their moot court programs, because answering questions is difficult. Hence even if a law school has in place an effective advocacy program, students need more experience in the kind of flexible interchange that produces good oral argument.

That begs the question of how else law schools might teach this all important skill. In considering this question, I offer my own experience. When I went to law school, the only required advocacy course was a first year legal writing course taught by upper level students. During the second semester, a classmate and I submitted a joint brief and gave a mock argument to a panel of upper level students. Beyond that, moot court was an extracurricular activity. I learned something about advocacy in the program, but I am not sure how much.

Shortly after graduating from law school, I served as counsel in cases before federal district courts in Philadelphia, New Orleans, and before the United States Court of Appeals for the Fifth Circuit. In thinking about my experience, I question how I was able to function as an effective oral advocate. As unpleasant as I found the Socratic method as a student, I concluded that I had learned invaluable
lessons about oral advocacy through the rigorous grilling that my best professors provided. [FN121]

An effective Socratic dialogue is an invaluable tool to teach advocacy skills. A professor's questions ought to be similar to those that a judge would ask an attorney. Good law professors and judges expect answers to be responsive. The Socratic dialogue should teach students the importance of listening to questions and framing thoughtful answers. Students should realize that their answers will in turn inspire follow up questions and that they must be able to think through the implications of their answers. [FN122] Like oral argument where judges ask probing questions to bring out the specific issues in the case, [FN123] a classroom discussion should focus on the strengths and weaknesses of different legal positions.

Students in law school today are far less likely than students in my generation to receive a similarly rigorous education. [FN124] That is so because the Socratic method has been under attack for over thirty years and, although clear empirical evidence is unavailable, professors today are almost certainly more likely to use a modified, less demanding Socratic teaching method than did the previous generation of law professors. [FN125]

Commentators have leveled numerous attacks on the Socratic Method. For example, one study concluded that “the Socratic method alienates, oppresses, traumatizes and silences women.” [FN126] Some critics argue that the method is ineffective for all students because it “fails to prepare the student for work as an attorney” [FN127] and suggest that it may be responsible for lawyers' incompetence [FN128] and incivility. [FN129] Further, critics allege that it causes students to become cynical: the Socratic method and other traditional techniques “set students' moral compasses adrift on a sea of relativism, in which all positions are viewed as ‘defensible’ or ‘arguable’ and none as ‘right’ or ‘just.’” [FN130] In effect, the Socratic method leads to moral numbing. As summarized by one writer, the Socratic method is “infantilizing, demeaning, dehumanizing, sadistic” and “destructive of positive ideological values.” [FN131]

So anathema is the Socratic method that many law schools now distance themselves from the historical image of law school and advertise themselves as “kinder and gentler,” than the traditional law school where Professor Kingsfield, the archetypal law professor in The Paper Chase, roams the halls. [FN132]

The literature is replete with suggested remedies, including allowing students to demur if called upon or giving advance notice when a professor will call upon a particular student. [FN133] Further, critics of the Socratic method and law school education generally urge that we validate our students. [FN134] Professors must tailor their teaching to reach the current generation raised on the media, with shorter attention spans, and less motivation than previous generations of students. [FN135] Critics argue that law professors ought to allow their students to voice their own views and not force them to take positions in which they do not believe. [FN136]

Measuring the extent to which law professors have responded to these criticisms by adopting gentler teaching techniques is difficult. [FN137] Even though critics continue to rail against the Socratic method, [FN138] I suspect that many law professors have abandoned the more demanding version of the Socratic method in favor of a “kinder and gentler” classroom style. That is a shame.
Elsewhere, I have written extensively about the Socratic method and attempted to address the main criticisms leveled against its use. [FN139] Here, I want to explore the kind of teaching that critics of the demanding form of the Socratic method propose in its place and discuss why that kind of classroom experience is ineffective in training students to be effective oral advocates.

Judges expect precise answers from advocates. [FN140] They care little about the personal views of attorneys appearing before them and even less about their feelings. Judges may bruise an advocate's ego when the advocate's performance is inadequate. [FN141] In making a classroom too “kind,” a law professor may create the impression that careless thinking meets the lawyer's professional responsibility. In such a setting, the professor loses an opportunity to introduce her students to the realistic demands of the practice of law. [FN142]

Apart from the missed opportunity to acclimate students to the demands of the courtroom and law practice generally, [FN143] the professor who allows students to state their own views for fear of moral numbing, by forcing them to support positions contrary to their own values, disserves his students. Implicit in the discussion about the appropriate solicitation of students' personal views is that much of a classroom discussion is devoted to individuals' value choices. [FN144] That suggests a misuse of the classroom.

The failure to have students argue positions that they do not believe in amounts to educational malpractice. As I have stated elsewhere, “[t]he most important feature of a legal education is that it challenges our views and forces us to examine them with care.” [FN145] Students must be able to argue those positions because lawyers must be able to anticipate and rebut their opponents' arguments. A lawyer who lacks that skill cannot adequately represent her clients. [FN146] Further, students ought to recognize the reality that advocating a position contrary to her own beliefs may be necessary as part of her professional responsibility to advocate zealously on behalf of her client. [FN147]

Other problems exist when law professors solicit students' views. Envision a class in which the professor is teaching the law of rape. Soliciting students' views may invite the expression of some boorish, hurtful points of view. [FN148] But even more importantly, the solicitation of students' views is distracting from the core function of the classroom. If professors are using the classroom to educate lawyers, professors ought to ask for legally relevant arguments and demand carefully focused answers, the kinds of answers that judges expect during oral argument. [FN149] I have found that students often interpret a question about their views of the case as an invitation to talk about feelings and positions that are only tangentially related to the subject at hand.

Teaching the relevance of mistake as to consent in rape cases offers an illustration. Courts have divided on the law governing the relevance of a man's mistake of fact as to the woman's consent. [FN150] Following the advice laid out above, a professor might ask for students to express their views on the subject. No doubt, the professor can generate a freewheeling discussion with some interesting points. In my experience, much of the discussion will be off the point and will fail to reinforce the need for rigorous analysis of precise legal issues.

When I taught the issue of consent, I had to push students hard to see that the relevance of mistake of fact has long standing roots in the criminal law, that the courts needed to interpret language in the rape statute, and that the effect of one interpretation might be to make the crime of rape a strict liability offense, despite
the grading of the punishment as a crime of violence. [FN151] Long before I considered opening up the discussion to students' personal views, I found that I had to devote a great deal of time simply getting students to explicate the holdings of the cases and to see the very real difference between the results of following one rule as opposed to another. Many students would prefer to talk in broad theoretical terms about feminist theory and power relationships. It takes far less time and effort to form those kinds of opinions than it does to do the close reading and careful exegesis of the courts' opinions. But professors miss the opportunity to teach the essential skills needed for effective oral advocacy when they allow students to spend too much time discussing their views as opposed to legal analysis and reasoning.

Open-ended discussion of students' personal views may be affirming for students but it fails to focus the discussion and thereby fails to train them in critical oral advocacy skills. [FN152] Thus, affirming students may also be inappropriate for a second reason: too much concern about affirming students invites tolerance of superficiality. For example, even advocates of the gentler classroom who want to avoid embarrassing students, also recognize the importance of setting high academic standards. [FN153] A professor who adheres to the modern view of a gentler classroom and who invites freewheeling discussions of students' personal views may err on the side of allowing poor legal arguments in an effort to avoid hurting students' feelings.

A professor like Kingsfield showed no hesitation to bruise the ego of his students when they made poor legal arguments. [FN154] Critics have railed against the Kingsfields of the world for such boorish behavior. [FN155] But allowing students to make poorly reasoned arguments does not serve them or their future clients well. For example, in The Paper Chase, Professor Kingsfield shows little patience with Mr. Bell when Mr. Bell argues that application of the Deadman's Statute is “unfair.” [FN156] Students often appeal to such basic feelings of fairness in class. But leaving such “arguments” unchallenged does not serve students well, despite the fact that challenging such superficial statements may cause students to feel insecure or uncomfortable. Judges expect more than gut reactions. A primary virtue of the Socratic method is that it challenges students' views and forces them to think more deeply than they may have done before attending law school. [FN157] Being challenged may be painful; it may cause us to realize that we are not as smart or as well prepared as we would like to believe. It may make us rethink our comfortable assumptions about the world. But as painful as that may be, the intellectual challenge posed by the rigorous application of the Socratic method is essential to training competent professionals. [FN158] Students, like lawyers, must be able to articulate opposing arguments if they want to be effective advocates. If that is morally numbing, so be it.

Today, I surmise that too much, not too little, time is spent soliciting students' views. Discussion of personal views may come at the expense of much more important lessons, including the ability to state with precision the holding and reasoning of complicated cases, competing arguments to the majority opinion, and the application of the court's ruling to new sets of facts. Some students may interpret the emphasis on the expression of personal opinions as an invitation to prepare poorly, because they are confident that they can talk about their own view of the subject rather than explicating the court's view. [FN159] By making class
gentler or more fun, professors miss the opportunity to teach essential oral advocacy skills.

IV. CONCLUSION: WHERE DO WE GO FROM HERE?

My argument thus far begs a question: where do we go from here? Many of us recognize that law schools still provide inadequate training in oral advocacy. But simply pointing out the problem is not especially helpful.

Programs like this symposium are encouraging. So too are clinical programs ... where faculty can teach meaningful advocacy skills. But schools often limit enrollment in clinics because clinics require a low student to faculty ratio to guarantee meaningful supervision. [FN161]

Judges have a significant role in educating the profession about the need for improved oral advocacy skills. Some judges educate the profession through their writings about advocacy. Many judges volunteer their time by judging moot court competitions. However, at least according to Judge Kozinski, some of them are not forthcoming with the student advocates but instead play right into the conceit that student competitions are teaching the right stuff. [FN163] Judges who share Judge Kozinski's view of moot court would do well to end the charade and give more meaningful criticism of student advocates. Were prominent judges to award top honors to the advocate who stayed with the judges' questions and who entered into a meaningful dialogue, rather than trying to score debating points, and were those judges to explain their criteria, competition organizers and faculty involved in moot court programs would get the message.

Motivated professors can introduce oral advocacy into their classes through the use of simulation exercises. [FN164] My own hobby horse is to provoke a dialogue in the legal academy about whether we have been too quick to advocate in favor of kinder gentler legal education. [FN165] At a minimum, I hope that professors who use the Socratic dialogue explain to their students the essential skill that they are learning through the process. That explanation might make students less resistant to the method. [FN166]

These suggestions are at best incremental. For a wider impact, I would encourage the ABA to commission another study of oral advocacy training in our nation's law schools. Its previous study produced marked changes in advocacy programs. [FN167] But as indicated above, [FN168] law schools still have a way to go. Our study was necessarily limited in scope. An ABA study might examine programs at all accredited law schools. Additional resources might allow it to study more closely the content of the courses around the country to assess the quality of instruction. Among proposals that a committee might study is the need for mandatory oral advocacy training beyond the limited training now required at most schools.

Law schools would almost certainly pay attention to an ABA report and many schools would likely follow recommendations for upgrading advocacy training. Such an effort might result in better oral advocacy, with more lawyers who truly understand the role of oral argument and who attempt to engage in a meaningful dialogue with the bench.
APPENDIX A

EVALUATION SHEET FOR ORAL ARGUMENTS

I. Substantive Content and Analysis

A. Introduction
   1. Opening Statement
      Did you introduce yourself?
      Did you tell the court whom you represent?
      Did you tell the court the relief your client is requesting?
   2. Theme
      Did you start with a statement which, by weaving the applicable law
      and facts together, tells the judge what is at stake in your case?
   3. Road map
      Did you give the court in a few sentences a brief overview of how
      your argument will be organized?

B. Argument
   1. Opening Statement
      Did you tell the court where your client stands on this issue and what
      your client wants?
   2. Organization
      Did you start with the strongest argument and continue in a logical
      and comprehensive manner?
   3. Support of Argument
      Did you make effective use of authority, reasoning, and policy to
      support your arguments?
   4. Application of Law to Fact
      Did you effectively apply the legal arguments to your client’s
      situation?
   5. Response to Questions
      When the court asked a question, did you first reply with a “yes” or
      “no”?
      Did you then explain your answer?
      Did you make a smooth transition back into your argument?
   6. Conclusion
      Did you concisely and effectively summarize your argument?

C. Closing
   1. Theme
      Did you briefly restate your theme and explain why you should win?
   2. Relief requested
      Did you state what you want the court to do?

II. Speech and Delivery

A. Volume
   Was the court able to hear you?

B. Speed and Clarity
   Was your speech clear and deliberate?
   Did you vary the pace and pause occasionally?
C. Body Language
   Did you maintain eye contact with the judge?
   Did you use appropriate gestures for emphasis?

D. Verbal Language
   Did you use correct vocabulary and grammar?
   Did you avoid excessive informality of speech?

E. Notes
   Did you present your argument without relying excessively on notes?

III. Overall Impression
A. Coherence
   Was your argument well organized?
   Was your argument logical?

B. Comprehensiveness
   Was your argument thorough?
   How well did you discuss and analyze the substantive issues?

C. Persuasiveness
   Did you treat the court with respect?
   Did your argument appeal appropriately to public policy, justice, and fair play?
   Did you effectively maximize your strengths and minimize your weaknesses?

D. Time
   Did you manage your allotted time effectively to enable you to present and support your major arguments?
   Had you decided in advance how much time to spend on each issue?
   Did you move from questions to arguments and from point to point with awareness of the time?

…

[Appendix B and Footnotes omitted]
Advocacy and Emotion

Advocates benefit from knowing the unique complementary relationship between reason and emotion. Persuading people requires an understanding of how they respond to emotional as well as logical arguments. The secret of successful advocacy is in using emotion effectively to persuade different audiences.

The term “emotion” should be broadly defined to encompass a vast range of human feelings. People express a variety of emotions and feelings in nearly all social settings. …

Many lawyers are uncertain about the proper way to express emotion in the courtroom. Some mistakenly believe that subjective emotions cannot be trusted when presenting an argument involving objective legal doctrine. These lawyers apply to advocacy what Sir Edward Coke wrote about the law: “[R]eason is the life of the law, nay the common law itself is nothing else but reason; …. “[FN1]

Many scholars, however, disagree about the primacy of reason in the legal process. Justice Oliver Wendell Holmes, Jr. observed that “the life of the law has not been logic: it has been experience.” [FN2] Emotions play a central role in the human experience. As a distinguished English barrister has observed, “[M]ost human action is prompted by feeling … [One distorts reality by suggesting that] emotion is an unreliable guide to a true decision on fact, and that there is therefore something suspect in evoking or displaying emotion.” [FN3]

Strong emotions lie at the heart of the decision-making process in our system of justice. Judges and jurors alike want to feel that they have contributed to a “fair” or “just” result. They hope to savor the feeling at the conclusion of a case that they have satisfied an important moral duty by arriving at the “right” decision.

Some litigators acknowledge the importance of emotion in persuading lay members of a jury but discount its value in persuading a trial judge or an appellate court. They contend that judges do not respond favorably to emotional arguments as evidenced by the common judicial admonition to counsel during oral argument: “Do not make an emotional jury argument. Confine yourself to the facts and the law.”

Lawyers who provoke this type of rebuke from the court, however, often merely demonstrate that they have awkwardly used emotion in their argument and have misunderstood their judicial audience. The truth is that like all other people, judges are moved by the right combination of reason and emotion. The great advocates understand this principle and are able to modify their presentations to meet the unique needs and personality characteristics of the jurists who are deciding their cases.

…

If you have any doubt about the central role of emotion in the art of advocacy, rely on Aristotle and Quintilian, those classic teachers of oratory and rhetoric. They taught that a persuasive written or oral presentation contains three elements:

- ETHOS: The ethics, integrity, and character of the advocate;
- PATHOS: The emotions that the advocate instills in the audience; and
- LOGOS: The logic or reason that supports the advocate's argument. \[FN5\]

A modern litigator's success depends on applying the wisdom of these ancient philosophers. Emotion and reason are necessary elements of all persuasive arguments.

**Know Your Audience**

An advocate needs to know the audience before emotion can be used effectively as a tool of persuasion. This principle is supported by our experience that the more we know about the emotional and intellectual qualities of a person, the greater likelihood that we can successfully persuade.

Classical rhetoricians place supreme importance on the advocate's ability to understand the state of mind of the listener or reader. Indeed, one scholar defined rhetoric as the "art of adapting discourse, in harmony with its subject and occasion, to the requirement of a reader or hearer." \[FN6\]

... An argument to a judge requires counsel to engender emotion in a subtle and more skillful manner.

... Vast differences, of course, exist among the personalities of individual people. These differences require the advocate to consider carefully the manner in which emotion is used in argument.

**Express Feeling through Storytelling**

The emotions that underlie human conflict are contained in the facts or the "story" of your case. You cannot persuade another person unless you can communicate the facts in a simple, organized, and coherent fashion.

Chronology and plot form the essential elements of a good story. Advocates should pay close attention to these elements in describing the facts of their cases.

Chronology refers to the time sequence of the facts. A jury or judge will generally not understand the case unless the central events and characters are presented in a chronological fashion; start with the past and move forward to the present.

The plot explains why the characters acted and the events occurred as they did. Use your ingenuity to paint the best picture for your client by describing or alluding to the human emotions that motivated the behavior. Your goal is to stimulate the listener or reader intellectually and emotionally to thinking and feeling that your client's cause is just.

John D. Mooy, a renowned storyteller, explained the advocate's role this way:

Juries already possess all of the requisite intellect for deciding the outcome of any case, no matter how complex; they have the inherent ability to imagine and visualize. This is the first and most fundamental lesson of storytelling. In order to tell a successful story you must present your tale in a manner which enables the judge or jury to visualize your version of the facts. A most effective technique for helping your trier of fact visualize is to involve the judge or jury in the story itself. \[FN7\]
A good factual presentation will allow the jury to feel naturally the favorable emotions in your presentation. Describing the details of a plaintiff's accident and injuries, for example, is a far superior method of generating the jurors' sympathy and empathy for your client than making an outright emotional plea.

Lawyers who make direct appeals to the emotions of a jury are often unsuccessful. Jurors recognize their high moral obligation to dispense justice. They will perceive a purely emotional argument as cheap or sentimental and beneath the dignity of their now new, awesome duty. Jurors will wonder whether an advocate who relies so heavily on emotion is adopting this strategy because the case has no legal merit.

Another serious problem with a litigator's overt display of emotion is that the jurors may become so overwhelmed with feeling that they cannot use their intellect to analyze the legal issues and reach a proper verdict. Jurors who are emotionally exhausted may also lose their motivation to expend further the energy that is necessary for their deliberations at the end of the case.

William Wordsworth's sensitive observation about a poet's use of emotion applies to the advocate's craft:

I have said that poetry is the spontaneous overflow of powerful feelings: it takes its origin from emotion recollected in tranquility; the emotion is contemplated till, by a species of re-action, the tranquility generally disappears, and an emotion, kindred to that which was before the subject of contemplation, is gradually produced, and does actually exist in the mind. In this mood successful composition generally begins, and in a mood similar to this it is carried on; .... [FN8]

Emotions are powerful tools of advocacy. Treating emotions with delicacy and subtlety are required to portray sincere feelings of love, of grief, and of empathy with pain.

**Clarence Darrow's Style of Expressing Emotion in Advocacy**

Great advocates, like Clarence Darrow, understood the strong force of Wordsworth's “emotion recollected in tranquility.” Darrow's final argument in the 1924 murder trial of Nathan Leopold, Jr. and Richard Loeb is a model for all trial lawyers who want to learn how to harness natural emotion to make their arguments persuasive.

Leopold and Loeb were two brilliant and wealthy teenagers who pled guilty to one of the most notorious and heinous crimes of the early part of this century: the kidnapping and murder of fourteen-year-old Bobby Franks, son of a prominent Chicago family. The State of Illinois sought the death penalty. A public frenzy quickly developed in support of the State's demand for the boys' execution.

Clarence Darrow, however, stood as a formidable obstacle in the path of the gallows. He devised an argument strategy around a sympathetic theme that saved the lives of Leopold and Loeb. Darrow argued that the boys must have suffered from a severe mental disease to have committed such a senseless murder. He insisted that a system of justice could not impose a sentence of death for a crime that could not be understood in any traditional manner.

This theme allowed Darrow to channel the hostile feelings generated by the murder toward sympathy for the two boys who, he argued, could not be held responsible for the crime because of their mental condition. Imagine the emotional impact of Darrow's words to the judge who had to decide whether Leopold and Loeb lived or died.
[I]t was the senseless act of immature and diseased children ... wandering around in the dark and moved by some emotion that we still perhaps have not the knowledge or the insight into life to understand thoroughly.

***

There was not a normal act in any of it, from the inception in a diseased brain, until today, when they sit here awaiting their doom.

***

We are satisfied with justice, if the court knows what justice is, or if any human being can tell what justice is. If anybody can look into the minds and hearts and the lives and the origin of these two youths and tell what justice is, we would be content. But nobody can do it without imagination, without sympathy, without kindliness, without understanding, and I have faith that this [c]ourt will take this case, with his conscience, and his judgment and his courage and save these boys' lives. [FN9]

We can learn an important lesson from Clarence Darrow's style of advocacy: Emotion may be used as a persuasive weapon by all parties to a controversy. Good lawyers highlight the favorable emotions that support their clients in the same way that they use legal reasoning and the strongest legal precedents in their arguments.

The Leopold and Loeb trial provides an excellent example of the different ways in which counsel can focus attention on the emotional equities of the client's position. The prosecution supported its request for the death penalty by emphasizing the cruel nature of the crime, the immorality of its perpetration, and the suffering of the young victim's family. The State also expounded on the values of retribution and punishment that justified a sentence of death.

Darrow defused the emotional charge of the prosecution by expressing outrage for the crime and sadness for the victim's family. He then evoked sympathy for his clients by emphasizing the mental disease that compelled them to commit such an irrational crime. He asked the court to dispense justice with kindness, mercy, and an understanding of the dark side of human nature.

Civil litigation also presents strategic opportunities for an advocate to present the emotional theme of the case from different perspectives. Consider a negligence action involving an automobile accident. Plaintiff's counsel might focus the emotional aspects of the argument on damages issues. The advocate might hope to attract the jury's sympathy and compassion by describing how the client's lifestyle has been diminished as a result of the injuries sustained in the accident.

Defense counsel, on the other hand, would present a different emotional theme to the jury by asking the jurors to decide the case based on higher principles of the law and to resist the temptation of feeling influenced by opposing counsel's "emotional" argument centered on the plaintiff's injuries. Counsel for the defendant would then focus the jury's attention on the plaintiff's contributory or comparative fault and would argue that the facts and the law require a defendant's verdict or a small award of damages.

Accomplished defense lawyers often attempt to weaken the emotional strength of their opponent's argument by telling the jury that they should decide the case dispassionately based on the higher morality of the law. They proceed, however, to disguise the strong emotions underlying their legal defenses with appeals to justice and the rule of law.

Successful advocates express emotion naturally in a way that complements their unique personalities as well as the facts of their cases. Different emotional "styles"
can be equally persuasive before the same judge or jury. Clarence Darrow's emotionally explosive delivery suited him well but his style is not appropriate for everyone. Some lawyers can be equally effective with a soft-spoken delivery focused on the merits of the case. The subtle emotion in this type of argument is rooted in the conviction and integrity of the speaker. Advocates enhance their persuasive abilities when they successfully develop their own emotional styles.

**Delivery of an Emotionally Persuasive Argument**

Persuasive advocates believe in and care deeply about their client's cause. Successful advocates know how to express their strong, positive feelings for their clients in a manner that touches the emotions of a judge or jury.

