APPELLATE PRACTICE

Why and How To Moot Cases on Appeal

BY ERIC M. FRASER & HAYLEIGH S. CRAWFORD

Justice Scalia and Bryan Garner emphatically urged lawyers to conduct moot arguments: "No preparation for oral argument is as valuable as a moot court in which you're interrogated by lawyers as familiar with your case as the court is likely to be. Nothing, absolutely nothing, is so effective in bringing to your attention issues that have not occurred to you and in revealing the flaws in your responses to issues you have been aware of."[1]

Why is the practice so popular, and how can it be used effectively? This article explores why to hold moot arguments and explains how to conduct an effective one, from the perspective of both the arguing attorney and the other attorneys helping with the moot.

Why to Conduct a Moot Argument

Although "moot argument" essentially means a practice argument, it is much more than a dress rehearsal. For experienced and inexperienced lawyers alike, an effective moot helps to avoid being caught unprepared for a question at oral argument. A moot court will help to reveal weaknesses in the case. And it will help develop responses to those weaknesses and the particularly tough questions the judges might ask. It also helps practice the flow of an argument, the opening and closing points, major talking points, and the choreography of pivoting among questions, answers and argument.

For those with less oral argument experience, a moot also provides an opportunity to practice delivering argument and responding to questions, work out vocal tics, and get comfortable with the whole process. It's a safe place to practice and refine one's argument, both in substance and style.

How to Organize a Moot Argument

An effective moot requires more than just hopping into a conference room with the other lawyers on the case. To be most useful, you'll want to assemble the right team and make sure that everyone prepares.

Choosing the right panel

The first step in preparing an effective moot is assembling a good panel of mock judges. We typically have three lawyers in most moots, or at least five lawyers for arguments in front of larger panels of judges.

The best panels have a mix of lawyers who possess different perspectives, such as fresh eyes, deep or unique knowledge about the case or issues, or significant appellate experience.

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We always include at least one person **new to the case**. A person new to the case will be reading the briefs and reviewing the record cold, just like the appellate judges and clerks, thereby bringing a more realistic and unbiased perspective. Recycling the team that wrote the briefs risks creating an echo chamber with knowledge about the case beyond what the panel will have.

Consider also finding a **recent appellate law clerk**, who just spent a year working closely with a judge. A recent clerk will have fresh experience, knowing what goes into a bench memo and how the clerks and judges might view the case.

Other candidates are the **other lawyers who worked on the briefing**, particularly if one of them will also come to the real argument, **lawyers who recently argued** before a judge or judges on your panel, or **lawyers with particular expertise** on the issues.

For a less-experienced lawyer, **a seasoned appellate lawyer** who knows the ropes can offer tips on the courtroom, insights into the judges, and help refine the arguments. Most appellate lawyers also have experience running moot arguments and can help less-experienced lawyers get the most value out of the exercise.

In cases involving lengthy or complicated records, asking **trial counsel** to attend can be helpful because of their familiarity with the record and knowledge about ambiguities in the case. Trial counsel can sometimes provide helpful context about the current statute of the dispute, which may inform your strategy and framing at oral argument. In addition, the **client** (particularly in-house counsel) might want to come.

Circulating materials

After organizing your panel, the next step is to provide them with the key materials and instructions.

Circulate the key materials to the panel at least a week ahead of time. We circulate all appellate briefs and copies of the appendix or excerpts of record submitted to the appellate court. At a minimum, send the decision on review and other crucial record items. If the rest of the record is easily available electronically, we advise letting the panel members know how to access it (e.g., on the firm's network or via PACER link). We also send details about the argument: the argument date, the panel composition (if known), and who will argue on the other side.

When appropriate, consider sharing an overview of how you like to run your moots with the panel ahead of time. For inexperienced participants, we also explain our expectations for moot participants, such as whether to prepare a written list of questions.

Time and place

The best moot arguments simulate the courtroom experience as closely as possible. Find a large conference room with a lectern (or call in a favor if you have access to a mock courtroom).

There's a sweet spot for when to hold the moot. We aim to schedule the moot for when you will have at least 80 percent of your preparation done, but with enough time to adjust your arguments. Two or three business days before the argument works well. Any earlier and you risk not being prepared well enough to get the most value from the moot. Any later and you might not have enough time to adjust your approach before the real argument. We also try to hold the moot around the same time of day as the real argument. Most people operate differently at 9 a.m. than they do at 2 p.m., so we do morning moots for morning arguments and vice versa.

How to Prepare To Moot Someone

Mooting someone is a big responsibility. Quickly skimming the briefs and asking the obvious questions doesn't help much. Be realistic—if that's all you will have time for, it's better to decline the invitation.

Preparing well doesn't have to take much time, but it does require serious focused

thought. Read the briefs actively and skeptically. Every time you get confused, spot an ambiguity, or have a question, make a note in the margin (in hard copies or the PDFs). Our copies end up covered with highlighted passages, question marks, stars, notes and questions.

Different lawyers read the briefs differently. Some lawyers prefer to read the briefing straight through in chronological order. Others recommend taking them in reverse order—reply brief, answering brief, and then opening brief. Some analyze one issue at a time, by reading how the opening brief, answering brief, and reply brief handle one issue before moving on to the next.

No matter what approach you take, the goal is to identify the core dispute between the parties for each issue. In other words, after all the briefing is done, what do the parties really disagree about? What are they asking the court to resolve, and how will the court write its decision? For key disputes about facts or law, we check the record or pull up the case or statute while analyzing that issue.

