

Moot Court Is Not Just for Law Students

Extensive preparation for oral argument with the assistance of skilled moot court preparation, will give you the confidence and the experience to tackle the hard questions and facilitate your effort to persuade an undecided appellate panel. It can be all the difference between winning and losing.

[David B. Saxe](#) and [Danielle C. Lesser](#), *New York Law Journal* – April 5, 2019

All of us can recall our law school moot court competitions that occupied our energies—learning how to write a persuasive brief and to argue its contents before a “court” often comprised of professors, teaching assistants and alumni. But, the importance of the moot court experience does not stop at graduation. Practicing lawyers, especially appellate counsel can be significantly assisted by engaging in a law school style “moot court” exercise as they prepare for an appellate or motion court engagement.

Enlisting the assistance of those with a careful eye toward maximizing the effect of courtroom presentations—both the brief and the argument—should not be underestimated. While the trained ear of a colleague, a friend, perhaps a spouse or partner who takes some time out to listen to snippets of an intended argument can make a big difference in the effectiveness of an oral argument, to maximize the benefit of a moot court experience, the practitioner should consider a more exacting approach.

A compelling oral argument, supplementing a thoughtful and well-crafted brief can help persuade the court to rule in your favor in a close case. The opportunity to persuade the appellate panelists should not be squandered.

A good moot court approach for an appeal begins with the briefs, which are the most important part of the appeal. It is while drafting the appellate briefs that lawyers make strategic decisions on what arguments to advance, how they are prioritized and how to present them.

It is useful, even at the brief-writing stage, to engage the assistance of parties who are not as close as you are to your argument to review your brief and assess whether or not an argument should be made and how it should be structured and prioritized with other points. Remember, at the appellate stage, it is important to focus on the issue or issues on appeal not necessarily on the issues as they were presented in the lower court. This dispassionate third-party perspective is especially important if you were also counsel at the trial level because it may be difficult to extricate yourself from the factual details, themes and arguments made at the trial level. See Joseph W. Hatchett and Robert J. Telfer III, *Appellate Advocacy Symposium, Part II: The Importance of Appellate Oral Argument*, 33 *Stetson L. Rev.* 139, 146 (Fall 2003). By seeking outside help, you can focus on advancing the strongest arguments in your appellate briefs.

Briefs are where you set the stage for oral argument and evaluating how your brief frames the issues for oral argument should not be overlooked. See Gwen J. Samora, *Symposium: Preparing for Appeal: New Challenges: Oral Argument Tips for Trial Lawyers—Aim For The Good, Avoid The Ugly*, 76 *The Advocate* 23, 23 (Fall 2016).

Attorneys preparing for an appellate oral argument must practice delivery of their argument prior to the oral argument date. A good response to a tough question can make a difference to a judge who is on the fence. Practicing your argument aloud with experienced interlocutors, preferably through a formal moot court exercise, can give you an invaluable perspective on how to handle questioning. Even if you engaged in the brief writing stage without assistance, there is still value in mooting your argument with others. The moot court process provides the practitioner with a tough and thorough interrogation of the perceived weaknesses of your argument. See Dori Bernstein, *Feature, How to Construct an Effective Moot Court*, 44 *Litigation* 47, 47 (Fall 2017). During this process, your moot court panelist or panelists may ask you important questions that may not have occurred to you. They also may have ideas on how to better articulate what you are trying to say. Each question can help you refine your argument and prepare the best responses to potential questions. Because moot court questioning is often tougher than the actual oral argument, going through the moot court process can also boost your confidence and make you better prepared for an argument.

Finding the right moot court panelists is critical. Ideally, utilizing skilled appellate advocates is important, especially those who regularly argue in the court in which you are scheduled to appear. See *id.* at 48-49. You should also provide the panelists with the decision below, the appellate briefs and important excerpts from the record. Encouraging the panelists to be fully prepared will ensure that they can zero in on the critical issues in the case during the moot court questioning. Interlocutors who have not examined the briefs and the record may actually do you a disservice. There should be a structure to the moot court; the first part is the question and answer portion where the lawyer presents the case and the panelists ask questions, probe weaknesses and push the strongest points supporting the opposite side.

Additionally, unlike the actual argument itself where judges often interrupt a counsel's response to a prior question, moot panelists should allow the lawyer to fully complete each answer. Bernstein, 44 *Litigation* at 50. That way, the mooting panelists can evaluate the effectiveness of the lawyer's response.

After the question-and-answer part is concluded; the feedback portion begins in which panelists get to share their reactions to the form and substance of the presentation. Here, there should be a frank discussion of what aspects of the oral argument worked, what did not work, what improvements or modifications may be needed and how to deal with problematic issues. Bernstein, 44 *Litigation* at 50. We feel that ideally, the moot should be held only a few days to two weeks ahead of the scheduled appeal or motion argument.

Give yourself plenty of time prior to the oral argument to engage in the moot court process. If time allows, follow up with your panelist or panelists to vet new responses to questions you were having trouble with during the moot court process. And, continue to practice. If you cannot arrange for a formal moot court session, practicing before other colleagues is still valuable. Just remember, the more you prepare in advance, the better prepared you will be when it's show time.

Arguments in any of the departments of the Appellate Division are live-streamed and archived. These archives are a treasure trove of information as to how appellate judges interact with counsel and think through legal issues. Many judges have distinct approaches which are regularly displayed during oral argument. Studying these variations can be useful even if, as is the case in the First Department, the make-up of the panel you are arguing before is announced on the preceding afternoon. Your preparation is not complete without a review of past oral arguments in order to get a feel for the judges, the court room, the tempo of questioning and the like.

After all that practice, it is now your oral argument date. What some practitioners forget is that each question from the court is an opportunity to persuade the court. Start off strong. Don't waste time reciting facts; immediately state what relief you are seeking and why you should win. It may be the only time you can present your argument without interruption. Answer the courts questions in a direct, professional and non-aggressive manner. Because you practiced extensively prior to the oral argument, you will be well-prepared to address the weaknesses in your argument, while using each opportunity to advance your argument. Do not assume that all questions are hostile; it may be a softball question intended to give you an opportunity to make your point. If you encounter a judge who appears to be taking you on an unrelated tangent, answer the question directly as best as you can and try to pivot back to your argument. If it is not directly on point, do not be afraid to say that you could look into it and submit supplemental briefing post-argument if the court would like. If one judge ties up your time with a series of off-point questions, ask the Justice Presiding for some additional time, noting you were stymied by the need to respond to Judge X's questions. Who knows, a sympathetic Justice Presiding might recognize you were unfairly held hostage and allow some limited time.

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