John Mooy described the emotional interaction between the advocate, as storyteller, and the audience:

> When you truly believe in something - a cause, perhaps, or your version of the facts - you speak with a conviction which enables you to lead your audience through your story step by step. This technique is more than sincerity, for you can be sincere yet not believed .... Believability is that intangible that comes from within.

The “touching” element of storytelling does not only involve your audience in listening to you. Touching them is also having them hear you in such a manner that they identify with you and your version of the facts. This abstract concept of touching is often difficult for attorneys to grasp. You have been trained to act upon facts, to ferret out the truth, to deal in the logical and the specific. Yet, touching your audience is not contrary to your professional training. It is not an alteration of the facts. It does not create a fiction. Attaining believability is an art, a reciprocating art, that is performed when you, the storyteller, believe in your story and touch your jury - your audience - so that they believe as you do. It is more than persuasion. It is feeling with another, feeling for another, and having another feel with you. [FN10]

... A lawyer might hope to evoke positive feelings such as love, generosity, compassion, sympathy, and humor to win a particular case. On the other hand, negative feelings such as hate, anger, jealousy, indignation, and ridicule might dominate the courtroom atmosphere and play a central role in an advocate's strategy. ...

An advocate's ability to convey to the judge and jury strong feelings for the merits of the case will enliven and enrich the argument even when the issues seem dry, dull, and technical. Other valuable techniques may also be used to evoke favorable emotional reactions in the audience.

Images, analogies, metaphors, stories, symbols, and emotive language are all potent devices that help the advocate to persuade the audience. An expert in jury psychology has observed, “Such image-creating words, phrases, analogies and stories are important to attorneys because they predispose jurors to interpret material presented at trial favorably to their client. Creating favorable images [such as “the little guy” or “the innocent victim”] is one of the most important tasks attorneys perform .... The challenge for the attorney is to evoke the kinds of images that have the strength, emotion, duration and relevance to favorably influence juror decision-making during the course of the trial.” [FN11]

Emotionally charged images are particularly effective if the jurors relate them to memories and feelings connected to their own experiences in life. In a securities fraud case, for example, a juror who has lost money in the stock market might dwell
on that unpleasant experience if the plaintiff's lawyer creates images of the "little
guy" against the "big corporation." The defendant's lawyer would need to
counteract that image by personalizing the corporate client and creating an image of
the plaintiff as a risk-taker.

...  

An advocate also benefits by carefully considering the emotional content of the
language used in written and oral presentations. One observer explained the
problem this way: “All the time, advocates slip into a faceless, soporific argument in
which the facts come across as lifeless data. If your opponent errs this way, you
have a much greater chance of capturing the judge's imagination and sympathy
with a vivid, forceful depiction of the issues.” [FN12] You will improve the
persuasive quality of your presentation by selecting language that emotionally
complements your factual and legal theme.

**Emotion on Appeal**

Controlled and carefully measured emotions play a critical role in successful
appellate litigation. Indeed, many appeals are lost because the advocate does not
understand how to “touch” or persuade appellate judges when delivering a highly
principled legal argument. Some litigators mistakenly think that the hallowed
chambers of the court of appeals require an unfeeling, academic presentation of
abstract principles of law. Many trial lawyers err on the opposite end of the
spectrum by thinking that one may present an unrestrained, visceral argument
when, in fact, appellate judges resent such a display of feeling in their courtroom.

Why are members of the bar so confused about how to argue a case on appeal?
One reason is that many lawyers do not recognize a need to modify their trial
strategy on appeal. Successful appellate strategy begins with sensitivity to the
purposes and constraints of the appellate process. A court of appeals does not
decide questions of fact; it corrects errors of law that occurred in the trial court.

Appellate courts analyze the propriety of lower court rulings based on well
established standards of review. Understanding these standards before devising an
appellate strategy is fundamental. Courts of appeal are generally required to accept
the jury's or trial judge's findings of fact. You should, therefore, pay careful
attention to organizing the facts based on the applicable standard of review.
Counsel who reargue disputed factual questions on appeal can expect a chilly and
sometimes hostile reception.

An irony in the appellate process is that though appellate courts correct legal
errors, most appeals are won or lost on the judges' perception of the facts decided in
the trial court. By retelling the story in a candid and compelling fashion, the
favorable emotions and equities for your client should flow naturally from the
presentation in your brief or oral argument. Consider the following advice in
preparing your factual statement:

Though written by an advocate, the statement of facts in an appellate brief
should not seem overly adversarial. The narrative should flow in an apparently
inevitable fashion, avoiding overstatement and special pleading. It should seem as
natural as relaxed breathing - with no panting, sweating, or screaming. The
narrative should be economical with no excess facts or gratuitous references.
Achieving this tone is one of an appellate lawyer's greatest challenges: You must be
a committed advocate while setting out the facts in an objective, but nonetheless
persuasive, way. [FN13]
Appellate judges want to apply the law correctly and reach a just result that is fair to the litigants. An emotionally compelling appeal is one in which the advocate combines the facts and law into a simple but persuasive theme.

Fourth Circuit Judge J. Braxton Craven, Jr. observed that successful appellate advocates make the judges care about the disposition of the appeal. [FN14] You may accomplish this goal by delivering your argument with feeling, sincerity, “believability,” and conviction.

You can also persuade appellate judges to care about your client's cause by emphasizing the importance of the legal principles supporting your argument. Appellate judges view themselves as guardians of the law, and they can become passionate about discharging this moral duty. By appealing to the policies and values that underlie the rule of law, a good advocate can emotionally attract the appellate judges to the merits in the client's position.

The authors discussed the question of emotion in appellate advocacy with the Right Honorable Lord Mackay of Clashfern, Lord Chancellor of England, during his August, 1990 visit to the United States. Lord Mackay agreed that emotion plays a critical role in the art of persuading an appellate court. The Lord Chancellor observed that he is moved by the advocate who can demonstrate that the client's legal position enhances the “symmetry of the law.”

The written brief is the principal vehicle for the advocate to communicate the case to the court of appeals. The subtle emotional force of the brief expresses itself through the advocate's fair factual statement, accurate analysis of the law, and compelling legal reasoning. The brief should be written in an objective tone with no flashy displays of adjectives intended to incite the court or enrage the opponent. An appellate court reacts against blatant emotional arguments; it perceives them as reflecting counsel's weakness on the merits of the case. The court expects a candid, organized, and logical argument that focuses on the truly dispositive issues.

Oral argument is the time for the advocate to enliven the presentation in the brief with the emotions that emerge from face-to-face contact with the appellate judges. Professor Karl N. Llewellyn described the role of oral argument in the decision-making process:

The function of the oral presentation is, if that be doable, to catch and rivet attention, to focus the issue into a single challenging question, to make the facts create ineluctable conviction as to where right lies and to fit that conviction into a persuasive, even compelling legal frame .... In oral argument lies the opportunity to catch attention and rouse interest among men who must be got to read - or to reread - this brief not as a routine duty nor under the undiscriminating press of other business, but with the pointed concentration this cause merits. [FN15]

Stimulating the judges into asking questions of counsel is an additional benefit of the emotional communication between the advocate and the court in oral argument. As Professor Llewellyn observed, “[O]ral argument is the one chance for you (not for some chance-assigned mere judge) to answer any questions you can stir any member of the court into being bothered about and into bothering with, and the one chance to sew up such question into a *164 remembered point in favor.” [FN16] The outcome of an appeal may depend on the advocate's ability to respond to the judges' questions during the argument.

Appellate practitioners should reflect on the power of emotion in their oral presentations. One can benefit from studying the work of great nineteenth century advocates.
Daniel Webster's eloquent argument in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 518 (1819), where the Supreme Court relied on the Contract Clause to prevent the New Hampshire legislature from impairing the colonial charter of Dartmouth College, deserves our attention. Chief Justice William H. Rehnquist recounted the emotional climax of Webster's famous oration:

After four hours of intricate legal reasoning, Webster paused for a moment, then made a dramatic, emotional appeal to the Justices' sympathies for the cause of higher education. He stated, according to one surviving account of the oration:

‘Sir, you may destroy this little institution; it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do so, you must carry through your work! You must extinguish, one after another, all those great lights of science which, for more than a century, have thrown their radiance over our land!’ [FN17]

Webster then closed his argument with the memorable words: “It is, sir, as I have said, a small college. And yet there are those who love it -.” [FN18]

Webster brilliantly combined reason and emotion to support his views of the important constitutional principles at stake in his case. The flowery style used by advocates of an earlier era, however, may not be appropriate in today's appellate courtrooms.

Stephen M. Shapiro, former Deputy Solicitor General of the United States, described the proper technique that a modern appellate advocate should use to deliver an oral argument:

[The advocate should remember that the greatest barrier to an effective argument is boredom. It is imperative that the argument be vivid and striking. This does not result, of course, from exaggeration or from irrelevant emotional appeals. Counsel should never attempt to harangue the Justices or to speak in the florid and emotional style cultivated by some trial attorneys. Counsel's speech should, however, be varied, with changes in inflection, volume, and pace. An occasional appropriate metaphor also may be relied upon to facilitate *communication. The style of the presentation should fall approximately half way between a formal speech and a personal conversation. It must be clear, forceful, and emphatic, without any element of stilted oratory or artificial rhetoric. [FN19]

Advocates follow a long line of philosophers, theologians, writers, and thinkers who have debated the question of whether there is a conflict between emotion and reason. Whatever the outcome of this profound debate, successful lawyers have always understood that their power of persuasion depends upon a melding of the heart and the mind.

[Footnotes omitted.]
5.1- Specific learning outcomes

At the end of this unit, students are expected to be able to:

a) make an oral presentation of 20 to 25 minutes that includes response to questions;
b) offer feedback on the level of preparation and flexibility in the oral argument of others;c) explain the necessity of outline and notes that can be glanced at without losing adequate eye contact with the judges;d) evaluate the level of a moot participant’s performance with regard to the content, structure and style of oral arguments;
e) compare the overview of assessment procedures in Philip C. Jessup Moot Court Competition, African Human Rights Moot Court Competition, and APAP’s Moot Court Competition.
f) discuss the manner in which the various mooting and assessment procedures can be customized and used in other moot court competitions that can be designed in the law school.

<table>
<thead>
<tr>
<th>Expected number of learning hours (Weeks 8 to 15):</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Class hours: Two hours per week</td>
</tr>
<tr>
<td>• Student independent workload: A minimum of four hours per week (excluding rehearsal for oral arguments)</td>
</tr>
</tbody>
</table>

5.2- Unit Introduction

Three moot courts are briefly introduced in this unit owing to the participation of Ethiopian law schools in the competitions. They are Philip C. Jessup International Law Moot Court Competition, African Human Rights Competition and APAP’s Moot Court Competition. Ethiopian law schools also participate in the International Humanitarian Law Competition which is held at Arusha (Tanzania) and supported by the International Committee of Red Cross (ICRC). However, the role of a team from a certain law school in the latter mooting may

1 Action Professionals’ Association for the People
not involve oral advocacy skills *per se.* Another international moot court in which an Ethiopian law school participates is the ELSA Moot Court Competition (EMC²) which simulates WTO’s dispute settlement system.

This unit gives relatively more focus to Jessup because it is the largest mooting event, and most of the issues raised in connection with Jessup can be applicable (with some customization) in other moots that target at enhancing written and oral advocacy skills of law students. In fact, organizers of the various moots avail all the necessary information about each moot court competition. The Unit is divided into three sections. Jessup is covered in Section 1, while Sections 2 and 3 respectively include some readings on African Human Rights and APAP’s moot courts.

Reading 1.1 (of Section 1) shows the areas of performance that are evaluated during Jessup oral rounds. The highest points are allocated to *knowledge of the law* and *ingenuity and ability to answer questions.* Moreover, the points allocated to *application of law to facts* (25%) clearly show the significance of this factor in the assessment of oral contests. The other factors stated in the reading are *style, poise, courtesy and demeanor* (10%) and *time management and organization* (5%).

Reading 1.2 addresses various questions that are frequently asked about the Jessup moot. The reading indicates that “the presentation of oral and written

---

*Source: http://www.elsamootcourt.org (ELSA, Monday 29 June 2009)*
pleadings” addresses “timely issues of public international law in the context of a hypothetical legal dispute between nations.” It also states that the Compromis written by leading scholars of international law “is a compilation of agreed upon facts about the dispute that is submitted for adjudication to the International Court of Justice (ICJ), the primary judicial organ of the United Nations.” Students who participate in Jessup, should, soon after the release of the Compromis “begin researching and preparing arguments for both sides of the dispute, drafting and editing written pleadings, called ‘memorials’, and practicing oral presentations.”

Each team “prepares two written memorials and two 45-minute oral presentations, one for each party to the dispute (the “Applicant” and the “Respondent”)” and “[t]eams argue alternately as Applicant and Respondent against competing teams before a panel of judges, simulating a proceeding before the International Court of Justice.” As indicated in Reading 1.1, team advisors “are allowed to provide general advice and instruction regarding the basic principles of international law” and “are prohibited from doing any work for the team.”

The second reading in Section 1 includes some excerpts from the Official Rules of the 2010 Philip C. Jessup International Law Moot Court Competition. The Preamble of the Official Rules states the rationale of the moot, which, inter alia, includes educating “students and lawyers around the world about the principles and significance of international law”, professional skill development in written and oral advocacy, “[p]romoting the social responsibility of law students and lawyers, [s]triving to foster international understanding and cooperation” and others. Reading 2 includes Official Rules 6, 7 and 8 that deal with memorials, oral round procedures and qualifying tournament procedures. Official Rules 10 and 11 have also been included because they deal with the pertinent issue of competition scoring and penalties.

Reading 3 (Section 1) explores various purposes that can be served by Jessup moot court “including the development of international law itself.” The author uses the analogy of gaming and suggests the inclusion of tasks of
lawyers such as alternative settlement devices in a simulation framework. The primary focus of the reading is the potential of the Jessup “as an instrument involving policy problems.” To this end, Almond suggests some modifications with “possible cross-fertilization of gaming and moot court procedures.” It is to be noted, however, that overstretching Jessup’s objectives might have the risk of spreading out the focus of the moot too wide thereby diluting the prime targets of the moot.

The following is the setting that is expected to be used in moot courts.

**COURTROOMS**

(Source: National Administrator’s Guide, ILSA)

The readings of Section 2 include brief excerpts that introduce African Human Rights Moot Court Competition (Readings 4.1 & 4.2), relevant provisions of the Official Rules that deal with scoring guidelines (Reading 4.3), sample score sheet (4.4) and a sample moot problem (Reading 4.5). Section 3 similarly includes Rules of APAP’s moot court relevant to memorials and oral rounds (Reading 5.1), written pleading score sheet (Reading 5.2) score sheet for the selection of Best Oralist (Reading 5.3), oral argument score sheet (Reading 5.4) and sample moot problem (Reading 5.5)
5.3- **Tasks:** Weeks 7 to 15

1. **Week 7**
   a) Summarize the core skills and techniques of effective oral advocacy based on the readings in earlier course/s and the ones included in this course material.
   b) Compare the factors of evaluation of memorials and oral arguments in the three moot courts introduced in Unit 5 and comment on the parts that seem to be too subjective and difficult to measure.
   c) Watch a VCD of moot court oral rounds (conducted in Ethiopia) and state the areas of improvement you would suggest for the oralists you saw in the VCD.
   d) Formation of teams (pairs in each team)

2. **Weeks 8 to 11**
   *First Round* Oral Contest

3. **Weeks 12, 13, 14**
   *Second Round* Oral Debate
   **N.B**- Students who didn’t pass to the second round will participate in another round and upgrade their grades upon significant improvement.

4. **Week 15**
   *Semifinal* Oral Debate among a maximum of 8 (Eight) students

5. **Week 16**
   *Final round* debate among 4 (Four) students

**N.B**- The rounds here-above apply only where the number of students who are enrolled to the course demands it. The core purpose of mooting is its function as a pedagogic tool, and the instructor/coach can devise means of rounds which can facilitate the learning process.

5.4- **Readings (Unit 5)**

**Section 1**

Reading 1: About Jessup
   1.1- Oral round grading
   1.2- Frequently Asked Questions about the Jessup Competition

Reading 2: Jessup Official Rules (2010), Rules 6-8, 10 & 11

Reading 3: Harry H. Almond, Jr., “Strengthening the Philip C. Jessup International Law Moot Court Competition”
Section 2
Reading 4: African Human Rights Competition
4.1- About African Human Rights Competition
4.2- Official Rules: Instructions to Judges
4.3- Applicant’s score sheet
4.3- Sample moot problem

Section 3
Reading 5: APAP’s Moot Court Competition
5.1- Rules of APAP’s Moot Court Competition
5.2- Written pleading score sheet
5.3- Score sheet for the selection of Best Oralist
5.4- Oral argument score sheet
5.5- Sample moot problem
Reading 1- About Jessup

Oral Round Grading

Source: Jessup Scoresheet (with omissions)

INSTRUCTIONS [for oral round grading]:

Each oralist should be given a score between 50 (lowest) and 100 (highest) to reflect his/her performance during the oral argument. In particular, in assessing each oralist, you should take into account his/her:

1) knowledge of law (approximately worth 30% of each oralist’s score);
2) application of law to the facts (approximately worth 25% of each oralist’s score);
3) ingenuity and ability to answer questions (approximately worth 30% of each oralist’s score);
4) style, poise, courtesy and demeanor (approximately worth 10% of each oralist’s score); and
5) time management and organization (approximately worth 5% of each oralist’s score).

[The judge may use] two optional worksheets attached to this mandatory scoresheet in case [he/she] would like to breakdown … scores using the above criteria or provide additional written comments.

An excellent oralist, who … is likely among the top 10% of all the oralists in the competition, should be given a score between 91 and 100 points.

A very good oralist, who … is likely among the top 25% to 10% of all oralists in the competition, should be given a score between 81 and 90 points.

A good oralist, who … is likely in the top 50% to 25% of all oralists in the competition, should be given a score between 71 and 80 points.

An adequate oralist, who … is likely to be among the top 75% to 50% of all oralists in the competition, should be given a score between 61 and 70 points.

A poor oralist, who … is likely in the bottom 25% of all the oralists in the competition, should be given a score between 50 and 60 points.
Reading 1.2

FREQUENTLY ASKED QUESTIONS ABOUT THE JESSUP COMPETITION

http://www.ilsa.org/jessup/faq.php

I. GENERAL INFORMATION

Q: What is the Jessup Competition?
Q: How does the Jessup Competition compare to other moot court competitions?
Q: Who is Philip C. Jessup?
Q: What is the International Court of Justice?
Q: When will the Compromis be released?
Q: When is the deadline for submitting Memorials?
Q: How do I start a new Jessup Team at my school?

II. THE JESSUP COMPETITION AND ILSA

Q: What is the relationship between the Jessup Competition and ILSA?
Q: What is the difference between a Jessup Team and an ILSA Chapter?
Q: What is the relationship between the Jessup Team and ILSA Chapter at my school?

III. ELIGIBILITY AND PARTICIPATION

Q: Which schools are eligible to participate in the Jessup Competition?
Q: Which students are eligible to participate on a Jessup Team?
Q: Can a school have more than one Jessup Team?
Q: How are Team Members selected for a school’s Jessup Team?
Q: How many students may participate on each Jessup Team?
Q: Who may be a Team Advisor (coach or faculty advisor)?

IV. REGISTERING FOR THE JESSUP COMPETITION

Q: How can my Team register for the Jessup Competition?
Q: What is the deadline for Team Registration?
Q: How do I know that my Team’s Jessup Registration Form has been properly received?
Q: How do I know that my Team’s Registration Fee has been properly received?
Q: How much is the Registration Fee?
Q: What currency should I use to pay the Registration Fee?
Q: What form of payment should I use to pay the Registration Fee?
Q: How do Teams finance the cost of registration?
Q: How do I make changes to my Team’s Registration information, including adding or changing Team Members?
Q: How do I register a new Team Member or substitute a Team Member?
Q: When do Teams receive their Team Numbers?
V. COMPETITION FORMAT

Q: What is the schedule for the Jessup Competition?
Q: What is the official language of the Jessup Competition?
Q: What are the different levels of the Jessup Competition?
Q: What is a Qualifying Tournament?
Q: How many Oral Rounds will my Team compete in during a Qualifying Tournament?
Q: Does my nation or country have a Qualifying Tournament?
Q: How many Teams from each Qualifying Tournament advance to the International Tournament?
Q: How many Oral Rounds will my Team compete in during the International Tournament?

VI. PREPARING FOR THE COMPETITION

Q: What resources are available to assist my Team with researching and writing our Memorials?
Q: What is the best way to prepare for the Oral Rounds of the Competition?
Q: How and when do Teams get passwords to research databases such as LexisNexis, Westlaw, and HeinOnline?
Q: How do Teams finance the cost of traveling to the International Tournament?
Q: Does ILSA assist Team Members, Coaches or Judges in obtaining visas to attend the International Tournament in Washington, D.C.?
Q: What should my Team do to reserve a hotel at the International Tournament?

I. GENERAL INFORMATION

Q: What is the Jessup Competition?

A: The Philip C. Jessup International Moot Court Competition is an advocacy competition for law students. Teams of law students compete against one another through the presentation of oral and written pleadings to address timely issues of public international law in the context of a hypothetical legal dispute between nations. The Compromis is the springboard for the Jessup Competition. Written by leading scholars of international law, the Compromis is a compilation of agreed upon facts about the dispute that is submitted for adjudication to the International Court of Justice (ICJ), the primary judicial organ of the United Nations. After the Compromis is released, students begin researching and preparing arguments for both sides of the dispute, drafting and editing written pleadings, called “memorials”, and practicing oral presentations. Each team prepares two written memorials and two 45-minute oral presentations, one for each party to the dispute (the “Applicant” and the “Respondent”). Teams argue alternately as Applicant and Respondent against competing teams before a panel of judges, simulating a proceeding before the International Court of Justice.
Q: How does the Jessup Competition compare to other moot court competitions?
A: The Jessup Competition is the world’s largest moot court competition. It is also the oldest moot court competition dedicated to international law. The Jessup is noteworthy because it is open to law schools all over the world. …

Q: Who is Philip C. Jessup?
A: The Jessup Competition is named after Philip C. Jessup, the United States representative to the International Court of Justice, who was elected by the United Nations to serve a nine-year term in 1961. Judge Jessup had a long and distinguished academic, judicial, and diplomatic career. He practiced law and taught at several American universities until 1961. Jessup was an assistant to Elihu Root during the 1929 Conference of Jurists on the Permanent Court of International Justice. He attended both the Bretton Woods and San Francisco Conferences, and played a key role in the formation of the International Law Commission.

Q: What is the International Court of Justice?
A: The International Court of Justice, also known as the “ICJ” or “World Court”, is the primary judicial organ of the United Nations. The ICJ was established under the Charter of the United Nations in 1945 to succeed the Permanent Court of International Justice, or PCIJ. The ICJ adjudicates contentious cases between States and provides advisory opinions to legal questions submitted by authorized organs of the United Nations and specialized agencies. The competence, composition and functions of the ICJ are governed by the Statute of the International Court of Justice. The Court is composed of 15 judges, each elected by the United Nations General Assembly and the Security Council to serve a term of nine years. The seat of the Court is at the Peace Place in The Hague, The Netherlands.

Q: When will the Compromis be released?
A: The Compromis is released in September every year. The specific release date of the Compromis for the current season can be found in the Official Schedule.

Q: When is the deadline for submitting Memorials?
A: Memorials must be submitted by the memorial submission deadline indicated in the Official Schedule. Memorials must be emailed to the ILSA Executive Office in accordance with the Official Rules, which are released each August. Additional submission requirements and earlier deadlines may be imposed by a National Supplement to the Official Rules. It is the responsibility of teams to know the submission requirements of their National Rules Supplement, if any, which are posted on ILSA’s website.