As part of this process, write a list of questions. We typically end up with a dozen or more questions. It's a good idea to write down questions you had initially, even if you later resolve them yourself, because they can help identify ambiguities or weaknesses in the briefing that could come up at argument. Not all questions are created equal, of course. We recommend flagging he best and toughest questions to make sure they're addressed during the moot.

In many appeals, this doesn't take too much time. It might take an hour per brief, another hour for analyzing the key record items and cases, and half an hour for the list of questions. For a typical case, that's under five hours. You don't need to (and generally shouldn't) look at every record item or every case. For most run-of-the-mill appeals, we end up looking at fewer than five record items and fewer than five cases for the whole appeal. The key cases and documents tend to jump out.

How To Run the Moot Argument

Preferences for running moot arguments vary wildly. Here's one system that we find works well.

Treat it like the real thing at first. We begin the moot argument as if it were the actual argument. Everyone stays in character. The presenting attorney addresses the panelists as if they were judges. We even include the formalities, such as introducing the lawyers and clients, and reserving time for rebuttal. This helps to shake out mispronunciations and other issues.

Minimize mid-moot brainstorming. We think it's best not to brainstorm before or during the argument (no time-outs). There's plenty of time to brainstorm afterward. The person taking charge calls the panel to order and starts a stopwatch. After letting the presenting attorney speak a bit, the panelists jump in with questions.

Vary the questions. The point of the moot is to ask the meaty questions that cut to the heart of the argument and surface the weakest points of the case to help develop the best answers and the best strategy. But we think it's also wise to include questions about factual disputes, hypotheticals about the consequences of a decision, and ambiguities in the briefing. The best moots have a mix of tough questions and softballs. The moot should reflect the wide range of question types that different judges ask.

Drill down. If the lawyer stumbles, we advise asking a couple of follow-up questions. This isn't being cruel; it's giving the lawyer practice on how to gracefully deal with a tough situation at argument. Better to prac-

Checklists

Arrange moot panel (3-5 judges)

- ✓ Lawyer new to the case
- ✓ Recent appellate law clerk
- ✓ Experienced appellate lawyer
- ✓ Other lawyer with relevant experience
- ✓ Trial counsel
- ✓ In-house counsel

Schedule moot argument

- ✓ Circulate materials (briefing + record) to participants 1 week ahead
- ✓ Reserve a conference room with lectern, or mock courtroom if available
- ✓ Conduct moot argument about 2-3 days before real argument

Panelist preparation

- ✓ Read briefs
- ✓ Identify the parties' core dispute for each legal issue, plus any important fact disputes
- ✓ Write list of questions covering tough points, ambiguities, etc.

At the moot

- ✓ Assign someone to start moot and keep time
- ✓ Save brainstorming for afterwards; no time-outs
- ✓ Flag end of argument time
- ✓ Stop after about double the allotted argument time
- ✓ Take notes during argument
  - Good and bad answers
  - Proposed alternative answers or framing
  - Unaddressed or unclear points

Debriefing

- ✓ Provide feedback on opening and closing remarks
- ✓ Flag good answers and bad answers; workshop proposed alternatives
- ✓ Identify 2-3 must-make points
- ✓ Give the arguing lawyer list of questions and notes

tice how to recover now, in a safe space, rather than learning for the first time at the real argument. At some point, enough is enough; it shouldn't become torture. During the moot, participants can write notes about weaknesses, stumbles and advice for better answers.

Watch the clock. We don't let the "dress rehearsal" part linger on too long. For a 20-minute argument, we announce the 20-minute mark and cut things off after 40 minutes. Because the moot is artificial and designed for practice, asking more questions rather than strictly following the allotted time for argument can be helpful. But going too long has diminishing benefits.

Give feedback and brainstorm. When the time is up, it's time for feedback. Encouraging but honest feedback is best. The arguing lawyer should hear the good, the bad and the ugly. This involves discussing the most important points to convey during the argument, how to begin the argument, and how to close it. We try to identify distracting filler words. We talk about the good answers and what made them good. We brainstorm together on how to answer the toughest questions. We also want to discuss any important questions on anyone's list that didn't get asked. This feedback/brainstorming part of the moot frequently takes longer than the "dress rehearsal" part.

Hand over the documents. After the moot, we always have the panelists hand over their prepared list of questions and their notes from the moot. The comprehensive list of questions gives the lawyer one more tool for preparation. We always run through the lists of questions the night before the argument as last-minute practice.

Justifying the Cost of a Moot Argument

Moots are important. Even the most experienced Supreme Court advocates moot important arguments. For less-experienced lawyers, it provides valuable practice. For more seasoned lawyers, a moot can give valuable insights into the best ways to frame the case and address the central issues. It's the last chance to identify weaknesses in the case. It is well worth the money.

If costs are a concern, even a streamlined moot can help. Cutting the panel down to one or two lawyers, using junior lawyers with lower rates, or using the client's in-house lawyers can help minimize costs.

In our view, skipping a moot is penny-wise, pound-foolish. A moot argument is a drop in the bucket in the grand scheme of an appeal, but it provides tremendous value.

Conclusion

Practice makes perfect, and a well-run moot argument adds tremendous value. Taking the time to think carefully about organizing a moot, selecting the panel, preparing for the moot, and running the moot will likely pay dividends by leading to better advocacy at argument.

endnotes

1. Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 158 (2008).