Q: How do I start a new Jessup Team at my school?
A: Before beginning the process of starting a new team, you should check to make sure that your school does not already have a Jessup team. Each school may only enter one team in the Competition. Once you have verified that your school does not already have a Jessup team, we recommend that you seek the advice of faculty members at your school who teach international law or who may be familiar with
the Competition. Faculty advisors are useful because they can mobilize the resources of the school to support your team. Many Jessup teams receive funding, advisory support, and academic credit from their schools. Your next step is to introduce the Competition to other students who may be interested in participating on a Jessup team. Once the members of the team are organized, the last step is to contact the ILSA Executive Office at jessup@ilsa.org to register your team. ILSA recommends that new teams read the White & Case Jessup Guide, a student-focused guide to working with the Jessup Problem, researching international law, writing memorials, and presenting oral arguments.

II. THE JESSUP COMPETITION AND ILSA

Q: What is the relationship between the Jessup Competition and ILSA?

A: The ILSA Executive Office is responsible for the global administration of the Jessup Competition. The ILSA Executive Director appoints Administrators to run national and regional qualifying tournaments. The ILSA Executive Director is the final arbiter in the implementation and interpretation of the Official Rules and National Supplements to the Official Rules.

Q: What is the difference between a Jessup Team and an ILSA Chapter?

A: The purpose of ILSA is to promote the study and understanding of international law. ILSA achieves this purpose through various programs, including the Jessup Moot Court Competition and local ILSA Chapters.

(1) Jessup Competition: The Philip C. Jessup International Moot Court Competition is an international law advocacy competition for law students. Each law school, law faculty or institution with a law-related degree program may select one Jessup team to represent the school in the Competition. A maximum of five students may participate on a school’s Jessup team. Teams compete against each other by presenting both oral and written pleadings, which are evaluated by judges based upon advocacy skills and knowledge of international law.

(2) ILSA Chapters: ILSA Chapters are student-run organizations dedicated to the promotion of international law. ILSA Chapters are established locally at law schools as clubs or student groups, and are commonly known as International Law Societies (ILS). While only a maximum of five students may participate on a school’s Jessup team, ILSA Chapter membership is open to all students interested in joining. The activities of ILSA Chapters generally include organizing conferences, contributing to student-edited journals and magazines, promoting an international law curriculum, supporting the school’s participation in international law moots, and providing networking opportunities to students in the field of international law. The ILSA Executive Office serves as the umbrella organization for the global network of ILSA Chapters and facilitates Chapter activities.
Q: What is the relationship between the Jessup Team and ILSA Chapter at my school?

A: Many schools have both an ILSA Chapter and a Jessup team. ILSA chapters at some schools organize the selection process and provide support for their school’s Jessup team, while ILSA chapters at other schools are less involved with their school’s Jessup team. One of the benefits of having a registered ILSA Chapter at your school is a reduced Jessup Registration Fee. NOTE: Some schools may have an International Law Society or similar student group that is not a registered ILSA Chapter. In order to qualify for the Jessup Registration Reduced Fee, and other ILSA benefits, these groups must register as ILSA Chapters by submitting the

III. ELIGIBILITY AND PARTICIPATION

Q: Which schools are eligible to participate in the Jessup Competition?

A: Any law school, law faculty, or institution with a degree program in international law is eligible to participate in the Competition. Each school may only enter one team to compete, unless the Executive Director determines that extenuating circumstances justify the participation of multiple teams from a single school. Please see the Official Rules, which are released each August, for more detailed information regarding eligibility.

Q: Which students are eligible to participate on a Jessup Team?

A: Students pursuing a law degree or a degree related to international law at an eligible school may compete on behalf of that school so long as they are enrolled at least part-time and have not engaged in the practice of law after graduating from another law degree program. Some students must also obtain the ILSA Executive Office’s written permission to participate if the Official Rules so require. Please review the Official Rules, which are released each August, for detailed information regarding team member eligibility.

Q: Can a school have more than one Jessup Team?

A: Generally, each school may only enter one Jessup team in the Competition. In extenuating circumstances, a tournament Administrator may petition the ILSA Executive Office to allow multiple teams from a single school to compete. For more information, please see the Official Rules, which are released each August.

Q. How are Team Members selected for a school’s Jessup Team?

A: A school may determine its own method for choosing the members of its Jessup team. A school may hold an intramural competition to determine the members of the school’s Jessup team. However, the current Competition Problem may NOT be used in an intramural competition unless the written approval of the ILSA Executive Director has been obtained. In the United States, a school’s ILSA Chapter, if one exists, has the first right to administer the selection process for the school’s Jessup team. For more information, please see the Official Rules, which are released each August.
Q: How many students may participate on each Jessup Team?
A: Each Jessup team may have a maximum of five (5) team members. A Jessup team may choose to have less than five (5) team members, but must have at least two (2) team members to constitute a team. No more than five (5) individuals may contribute to the work product of the team over the course of the competition year. For more information, please see the Official Rules, which are released each August.

Q: Who may be a Team Advisor (coach or faculty advisor)?
A: A team advisor is anyone who is responsible for organizing, advising, or training a Jessup team, such as coaches and faculty advisors. Anyone may act as a team advisor, including professors, lawyers, graduate students, and former Jessup Competitors. Team advisors are allowed to provide general advice and instruction regarding the basic principles of international law, but they are prohibited from doing any work for the team. Jessup teams are not required to have a team advisor, and as a general rule a team should not have more team advisors than necessary to adequately prepare them for fair competition. For more information, please see the Official Rules, which are released each August.

Q: How do I register a new Team Member or substitute a Team Member?
A: Once your team has submitted the online Jessup Registration Form, you may NOT submit it again, even if some or all team member names were not included on the Registration Form when it was originally submitted. Once this Form has been submitted, you may only register additional team members before the team roster submission deadline indicated in the Official Schedule. Substitutions of team members are not permitted after the release of the Competition Problem (the Compromis) except in extenuating circumstances and only with the written permission of the ILSA Executive Office. To request a substitution, send an e-mail to jessup@ilsa.org, making sure to include an explanation of the circumstances justifying the substitution.

Q: When do Teams receive their Team Numbers?
A: Teams receive their team numbers once the online Registration Form has been submitted AND the Registration Fee has been paid in full. Your team number will be included on the receipt confirming payment of the Registration Fee, which will be sent via e-mail to the official team contact listed on your Registration Form.

V. COMPETITION FORMAT

Q: What is the schedule for the Jessup Competition?
... The competition season officially begins in September, when the Jessup Competition Problem (the Compromis) is released. Each team’s written pleadings (memorials) must be submitted to the ILSA Executive Office by the deadline indicated in the Official Schedule, or earlier if required by an applicable National Rules Supplement. Most countries with more than one registered Jessup team hold Qualifying Tournaments (National or Regional competitions) in January and
February. The team or teams representing each country travel to Washington, D.C. to compete in the White & Case International Rounds in March or April of each year.

... 

Q: What are the different levels of the Jessup Competition?

A: The Jessup Competition consists of two levels: (1) the Qualifying Tournaments (National and Regional Rounds), and (2) the International Tournament (White & Case International Rounds).

1. Qualifying Tournaments: If more than one team registers for the Jessup Competition from the same country, the ILSA Executive Director will notify each team that a Qualifying Tournament will be held to determine which team(s) will represent the country at the White & Case International Rounds. The Executive Director will also appoint a local Administrator to organize the Qualifying Tournament. The Administrator may create a National Rules Supplement to the Jessup Official Rules that will regulate the Qualifying Tournament. Each team participating in a Qualifying Tournament will participate in four Preliminary Oral Rounds, arguing twice as Applicant and twice as Respondent. However, if four (4) or fewer teams are participating in a Qualifying Tournament, the ILSA Executive Director may allow each team to participate in less than four Preliminary Oral Rounds. For more information, please see the Official Rules, which are released each August, and the National and Regional Rounds Page on ILSA’s website.

2. International Tournament: The highest level of the Jessup Competition is the White & Case International Rounds, held each year in Washington, D.C. The White & Case International Rounds includes Preliminary Rounds, Advanced Rounds, and the World Championship Round. During the Preliminary Rounds, each team will compete in four (4) Oral Rounds, pleading twice as Applicant and twice as Respondent. The White & Case International Rounds last one week and coincide with the American Society of International Law’s annual meeting. For more information, please see the Official Rules, which are released each August, and the International Rounds Page on ILSA’s website.

Q: What is a Qualifying Tournament?

A: When more than one team from a single country registers for the Jessup Competition, a Qualifying Tournament (National or Regional Rounds) will be organized to determine which team or teams will represent that country at the White & Case International Rounds. Qualifying Tournaments are organized by a local Administrator, appointed by the ILSA Executive Office. The Administrator may develop a National Rules Supplement to the Jessup Official Rules that will regulate the Qualifying Tournament. For more information, please see the Official Rules, which are released each August, and the National and Regional Rounds page on ILSA’s website.
**Q: How many Oral Rounds will my Team compete in during a Qualifying Tournament?**

**A:** Each team participating in a Qualifying Tournament (National or Regional competition) will participate in four Preliminary Oral Rounds, pleading twice as Applicant and twice as Respondent. However, if four (4) or fewer teams are participating in a Qualifying Tournament, the ILSA Executive Director may allow each team to participate in less than four Preliminary Oral Rounds. If there are any Advanced Rounds in the Tournament, and your team advances, it will compete in one (1) additional Oral Round each time it advances. The Advanced Rounds in a Qualifying Tournament may include Quarterfinal, Semifinal, and Championship Rounds, depending upon the number of teams competing in the Tournament and subject to the Administrator’s discretion. For more information, please see the [Official Rules](#), which are released each August.

**Q: Does my country have a Qualifying Tournament?**

**A:** The list of countries that hold Qualifying Tournaments varies from year to year. Currently, approximately 45 participating countries hold Qualifying Tournaments. Countries and regions that have consistently held Qualifying Tournaments in recent years include: Argentina; Armenia; Australia; Belgium; Brazil; Canada; Chile; China; Chinese Taipei; Colombia; Czech Republic; Ethiopia; France; Germany; Ghana; Greece; Hong Kong, China; Hungary; India; Indonesia; Ireland; Israel; Italy; Japan; Kazakhstan; Malaysia; Mexico; Netherlands; Nigeria; Philippines; Poland; Romania; Russia; South Africa; South Korea; Sri Lanka; Turkey; Ukraine; United Kingdom and United States. For a list of countries that held Qualifying Tournaments last season, please refer to last year’s National Rounds Schedule, which can be found on the National and Regional Rounds Page. If you are unsure whether your country will hold a Qualifying Tournament, please inquire with the ILSA Executive Office via e-mail at jessup@ilsa.org.

**Q: How many Teams from each Qualifying Tournament advance to the International Tournament?**

**A:** Each Qualifying Tournament may advance at least one team to the White & Case International Rounds of the Competition for every ten teams that participate in its Qualifying Tournament. Therefore, if twenty teams compete in a national Qualifying Tournament, at least two teams may advance to the White & Case International Rounds. Beyond this minimum threshold, the ILSA Executive Director will determine the exact number of teams that will advance to the White & Case International Rounds and the manner in which they are chosen. For more information, please see the [Official Rules](#), which are released each August.

**Q: How many Oral Rounds will my Team compete in during the International Tournament?**

**A:** If your Team advances to the International Tournament, it will compete in four Preliminary Oral Rounds, pleading twice as Applicant and twice as Respondent. If your Team advances to the Advanced Rounds, it will compete in one additional Oral Round each time it advances. The Advanced Rounds consist of Octafinals, Quarterfinals, Semifinals, and the World Championship Rounds. For more information, please see the [Official Rules](#), which are released each August.
VI. PREPARING FOR THE COMPETITION

Q: What resources are available to assist my Team with researching and writing our Memorials?

A: ILSA offers two batches of “basic materials” to help teams research the Competition Problem. These materials are available to all teams participating in the competition, and may be accessed free of charge on ILSA’s website. For release dates of the basic materials, please refer to the Official Schedule. In addition, ILSA lists a variety of research tools on the Jessup Research Page. Finally, ILSA also recommends that teams read the White & Case Jessup Guide, and the ILSA Guide to International Moot Court Competitions.

Q: What is the best way to prepare for the Oral Rounds of the Competition?

A: Most teams prepare for their Oral Rounds by holding practice rounds where one team member presents his or her oral pleadings while the other team member(s) serve as Judges. Some teams also invite professors and legal practitioners to attend their practice rounds as guest Judges. Many teams watch videos from the World Championship Round of past International Tournaments. These videos allow students to observe the general procedure and set-up of the mooting process, the types of questions asked by judges, and the speaking style of past winners. For an example of what mooting looks like in action, please see the video clip of the 2009 Shearman & Sterling Jessup Cup World Championship Final Round. If you are interested in purchasing Final Round DVDs or VHS videos, please visit the Merchandise Page on ILSA’s website.

Q: How and when do Teams get passwords to research databases such as LexisNexis, Westlaw, and HeinOnline?

A: Eligible teams competing in the Competition may request a password to access LexisNexis, Westlaw and/or HeinOnline free of charge to assist with their research. A team may request a password to one or all of these research databases by sending an e-mail to research@ilsa.org AFTER registration (including payment of the Registration Fee) has been completed. Westlaw and HeinOnline passwords will be sent via e-mail to the official team contact once your team has been assigned a team number. LexisNexis passwords will be distributed only after your team has submitted its official team roster listing the names of ALL team members. No passwords will be given unless specifically requested in an e-mail to research@ilsa.org.

Q: How do Teams finance the cost of traveling to the International Tournament?

A: Each team is responsible for funding the expenses associated with attending the White & Case International Rounds, including all transportation costs, hotel accommodations, and meals while in Washington, D.C. Many teams fundraise by asking their school, local and regional companies, law firms, government agencies, and educational foundations to contribute monetary and other resources. The ILSA Executive Office will provide a letter of support to potential sponsors...
Q: Does ILSA assist Team Members, Coaches or Judges in obtaining visas to attend the International Tournament in Washington, D.C.?

A: ILSA will prepare a letter of invitation for those who need a visa to attend the week-long White & Case International Rounds in Washington, D.C. ILSA will provide letters only to those who are officially involved with the Competition. Individuals who wish to obtain a letter of invitation must submit their Jessup affiliation details, passport information, and school name in a timely manner to the ILSA Executive Office at jessup@ilsa.org. If an individual qualifies for a letter of invitation, ILSA will send the letter of support to the applicant. The applicant is responsible for submitting the letter of support to the appropriate officials and completing the visa application process.

Q: What should my Team do to reserve a hotel at the International Tournament?

A: Jessup teams may stay anywhere they like in Washington, D.C. Most teams stay at a hotel or youth hostel. Some teams stay with friends or family. Other teams make accommodation arrangements through their local Embassies. The ILSA Executive Office reserves a block of rooms at two hotels: the competition venue and an overflow hotel. All reservations at these two hotels must be made through the ILSA Executive Office. The ILSA Executive Office will send instructions for making reservations at these two hotels to all teams advancing to the White & Case International Rounds. There are a limited number of rooms. All reservations are on a first-come, first-serve basis. If a team is not able to make reservations at one of these two hotels, teams must find other accommodations on their own. It is important that each advancing team make its reservations as soon as possible. The spring is a popular tourist season in Washington, D.C., and hotel rooms fill up quickly. Please contact reservations@ilsa.org with questions about hotel arrangements at the White & Case International Rounds.

ILSA Executive Office, <jessup@ilsa.org>
Reading 2: Jessup Official Rules (2010), Rules 6-8, 10 & 11

OFFICIAL RULE 1.0 to 5.0 (omitted)

OFFICIAL RULE 6.0 MEMORIALS

6.1 Submission of Memorials

a) Each Team participating in the Competition must prepare one Applicant and one Respondent Memorial.

b) Each Team must send its Applicant and Respondent Memorials via e-mail to the ILSA Executive Office at jessup@ilsa.org, and to the Administrator, if any, at the e-mail address provided by the Administrator, no later than 11:59 p.m., university's local time, on the date specified in the Official Schedule. Submission must occur in a single e-mail message, addressed to the ILSA Executive Office and the Administrator, with both Memorials attached. If one of the Memorials will be submitted late, a Team may separately send the timely Memorial before the deadline without penalty.

c) In exceptional situations and upon approval of the Executive Director pursuant to Official Rule 1.5, an Administrator may modify the Memorial submission guidelines via a National Rules Supplement in the following ways:

i) By establishing a deadline which is earlier, but not later, than the time and date specified in the Official Schedule. If an earlier deadline is set, the Memorials must be sent both to the ILSA Executive Office and to the Administrator by this revised deadline. Memorials received by the ILSA Executive Office after the revised deadline will be subject to late penalties.

ii) By requiring electronic copies to be mailed to opponent Teams by the deadline and in the manner and form specified by the Administrator.

iii) By requiring paper copies to be mailed to the Administrator and/or opponent Teams by the deadline and in the manner and form specified by the Administrator. If the Administrator requests paper copies, the Administrator may specify a later postmark or courier deadline for the paper copies than for the electronic submission provided an electronic copy is sent to ILSA and the Administrator by 11:59 pm local time on the designated due date for electronic copies.

d) All electronic and paper copy versions (if any) submitted to the ILSA Executive Office, the Administrator, or any other person must be identical.

e) Once Memorials have been submitted to the ILSA Executive Office, whether or not the memorial deadline has expired, resubmitted Memorials will be subject to a five (5) point penalty. If resubmitted after the memorial deadline has expired, resubmitted memorials will also be subject to applicable late penalties.

f) Equipment failure or problems will not be considered an excuse for improper formatting or late mailing of Memorials.
6.1.1 Disqualification Deadline
Unless otherwise agreed in advance and in writing by the ILSA Executive Office, a Team will be disqualified from the Competition if it does not submit both of its Applicant and Respondent Memorials by 11:59pm, university’s local time, on the Disqualification Deadline for Memorial submission specified in the Official Schedule. Any Memorial submitted after the deadline for Submission of Memorials as defined by Official Rule 6.1(b) but prior to this Disqualification Deadline will be subject to applicable late penalties.

6.1.2 Memorials Submitted in Languages Other Than English (omitted)

6.2 Memorial Format

6.2.1 Document Format
All parts of each Memorial must be contained in a single file. Memorials must be in Microsoft Word 2003 or Microsoft Word 2007 format. Memorials that do not conform to this rule will not be accepted. In this event, a Team may resubmit conforming Memorials but will be subject to resubmission penalties under Rule 6.1(e).

6.2.2 Paper Size and Margins
All pages of the Memorial must be letter size, 8.5 x 11 inches (21.6 x 27.9 cm), with equal margins of at least one inch (2.54 cm) on all four sides. The ILSA Executive Office and Administrator may reformat a Memorial that does not comply with this rule. Teams are advised that such reformatting may result in changes to pagination and layout.

6.2.3 Printing
Administrators in jurisdictions where letter is the standard paper size must print Memorials on letter size paper for their Qualifying Tournament. Administrators in jurisdictions where A4 is the standard paper size may print Memorials on letter size or A4 size paper for their Qualifying Tournament. However, the document settings in Rule 6.2.2 for paper size and margins must not change.

6.2.4 Font and Font Size
The font and size of the text of all parts of the Memorial, excluding the Cover Page but including the footnotes, must be in Times New Roman 12-point.

6.2.5 Line Spacing
The text of all parts of the Memorial, excluding the Cover Page, Table of Contents, and Index of Authorities, must be at least double-spaced. The text of footnotes may be single-spaced, but there must be at least double-spacing between separate footnotes. The text of headings may be single-spaced, but there must be at least double spacing between each heading and the body-text of the Memorial. Quotations to sources outside of the Memorial may be block quoted (i.e. right and left indented) and may be single-spaced if the quotation (excluding footnotes) has at least fifty words.
6.2.6 Advanced Features of Microsoft Word

Teams that take advantage of advanced features of Microsoft Word – including Track Changes and Comments -while drafting their Memorials are responsible for understanding how those advanced features work. A Memorial with tracked changes that have not been properly accepted or comments that have not been properly removed prior to submission will be assessed a five (5) point penalty, and Administrators shall accept any tracked changes and remove any comments found in an affected Memorial before submitting it to judges.

6.3 Memorial Content

6.3.1 Parts of the Memorial

The Memorial must contain the following parts, and only the following parts:
(a) Cover Page;
(b) Table of Contents;
(c) Index of Authorities;
(d) Statement of Jurisdiction;
(e) Questions Presented;
(f) Statement of Facts;
(g) Summary of Pleadings; and
(h) Pleadings (including Conclusion/Prayer for Relief).

6.3.2 Cover Page

The front cover of each Memorial must have the following information:
(a) the Team number in the upper right-hand corner followed by “A” if an Applicant Memorial or “R” if a Respondent Memorial (e.g., Team Number 123 would put “123A” in the top right hand corner of the front cover of its Applicant Memorial);
(b) the name of the court (i.e., “International Court of Justice”);
(c) the year of the Competition;
(d) the name of the case; and
(e) the title of the document (i.e., "Memorial for Respondent" or "Memorial for Applicant").

6.3.3 Index of Authorities

The Index of Authorities must list all legal authorities cited in any part of the Memorial and must indicate the page number(s) of the Memorial on which each authority is cited.

6.3.4 Statement of Facts

Teams are advised that judges will take the following into account in evaluating the Statement of Facts. A well-formed Statement of Facts should be limited to the stipulated facts and necessary inferences from the Competition Problem. The Statement of Facts should not include unsupported facts, distortions of stated facts, argumentative statements, or legal conclusions. The Competition Problem typically omits certain facts which might be relevant or dispositive to the outcome of the
case. Participants will be judged on their ability to conform the facts to their arguments without creating new facts or drawing unreasonable inferences from the Competition Problem.

6.3.5 Summary of the Pleadings
A well-formed Summary of the Pleadings should consist of a substantive summary of the Pleadings of the Memorial, rather than a simple reproduction of the headings contained in the Pleadings.

6.3.6 Legal Argument Limited to Pleadings
Substantive, affirmative legal argument or legal interpretation of the facts of the Competition Problem may only be presented in the "Pleadings" part of the Memorial. Summaries of such arguments may be included in the Questions Presented and the Summary of Pleadings.

6.4 Length
The word count shall be conducted using the standard "Word Count" feature in Microsoft Word 2003 or Microsoft Word 2007.

a) The total length of the Pleadings, including the Conclusion/Prayer for Relief and any associated footnotes, must be no longer than 9,000 words.

b) The Summary of Pleadings must be no longer than 700 words.

c) The Statement of Facts must be no longer than 1,200 words.

6.5 Citation Requirement

a) Footnotes must be used to identify the source of statements or propositions made in the body of the Memorial. Endnotes are not permitted. Footnotes may not include substantive pleadings, examples, or any text other than the citation itself. Footnotes are included in the word limit of Rule 6.4.

b) Inclusion of text other than the actual citation in a footnote is a violation of Rule 6.3.6.

Example of a proper footnote: Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 23-24 (July 6) [hereinafter Norwegian Loans].

Example of a footnote in violation of the Official Rules: Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 23-24 (July 6) [hereinafter Norwegian Loans] (holding that France's reservation in its declaration denying the Court jurisdiction over issues essentially within the national jurisdiction as understood by France could be utilized reciprocally by Norway).

6.6 Citation Form
Citations appearing in the Index of Authorities and footnotes of the Memorial must include a description of each authority adequate to allow a reasonable reader to identify and locate the authority in a publication of general circulation.

6.7 Anonymity in Memorials
Names of participants, and the nations or school name of Teams, may not appear on or within the Memorials. Signature pages are prohibited. The Administrators shall strike all references to Team Members, and countries or school names of
Teams, from Memorials before submitting them to judges.

6.8 Teams with Technological Limitations
If a team is unable to comply with any portion of Official Rule 6.0 due to technological limitations, the Team may request alternative arrangements with the ILSA Executive Office. Any such request must be made as soon as possible before the Memorial deadline.

6.9 Three-Judge Panels
The Administrator shall employ three (3) judges whenever possible to grade each Memorial. In extenuating circumstances, the Administrator may authorize panels of two (2) judges, but this should be done only as a last resort and the Administrator should minimize the number of times that a Team is evaluated by a two-judge panel. In no case may an Administrator authorize a panel of one (1) judge.

OFFICIAL RULE 7.0 ORAL ROUND PROCEDURES

7.1 General Procedures
Each Oral Round of each Tournament consists of ninety (90) minutes of oral pleadings. Applicant and Respondent are each allotted forty-five (45) minutes. Oral presentations during the round must be made by two (2) members, but only two members, from each Team. Prior to the beginning of the Oral Round, each Team must indicate to the bailiff how it wishes to allocate its 45 minutes among (a) its first oralist, (b) its second oralist, and (c) rebuttal (for Applicant) or surrebuttal (for Respondent). The Team may not allocate more than twenty-five (25) minutes, including rebuttal or surrebuttal, to either oralist. Time allocated for but not used by one oralist may not be used by another oralist, or in the rebuttal or surrebuttal. Any Team Member may act as an oralist during any round of the Competition and need not always argue the same side. In extenuating circumstances, the Executive Director has discretion to permit a single oralist to argue beyond the twenty-five (25) minute limit. Teams using interpreters shall be allotted additional time pursuant to Rule 7.8.

7.1.1 Extension of Time at Judges' Discretion
Judges may, at their discretion, extend total Team oral argument time beyond the forty-five (45) minute allocation. Oralists asked to further expand upon arguments may, in this instance, argue for more than the twenty-five (25) minute individual limit.

7.2 Three Judge Panels
In each Oral Round, the Administrator shall employ three (3) judges whenever possible. The Administrator may employ more than three (3) judges in Advanced Rounds. In extenuating circumstances, the Administrator may authorize panels of two (2) judges, but this should be done only as a last resort and the Administrator should minimize the number of times that a Team is evaluated by a two-judge panel. In no case may an Administrator authorize a panel of one (1) judge.
7.3 Oral Rounds

The order of the pleadings in each Oral Round at all levels of the Competition is: Applicant 1 --> Applicant 2 --> Respondent 1 --> Respondent 2 --> Rebuttal (Applicant 1 or 2) -->Surrebuttal (Respondent 1 or 2). Once an oralist has completed his or her main pleading, that oralist may not make any additional argument except for rebuttal or surrebuttal. This applies irrespective of whether the pleading Team uses all of the time it has allocated for the main pleading. Further, any time that is not used in the main pleading may not be used to extend the time allocated to rebuttal or surrebuttal.

7.3.1 Rebuttal and Surrebuttal

Each Team may reserve up to ten (10) minutes for rebuttal or surrebuttal. As a courtesy to the judges, Teams should announce whether they intend to reserve time for rebuttal or surrebuttal at the beginning of their oral argument, and how much time they intend to reserve. Failure to announce will not waive the right to rebuttal or surrebuttal. Only one Team Member may deliver the rebuttal or surrebuttal. The rebuttal or surrebuttal must be delivered by one of the two oralists participating in the Oral Round. A rebuttal shall immediately follow Respondent 2, and the surrebuttal shall immediately follow the rebuttal. The Team need not indicate prior to rebuttal or surrebuttal which of the pleading Team Members will deliver rebuttal or surrebuttal. Teams may waive their rebuttal or surrebuttal.

7.3.2 Scope of Pleadings

A Team’s oral pleadings are not in any way limited to the scope of the Team’s Memorial. The scope of the Applicant's rebuttal is limited to responding to the Respondent's primary oral pleadings, and the scope of the Respondent's surrebuttal is limited to responding to the Applicant's rebuttal. If the Applicant waives rebuttal, Respondent may not appear for surrebuttal. Although judges are admonished to enforce the limits on the scope of rebuttal and surrebuttal, and may take a violation of this Rule into account in evaluating an oralist's performance, there is no discretionary or non-discretionary Penalty for exceeding the scope of rebuttal or surrebuttal.

7.4 Ex Parte Procedure

a) In extreme circumstances, such as when a Team fails to appear for a scheduled Oral Round, the Administrator, after waiting thirty (30) minutes, may allow the Oral Round to proceed ex parte. In an ex parte proceeding, the attending Team presents its oral pleadings, which are scored by the judges to the extent possible as if the absent Team had been present and arguing. In such a case, the Team that fails to appear for its scheduled Round forfeits all six (6) of the Round's Oral Round Points.

b) The Administrator may schedule an additional ex parte proceeding for the absent Team later in the Tournament, if time and administrative concerns permit. The scores from the absent Team's ex parte proceeding do not affect the scoring of the original Oral Round and are used only for purposes of calculating individual oral pleading scores.

c) Failure to appear under subsection (a) also includes the situation in which only one team member from a given team appears for the oral round. In such an
event, the absent team's single oralist shall be allowed to plead and receive an individual score during the ex parte procedure for purposes of calculating individual oral pleading scores, even though his/her team forfeits all six (6) Oral Round points.

7.5 Of Counsel

During each Oral Round, one (1) additional Team Member may sit at the counsel table with the two (2) oralists as counsel. The person acting as counsel must be one of the Team Members registered pursuant to Rule 3.3. The person acting as counsel need not be the same person in each Oral Round.

7.6 Competition Communications

Only oral communications described in this Rule 7.6 are permitted. In particular, no written communication or exhibits may be presented or delivered by any Team Member to any judge.

7.6.1 Oral Courtroom Communication between Counsel and Judges

Each oralist may communicate with the judges, and the judges may communicate with that oralist, during the oralist's allotted time. In addition, in extraordinary circumstances, the judges may communicate directly with either Team's counsel table (for example, to clarify the spelling of an oralist's name or to request that a Team remain quiet during its opponent's oral presentation).

7.6.2 Oral Courtroom Communication and Activity at Counsel Table

Communication at the counsel table between Team Members may only be in writing to prevent disruption. Teams and team-affiliated spectators shall avoid all unnecessary noise, outbursts, or other inappropriate behavior which distracts from the argument in progress.

7.6.3 Written Courtroom Communication

Written communication during the Oral Round shall be limited to written communication among Team Members seated at the counsel table. No other written communication may take place between any combination of the following parties: judges, the oralist, Team Members seated at the counsel table, or spectators (including Team Members seated in the audience).

7.7 Spectators

All Preliminary Rounds should be open to the public. Teams may agree in advance, and after consultation with the Administrator, to limit the number of spectators in a room during the Preliminary Rounds. The presence of Team Advisors or other spectators affiliated with the Team is permitted in the courtroom during an Oral Round in which the Team is competing. Teams are responsible for ensuring that their spectators do not engage in any disruptive behavior.

7.7.1 Scouting

a) Team Members or persons directly affiliated with any Team may only attend
Preliminary Rounds in which their Team is competing. The Executive Director may in the interests of the Competition waive this Rule. Violation of this Rule should be brought to the attention of the bailiff and/or Administrator immediately, without disturbing the Oral Round, or immediately after the Oral Round has finished.

b) There are two types of scouting, both of which are prohibited. "Direct Scouting" occurs when a Team attends an Oral Round involving one or more Teams against which it will compete in a future Oral Round. "Indirect Scouting" occurs when a Team attends an Oral Round involving two Teams against which it is not scheduled to compete in the Preliminary Rounds.

c) A Team which commits Direct Scouting forfeits all six Oral Round Points in the future Preliminary Round (or Rounds) in which it competes against the Team (or Teams) which it scouted.

d) A Team which commits Indirect Scouting shall forfeit one Preliminary Round. For example, if the Team won four Preliminary Rounds, its total number of wins shall be reduced to three, without other adjustment to its Total Raw Points or Total Round Points. (If a Team which commits Indirect Scouting wins no Preliminary Rounds, there shall be no such adjustment.) This adjustment shall occur prior to the determination of final Preliminary Round rankings described in Rule 10.4.

7.8 Interpreters and the Use of Interpreters

7.8.1 Qualifying Tournaments

Each Administrator may allow Teams and/or judges to use languages other than English during Oral Rounds in a Qualifying Tournament, and/or may provide procedures whereby interpreters may be used, by including Rules to this effect in their National Rules Supplements.

7.8.2 International Tournament

a) A Team wishing to present its oral pleadings at the International Tournament in a language other than English must arrange to have its oral pleadings interpreted during the International Tournament. Arrangements for and costs incurred in hiring interpreters and equipment are the responsibility of the Team. A Team wishing to use interpreters must inform the Executive Director no later than two (2) weeks prior to the start of the International Preliminary Rounds.

b) Such Teams may request permission from the Executive Director to extend total Team oral argument time beyond the forty-five (45) minutes allotted under Rule 7.1. The maximum extension of time will be twenty (20) minutes per Oral Round. The use of an interpreter in one Oral Round does not commit the Team to using an interpreter in every Oral Round. Given that interpreters will be translating all arguments in a given Oral Round, any extension of time granted to a Team shall also be granted to its opponents. All judges and oralists in an Oral Round involving an interpreter should take the professional needs of the translator (for example, the need for clear enunciation of speech) into account during the Oral Round.

7.8.3 Team Members as Interpreters

A member of a Team may serve as an interpreter for other members of the Team if:
(a) he or she does not act as an oralist in the same Oral Round in which he or she is an interpreter; and (b) he or she does not sit at the counsel table during the Oral Round in which he or she is an interpreter; and (c) he or she does not communicate with his or her Team in any way during the Oral Round, except to interpret the oral pleadings.

7.8.4 Non-Embellishment by Interpreters

When a Team employs an interpreter, the interpreter may only engage in a literal interpretation of the oralists' pleadings and the judges' responses. No embellishment on the part of the interpreter to enhance or clarify the oralists' arguments or the judges' responses is allowed. A Team which violates this Rule is subject to forfeiture of all six (6) of the Oral Round Points for that Oral Round.

7.9 Audio and Videotaping

No audio taping or videotaping of oral pleadings is permitted without the advance permission of the entire panel of judges, the two (2) participating Teams and either the Administrator or the Executive Director. In no circumstances are participating Teams permitted to view or listen to any video or audio tape until after the completion of the Tournament in which the taped Oral Round occurred. ILSA reserves all rights to the audio taping and videotaping, or any other form of audio or visual reproduction, of any Oral Round or part thereof. All Teams participating in the World Championship Jessup Cup Round will be deemed to have consented to the taping and broadcasting of that Oral Round.

7.10 Anonymity of Teams in Courtrooms

During an Oral Round, participants may not indicate their country or school of origin to the judges or bailiff. Participants must not reveal their school or country of origin through direct or indirect means, including statements to judges, name tags or other signifiers, the placement of folders, files, library books or other materials bearing the name or logo of the school on the counsel table, and the wearing of pins or clothing revealing the identity of their country or school. For the purposes of this rule, the term “participants” includes Team Members, Team Advisors, and spectators affiliated with the Team.

7.11 Computers, Mobile Phones, and other Electronic Devices in Courtrooms

During an Oral Round, oralists at the podium and participants seated at counsel table may not operate, for any purpose, mobile phones, laptop computers, PDAs, or any other computing or electronic devices, particularly those which are internet enabled or have instant messaging capabilities. All such devices, including mobile phones, must be turned off and removed from sight as soon as the bailiff first enters the courtroom, and must thereafter remain off and out of sight until the conclusion of the Oral Round. A Team that violates this Rule forfeits up to six (6) Oral Round Points. The Administrator shall determine a penalty that corresponds to the severity of the violation.

7.12 Watches in Courtrooms

The use of digital watches by the oralist at the podium or Team Members at the counsel table is prohibited as a violation of Rule 7.11. The use of analog
wristwatches and analog stopwatches is allowed. The only official time of the match is the time indicated by the bailiff. No one other than the bailiff may display timecards or otherwise signal to the oralist how much time is left.

**OFFICIAL RULE 8.0 QUALIFYING TOURNAMENT PROCEDURES**

8.1 Preliminary Rounds

Each Team participating in a Qualifying Tournament shall participate in Preliminary Rounds consisting of four (4) Oral Rounds, twice as Applicant and twice as Respondent. If four (4) or fewer Teams are participating in a Qualifying Tournament, the Executive Director may permit fewer rounds, and the Administrator shall work with the Executive Director to decide an appropriate match schedule, pairing procedure, and scoring system. Each Team shall, to the degree possible, face any opposing Team only once in the Preliminary Rounds of a Qualifying Tournament. In the event that Teams must face each other in two (2) Preliminary Rounds, each Team shall plead as Applicant in one Round and Respondent in the other Round.

8.1.1 Pairings

The pairing of Teams for Preliminary Rounds shall be done, in the first instance, by a random draw. Pairings and Memorials of opposing Teams will be distributed to Teams on or prior to the first day of the Qualifying Tournament. The Administrator may modify the pairings to account for absent Teams or other contingencies. If Teams must be newly paired, they must be provided their new opponents' Memorials as soon as reasonably possible, but at the very least fifteen (15) minutes prior to the start of the newly paired round.

8.2 Quarterfinal Rounds

If sixteen (16) or more Teams are participating in a Qualifying Tournament, the Administrator may hold Quarterfinal Rounds consisting of four (4) matches among the eight (8) highest ranking Teams from the Preliminary Rounds. In such Quarterfinal Rounds, the pairings shall be as follows: the eighth-ranked Team versus the first-ranked Team ("Match One"); the seventh-ranked Team versus the second-ranked Team ("Match Two"); the sixth-ranked Team versus the third-ranked Team ("Match Three"); and the fifth-ranked Team versus the fourth-ranked Team ("Match Four").

8.3 Semifinal Rounds

a) If Quarterfinal Rounds have been held, the winning Team in each of the four Quarterfinal Rounds shall advance to the Semifinal Rounds. In such Semifinal Rounds, the pairings shall be as follows, with reference to the match numbers described in Rule 8.2: the winner of Match One versus the winner of Match Four; and the winner of Match Two versus the winner of Match Three.

b) In other Qualifying Tournaments of eight (8) or more Teams, the Administrator may hold Semifinal Rounds among the four (4) highest ranking Teams from the Preliminary Rounds. In such Semifinal Rounds, the pairings shall be as follows: the fourth-ranked Team versus the first-ranked Team; and the second-ranked Team versus the third-ranked Team.
8.4 Championship Rounds

If Semifinal Rounds have been held, the winning Team in each of the two Semifinal Rounds shall advance to the Championship Round. If Semifinal Rounds have not been held, then the top two Teams from the Preliminary Rounds shall compete against one another in a single Championship Round. In either case, the winner of the Championship Round is the National Champion.

8.5 Pleading option

a) Prior to the commencement of the Advanced Rounds, each competing Team will be given its completed master Team scoresheet from the Preliminary Rounds, but not individual judges' scoresheets or notes.

b) In the Quarterfinal and Semifinal Rounds, the higher-ranking Team from the Preliminary Rounds shall have the right to choose which side it will argue. This right is called the "pleading option."

c) The Administrator shall choose one of the following three methods to determine the pleading option for a Championship Round:
   i) Drawing from a Container: A designated Team Member of the higher ranking Team from the Preliminary Rounds will select a piece of paper from a container (e.g., a hat, bag, or box). The pieces of paper will say either “Yes” or “No”, and there shall be an equal number of pieces marked “Yes” and “No” from which to choose. If the Team Member selects a piece of paper which says “Yes,” then his or her Team will have the pleading option. If the Team Member selects a piece of paper which says “No,” then the opposing Team will have the pleading option; or
   ii) Rolling a Die: A designated Team Member of the higher ranking Team from the Preliminary Rounds will roll a 6-sided die. If the Team Member rolls an even number (i.e., 2, 4, or 6), then his or her Team will have the pleading option. If the number rolled is odd (i.e., 1, 3, or 5), then the opposing Team will have the pleading option; or
   iii) Tossing a Coin: A designated Team Member of the higher ranking Team from the Preliminary Rounds will call the toss, and the Administrator will toss the coin. If the Team Member correctly calls the toss, then his or her Team will have the pleading option. If that Team Member does not correctly call the toss, then the opposing Team will have the pleading option.

d) The Team with the pleading option has twenty (20) minutes to select which side it wishes to plead. If that Team fails to select, then the opposing Team has ten (10) minutes to select a side. If the opposing Team then fails to exercise its pleading option within a ten (10) minute period, it also shall forfeit its pleading option. Should both Teams fail to select, then the higher-ranked Team will argue Applicant and the lower-ranked Team will argue Respondent.

e) Once the sides have been determined, the Administrator will immediately notify both Teams. The Administrator will give to both Teams the appropriate Memorial of their opponent. The Teams will then be granted a reasonable time to prepare for the Oral Round.
OFFICIAL RULE 9.0 INTERNATIONAL PAIRING PROCEDURES

[Omitted]

OFFICIAL RULE 10.0 COMPETITION SCORING

10.0 **Basis for Scores**

Judges should judge the Teams on the overall quality of their performances, not on the underlying merits of the case.

10.1 **Preliminary Rounds**

a) Scoring of the Preliminary Rounds shall consist of two parts: the scoring of the written Memorials, and the scoring of the Oral Rounds.

b) Each judge will score each Memorial on a scale of fifty (50) to one hundred (100) points.

c) Each judge will score each oralist on a scale of fifty (50) to one hundred (100) points.

10.2 **Calculation of Scoring Points**

Two (2) categories of points shall be awarded to Teams in each match: Raw Score and Round Points.

10.2.1 **Raw Scores**

The calculation of Raw Scores shall be subject to the deduction of Penalty points under the provisions of Rule 11.0.

10.2.1.1 **Memorial Raw Scores**

In each match, the Total Memorial Raw Score for each Team is the sum of the three (3) Memorial judges' scores for the side the Team argued in that Oral Round. A Team's Total Competition Memorial Raw Score is the sum of the six (6) scores for its Applicant and Respondent Memorials. This score shall be used to determine Best Memorial Awards.

10.2.1.2 **Oral Raw Scores**

In each match, a Team's Total Oral Raw Score is the sum of the scores of the three (3) judges for each of its two oralists.

10.2.1.3 **Total Raw Scores**

In each match, a Team's Total Raw Score for that match is the sum of the Team's Total Memorial Raw Score for that match and the Team's Total Oral Raw Score for that match. A Team's Total Competition Raw Score is the sum of the Total Raw Scores from each of its matches.

10.2.2 **Round Points**

10.2.2.1 **Memorial Round Points**

In each match, a total of three (3) Round Points will be awarded based on a comparison of the highest, middle, and lowest scores on Memorials. The memorials to be compared should correspond to the side that the Teams argued in that match.
In other words, the scores of the Applicant Team’s Applicant Memorials should be compared against the scores of the Respondent Team’s Respondent Memorials. For each comparison, the Team with the higher score is awarded one (1) Round Point. Hence, the highest score given by a memorial judge for one Team is compared to the highest score given the other Team, and then one round point is awarded to the Team with the higher of these two scores. In a similar fashion, the two middle scores, and then the two lowest scores, are compared to determine which Team receives the second and third round points. If in any such comparison the two Teams' scores are equal, each Team is awarded one-half (0.5) Round Point.

10.2.2.2 Oral Round Points

In each match, a total of six (6) Round Points will be awarded based on a comparison of combined oral argument scores. For each judge, the sum of the judge’s score for Applicant Oralist 1 and Applicant Oralist 2 is compared to the sum of the judge’s scores for Respondent Oralist 1 and Respondent Oralist 2. For each judge, the Team with the highest combined oralist score is awarded two (2) Round Points. If in any such comparison, the two Teams' scores are equal, each Team is awarded one (1) Round Point.

10.2.2.3 Total Round Points

In each Round, a Team's Total Round Points is the sum of the Team's Memorial Round Points and Oral Round Points.

10.3 Two (2) Judge Panels

If only two judges score a given Memorial or a given Oral Round, the Administrator shall create a third score by averaging the scores of the two judges.

10.4 Determination of Winners and Rankings from Preliminary Rounds

10.4.1 Determining the Winner of a Match

In any given match, the Team receiving the greater of the nine (9) available Round Points wins the match. If the two Teams each receive 4.5 Round Points, the Team with the higher Total Raw Score wins the match. If the two Teams have an equal number of Round Points and an equal Total Raw Score, the match is a draw.

10.4.2 Preliminary Round Rankings

a) Teams shall be ranked by number of wins in the Preliminary Rounds, from highest to lowest.

b) If two or more Teams have the same number of wins, the Team having the higher number of draws shall be ranked higher.

c) If two or more Teams have the same number of wins and the same number of draws, the Team having the higher Total Competition Raw Score from the Preliminary Rounds shall be ranked higher.

d) If two or more Teams have the same number of wins, the same number of draws and the same Total Competition Raw Score, the Team with the higher Total Competition Round Points from the Preliminary Rounds shall be ranked higher.
10.4.3 Tie-Breaking Procedure
If two or more Teams are tied after application of Rule 10.4.2, and the outcome of
the determination does not affect (a) any Team's entry into the Advanced Rounds,
or (b) the pairing of any Teams in the Advanced Rounds of the Tournament, the
Teams shall be ranked equally. If, however, further determination is necessary
(under either (a) or (b) above), the rankings shall be accomplished as follows:

a) If only two Teams are tied and if the tied Teams have faced each other in the
   Preliminary Rounds, the winner of that match shall be ranked higher.

b) If only two Teams are tied and the Teams have not faced each other in the
   Preliminary Rounds, the Administrator shall break the tie according to the
   following methods, starting with the first and working down only if the prior
   method does not break the tie:

   i) tie goes to the Team with the higher total oralist and memorial score
      average, calculated by adding the Team’s Total Competition Oral Raw
      Score divided by twenty-four (24) and the Team’s Total Competition
      Memorial Raw Score divided by six (6);
   
   ii) tie goes to the Team whose opponents won more matches, calculated by
       adding the number of wins of the Teams’ opponents and for this purpose
       only, counting a draw as one-half (1/2) of a win;
   
   iii) tie goes to the Team whose opponents scored higher, calculated by
       adding the Total Raw Scores of the Teams’ opponents;
   
   iv) tie goes to the Team with the higher total oralist score average calculated
       by dividing the Total Competition Oral Raw Score by twenty-four (24);
   
   v) a method determined by the Administrator, taking into account the
      interests of the Teams and the Competition as a whole.

10.5 Scoring Procedures for Advanced Rounds
The following scoring procedures and guidelines shall apply to the Advanced
Rounds of applicable Tournaments.

10.5.1 Method of Scoring – Qualifying Tournaments
Judges of Advanced Rounds at each Qualifying Tournament shall make an
independent review of the Team Memorials and oral arguments. Judges may
employ a point scoring system of their individual choice in making their
determinations, including the use of the scoring system from the Preliminary
Rounds. The Administrator should provide a Preliminary Round Oral Scoresheet to
the judges to use at their discretion. The decision regarding the winner of the
Round shall be by majority vote of the judges. No ties are allowed. Judges need not
give any particular fixed weight to either Memorials or oral arguments, but should
take into account the Memorials and oral arguments as part of each Team’s
performance.

10.5.2 Method of Scoring – International Run-Off, Octafinal, Quarterfinal
   and Semifinal Rounds
In each match in the International Run-Off, Octafinal, Quarterfinal and Semifinal
Rounds, scoring procedures for each pairing shall be conducted according to this
Rule. Judges must keep secret from all Teams the exact score in each pairing, and
each judge’s determination in the pairing; only the identity of the winning Team
shall be revealed.

a) Three (3) judges shall read the Applicant Memorial of the Team arguing Applicant and the Respondent Memorial of the Team arguing Respondent. The Team whose Memorial each judge determines is superior will receive one (1) point. If a judge determines that the two Memorials are of equal quality, each Team will receive one-half (0.5) point. Thus, three (3) points are allocated by the Memorials judges. Penalties from the Preliminary Rounds shall not apply in the Advanced Rounds.

b) Three (3) judges shall sit for the Oral Round. The Team whose presentation each judge determines is superior will receive two (2) points. If a judge determines that the two oral presentations were of equal quality, each Team judge will receive one (1) point. Thus, six (6) points are allocated by the oral-round judges.

c) The winner of the match is the Team with the greater of the nine (9) points allocated by Memorials and Oral Round judges.

10.5.3 Method of Scoring – World Championship Jessup Cup Round

Judges of the World Championship Jessup Cup Round shall follow the guidelines set out in Rule 10.5.1 for determining the winner of the Jessup Cup.

10.6 Ranking of Oralists

Total scores for each oralist in the Tournament shall be determined by adding the raw scores awarded to that oralist in each Preliminary Round in which the oralist argued, adjusted for any Penalties assessed against the oralist, and dividing this sum by the number of Preliminary Rounds in which the oralist argued. Oralists shall be ranked from highest to lowest total score. Ties are permitted. If an oralist argued in only one (1) Preliminary Round, he or she is ineligible for ranking.

10.7 Ranking of Memorials

Total Memorial scores for each Team shall be determined by adding the Total Raw Score of a Team's Applicant Memorial and the Total Raw Score of the Respondent Memorial, for a total of six (6) judges' scores. Team Memorials shall be ranked from the highest Total Memorial score to the lowest. Ties are permitted. Scores shall be adjusted for Penalties per Rule 11.0.

10.8 Reporting of Results

After the conclusion of each Tournament, each Team participating in such Tournament shall receive the following:

a) a copy of individual Memorial judges' scoresheets with attendant comments, if any;

b) a copy of individual oral judges' scoresheets and Penalties, if any, with attendant comments, if any, from Preliminary Rounds of the Tournament;

c) a copy of the Overall Rankings of the Preliminary Rounds of the Tournament, with the Total accumulated Win-Loss records, Overall Raw Scores, and Overall Round Points;

d) a copy of the Oralist Rankings from the Preliminary Rounds of the Tournament;

e) a copy of the Memorial Rankings from the Preliminary Rounds of the Tournament; and

f) a summary of the Advanced Rounds of the Tournament.
OFFICIAL RULE 11.0 PENALTIES

11.1 Memorial Penalties

a) Memorial Penalties may be imposed by the Administrator and shall be deducted from each of the individual judges' scores on a Team's Memorial. In the event that a Memorial is scored by only two (2) judges under Rule 10.3, penalties shall be deducted from each of the two (2) judges' scores prior to calculating the third score.

b) The minimum adjusted raw score that any Team may receive from any individual Memorial judge is fifty (50) points. No further reduction may be made to scores after the minimum score is reached, regardless of unallocated Penalty points remaining.

c) In instances where only one Memorial is in violation of the Rule, Memorial Penalties may be deducted from the scores of the offending Memorial only.

d) The Administrator shall notify all affected Teams of imposed Penalties prior to the first Preliminary Round, and shall include with such notification a reasonable deadline for any appeals from the decision to impose Penalties. A Team may appeal any Penalty imposed against its Memorials in writing to the Administrator. The Executive Director shall decide upon the validity of any appeal from the imposition of a Penalty by the Administrator. No further appeal is available from this appellate decision of the Executive Director.

e) Penalties shall be assessed for violations of other Rules concerning the Memorials by reference to the following table:

<table>
<thead>
<tr>
<th>Rule</th>
<th>Summary</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.1, 6.1.1</td>
<td>Tardiness in submitting Memorial</td>
<td>5 points for first day, 3 points per day thereafter If both Memorials have not been submitted by the Disqualification Deadline, the Team will be withdrawn from the Competition.</td>
</tr>
<tr>
<td>6.1(e)</td>
<td>Resubmission of Memorial</td>
<td>5 points</td>
</tr>
<tr>
<td>6.2.4, 6.2.5</td>
<td>Formatting Violations:</td>
<td>1 point per type of violation, up to a maximum of 5 points</td>
</tr>
<tr>
<td></td>
<td>• Use of incorrect font</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Use of incorrect font-size</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Use of improper line spacing</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Use of improper block quote</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Use of endnotes</td>
<td></td>
</tr>
<tr>
<td>6.2.6</td>
<td>Failure to remove Tracked Changes or Comments</td>
<td>5 points (one-time penalty)</td>
</tr>
<tr>
<td>6.3.1</td>
<td>Failure to include all parts of Memorial, or inclusion of an unenumerated part</td>
<td>2 points for each part</td>
</tr>
<tr>
<td>6.3.2</td>
<td>Failure to include necessary and correct information on Memorial Cover Page</td>
<td>2 points (one-time penalty)</td>
</tr>
<tr>
<td>6.3.6</td>
<td>Substantive legal argument outside of approved parts of Memorial</td>
<td>2 points (one-time penalty)</td>
</tr>
</tbody>
</table>
6.4(a) Excessive length: Pleadings
   - 1-100 words over 3 points
   - 101-200 words over 6 points
   - 201-300 words over 9 points
   - 301-400 words over 12 points
   - 401+ words over 15 points

6.4(b) Excessive length: Summary of Pleadings
   - 2 points (one-time penalty)

6.4(c) Excessive length: Statement of Facts
   - 2 points (one-time penalty)

6.7, 2.8 Violation of anonymity in Memorial
   - Disqualification or up to 10 points (one-time penalty)

11.1.1 Plagiarism

Teams shall not plagiarize. Plagiarism means the act of appropriating the literary composition of another, or parts or passages of another’s writings, or the ideas or language of another, and passing them off as the product of one’s own mind, either through exact duplication of another’s work or by lifting substantial portions without attribution.

After investigation and review, in a verified case of plagiarism an Administrator shall assess a penalty between one (1) and twenty (20) points to each offending memorial. Any penalty imposed shall correspond to the degree of the violation in the judgment of the Administrator.

Administrators shall refer all allegations of plagiarism to the ILSA Executive Office. After investigation and review, the ILSA Executive Director may do one or both of the following: (1) disqualify the team; (2) notify the team’s dean and/or other university official(s) of the results of the ILSA Executive Office’s investigation.

11.2 Oral Round Penalties

The Administrator shall impose an Oral Round Penalty only when he or she is satisfied that an event subject to such Penalty has occurred, if necessary after consultation with the judges, bailiff, Teams and spectators.

11.2.1 Complaint Procedure

a) If a Team believes that an infraction of the Rules has occurred during an Oral Round, the Team may notify the bailiff in writing within five (5) minutes of the conclusion of that Oral Round. If there is no bailiff, Teams must approach the Administrator with complaints. Written notification shall clearly describe the violation and the parties involved in the violation. The Team shall not directly approach the judges regarding a violation of these Rules. When possible, the matter should be raised with the bailiff outside the attention of the judges. Failure by any Team to follow the procedures described in this paragraph shall result in a waiver of the Team's complaint.

b) If one or more judges believe an infraction has occurred during an Oral Round, he or she shall notify the bailiff orally or in writing within five (5) minutes after the completion of the Oral Round. When possible, the matter should be raised with the bailiff outside the attention of the other judges.
11.2.2 Deduction of Penalties by Judges Prohibited
Penalty points may be deducted only by the Administrator. In no instance shall judges themselves deduct from the scores of the oralists any Penalty points. Judges shall score the Oral Round as if no violation occurred.

11.2.3 Activity Subject to Oral-Round Penalties
Penalties may be assessed for violations during an Oral Round by reference to the following table. The Administrator shall deduct the Penalty amount from each judge’s combined score (the sum of the judge’s score for Oralist 1 and Oralist 2) prior to determining the Oral Round Points.

<table>
<thead>
<tr>
<th>Rule</th>
<th>Summary</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.6</td>
<td>Improper courtroom communications</td>
<td>Up to 10 points</td>
</tr>
<tr>
<td>7.7.1</td>
<td>Scouting</td>
<td>Forfeiture of one preliminary round if indirect scouting. Forfeiture of all six oral round points if direct scouting in round against team which was scouted. (See Rule 7.7.1 for description of penalty.)</td>
</tr>
<tr>
<td>7.10, 2.8</td>
<td>Violation of anonymity in courtroom</td>
<td>Disqualification or up to 15 points</td>
</tr>
</tbody>
</table>

11.2.4 Discretionary Penalties
In addition to the Penalties listed in Rule 11.2.3, the Administrator may assess up to fifteen (15) point Penalties for other violations of the letter or spirit of these Rules. The size of the Penalty shall correspond to the degree of the violation in the judgment of the Administrator. Discretionary Penalties shall be imposed only by the Administrator. Such violations may include:
- engaging in poor sportsmanship;
- submitting multiple frivolous complaints against other Teams;
- engaging in inappropriate behavior at the counsel table during the Oral Rounds;
- exhibiting blatant disregard for the procedures or requirements outlined in the Rules.

11.2.5 Notice and Appeals
The Administrator shall notify Teams of his or her decision regarding imposition of any Oral Round Penalty as soon as practicable. Along with the decision, the Administrator shall set a reasonable deadline by which either Team may appeal the decision. If an appeal is submitted, the Administrator shall consult with the Executive Director in resolving the appeal. The Executive Director's decision, if any, on all appeals is final.

11.3 De Minimis Rule
The Administrator may waive or reduce the penalty for a de minimis Rule violation.

OFFICIAL RULE 12.0 AWARDS [Omitted]
**Reading 3: Harry H. Almond, Jr.**


4 ILSA J. Int’l & Comp. L 635

---

**Strengthening the Philip C. Jessup International Law Moot**

I. INTRODUCTION

The Jessup Competition has awakened perspective about decision making in the students of international law. It has served in the legal education of countless students, and it has even served the promotion and perhaps the development of international law itself. [FN1] In pursuit of its objectives, the Jessup has grown to command major worldwide attention and substantial prestige due to its inclusion of contestants originating from all parts of the globe. The inclusion of these worldwide contestants is enough evidence to show that the Jessup Competition has caught the imagination of law schools throughout the world. [FN2] With the aid of television, video cassette recordings, and the publication of Jessup materials, the competition could expand its reach even further. [FN3]

Even given these past accomplishments and the present praiseworthy state of the Jessup, it is not inopportune to make a reappraisal at this time to determine whether we can strengthen the Jessup. In making this appraisal, we can draw upon the experience of other devices operating in reasonably similar contexts or situations to aid us. [FN4]

One device available to us is the art of gaming. Specifically, war gaming offers us great potentialities: it can be conceived primarily as a means for assembling and collecting information, data and intelligence in groupings suitable or relevant to a given inquiry; for identifying outcomes or potential outcomes; for working with problems that have a need for urgent action; for promoting data access or retrieval; and for building a data bank or even tapping other data banks. War gaming makes us data conscious as no other technique does.

Of course, there are differing perspectives about the conceptual element in making war. We look to this exercise as an art, while the Soviet Union in their war gaming were said to consider it a science with applicable principles, but including the application of complex technological advancements and features such as those evidenced by nuclear weapons and the high technology jet aircraft. [FN5]

Similar to the differing perspectives of the United States and the Soviet Union about the concept of war gaming itself, war gaming and moot court participants differ in their approaches to their respective games. War gaming participants are eager to refine the power element in their games whereas those engaged in Jessup Moot Courts tend to keep the rules of the moot court game intact and unchanged. The attitude of the moot court participants runs parallel with the prominent attitude about our courts and their proceedings, but it interferes with the
development of refinements, which have only recently and slowly come into view in the interest in alternative dispute settlement procedures. Borrowing from this recent refinement, if encouraged by the adoption of gaming, the Jessup might consider the possibility of alternative settlement devices tested in a simulation framework.

Another interesting possibility that may be encouraged by gaming is the intrusion or intervention of law as an element in the decisions to be made when states are interacting with each other in a global, even if competitive, arena. Introduction of law as an element in the decision process amounts to an introduction of a theory or concept of public legal order, ambiguous to a large extent in this period of largely unorganized organs for a global community. [FN6] It also introduces the legal processes applicable under this legal order, and the outcomes expected in introducing law into the decision process. This possibility can be explored, through the application of law in gaming, i.e., in the war games, or other conflict-oriented games. [FN7]

But instead of limiting the discussion to war games, this paper will look at war gaming on a conceptual level to determine whether the Jessup might benefit from the experience that has accumulated through the use of war gaming. My primary objective is clarification of the Jessup as an instrument involving policy problems. I intend to consider standards that might be applied to add useful modifications to the Jessup. [FN8] I have refrained from assessing the housekeeping or even major repair efforts for running the Jessup at this time. Consequently, this inquiry is limited to the possible cross-fertilization of gaming and moot court procedures.

II. STRENGTHENING THE JESSUP COMPETITION

A. The Jessup As an Instrument for Learning and Promoting Policy

What are the objectives of the Jessup Competition? Foremost among the Jessup's objectives is to facilitate the learning experience for the contestants, and, to a comparable extent, for the judges, faculty advisors and others who participate. [FN9] But what does this learning experience entail? Moreover, what learning experiences can be added to the presents ones, partly as an effort to promote policy?

1. Present Learning Experiences

The Jessup offers a valuable instrument for improving the general lawyer skills of the contestants, coupled with improvements in the analytical skills of the observers of the moot court cases. [FN10] The Jessup also provides a forum of deliberation and discourse for probing current problems in law, especially when presented in the context of a legal dispute. As such it enables those who participate or analyze the Jessup cases an opportunity to see the perspectives of numerous participants at play upon such problems, paralleling one of the ways in which the student is introduced to practice in the law schools. It extends a student's effort beyond the review of cases and appellate review into a complex, real-world simulation where the performance is judged by the effective invoking and appraisal of law, and the innovative effort in making law serve us, rather than having us serve the law and the rigidities we might arbitrarily impose upon it. [FN11]
In essence, the Jessup is a collegial effort, where reinforcement and testing of learning arises from the interaction of the participants. Our experience so far shows that this interaction has been strongly motivated among them. Because the problems presented by the Jessup are problems of global significance, the problems add to that motivation the element of exhilaration. At least a major refinement of the competition would be one which facilitates greater and deeper participation. This refinement would be sharpened if we could apply the Jessup as an instrument to refine our critical faculties.

Because the development of international law is in part an outcome of attitudes and perspectives, the Jessup offers opportunities for practicing lawyers, acting as judges, to gain working skills in a subject of major importance. As in the war gaming exercises, there is also the possibility of changing the format of the Jessup, adding to the overall, adjudicatory setting of the Jessup a panel for the meetings of the American Society of International Law that takes the output of the Jessup competition and then provides comments and opinion. [FN12]

2. Possibilities for the Future

Carefully designed Jessup problems can introduce social order perspectives critical to the evolution of international law intended to serve global public order. [FN13] Hence the Jessup can serve other law and policy oriented objectives. [FN14] It can provide a valuable instrument for probing real world disputes, the policies and competing claims entailed, and their ramifications. Even real world courts do this: they consider various situations that have not come before them, and they provide dicta to reach situations or issues not before the Court. [FN15] Their dissents reveal differences in attitudes and perspectives among the judges, and so on. [FN16] Hence the Jessup offers us an instrument to probe important, but oft-treated marginal, issues that every international court must face such as whether a dispute offers a legal issue or, instead, is too political or too involved in regulatory, administrative or discretionary matters for an international court to tackle, let alone monitor or supervise. [FN17]

The Jessup problem is a problem that should be designed so that it can address a situation or events that have already been presented before a court. Or, the Jessup can look at an array of real world problems and situations to consider issues that might never be raised in the immediate term of a court. Or it can look into a hypothetical problem working with real world premises and assumptions. Or, we can even consider for the Jessup a problem that is sub judice in international courts or tribunals. [FN18] All of these matters will eventually flow into the broader streams that make up the great collegial effort that is part of the conscious shaping of international law, its concepts, and its decision-making impacts. But to achieve this expanded perspective for the Jessup we must adopt as its goals wider missions, such as those mentioned here.

The Jessup is also a valuable and refined instrument of learning and argument that can be used by others such as courts, schools, advocates, working in or concerned with analogous cases. It offers a rare opportunity to undertake with great care and in great depth an appraisal of disputes and the applicable normative rules or principles. Clearly, the effectiveness of the Jessup Competition depends upon the participants, but in the hands of outstanding practitioners the Jessup and its
contestants can reach outcomes that match the efforts of experienced jurists. The Jessup does include among the judges, especially in the final round, distinguished jurists from the International Court of Justice and other high tribunals. And perhaps more than the ICJ, the Jessup has the added competence to question and probe issues from many points of view. The repetition of the moot court trials upward through the Jessup competition tends to add further refinements. To facilitate these refinements, the Jessup might include a rule enabling contestants to modify their memorials several times as they move forward.

The Jessup also provides us with a teaching tool. In praise of this teaching aspect, the losing contestants have indicated that they benefited from this feature even though they also saw the contest as one to be won. Taking advantage of the Jessup is a teaching text about the law of war, which makes use of a modified version of the Jessup. The text is open-ended because a given problem in factual terms will always face changing law, or changing attitudes about law. Thus, an instructor using a Jessup oriented text is in the position to use an appropriately designed text over a period of years, adding or eliminating situations or facts, and adding supplementary materials of the instructor's own law or, for teaching purposes, even facts that had not been included in the earlier versions. [FN19] We can envision that this use of the Jessup might expand in the future because the instrument it provides demands wide participation by the class and instructor.

In this text the student learns from a form of practice. Through a simulated unraveling of a problem dealing with a complex subject, the student becomes familiar with the law of war and the law relating to the use of force. The Jessup format is being used except that the facts are not presented all at once, but in a sequential and simulated real time basis as the conflict proceeds, uncovering a wide variety of legal issues to be considered. This approach has some similarities to the briefings of high ranking military officers at the Department of Defense in the various exercises involving contingency operations, where the officers are briefed in a real time combat situation, and then enabled in the game that follows to engage in a simulation of a wartime situation.

Although beyond the scope this paper, we might raise a further problem to be probed through Jessups in the future. The Jessup approach might enable us to consider more deeply on a collegial basis the decision and law-making processes and activities of governments. Because disputes, disagreements and misunderstandings are natural features of human interaction, we need to know continuously how far we can invoke a court in such matters. It is evident that most of the law-making process, especially those that involve trans-national activities, occurs outside the courts, and much of this process involves dispute settlement and the accumulation of a wide variety of dispute settlement mechanisms. [FN20] The Jessup, modified in approach, might enable us to probe the new institutions and practices accumulated.

The Jessup offers the opportunity, not yet explored, of tackling legal questions where advisory or commentary opinions are demanded. The traditional dispute format of the Jessup, following fairly closely the practice of the International Court of Justice, involves two states with a dispute that can be resolved under law, pursuant to Articles 36 and 38 of the ICJ statute. Under this authority, the court is to resolve legal disputes by applying the applicable or relevant law. But for an
advisory opinion, legal questions about law are raised before the ICJ by way of a request from an appropriate organ of the United Nations. [FN21] Because the Jessup format does not precisely follow the ICJ, it would be possible, in the Jessup context, to consider requests by almost anyone for advisory recommendations concerning the implications of any legal question or prospective courses of action. In short, the Jessup offers flexibility that is not available in the real world of the ICJ, but in return for foregoing real world decisions in a real world context, we are given the opportunity of testing such decisions where we can enjoy the luxury of trial and error. Clearly, these are matters that require further review.

Accordingly, if in the future we were to develop a Jessup competition to work with legal questions while following the practice of the ICJ, we would be looking to the interesting yet complex problem of working out an approach for future contests that would employ the advisory opinion. This would open the Jessup to a number of important possibilities in testing the contestants and in testing the ICJ as an institution to promote customary international law through its own actions in the formulation or prescription process. [FN22] We would also be coming face to face with the matter of formulating international law through the court and the practices established or institutionalized to ensure that even though recommendatory, the advisory opinions would be expected to be assimilated as part of the customary international law. This format, both for the Jessup and for a more active ICJ involved in advisory opinions, would require that the judges, and perhaps a staff to assist the judges, have a more active role in the intended output. [FN23] At the same time, while the opinion is the opinion of judges, the advisory opinion would take on a legislative or prescriptive character. [FN24]

But this is not the place to critique the use of the advisory opinion, in the real world, or in the Jessup. At the present time in the Jessups no written opinion is handed down, and it is not proposed at this time that one should be prepared in the Jessup contest. But such a proposal for the court and its work in the real world is another matter. Opinions are provided, complete with dissents, under conditions and under assessment procedures, differing from those in which states come together to make law through their treaties. But if we were to have the Jessup court pass on legal questions, we would need to be assured that the legal question is appropriately framed; that the differing perspectives of the advocates as to the legal question be introduced to the court; and that the court be called upon to issue its opinion.

Although a legal question may be the starting point for a variety of responses, including those that may be contrary to each other, we might arbitrarily break the problem involving advisory competence of the Jessup Court into two sides, each presenting an opposing view as to the response sought for the legal question. This format would be close to the war gaming approach where an analysis and a report are made at the close of the game.

If the Jessup court were given the competence to issue advisory opinions for a future Jessup Competition, the report of the Jessup judges, or even of a separately constituted panel of overseers and reporters, might be simplified. Under this approach, the Jessup judges would consider and pass upon the positions and arguments presented by the contestants, the differing strengths of these, and the conclusion of the Court, operating as a panel. [FN25]
Of course, in the Jessup context, there is another possibility for the Jessup court to review requests for an advisory opinion that is somewhat less ambitious. The legal question for an advisory opinion could be presented in the Jessup context by two sides, guided by the Jessup guidelines to advocate differing or opposing points of view concerning the legal question, and acting in place of the larger number of participants in the real world of the ICJ. The Jessup Court could then consider the opposing positions, and come down on the position that was best presented. It might be required to provide a very brief statement supporting its determination and no more.

The first approach might provide a more valuable output both for the academic and the practicing community of lawyers and jurists, but the second might be more appropriate for the decisions that are to be taken by an ad hoc group of judges operating in the traditional form of the Jessup. It should be borne in mind, however, that even with the traditional Jessup competitions, the court provides only its views as to the persuasive or argumentative quality of the contestants' presentations and it does not provide an opinion. The Jessup court does not rely upon facts or materials introduced from outside the problem, nor does it review the memorials, which are reviewed by others. The second approach thus serves one of the major objectives, to wit, an appraisal of the forensic capabilities of the contestants and the selection of those that are superior in a given contest. Of course, both approaches serve the learning objective mentioned earlier.

But if pursued, the venture into advisory competence offers the Jessup an opportunity to undertake a further task of probing. The ICJ, the object of such probing, is an institution that is gradually gaining strength with regard to customary international law and the promotion of treaty law. The global community stands to benefit from such efforts at promoting a court that began its life in a weakened position. A determination, even on the moot court-gaming dimension, may assist us in finding what we can expect from the ICJ, and under what conditions these expectations might become operative. Hence the venture can probe the possibilities through moot court exercises of strengthening the competence of the ICJ itself. The specific possibilities of this nature and even a preliminary inquiry into the appropriate theory of advisory opinion jurisdiction, either for the ICJ or the Jessup Court, are not explored here. But such an inquiry might include in our objectives an expansion of the ICJ and its panels to reach regional disputes, and a more sophisticated competence for the advisory jurisdiction of the ICJ.

Lastly, we can invoke the Jessup moot court framework for testing and also teaching the use of models or theories to promote the assimilation of common standards of policy and law. In short, it offers a setting amounting to a meta-world setting; it offers us a chance to look at how we and others look at real world happenings, and with sophistication of technique, how we from differing cultures go about solving and working the problems. Although the Jessup invokes law, it is not the means for generating law. It might of course generate law for the problem, but this is not the law we might anticipate will be applicable in the real world. And it is evident that the Jessup does not provide us with precedents of law either for future Jessups, or otherwise. But participating in the Jessup assists in the promotion of scientific thought, and assists in shaping effective mind sets of those involved in clarifying complex problems of policy and strategy.
But, this is not the place for working out a theory of theories [FN29] or for constructing a program that might help us break up and analyze policy and legal problems as such. [FN30] Unquestionably our goals will call for achieving such a program or even a theory of control eventually. [FN31] But the purpose here is to introduce the gaming concept in the framework of the moot case, and analyzing that framework to determine its potential in shaping or at least testing attitudes. The Jessup offers us the opportunities for exposing the attitudes of the participants in the context of a Jessup context - the predispositions, biases, assumptions, inferences, and the skeptical features in their decision making efforts. Our purpose, which is scientific in nature, is to work toward finding the way to common objectives and standards and a common vocabulary among the contestants and others; toward installing trend thinking; and toward scientific skepticism. These attitudes are likely to be most fruitful in pursuing a scientific inquiry and the scientific and progressive development of the decision-making art. [FN32]

B. The Benefits of Gaming (omitted)

... III. CONCLUSION AND RECOMMENDATIONS

From a policy perspective, this paper is an inquiry into exploring and reappraising the application of the Jessup competition as a means of enhancing legal education. But it also provides a preliminary look at other uses. With regard to legal education, as Professors McDougal and Lasswell had observed:

A first indispensable step toward the effective reform of legal education is to clarify the ultimate aim. We submit this basic proposition: if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic training for policy-making. The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values .... [FN54]

The two authors supported the moot court as a key device for professional training:

One principle of professional training is to project the student into situations that resemble as closely as possible the circumstances of his future career. One well-established pattern of this type can, in the reformed law school, be turned into a more productive instrument of legal education. We refer to the moot court. It is common in some places to conduct various autopsies on the performance of students before these tribunals. What we propose is that the appraisal should be conducted not only in terms of legal technicality but for the purpose of revealing the total effectiveness of the participant in handling himself in the situation. [FN55]

Experience with war gaming indicates that a key refinement involving policy can be made with the Jessup moot case by increasing the number of participants and by specifying the appropriate objectives in designing both the problem and the conduct of the competition. By adding on participants that critique the Jessup as well as others that might draft a report on the Jessup's findings, or by including additional competence for the Jessup format, such as the preparation of advisory opinions, the Jessup has the possibilities of providing a more substantial
contribution to international law itself. Finally, the Jessup format can be used by experienced lawyers or jurists. If they are used, the differing or matured perspectives of the practitioner or scholar can be added. In all of these refinements, we bear in mind that the Jessup is a simulation, not a real world exercise, but, as such, it has the advantages of operating in a framework that can focus on the law and its impacts.

The Jessup is conceived in this paper as an instrument; that is, it is an instrument that is aimed at policy or strategic objectives. Seen in that light, law, especially international law, is a strategic instrument in itself, coupling in some instances, diplomatic, economic, ideological or even military strategies. Thus, law beyond the Jessup, extending to enforcement, includes resort to permissible force, where force is perceived as an essential means to maintain or protect public order.

Hence the Jessup can be used as an instrument that enables us to probe either past policy or prospective policy that is involved with the impacts of law. Second, the Jessup is an instrument that enables the participants to learn about law, policy and decision-making. The effectiveness of this depends upon the problem design and upon the motivation and capabilities of the participants. Problem design thus requires separate attention so that the design is aimed at specific objectives - probing law, testing law and its applications, and so on.

Third, the Jessup can be used to review cases that have taken place in the ICJ, thus affording another vehicle for critiquing those cases. Such critiques have greater strength than those that are in the form of commentary, and should produce publishable material for learned and practicing lawyer journals.

The Jessup necessarily is an instrument to promote international law. And the law it promotes is then perceived as a strategic instrument with strategic goals of its own to attain. Moreover, it is then perceived as part of the larger, collegial, global strategy to establish and strengthen global public order and its law. Hence it can also serve to probe and assist the law-making process; to condition or alert the attitudes of the practitioners; to hone the minds and analytical skills of the jurist involved in international law; and to arouse the interaction of theory and practice, and the choices that are available for the pursuit of goals and action. [FN56] *665 Some emphasis should be given to the collegial element that it applies; this is the element that we find in operation in the law making context. Those who participate in the Jessup become familiar with what the collegial aspect is all about. Law is not the output of a single scribe.

Fourth, the Jessup can operate as the simulation of an instrument, or vehicle, that works with other strategies. It is in a sense a diplomatic strategy, but as a vehicle, with varying policy content, it can include diplomatic, economic ideological strategies, or strengthen these. The wide variety of international institutions attest to the effectiveness of this.

Finally, implicit in the other observations above, the Jessup is an instrument that can sharpen the critical skills - the skills of the scientific mind - applied to the complexities of human action. We can anticipate that those motivated or stimulated by such an activity are likely to continue with their self-development, but will be stimulated toward an environment in which law-making actually takes place.
The brief excursus in this paper into strategy, theory, and wargaming highlights some of the possibilities of pressing the Jessup format into new uses, into texts for teaching, and into exploratory efforts that may lead to uncovering further applications. In some respects, the Jessup will gain in strength and effectiveness once it is perceived that whatever its shortcomings, the potentials are large, and open-ended. The need to have greater participation in law-making at all levels of human activity is widely acknowledged. The Jessup serves this need. [FN57]

To this end, the Jessup is a simulation of decision and policy-making and operates as the means to enable us to refine, correct, and amplify the jurisdiction of the Court, including the reduction of the impact of the denial of jurisdiction by the court's invoking the political question, enabling those involved in the Jessup, like those that were involved in war gaming, to pursue what the ICJ and other international tribunals are now actively doing. But with the growing appeal of cooperative and joint enterprise among states, their disputes and disagreements in the future will tend to disrupt their common enterprise, or even endanger the neighborly approach to achieving common goals.

Thus, the Jessup, with some of the refinements proposed in this paper, can first be fashioned into an instrument reaching beyond the traditional moot court format to serve us in more effective ways, such as the treatment of issues through alternative dispute settlement procedures. Perhaps the future combinations might include both gaming and moot court approaches so that the Jessup Moot Court, no longer rigidly tied to the traditional confrontational and adversary entity, will be exploited for the invention and adoption of more appropriate means for shaping our needed, future law. [FN58] Or it may be made available for testing the work of the courts themselves so that the current debate over the law promoting efforts of the advisory opinion courts can reach more substantial results and even substantive outcomes. [FN59] Assessment of such alternative settlement procedures may ultimately lead us to using them in place of the traditional courts and tribunals, or to supplement the work of those tribunals. [FN60] A similar assessment of the application and use of general principles of law as a means for strengthening the law of the global community may prove to be as valuable. [FN61] The call of these demands is therefore a call for imaginative and innovative collegiate efforts that will best serve a global community of growing interdependence. [FN62] For these purposes we can look for analogies, simulations, and models in the municipal legal system, particularly as it has grown to serve a more complex community, and a greater, more incessant, interaction of activities. [FN63]

[FNa1]. Adjunct Professor, National Security Studies Program, Edmund A. Walsh School of Foreign Service, Georgetown University …

[Footnotes omitted]
The following table shows a list of international law moot court competitions. Ethiopian teams participate in three of the following moot court competitions, namely, Philip C. Jessup International Law Moot Court Competition, African Human Rights Moot Court Competition and ELSA Moot Court Competition.

<table>
<thead>
<tr>
<th>COMPETITION NAME</th>
<th>AREA OF LAW</th>
<th>COURT FORUM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central and East European (European Law) Moot Competition</td>
<td>European Union Law</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>Charles-Rousseau Moot Court Contest</td>
<td>Public International Law</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>Commonwealth Moot Competition</td>
<td>Commonwealth Law and International Law</td>
<td></td>
</tr>
<tr>
<td>Competencia Internacional Eduardo Jiménez de Aréchega</td>
<td>International Human Rights - Inter-American System</td>
<td>Inter-American Commission on Human Rights Inter-American Court of Human Rights</td>
</tr>
<tr>
<td>Customs Unions or Free Trade Areas (CUFTA) Dispute Settlement Competition</td>
<td>International Trade</td>
<td>Arbitral Tribunal</td>
</tr>
<tr>
<td>D. M. Harish Memorial Government Law College International Moot Court Competition</td>
<td>Public International Law</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ELSA Moot Court Competition (EMC2)</td>
<td>International Trade</td>
<td>World Trade Organization</td>
</tr>
<tr>
<td>European Law Moot Court Competition</td>
<td>EU Law</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>FIAC Investment Moot</td>
<td>International Investment</td>
<td>Arbitral Tribunal</td>
</tr>
<tr>
<td>Foreign Direct Investment International Moot Competition</td>
<td>International Arbitration and International Investment</td>
<td>Arbitral Tribunal</td>
</tr>
<tr>
<td>GNLU International Moot Court Competition (GIMC)</td>
<td>Public International Law</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>Henry Dunant Memorial Moot Court Competition</td>
<td>International Humanitarian Law</td>
<td></td>
</tr>
<tr>
<td>ICC Trial Competition</td>
<td>International Criminal Law</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>Inter-American Human Rights Moot Court</td>
<td>International Human</td>
<td>Inter-American Court</td>
</tr>
<tr>
<td>Competition</td>
<td>Rights Law</td>
<td>of Human Rights</td>
</tr>
<tr>
<td>----------------------------------------------------------------------------</td>
<td>------------------------------------------------</td>
<td>----------------------------------------------</td>
</tr>
<tr>
<td>International Environmental Moot Court Competition</td>
<td>International Environmental Law</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>International Maritime Law Arbitration Moot Competition</td>
<td>International Maritime Law</td>
<td>Arbitral Tribunal</td>
</tr>
<tr>
<td>International Negotiation Competition</td>
<td>International Transactions and International Disputes</td>
<td></td>
</tr>
<tr>
<td>Jean-Pictet Competition</td>
<td>International Humanitarian Law</td>
<td></td>
</tr>
<tr>
<td>LAWASIA Moot Competition</td>
<td>Public International Law</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>M.M. Singhvi Memorial Bar Council of India International Law Moot Court Competition</td>
<td>Public International Law</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>Manfred Lachs Space</td>
<td>Space Law</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>Niagara International Moot Court</td>
<td>International Law - Canada/U.S. Focus</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>NLS International Arbitration Moot Competition</td>
<td>International Arbitration</td>
<td>Arbitral Tribunal</td>
</tr>
<tr>
<td>Philip C. Jessup International Law Moot Court Competition</td>
<td>Public International Law</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>Rene Cassin European Human Rights Moot Court Competition</td>
<td>International Human Rights Law - European System</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>Susan J. Ferrell Intercultural Human Rights Moot Court Competition</td>
<td>International Human Rights Law</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>Telders International Law Moot Court Competition</td>
<td>International Law - Europe Focus</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>Victor Carlos Garcia Moreno Competencia</td>
<td>International Criminal Law</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>Willem C. Vis (East) Internantional Commercial Arbitration Moot</td>
<td>International Arbitration</td>
<td>Arbitral Tribunal</td>
</tr>
<tr>
<td>Willem C. Vis Internantional Commercial Arbitration Moot</td>
<td>International Arbitration</td>
<td>Arbitral Tribunal</td>
</tr>
</tbody>
</table>

Source: http://www.ilsa.org/listings/intlmoots.php  
N.B- The column which shows sponsoring institutions is omitted
Reading 4: African Human Rights Moot Court Competition

Reading 4.1- About African Human Rights Moot Court

The African Human Rights Moot Court is an annual event that brings together law students, academics and judges from all over the African continent to argue and debate human rights issues. Since its establishment in 1992, 107 law faculties (of approximately 120 in total) representing 40 African countries (of 53 in total) have taken part.

...[T]here are preliminary rounds, which stretch over a period of 2 days. Teams (composed of two students) from each university argue the case 4 times before panels consisting of academics. The final round opposes the 4 best teams that are paired up to form 2 new joint teams.

An important component of the Moot Court is the one-day conference on the emerging African human rights system where experts present papers on contemporary challenges and successes, including current issues such as the new African Court of Human Rights and the African Peer Review Mechanism of NEPAD.

The prime objective of the Moot is to educate future legal practitioners and academics from across the continent with regard to human rights law. It introduces the United Nations and African human rights protection systems to those people who are most likely to oversee its implementation, namely lawyers. It provides experience in formulating and presenting legal argument on human rights issues. The Moot has, in many ways, paved the way for the ... African Human Rights Court.

Over the years, the Moot Court has developed a life of its own. It is the only project that brings together such a significant number of African law faculties, offering an opportunity for critical debate and the establishment of exchange programmes between African law faculties. By pooling resources together, academics and practitioners can find answers to common problems through co-operation. ...


* * *

... The African Human Rights Moot Court Competition has become the largest annual gathering on the continent of students and lecturers of law. Established in 1992, 845 teams from 125 universities, representing 45 African countries, have over the last 17 years participated in this premier event on the university and human rights calendar of the continent.

The Competition aims to prepare a new generation of lawyers to argue cases of alleged human rights violations before the newly established African Court on Human and Peoples’ Rights, which is likely to become operational in 2008. The programme is organised each year by the Centre for Human Rights, in collaboration with a faculty of law in a host country on the continent. ...

The African Human Rights Moot Court Competition is unique in giving the youngest and the brightest future African lawyers the opportunity to critically examine the human rights situation on the continent, with a view to improving it through the use of the persuasive tactics of logical legal argument based on the African Charter on Human and Peoples' Rights.

INSTRUCTIONS TO JUDGES

1. SCORING DURING PRELIMINARY ROUNDS

Each individual judge, after deliberations with the other judges on a particular panel, shall assess each team participating before him/her on the basis of the instructions given below. Teams are assessed on their written memorials as well as their oral presentations. A maximum mark of 100 can be awarded, comprising 30 marks for written memorials and 70 marks for oral presentation.

1.1 Memorials

Memorials are assessed by independent experts prior to or during the Competition. Judges will receive the memorials of the teams to argue before them at the beginning of the competition and must read the memorials before the rounds in question.

1.2 Oral presentation

Judges will assess the advocacy skills and general oral presentation of each oralist of each team before them during a given round, awarding each oralist a maximum mark of 100%. In assessing the oral presentations, judges shall consider the following:

a) Correct and articulate analysis of the issues;

b) Familiarity with international authorities (preference should be given to the use of African sources, including the African Charter and national constitutions);

c) Response to questions;

d) General knowledge of the substance and process of international law;

e) Clarity;

f) Ingenuity (ability to argue by analogy from related legal aspects);

g) Organisation;

h) Persuasiveness;

i) Knowledge of the facts; and

j) Knowledge of legal principles directly applicable to the facts.

1.3 Total scores

The average team score will be calculated by the organisers by adding up the scores for written memorials and oral presentation, and the winner of each round will be announced.

The highest and the lowest individual score given to an oralist in any given round will be disregarded, provided that four or more judges adjudicated the round.
2. **GENERAL**

2.1 Each panel shall appoint from its ranks a president for each round. It will be the responsibility of the president to keep order in the courtroom, to ensure that the rules of the competition are adhered to and to calculate the total score of each team appearing before the panel from the scores of each individual judge on the panel.

2.2 Judges, in assessing both the written memorials and the oral presentation of any team, should take into account the fact that most of the participants will be arguing in a language other than their mother tongue. Fluency in the particular language used (or the lack thereof) should therefore not determine the marks awarded.

2.3 Since a team has no choice as to which side of the dispute it must plead in a given round, scoring must not reflect the merits of the case but only the legal analysis and advocacy skills of the participants.

2.4 Judges should feel free to question oralists at any point during the pleadings, but should also bear in mind the importance of affording oralists the opportunity to "make their case". Narrative commentary by the judges should be kept to a minimum. The primary intention of oral pleadings is to allow judges to ask relevant questions to expose the knowledge and capabilities of the advocates. It is the responsibility of the president of a specific panel to ensure that judges do not obstruct the smooth running of the proceedings and do not unduly interfere with the argument of a participant.

2.5 No improper oral or written communication may take place between judges and participants or directly affiliated parties before a particular case is heard.

2.6 Judges are reminded that it is their responsibility to enforce the rules of the competition during pleadings. Any transgression of the rules should be noted, and referred to the Steering Committee for a decision, preferably accompanied by a proposal on how to act.

2.7 Judges are required to write short comments on the performance of each oralist that appears before them.

3. **SCORING DURING FINAL ROUND**

During the final round judges must give an overall mark, out of a hundred, for the oral presentation of each combined team member. The oral presentation of each oralist should be evaluated according to the same criteria as those applied in the preliminary rounds (see 1.2 above). The combined team with the highest total score wins.

__________
Reading 4.4

APPENDIX B1: APPLICANT’S SCORING SHEET

PRELIMINARY ROUNDS

(Applicant) _______ V_______ (Respondent)

<table>
<thead>
<tr>
<th>ORALIST 1 - SURNAME</th>
<th>ROUND</th>
<th>SESSION</th>
<th>ORALIST 2 - SURNAME</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highest possible score</td>
<td>Score given</td>
<td>INDICATORS</td>
<td>Score given</td>
</tr>
<tr>
<td>25</td>
<td></td>
<td>• Knowledge of the facts</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td></td>
<td>• Correct and articulate analysis of the issues</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td></td>
<td>• Familiarity with international authorities (preference should be given to the use of African sources)</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td></td>
<td>• General knowledge of substance and process of international law</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td></td>
<td>• Knowledge of legal principles directly applicable to the facts</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td></td>
<td>• Organisation</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td></td>
<td>• Clarity</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td></td>
<td>• Response to questions</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td></td>
<td>• Ingenuity</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td></td>
<td>• Persuasiveness</td>
<td></td>
</tr>
<tr>
<td>100%</td>
<td></td>
<td>TOTAL</td>
<td></td>
</tr>
</tbody>
</table>

I found the presentation of Oralist 1 to be:  

I found the presentation of Oralist 2 to be:

Name of Judge: ______________________ Name of Judge: ______________________
Reading 4.4
African Human Rights Moot Court Competition: 2009 Moot Problem

18th AFRICAN HUMAN RIGHTS MOOT COURT COMPETITION
10 – 15 AUGUST 2009, UNIVERSITY OF LAGOS, NIGERIA
HYPOTHETICAL CASE TO BE ARGUED

1 The Republic of Kuramo (Kuramo), a country on the west coast of Africa, gained independence from Halifax on 1 July 1962. Kuramo is divided into four administrative units, namely the Southern, Northern, Eastern and Western Provinces. Kongi City is the capital of Kuramo’s Eastern Province. Kuramo borders the Democratic Republic of Bamalus (Bamalus), also previously colonised by Halifax. Both states became members of the United Nations (UN) soon after independence. The capital city of Bamalus is Bama City, which also constitutes one of the five administrative units of the country. Bama City is situated immediately adjacent to Kongi City, on the coast, divided only by the Crocodile River. The present population of Bama City is about 800 000, while that of Kongi City is about 200 000, almost exclusively members of the Kongi group. The total population of Kuramo is about 10 million; and that of Bamalus about 12 million people. The Kongi is the smallest ethnic group in Kuramo. Bamalus has claimed since its independence in 1965 that it is the rightful sovereign of Kongi City. In 1984 Bamalus invaded and occupied Kongi City for two months before withdrawing. During the occupation, there was a reign of terror in which thousands of Kongi lost their lives.

2. Long before independence, the area now constituting Kongi City and Bama City served as trading zones between local inhabitants and colonial traders. The Bama City area was originally inhabited by the Bama ethnic group. Although the Kongi and Bama languages are quite distinct, the people of the two territories shared most of their customs and traditions. They have traditionally mainly been fishermen and hunters, and had close affinity to nature and the environment. After independence, the Bama developed much faster than the Kongi, mainly as a result of numerous schools being built in Bama City, and the settlement of other groups in that area. Today, Bama City is a very multi-ethnic and industrialised city. Bama identity has largely disappeared, mainly as a result of the government’s policy of assimilating all groups as part of the nation-building process. By contrast, Kongi City is a mono-ethnic and largely ‘peri-urban’ settlement, where many people still practice their traditional culture and modes of production such as fishing and hunting in the adjacent hills. In the Preamble to the Kuramo Constitution, the Kongi is recognised as a ‘vulnerable minority’.

3 The mainstay of the Bamalus economy is minerals like gold, diamonds and tin. Its per capita GDP for 2008 was officially estimated at $1 200. With the assistance of the Haliff International Oil Services Company Limited West Africa (Haliff Ltd WA), a local subsidiary of a private company registered under the laws of Halifax and with its headquarters in Halifax, Bamalus also recently started exploiting oil
and gas reserves in the area around Bama City. Bamalus holds a 45% share of Haliff Ltd WA. Depending for its survival mostly on agriculture and limited tourism, and with an officially estimated *per capita* GDP of $690 for 2008, Kuramo is a much poorer country. The recent explorations by Haliff Ltd WA revealed that there may be oil and gas deposits in the Eastern Province of Kuramo, especially in and around Kongi City. Efforts by Haliff Ltd WA are on-going to determine if these are sufficient for commercial exploitation. Some international newspapers have reported that the explorations are starting to affect the natural environment around Kongi City.

4 Both countries have enacted a Bill of Human Rights, similar in substantive rights to the International Covenant on Civil and Political Rights (ICCPR), as part of their respective Constitutions. They have also both been state parties to the African Charter on Human and Peoples’ Rights since 1987. In 1977, Kuramo and Bamalus entered into a ‘Bilateral Crimes and Transnational Prosecution Treaty’, allowing for extradition in respect of ‘all serious crimes’ between the two countries which was ratified by the parliaments of Kuramo and Bamalus. Kuramo also ratified the following AU instruments: the amended African Convention on the Conservation of Nature and Natural Resources (2003), the Protocol to the African Charter on the Rights of Women in Africa (in 2005), the African Charter on the Rights and Welfare of the Child (in 2003), and the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights (on 10 December 2007, having signed the Protocol on 10 December 2006). Kuramo is also a state party to the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC). Kuramo has signed but not ratified the Convention on the Prevention and Punishment of the Crime of Genocide.

5 Section 1 of the Kuramo Constitution provides that ‘the Constitution of Kuramo is supreme and anything in any law, conventions, protocols, or regulations shall to the extent of its inconsistency with it, be void’. All international instruments which Kuramo has ratified have been domesticated by virtue of the International Instruments and Conventions (Ratification and Domestication) Act of 1987. The Federal High Court of Kuramo is the highest court in the country.

6 Early in 2005, Bamalus filed a petition against Kuramo before the International Court of Justice (ICJ). Kuramo made a declaration accepting the jurisdiction of the Court. The sole issue before the ICJ was whether Kongi City falls within Kuramo or Bamalus. According to undisputed tradition, the Bama chief Onikoko concluded an agreement at the beginning of the 19th century with Kola, the chief of the territory across the Crocodile River, in which Kola ceded part of his territory, known today as Kongi City. The agreement was concluded to enable the Bama to withstand external aggression. Relying on the agreement, the ICJ in December 2005 ruled that Kongi City had been annexed to Bama City by virtue of the agreement, and that it therefore belongs to Bamalus. The ICJ ordered that Kuramo must, by 1 January 2007, transfer the territory of Kongi City to Bamalus. Immediately after the judgment, the Kuramo government declared that it would refuse to give effect to determination of the ICJ.

7 The late Chief Alfred Cole migrated from Bama City to Kongi City in the 1920s. Under Kongi custom, the traditional ceremony called ‘Iwale’, meaning ushering,
was the only requirement for admitting a stranger who offered to become a member of the Kongi community, provided the person had lived in the community for not less than 10 years and demonstrated evidence of good communal living. In 1935, the late Chief Alfred Cole was admitted as a member of the Kongi community, by way of ‘Iwale’, with full privileges and benefits. He lived and carried on his business in Kongi City until his death in 1972. However, he never formally acquired Kuramo citizenship. Wale Cole was born in Bama City to one of Chief Cole’s wives, in 1959. Wale later joined his father in Kongi City, and went to study law at the University of Dalton in the northern region of Kuramo. He was a vocal member of the Dalton Student Union, especially on the issue of the rights of gay and lesbians, arguing that the dominantly Muslim society of the northern region should accept or at least tolerate them. A rumour started going around that he was involved in a sexual relationship with another male student.

8 Upon graduating with distinction in 1984, Wale set up a law firm in Kongi City called ‘Amity Chambers’. He also pioneered the formation of the Kongi Peoples’ Movement (KPM), which was established in 2001. According to the Constitution of KPM, its objectives are not only to ‘advance the development and protect the human rights of the Kongi minority in Kuramo’, but also to ‘promote and protect the rights of all minorities, including sexual minorities’. In the Constitution, the term ‘member of a sexual minority’ is defined as ‘anyone whose sexual orientation either exclusively or partially predisposes a person to a member of the same sex’. At the time of its formation, an attempt was made to register KPM under the Non-Profitable Organisations (Registration) Act. The Registrar denied the application on the basis that that registration would be impossible as it conflicts with Kuramo’s anti-sodomy laws. Article 7(2) of the Kuramo Penal Code outlaws ‘sexual relations between persons of the same sex’, and prescribes the imposition of a sentence of between two and seven years’ imprisonment upon conviction. Although none of its members have been arrested, KPM remains unregistered up to this day and functions mainly ‘underground’.

9 Early in 2006, the Kuramo government changed its position on the ICJ’s judgment. According to the Attorney-General (AG), the main reason for this reversal was a full appreciation of the fact that Kuramo had consented to the ICJ’s jurisdiction. In order for the country to maintain its international reputation, the AG argued in a television interview, it had to comply with the order. In addition, he revealed that Haliff Ltd WA, which has exclusive rights to conduct the exploitation of resources in Kuramo, entered into an agreement with the Kuramo government to pay 49% of all future profits from any oil or other minerals found in the Kongi City area to the Kuramo government. Following this change in the government’s position, KPM members resolved at a general meeting that the Movement should deploy every effort to resist Kuramo’s ceding of Kongi City pursuant to the decision of the ICJ. KPM also resolved to file an application in its own name before the Federal High Court of Kuramo to ‘restrain the government, its organs, agencies or departments from ceding Kongi City to Bamalus pursuant to the decision of the ICJ’. Before the Court, KPM also raised the government’s refusal to register it, arguing that it was a violation of its right to freedom of association guaranteed in the Kuramo Constitution. Declining the invitation to decide on this issue, the Court left the matter pertaining to the registration open, but found that
the substantive issues raised needed the Court’s engagement irrespective of whether KPM was registered or not under the relevant Act.

10 On 23 June 2006, the Federal High Court of Kuramo found in favour of KPM and held as prayed. The AG of Kuramo publicly contested the correctness of the Federal High Court’s decision, on the basis that KPM did not have *locus standi* to bring the application. Some time thereafter, in November 2006, members of the Kuramo government attended a final consultative meeting between Bamalus and Kuramo, in collaboration with the UN Secretary-General, to work out the peaceful transfer of Kongi City to Bamalus.

11 In view of the position adopted by the Kuramo government, KPM and its members resolved to employ all necessary means to resist the ceding of the Kongi City area to Bamalus. In early December 2006, a group of youths invaded Haliff Ltd WA operations in the Kongi City area and damaged its vital equipment. In a televised statement, the youths contended that it was Haliff Ltd that ‘unfairly persuaded the government into honouring the ICJ decision ceding the Kongi City territory to Bamalus’. The youths also killed two Halifax nationals, who were workers of the company, and escaped with cash in the sum of $200 000. They also seized two other workers as hostages, and demanded ransom in the sum of $1 million for each of the workers and the immediate cessation of explorations in their community.

12 Two days after the attack, on 7 December 2006, the Federal Police of Kuramo Republic (FPK) invaded Kongi City, killing about a thousand people, mainly women and children and a few elderly people. The Chief of the FPK regretted these killings, but stated that they occurred because the community resisted its efforts to find the ‘elements responsible for the atrocities committed against the Halifax nationals’. Television footage showed members of the community, gathered together in masses, hurling stones and self-made petrol bombs at the FPK. The FPK also declared Wale a wanted person. In a broadcast on the state radio station, the Inspector-General of the Federal Police (IGFP) alleged that ‘preliminary investigations revealed that “a homosexual immigrant” is the mastermind of the recent attacks, killings, stealing and kidnapping of personnel and equipment of Haliff Ltd WA in the Kongi City region’. The IGFP offered a reward of $50 000 for anyone with useful information about the whereabouts of Wale Cole.

13 On the morning following the broadcast of the IGFP, Wale appeared at the Federal Police Headquarters in Kongi City contending that he was not a criminal and was never on the run. Immediately upon his appearance, the IGFP directed that he be detained in police cells, pending a decision of the Minister of Police Affairs and Internal Security or the AG on whether to prosecute him in the Republic or deport him with a request for prosecution in his country of origin, Bamalus, pursuant to Bilateral Crimes and Transnational Prosecution Treaty. Extradition proceedings proved difficult and stalled. After *habeas corpus* proceedings instituted on Wale’s behalf succeeded, he was released on 21 February 2007. A week later, he was re-arrested and held in the awaiting-trial prisoners’ section of Kongi City prison. In a press statement, the AG stated that Wale Cole was being detained under the Enemy Combatant (Federal Police Discretion) Act of the Kuramo Republic 1984. Section 7 of this Act allows the
detention without trial of anyone suspected on reasonable grounds of endangering public safety and national security for renewable periods of 90 days. After the expiry of 90 days, the detention of a suspect may only be prolonged if a judge, sitting in camera, so decides, on evidence provided to him by the national security agencies. After his re-arrest, Wale Cole’s detention has been prolonged time and again by different judges, in line with the prescribed procedures. He remains in detention up to this day. He never raised any complaints about the material or psychological conditions of detention to the observers of the ICRC who have regularly visited him.

14 On 1 January 2007, acting on the directive from the President, the national flag of Kuramo was lowered in Kongi City. However, the people of the community insist that they will not accept the authority of any officials of Bamalus. The Home Affairs Office of Bamalus then started to distribute pamphlets to all inhabitants of Kongi City, informing them that they must either accept to be part of Bamalus, or leave its territory within seven days. With very few exceptions, all the inhabitants stayed on in Kongi City, and continued their protests. Due to these continuing protests, Bamalus never exerted its authority over the territory. To fill the void, Kuramo retained legal and administrative authority. Haliff Ltd WA continued to undertake explorations in the Kongi City area, under heavy security provided by the Kuramo government.

15 Meanwhile, Wale’s detention continued. In June 2007, a group of lawyers who graduated from the law faculty of University of Dalton teamed up to challenge his continued detention. They argue that Wale’s detention is contrary to the Constitution and international law. In September 2007, the group instructed a leading lawyer in Kuramo, Jude Law, who filed an action in the Federal High Court in Kongi City, seeking leave of court for the enforcement of human rights under the Human Rights (Enforcement Procedure) Rules of Kuramo Republic 1982.

16 At the time of hearing of the application for leave to enforce human rights, in January 2008, counsel to the respondent, the AG, filed a motion for preliminary objection. The ground of the objection is that section 23 of the Combatant (Federal Police Discretion) Act ousts the court’s jurisdiction to hear an application based on the enforcement of human rights of a person or persons detained pursuant to the Act. In its ruling, dated 21 July 2008, the Court upheld the submission of the respondent, and held that by virtue of section 23 of the Enemy Combatant (Federal Police Discretion) Act of Kuramo Republic 1984, it lacks the jurisdiction to hear and determine the application of Wale seeking leave to enforce his human rights.

17 Dissatisfied with the ruling of the High Court, KPM immediately submitted a complaint against Kuramo to the African Commission on Human and Peoples’ Rights (African Commission), through an international non-governmental organisation (NGO) based in London, called ‘Green Advocates’ (GREA), seeking the following relief:

(i) a declaration that Kuramo’s implementation of the ICJ’s decision on Kongi City amounts to violation of the rights of the Kongi people under the African Charter and international human rights law;
(ii) a declaration that the continued detention of Wale without trial violates the African Charter and other international human rights law, and a compensation order for the hardship he had suffered;

(iii) a declaration that the invasion and killing of the people of Kongi City, mainly women, children and old persons, by the Federal Police amounts to genocide or is otherwise in conflict with the African Charter and international human rights law, and compensation to the families of those killed;

(iv) a declaration that the refusal to allow KPM to register violates the African Charter and international law.

18 At its November 2008 session, the African Commission declared these matters admissible, and referred the case to the African Court for its decision.

**Instruction:** Prepare heads of argument on behalf of (1) the African Commission on Human and Peoples’ Rights (which prepares and argues the case on behalf of the applicant) and (2) the government of the Republic of Kuramo on (a) the admissibility and (b) the merits of each claim to be argued before the African Court on Human and Peoples’ Rights. The case has been set for hearing in August 2009.
Rules of APAP’s Moot Court Competition on Economic, Social and Cultural Rights

Preamble

Whereas, moot court competition on issue pertaining to economic, social and cultural rights is organized annually as of the year 2005 by Action professionals’ Association for the People (APAP),

Whereas, moot court competition is one of the strategies APAP uses for the promotion and protection of economic, social and cultural rights in general and the rights to education, food, health and housing in particular

Convinced, that organizing moot court competition is the appropriate strategy to generate interest and commitment relating to economic, social and cultural rights among the academic society and initiate stakeholders to engage in systematic dialogue towards developing appropriate policies, laws and practices on housing, education, food and health rights.

Recognizing, that moot court competition affords participating students an opportunity to translate the theoretical foundations students obtain in class and their research as well as writing abilities to a practical test and to present arguments in an atmosphere that simulates an ordinary court room.

Therefore, the following rules shall govern APAP’s moot court competition

(Articles 1 to 3 omitted)

4. Written Pleadings

4.1. Form and content

a) Each team must prepare type written pleadings, setting out the possible legal and factual arguments for the applicant and the respondent.

b) The length of the pleadings excluding cover page and appendixes must be no longer than twenty double spaced pages printed on A4 size paper.

c) the written pleading shall include

- cover page in the form of caption as per the civil procedure code of Ethiopia
- table of contents
- a brief summary of the hypothetical case
- summary of the factual and legal arguments (that shall contain international human rights principles and standards as well as national legal instruments that are pertinent to the problem in the hypothetical case)
- conclusion and the relief sought form the court
4.2. Time for the submission of the written pleading

One copy of the pleadings (one for the applicant and one for the respondent) shall be filed no later than the deadline to be announced by the committee.

4.3. Language

Written pleadings shall be prepared in English language.

4.4. Correction on written pleadings

No team may revise, substitute, add to, delete or in any other manner alter its written pleadings after it has been submitted to the Committee.

5. Evaluation of the written pleadings

5.1. The evaluation committee

All written pleadings shall be evaluated by a panel composed of three programme staffs from APAP to be established by the Moot Court Committee.

5.2. Scoring procedure

a) The pleadings will be scored by all the three judges having regard to their content as well as their form and according to scoring criteria annexed to this document (Annex A: written pleading scoring sheet)

b) Each written pleadings for the applicant and the respondent will be graded on a scale of 100 points. The three scores of the written pleadings for the applicant and the respondent will be averaged for deciding written pleadings score with respect to each side.

c) The average score achieved with respect to written pleadings for each side shall again be averaged for the final score for written pleadings of teams. These scores are confidential and shall only be revealed on the official team’s score sheets to be posted at the end of the final competition.

6. Oral Argument

6.1. Language

The oral arguments shall be conducted in Amharic unless a particular word or phrase in any other language do not have an equivalent word or meaning in Amharic.

6.2. Time

A “Hearing” consists of forty (40) minutes total of oral argument, including questioning of judges, of both teams for the Petitioner and Respondent sides. Each team is permitted a maximum of twenty (20) total minutes. Petitioners must reserve at least a minimum of two minutes for “rebuttal” from the twenty minute total. Individual contestants must present a minimum seven (7) minutes of oral argument, including questioning.

6.3. References and exhibit

The speaker may use notes, but he or she is encouraged not to read from a prepared text. During the oral hearing use of any exhibits is not permitted. This does not include legal texts and text books.
7. Stages of Competitions and pairings

7.1 General

The tournament consists of:

a) a minimum of two “preliminary hearings,” during which teams of contestants argue in behalf of both Petitioner and Respondent, and

b) at least one “Elimination” hearing, which is used to determine the First Place team.

c) The committee may organize additional “Elimination” hearings, such as “Quarter-finals” and “Semi-finals.” The motion a team can represent during the “elimination” hearing shall be either for the Petitioner or the Respondent only.

7.2 Pairings

a) At every round the pairing of teams and the side they represent shall be determined by an open lot.

b) No team shall meet each other twice in the competition unless the second meeting is the final competition.

7.3 Grading and identification of winners

7.3.1 The grading of oral argument at each stage shall consider command of issues; organization and reasoning; ability to answer questions; persuasiveness; and courtroom manner and appearance as per the attached score sheet (Annex B: Oral Argument Score Sheet).

7.3.2 Each session of oral argument will be graded with the scale 100 points for single competing team.

7.3.3 In the event of a tie in any round, the competitor who has the highest written pleading score will win the round.

7.3.4 The average of scores by each judge at each competition shall determine the qualifying team.

7.3.5 Judges may not disclose winners or scores to anyone other than the Committee.

7.3.6 Scores shall be announced by the committee after the completion of each round. Competing teams can see their scores after such announcement.

8. Judges of the competition

Three judges, appointed by the committee, shall preside each competition provided that they are not teaching staff or current students of the competing universities. However, five judges of shall preside the final competition. The committee may increase the number of judges who shall preside the final competition if it deems necessary.

---

Number 7.2 is repeated in the original most likely owing to typographical error. The numbers there-under (originally 7.2.1, 7.2.2, etc) are adjusted accordingly.
9. Scouting
No member of competing team, a coach or another person shall engage in reconnaissance activity when other teams are competing by taking notes, recording (audio or visual), or copying. Violation of this may entail an automatic disqualification from the competition.

10. Selection criteria for Best Written Pleading and Best Oralist
a) Written pleadings that have scored the highest score for written pleadings calculated as per section 5.2 (c) will be selected as best written pleading of the competition.

b) The scores of a team member at each stage of the competition, which shall consider the points under the score sheet for best oralsit (Annex C: Best oralist score sheet), will be averaged and team member with the highest score will be crowned as the best oralist of the competition.

Articles 11 and 12 (omitted)
Reading 5.2

Written Pleading Score Sheet

Judge’s Name ________________________
Participating team: ____________________

Instructions: For each criterion, assign a score within the range indicated. When finished, add the scores in the right-hand column to determine the total score. Additional comments may be included on the sheet attached to this score sheet.

Written argument: Applicant/Respondent (circle one)

A: LEGAL ANALYSIS (Maximum of 60 points total for the following)

• Focus on relevant issues (30 points)
• Originality and creativity (10)
• Effective use of cases and other authorities (20)

B: WRITING QUALITY (Maximum of 40 points total for the following)

Logical organization (15)
Clarity in expressing arguments (15)
Effectiveness of writing style (5)
Use of proper grammar and citation form (5)

Total score ________________________
Judge’s signature ____________________
Reading 5.3

Score Sheet for the Selection of Best Oralist

Judge’s Name
Team member's name or code number: _______________________

Instructions: For each criterion, assign a score within the range indicated. When finished, add the scores in the right-hand column to determine the total score.

Maximum of 50 points total for the following
- Full understanding of law and facts (10)
- More organized, coherent, concise, logical and an outstanding presentation of points (10)
- Gives appropriate answers to questions with citation of authority if needed (10)
- Very persuasive and conveys sincere belief in position well (10)
- Adequate eye contact and adequately observant of decorum (10)

TOTAL SCORE

Judge's Signature _____________________________ Date _______________________

__________________
Reading 5.4

Oral Argument Score Sheet

Participating Team _________________________
Judge's Name : _________________________

Instructions: For each criterion, assign a score within the range indicated. When finished, add the scores in the right-hand column to determine the total score. Additional comments may be included on the sheet attached to this score sheet.

I. COMMAND OF ISSUES : (Maximum Points = 30.6 points for each)
A. Superficial knowledge of law and facts
B. Some knowledge of law and facts but uncomfortable with them
C. Adequate understanding of law and facts but hesitant
D. Good understanding of law and facts, but misses fine distinctions
E. Full understanding of law and facts including fine distinction and subtleties

II. ORGANIZATION AND REASONING (Maximum Points = 20.4 points for each)
A. No organization, confusing and illogical
B. Somewhat organized, but clearly below average
C. More organized but with a difficult outline to follow
D. Coherent with a cohesive outline and a clear presentation of points
E. Concise and logical with a flowing outline and an outstanding presentation points

III. ABILITY TO ANSWER QUESTIONS: (Maximum Points = 20.4 points for each)
A. Very evasive, fails to address question and fails to cite authority
B. Attempts to answer question and ultimately gives some answer
C. Gives adequate answer
D. Gives appropriate answer and possibly cites authority, but without smooth[transition back into the main argument]
E. Clear and concise answers, uses authority effectively and [smoothly goes back] into the main argument
IV. PERSUASIVENESS: (Maximum Points = 20.4 points for each)

A. Conveyed no real belief in position argued
B. Monotonous and/or reading from notes
C. Adequately persuasive but overly argumentative
D. Persuasive but fails to display a true sense of conviction
E. Very persuasive and conveys sincere belief in position well

V. COURTROOM MANNER AND APPEARANCE: (Maximum Points = 20.4 points for each)

A. Generally inarticulate, very nervous or overly casual
B. Significant physical signs of nervousness and poor eye contact
C. Some signs of nervousness that do not affect overall performance, adequate eye contact and adequately observant of decorum.
D. Confident, claim, good eye contact and respectful
E. Confident, smooth, exceptional eye contact and very respectful

TOTAL SCORE

Judge's Signature ____________________________   Date ____________________
Reading 5.5

APAP’s sample moot problem

Hypothetical Case for the Third APAP’s Moot Court Competition on Economic and Social & Cultural Rights

The state of Tinkish is a member of the United Nations and The African Union, which has ratified or acceded to the following major international and regional human rights instruments.

The International Covenant on Civil and Political Rights in 1994.

TINKISH

1) As per the United Nations Fund for Population (UNFP) report in December 2006, the state of Tinkish is a developing country with a population of about 45 million people. Its population grows with the rate of 2.7% per annum. It is one of the least developed countries in the world ranked 150 out of 177 countries in the United Nations’ Development Programme (UNDP) Human Development Index for 2006. The literacy rate for the whole population of the state of Tinkish is around 48 percent. Life expectancy is 50 years for men and 51 for women. The majorities of the people in the rural areas are illiterate and engaged in subsistence farming. As per the report by the Civil Society Union of Tinkish, 75% of households in the country do not have any education at all. Of the total private investment in Tinkish, only 0.5% goes to education highly superseded by 30% for agriculture and 25% for the manufacturing sector.

2) In 1990s Tinkish has adopted an education policy which envisages that education shall be provided free of charge up to grade10 in public schools. In addition the three education sector development plans put in place according to the Poverty Reduction Strategic Plans of the country have acknowledged that education, particularly primary education, is the pillar of development for the agrarian economy of the country. Accordingly, primary education is given much emphasis to boost its economic development. In pursuance of this target, as per the government reports on the PRSP at different times, there is tremendous progress in terms of gross enrollment rate (GER) of students in primary education and availability of schools and classrooms. In addition, the gender gap in primary education is narrowing as per the same reports.
3) The education legislation 135/2000 of Tinkish provides that the powers and duties of Ministry of Education with respect to administration and management of public schools (both government built and non-government built) are transferred to Regional Governments and Councils of City Administration accountable to the Federal Government. In addition, the legislation gives Education Bureaus of the respective Regional and City Administration the power to issue directives to implement regulations adopted by their respective Regional Council or City Administration Council. Accordingly, the public schools are made accountable to their Regional and City Administration Education Bureau. However, the Federal Ministry of Education has issued a directive pertaining to the management and administration of schools and administration and employment of teachers which is still being implemented in the regions.

4) This directive has made all schools, public and government, offering primary education accountable to Education and Training Management Boards at Sub-District and District levels, which is a government body. With regard to City Administrations, the Education and Training Management Boards are established at the Municipality and Sub-municipalities. Hence all schools, both government and public, offering primary education are under the government control. Though there is parent teacher council in the structure of primary schools, their power is limited since Education and Training Management Boards have to approve their decisions. Otherwise they will not be effective.

5) The directive of Ministry of Education and the five year education sector development plan adopted by the government requires the contribution of the community, either in kind, labor or money for the construction of schools and the provision of educational materials. Accordingly, primary schools are to be made available by state and community partnership. Parents are required to pay charges levied by the government to make their children attend primary education. Parents are often called to contribute to purchase of supplies and textbooks and to assist in the construction and maintenance of schools and their premises.

6) In addition, there is no legislation in Tinkish mandating free and compulsory Education. However, the directive issued by the Ministry of Education prescribes that awareness raising shall be undertaken to convince parents to send school age children to school.

7) In relation to the pattern of expenditure and allocation of budget, the education and training sub-sector takes the lion-share of the budget allocated for social services and is increasing from year to year. However, most of the education budget (more than 50%) goes to tertiary education. The share of the military and security budget of Tinkish state is escalating due to looming security threats developing in the area in recent years rising up to 20% of the total budget.

8) Despite the lack of thorough information, on the issue, violence against girls is quite pervasive in the country. There is no system put in place allowing girl students to report violence by teachers and other students, in such a way that the confidentiality of the victim is ensured within or out of the school premise. In addition, there is gender-based violence through comments suggesting that women are incapable or less able to perform academically or evictions from class
THE SITUATION IN THE TOWN OF NIGAT

9) Nigat is a city where more than 250,000 people reside, according to the projection made by the Population Agency of the state of Tinkish. More than 30% of its population is composed of children less than the age of 14 years. In the city there is only one primary school named Nigat Primary School. The school authorities have prohibited primary education of some families in the city based on the ground that:

- Parents of these children did not contribute for the construction and maintenance of the school, though they were summoned to do so separately.
- Students coming from these families did not pay the payment required for educational materials such as books.
- Parents have refused to make payments for acquisition of uniforms available by the school.
- Language of instruction is the native language of Nigat, which is not the mother tongue for 40% of the population in the city.

10) The number of students dropping out of the school at the primary level, due to economic inaccessibility of education or engagement in income generation activity or household labor is also increasing at an alarming rate in the city of Nigat as reflected in the dropout rate of the annual statistical report of the city’s education Bureau.

11) Due to absence of sufficient number of classrooms that accommodate the school age children in the town, it is too difficult to get a place for new entrants. Acquaintance and a close relationship with authorities or teachers only can ensure a place to the child in the school. Moreover, students who couldn't manage to pass to the next level will not get another chance to repeat the same grade during the regular program. They have to resort to attending class during the evening program for which they have to pay monthly fees.

12) When we see the situation of the school there is severe shortage of school facilities and instructional materials such as textbooks, libraries, laboratories, water, latrines, and clinics. In addition, female students complain that they are discouraged from going to school because there are no sanitation facilities suitable to them in the school.

13) Most of the children have to walk for more than an hour to get to the school. The problem is worse for disabled students, as the school facilities such as the buildings, libraries and latrines do not have special accommodation for them.

14) Despite the Education Sectors Development Plans and the different PRSP’S each adopted for a period of five years, some human rights institutions in Tinkish accuse the government of Tinkish, for its failure to submit plan of action to ensure primary education for all within its territorial jurisdiction.

There is an NGO by the name of Primary Education for ALL (PEA) registered by the law of the state of Tinkish. The main aim of PEA is in promoting and protecting human rights. PEA is of the view that the government has violated the
constitutinal rights of the citizens of Tinkish in general and the rights of the residents of Nigat in particular and would like to institute Public Interest Litigation against the state of Tinkish.

Based on the above facts, participants to the Ethiopian Moot Court Competition are requested to prepare a memorial both for the applicant and the respondent on the issue of free and compulsory primary education in the city of Nigat and the state of Tinkish. The competitors are required to deal with procedural issues thoroughly whenever relevant. In the pleadings and oral argument assumption of fact is not allowed. However reference to and analysis of policy, programme and legal materials mentioned in the case is allowed by taking equivalent of them in the Ethiopia.

N.B.

The state of Tinkish has a constitution, laws and legal system similar to the Federal Democratic Republic of Ethiopia.

In the oral arguments the procedural law of Ethiopia shall be observed as circumstances may allow and the rules of the competition.

…
Annex I

Guidelines for Judging Moot Court Competitions


TEXAS UNDERGRADUATE MOOT COURT COMPETITION: JUDGING GUIDELINES

Your judging guidelines should be independent, based upon each speaker's oral advocacy skills only, without consideration for which side should win on the merits. ...

Your point differential on the scoring sheet is also very important because in the event of a tie, teams advance according to their cumulative point totals. Therefore, please avoid making the scores close if the performances are not close. Please be sure to complete accurately every blank on your ballot and sign it.

Please note that there is a range for each category. Do try to give students scores within those ranges. Superior scores should receive higher points, and inferior performances should be lowered accordingly.

I. KNOWLEDGE OF SUBJECT MATTER

1. Does the speaker give a broad but brief overview of his/her argument in the beginning?
2. Is the speaker's presentation well organized, with his/her organization clearly expressed?
3. Does the speaker have a thorough knowledge of the record? Can the speaker direct you to important language therein?
4. Does the speaker emphasize the important issue?
5. Does the speaker argue the heart of the matter adequately and is he/she selective in discussing issues?
6. Does the speaker employ a variety of types or arguments (precedents, logic, policy, etc.) rather than relying on too few types?
7. Are the speaker's arguments clear and direct?
8. Are the issues firmly fixed in the Court’s mind when the speaker finishes?
9. Does the student stay within the time limits placed on him/her, speaking NEITHER TOO LONG NOR TOO BRIEFLY?

II. RESPONSE TO QUESTIONING

1. Is the speaker responsive to questions rather than evasive or repeatedly unable to give an answer? (Some deferring to one's partner is permissible where such a question involves the other speaker's argument.)
2. Is the speaker able to answer a question with authority …?
3. Is the speaker able to fit relevant questions into his/her overall analysis and presentation?
4. Is the speaker able to continue his/her argument after a question?
5. Is the speaker candid about the weak points in his/her arguments?
III. FORENSIC SKILLS
1. Does the speaker use correct pronunciation and grammar?
2. Does the speaker use timely emphasis?
3. Does the speaker effectively use pauses?
4. Does the speaker's voice have proper volume and good inflection?
5. Is the speaker's voice clear rather than inaudible or difficult to understand?
6. Does the speaker employ "ahs," "ums," or "ers" that are distracting?
7. Does the speaker use gestures effectively and appropriately?
8. Does the speaker exhibit a professional stance at the podium (stands straight, avoids distracting mannerisms, etc.)?

IV. COURTROOM Demeanor
1. Does the speaker appear to be trying to be helpful to the Court?
2. Does the speaker project an image of professional sincerity toward his/her client?
3. Is the speaker forceful without being overbearing?
4. Does the speaker talk to and look at the judges in a conversational manner INSTEAD OF READING A PREPARED TEXT?
5. Is the speaker courteous rather than sarcastic, condescending, or resentful?
6. Is the speaker poised and at ease rather than stiff and/or jittery?
7. Does the speaker display the proper degree of confidence (neither too little nor too much)?
8. Does the speaker use all of his/her time but not exceed his/her time limits?
9. Does each speaker begin with "May it please the Court" and end with a specific prayer for relief?

... ARGUMENTATION STANDARDS: STYLE AND CITATIONS
1. Each oralist should address the Court (i.e. "May it please the Court.")
2. Opposing counsel should never be addressed.
3. The second speaker for each side should introduce only himself/herself.
4. Every speaker should pray to the Court at the end of his/her presentation.
5. Then when the "0" timecard flashes, the speaker should finish only the sentence he/she is on and be seated unless the Court allows him/her additional time. TUMCA Rules strictly forbid an oralist to ask the Court for extra time.
6. ...
7. If a judge asks an oralist a question that is beyond the official TUMCA case packet (which judges are not supposed to do), the student should so inform the judge (respectfully), but may answer the question if the judge persists.
8. Competitors may cite general authorities/dictionaries, and widely known legal principles … even if these are not included in the … case packet.
The scoring procedure is explained in the rules herebelow. All teams must be prepared to argue the other side of the case without reliance on a brief from the opposing party.

Oral argument will be scored on the basis of quality of presentation and arguments, not on the merits of the case. The maximum possible score is 100 points.

I. Opening: 0-15 points

- Does the advocate go directly to the heart of the appeal or waste time reciting unnecessary matters?
- Does the advocate quickly summarize the party's basic position?
- Does the tone and manner of presentation immediately give the court confidence that the advocate has a command over the case?
- Is there an ease of presentation that engages the court and makes the justices eager to enter into a dialogue with the advocate?
- Does the opening make the court believe that the advocate will be candid and address the difficulties of the problem, rather than overzealous in support of a position?
- Does the advocate read from a prepared statement, use notes wisely, or appear to speak spontaneously, reflecting command of the situation?
- Does the respondent's opening highlight weaknesses in the appellant's presentation or start from a prepared script as if the appellant had not argued?

II. Presentation of the merits: 0-30 points

- Does the argument have a theme?
- Does the advocate make reasoned arguments or state conclusions without analysis?
- Does the advocate focus on the important questions raised by the case or become mired in unnecessary detail?
- Is the argument well organized?
- Does the advocate understand the legal issues?
- Does the advocate discuss the facts in the decisions in an appropriate manner or pay too much attention to immaterial details?
- Is the advocate familiar with the record?
- Does the advocate understand what parts of the record are most helpful to his
or her client's position?
- How well does the advocate handle the unfavorable parts of the record?
- Does the advocate know how to move on to a different subject?
- Does the advocate make good use of notes?
- Does the argument leave the court wishing for more time to explore issues further with an engaging advocate, or leave the court grateful that the argument is over?

III. Questions from the Court: 0-35 points

- Is the advocate prepared for questions or surprised and unable to answer?
- Does the advocate respond directly and immediately to each question?
- Does the advocate make concessions when necessary and then explain why the concession is not fatal?
- Does the advocate exhibit flexibility and use the questions to advance his or her client's position?
- Does the advocate get rattled by questions or utilize them as occasions for entering dialogue?
- Does the advocate know when to stop?
- How well does the advocate move back to what he or she wants to say?
- What does the advocate do if he or she does not understand the question?

IV. Demeanor: 0-15 points

- Is the advocate's presentation smooth and confident, or hesitant and fumbling?
- Does the advocate appear poised and ready to enter dialogue or nervous, unprepared, and unwilling to enter dialogue?
- Do the advocate's voice and manner of presentation engage the listener?
- Does the advocate vary his or her inflection and tone appropriately or is the presentation dull and uninspiring?
- Is the advocate overly rhetorical or sarcastic?
- What does the advocate's body language indicate?
- Does the advocate make, and keep, eye contact with the justices as appropriate?
- Is the advocate respectful of the court?
- Is the advocate dressed appropriately?

V. Closing and Rebuttal: 0-5 points

- Does the advocate make good use of what transpired during the argument to create an effective closing or rely on a prepared statement?
- Does the argument end on a good note or just fade away?
- Does the appellant use rebuttal effectively by capitalizing on weaknesses in the respondent's presentation and addressing any helpful questions raised by the court?
Panellist Marking Guidelines for the EMC² Oral Pleadings 2009-2010

Accessed 15 October, 2009

The first two days of each Regional Round and the Final Oral Round will consist of the Preliminary Rounds where all Registered Teams will be paired and appear before a Panel twice – pleading once as Complainant and once as Respondent.

The four highest ranked teams of the Preliminary Rounds will then proceed to the Semi-Finals, which will be held on the third day. In the Semi-Finals, the teams will be paired and each pair will appear before a Panel only once. Therefore, a team will only plead once - either as Complainant or Respondent – during this round.

The two winning teams will then compete against each other in the Grand Final, which shall follow a similar procedure as the Semi-Finals. At Regional Rounds the Grand Final and Semi-Finals may be held on the same day. At the FOR these events will be held on separate days.

One team will be declared Winner of each ELSA and non-ELSA Regional Round and will proceed to the Final Oral Round. In some circumstances the ELSA International has deemed that the Runner-up and/or the Semi Finalist will also proceed to the Final Oral Round.

Teams shall proceed to the Final Oral Round through the ELSA Regional Rounds held in Leuven (Belgium) and Helsinki (Finland) and the non-ELSA Regional Rounds held in Adelaide (Australia), Taipei (Taiwan), Sao Paulo (Brazil) and Ottawa (Canada) and the International Written Round. All teams competing in the Final Oral Round, to be held in Santo Domingo, Dominican Republic, will follow the same mooting procedure as per the Regional Rounds.

Procedure for the EMC² Oral Pleading Sessions

"Panellist": Individual Panellists are designated by ELSA International or the Academic Supervisors to judge particular Oral Pleading Rounds. ELSA International or the Academic Supervisors will also select which Panellist will act as the Panel Chairperson and this will be announced at each Panellist Briefing Session, to be held just prior to a specific Oral Pleading Round.

"Participants": Panellists are advised that the Participants in the EMC² range from first year undergraduate law students to masters students – they are not WTO experts and none have experience arguing legal cases infront of a tribunal, therefore Panellist should be mindful that questions reflect this level of experience.
“Process of presenting oral arguments”: *Rules 7.9.1, 7.9.2.1 and 7.9.3.1* provides that each team has, at first instance, a total of forty (40) minutes in which to present their arguments - this includes a maximum of thirty-five (35) minutes for “main” oral pleadings and maximum five (5) minutes for rebuttal/sur-rebuttal stage.

However, please note that the Panel has the sole discretion under *Rule 7.9.4.3* to extend a team’s “main” oral pleadings time and/or rebuttal/sur-rebuttal time. Competitors should not expect they will receive additional time, but should be prepared if requested by the Panel.

The Panel Chairperson will ask each Team Captain to introduce the members of his/her team. The introduction, referred to as *Team Appearance*, does not form part of the 35 minutes allocated per *Rule 7.9.2.1* to present main arguments.

After the introduction the Panel Chairperson will check with the Timekeepers if there are any anomalies in the names of the registered oralists. Once confirmed the Panel Chairperson will request the Complainant team to present legal arguments. It is recommended that the first oralist give a brief “road map” to the Panel as to the issues to be presented by each team member and in what particular order.

Once the Complainant has presented their arguments the Panel Chairperson will thank the delegation, ask both fellow Panellist and Timekeepers if they have concluded the “administrative” component for the Complainant and ascertain if both entities are ready to commence hearing oral arguments from the Respondents.

After both sides have completed their “main” oral arguments, the Panel Chairperson will invite the Complainant to present its Rebuttal. On the conclusion of the Rebuttal the Panel Chairperson will ask the Respondent’s to present Sur-rebuttal. Pursuant to *Rule 7.9.3.2* only one (1) of the oralists nominated in the *Team Appearance* to present the main oral pleadings may present rebuttal or sur-rebuttal.

Furthermore, under *Rule 7.9.3.3* only the nominated oralist presenting the rebuttal or sur-rebuttal is permitted to answer questions from the Panel during his part of the oral pleading session.

“Questions from the Panel”: ELSA International encourages Panellist to question teams during the presentation of their arguments. However it should be noted that the clock is not stopped whilst a team is answering questions.

During the Preliminary Rounds (of both the Regional Rounds and the FOR) Panellist are requested to focus their questions on the issues and arguments presented. However, during the Elimination Rounds questions of a more general “trade policy” or “public international law” nature should also be asked.
Therefore the important points to recall are:

- **Rule 7.9.2.1** provides that each team shall be given a total of 35 minutes to present its “main” oral pleadings.

- **Rule 7.9.2.2** provides that each team member who has been nominated as an orator in the *Team Appearance*, shall speak for a minimum of ten (10) minutes in one session.

- **Rule 7.9.3.1** provides that each team shall have 5 minutes to present rebuttal or sur-rebuttal.

The following are some specific suggestions for questioning:

- Panellists are asked to avoid asking rhetorical questions or making statements. The interaction between Participants and the Panel should be in question and answer format. Panellists must not engage in lengthy debates with the Participants.

- It is recommended that Panellists frequently utilize questions, which call for a "yes" or "no" answer. They test a Participant’s ability to answer a question directly, and the questions themselves tend to be shorter and more concise.

- Since time is limited it is important for a Panel to focus inquires on areas that will allow you to distinguish the Participants’ qualities.

- It is recommended that Panellists try, as much as possible, to interject their questions evenly throughout the round. The questioning should not be focused on one Participant or Team – remember the moot is part of ELSA’s commitment to the advancement of "clinical legal education”.

- Panellists are recommended to avoid detailed questioning about a co-speaker’s argument. Each competitor should outline at the beginning of his/her presentation the points he/she will cover. Although it is sometimes difficult to avoid questioning on a co-speaker’s argument, such questioning should be general in nature when necessary.

- Panellists are asked to avoid extensive questioning after time has expired.

- Panellists are requested to only question about the facts in the Case and not resort to questioning about emerging theories. Hypotheticals must be avoided.

- Panellists are encouraged to interrupt speakers at any time where clarification of the legal argument being presented is required; interruptions also test the Participants’ ability to respond as an advocate. However, Panellist should recall that the clock is not stopped during questions - therefore, Panellist should treat all Participants” equitably.

- Panellist should pose one question at a time so that Participants are able to complete the points raised in their skeleton arguments.

**“Team Identification and Anonymity”:** Please note in order to avoid any claim of bias, as per **Rule 6.3.4** Participants will only introduce themselves by their allocated Team Number and if representing the “Country of Freeland” or the “Country of Ipland”. They may also state that in the particular session they are either the “Complainant” or “Respondent” in the matter.
“Timekeeping”: Although in each round one or two persons will be appointed by either ELSA International or the Regional Round Organiser to keep track of the time, Rule 7.9.4 provides that the Panel is responsible for time keeping. The Panel, through the Panel Chairperson, has the discretion to extend the time allocated to a team. Extensions should be granted to allow a team to finish its arguments, especially if the Panel has asked extensive questions.

If a Panel grants the Complainant an extension, it should grant the same extensions to the Respondent. If however the Respondent requests additional time and the Complaint completed its arguments within the allocated 35 minutes for „main” oral pleadings, such a request should be denied. Furthermore, if a team does not utilise its time during „main” oral pleadings, the remaining time is not carried over to the rebuttal/sur-rebuttal.

“Feedback”: At the conclusion of the oral pleading session the Panel Chairperson will thank the delegations for their oral arguments and ask all individuals to leave the room so deliberation may take place. The Panel Chairperson will then instruct the Timekeeper to call the teams for Feedback. The Panel should provide competitors with constructive feedback comments on their performance. The focus should be on the presentation skills, as well as structural aspects.

Under no circumstances should a Panellist make comments on substance or make such comments that an individual believes he/she is being personally villified. This is a difficult issue as some competitors are naturally sensitive, but at all times Panellist must remember the individuals are students and in some cases are undergraduate law students in their first year of law school.

Finally, for time management purposes, we suggest that no more than 10 minutes should be utilized for feedback for each oral pleading session.

Explanations of the EMC² Oral Pleadings Score Sheet

“Oral Pleading Score-Sheet”: For each oral pleading round, Panellist will be provided by the Timekeepers with one Oral Pleading Score-Sheet per Team. The Timekeeper will have completed the basic information including the: Team Code (ELSA designated Team Number); Round Location (e.g. Santo Domingo Preliminary Round No. 1); Date; Session Time and by ticking (√) the appropriate Team Role box (i.e. Complainant or Respondent).

There are two sections on the Oral Pleading Score-Sheet which require Panellist to complete with different marks: firstly, provision is made for a Team Score and secondly provision is made for each Individual team member’s oral presentation.

“Oral Pleading Team Role”: Please indicate whether the Oral Pleading Team Role is being assessed is a Complainant’s or Respondent’s document.

“Team Code”: Each team is designated a number by ELSA International in the course of Team Registration. This number is the official Team Code and shall be placed in the top right corner of the cover of each Written Submission. Please
indicate the number designated to the Team by ELSA International in the section titled “Team Code”.

"Scoring the Team and Orator Oral Pleading": Team Panellists who constitute “the Panel” and should feel free to consult each other throughout the session. However, it is strongly recommended that Panellist complete the Oral Pleading Score-Sheets independently. ELSA International and the Academic Supervisors are responsible for the organisation and management of the Oral Pleading Score-Sheets. They will collect the Score-Sheets after each Panellist has completed their sheets, perform the calculations and announce the teams progressing to the Elimination Round at respective points throughout the competition.

"Team Score": Provision is made for a Team Score and each Panellist should firstly, evaluate the overall performance of the Team and subsequently, indicate points awarded to the Team for the oral arguments presented during a particular round. A Panellist should not base the Team Score on the average of the speakers’ Scores.

Rather a Panellist is required to base the Team Score on the overall impression projected by the entire Team. A Panellist must award points for each criterion between 0 to 100.

Per Rule 7.4.3.2 in the Preliminary Rounds only of either a Regional Round or the Final Oral Round, the Oral Pleading Session accounts for 70% of the mark which is utilised to rank the teams in order to progress to the Semi Final Rounds. The remaining 30% per Rules 6.9.10, 6.9.12, 7.4.2.2 and 7.4.3.2 will come from the Overall Written Submission scores.

"Individual Score": Panellist are asked to score each individual speaker’s performance however short (or long) his/her presentation is, keeping in mind Rule 7.9.2.2 that each speaker must present for longer than 10 minutes in the „main oral“ pleadings and that only one person may present during rebuttal or sur-rebuttal. A Panellist should not base an Individual Score on the average of the speakers” Scores. Rather a Panellist is required to base the Team Score on the overall impression projected by the individual oralist.

A Panellist must award from 0 to 100 points for each criterion.

"Criteria for Scoring the Oral Pleadings": The main part of the Oral Pleading Session Score-sheet features four (4) criteria to be used in assessing the documents:

(i) Command of the Issues – 25% weighting;
(ii) Argumentation – 25% weighting;
(iii) Legal Analysis – 25% weighting; and
(iv) Style - 25% weighting

The content of each of the criterion is explained below and summarised on the Oral Pleading “Team & Orator” Score Sheet. An example Oral Pleading Score Sheet is attached.
Criteria for Scoring the EMC² Oral Pleadings

All Oral Pleadings are to be assessed and evaluated pursuant to Rules 7.8.2 and 7.8.3 and a Panel shall be guided by factors such as:

- competence;
- inclusion of all relevant facts;
- structure and logic of the pleadings;
- soundness of the pleadings presented;
- response to questions by the Panel; and
- time management

“Criteria for Scoring Oral Pleadings”: These following elements have been designed and arranged by an Educational Assessment Methodologist to ensure that competitors receive the maximum learning experience from their participation in the event:

1) COMMAND OF THE ISSUES (25% WEIGHTING)

- Recognition of legal issues;
- Display of general knowledge related to the legal issues; and
- Proper analysis and weighting of the legal issues.

2) ARGUMENTATION (25% WEIGHTING)

- Logic of arguments;
- Reasoning of arguments;
- Ingenuity of arguments;
- Ability to analogise with legal or general scenarios;
- Persuasiveness of arguments; and
- Rebuttal or Sur-rebuttal is correctly utilised.

3) LEGAL ANALYSIS (25% WEIGHTING)

- Identification of the applicable treaties/law;
- Identification of the applicable jurisprudence;
- Knowledge and understand of law; and
- Analysis of the applicable treaties law to the facts.

4) STYLE (25% WEIGHTING)

- Levels of organisation and structure of the arguments;
- Manipulation of relevant authorities;
- Responses to Panellist questions;
- Eloquence and clarity of presentation;
- Teamwork; and
- Time Management.

Grades to be allocated when Scoring the EMC² Oral Pleadings

“Grades for Scoring Written Submission”: the grade must fall within the range provided in the following “Scale” (0–100) under each of the aforesaid indicators (0 – 49 being Poor; 50 – 64 being Average; 65 – 84 being Good; 85 - 100 being Excellent).
Poor
Up to 50
• Superficial knowledge of the law and facts;
• No organization, confusing, illogical;
• Extremely evasive, fails to address questions, does not cite authority;
• Conveyed no real belief in the position argued, read monotonously from notes; and
• Very nervous or overly casual, ignores rule of decorum and is generally inarticulate.

Average
50 – 64
• Adequate understanding of the law and the facts but seems hesitant;
• Organised but unable to follow outline or to present points;
• Attempts to address questions and ultimately gives some answer;
• Adequately persuasive but overly argumentative or conversational; and
• Shows some sign(s) of nervousness e.g. poor eye contact.

Good
65 – 84
• Good understanding of law and facts but misses fine distinctions;
• Coherent and cohesive outline and presentation of points;
• Gives appropriate answer and possibly cites authority effectively, and makes a smooth transition back into argument;
• Persuasive, but fails to display a true sense of conviction; and
• Good eye contact, observant of decorum, confident, calm, respectful.

Excellent
85 – 100
• Full understanding of law and facts including fine distinctions and subtleties;
• Concise and logical, cohesive outline with smooth presentation of points;
• Clear and concise answers, used authority effectively, and make a smooth transition back into argument;
• Extremely persuasive and conveys a sincere belief in the position argued; and
• Confident, smooth, exceptional eye contact, extremely respectful.
Annex IV

Jessup websites

International Law Students’ Association Website: http://www.ilsa.org/
Philip C. Jessup International Law Moot Court Competition website:
   http://www.ilsa.org/jessup/index.php
Jessup Moot Court Competition Official Rules:
Jessup Memorial score sheet:
   http://www.ilsa.org/jessup/jessup08/mscoresheet.pdf
Jessup Oral Pleading Score Sheet:
   http://www.ilsa.org/jessup/jessup08/oscoresheet.pdf
Jessup Cup Champions (1960 to 2005)
   http://www.foj.org/archives/
Selected Bibliography

Books

Articles
Dickerson, Darby “In Re Moot Court” Stetson Law Review (Spring, 2000)
Kozinski, Alex “In Praise of Moot Court –Not!” Columbia Law Review (January, 1997)
Kritchevsky, Barbara “Judging: The Missing Piece of the Moot Court Puzzle” University of Memphis Law Review

Annexes and Bibliography 253