



PREPARE A NEW LAWYER FOR ORAL ARGUMENT: THE SEVEN-MOOT SYSTEM

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It was a habeas appeal. My student and I had rehearsed the oral argument several times and I thought my student was prepared. Nevertheless, when a judge asked a difficult question, my student stood before the U.S. Court of Appeals panel with that “deer in the headlights” look. Then my student began repeating the theme of the argument as if it was a mantra, clinging to it like a life preserver.

In the past, my students represented Montana prisoners before the Montana Supreme Court’s Sentence Review Division, a panel of three judges that reviews legal sentences. The Sentence Review Division hears arguments that a sentence should, for equitable reasons, be changed. So we had much experience in appellate argument preparation. But it was not enough for more complicated federal cases.

When, for various reasons, we ended our sentence review program, we decided to participate in the Ninth Circuit’s pro bono program. Under this wonderful program, the Ninth Circuit identifies cases that would benefit from oral argument but whose parties lack counsel. If a law school takes a case, the court pays the travel costs for a student and supervising faculty and guarantees oral argument. In our habeas appeal, I thought we would be ready, but this was the second student to have a “deer in the headlights” moment. I was determined we would not repeat it.

My first call was to the University of Idaho College of Law’s esteemed professor Maureen Laffin, who directs a very successful appellate clinic. “Seven moots,” she said. That was four to five more

than I had been conducting. Her process, most of which I describe below, changed everything.

Over a decade, I tweaked the seven-moot system, adding something here, and taking away something there. This is what our oral argument preparation looked like when I retired 15 years later.

The First Moot

The first moot is not an argument rehearsal at all. It is a brainstorming session between the student and me. The student (who has written the appellate briefs under my supervision) and I talk about the likely oral argument issues. We always start first with the question, “Why did the panel order oral argument?” As a general rule, the courts of appeals hear oral argument in 20 percent to 30 percent of their cases.¹ Thus, in up to 80 percent of the cases, the three-judge panel considers oral argument to be unnecessary in large part because “the facts and legal arguments are adequately presented in the briefs and record.”² This means that at least one judge is looking for something from oral argument.

We prioritize the issues, but I point out that what we see as most important may not be what the judges see as most important. When we complete this session, my student begins the task of outlining the oral argument. (I use outline in both the figurative and literal sense, since some students work better with short narratives than with a hierarchical outline.)

The Second Moot

At the second moot, the student presents a rough version of the argument. It may simply be a discussion of the content or it may be a presentation of the first recitation of the argument. In this session, the student should stumble over the presentation, discov-

ering whether the order of the issues works, realizing if the order of ideas works, discovering that he or she is trying to do too much, or (hopefully not) discovering that he or she needs to re-read the briefs and the record.

The Third Moot

Like the first two, the third moot takes place in my office. Now the student presents a “soup-to-nuts” argument and does so two to three times. I do not ask questions during the first presentation. In the first presentation it is important that the student learn if he or she stumbles over word choice or awkward ideas. (This lesson may also have been learned in the second moot.) During the second and third presentations, I begin asking some of the questions that we expect the court to ask. I throw no curves here. The questions are straightforward but they interrupt the flow of the presentation.

My student now learns that the eloquent oral argument he or she rehearsed that morning before the mirror has gone out the window. Now I emphasize again and again, “You want questions. You love questions. Questions are your friends.” We talk about in-court etiquette and body language. We discuss other simple rules, such as do not take a pen to the podium and make sure your pockets are empty.

The student begins the physical lesson of how to access the record quickly during the argument. We use a lockable two-ring notebook. It contains the briefs, excerpts of record, and key sections of the transcript, some of which are tabbed. (Too many tabs make the notebook unmanageable.) The two-ring locking system prevents pages from falling out. It also allows you to pull down the upper corners to peek at a page.

The student learns at this moot that the rehearsed speech is still important. When the court goes silent, you pick up where you left off or move to the next topic. He or she begins to learn not to step on a judge’s question. The student quickly discovers a cardinal rule: Never tell the judge, “I am going to get to that.” (If I deem it necessary, I will respond with a raised voice, “I want to know it NOW!”) The student learns that it is unlikely that he or she will address more than two issues in the case.

I should point out that this is not an ambush. Before this rehearsal, we have talked about the importance of judges’ questions and how to receive them. We have discussed the fact that the student will not be able to address every issue. But the abstract idea is not the same as the concrete experience. Throughout the presentations we may stop and discuss how to answer or what significant thing the student did wrong. The final presentation should be uninterrupted but for questions.

The Fourth Moot

The fourth moot is the first dress rehearsal. We go to the moot court room for two to three repetitions. (If you lack a moot court room, ask the local court for the use of its courtroom.) The student now stands at a podium, wearing the clothes that he or she is likely to wear before the court. (This is the time to discover that your collar is too tight or that your favored blouse actually distracts you.) By now my student knows the record well. He or she knows the issues and how to address them. Now I ask the first of several unexpected questions. With respect to key facts, I ask, “Where is that in the record?” I give the appellee/respondent’s argument so my student has a foil for rebuttal. If I am doing my job, the student discovers that there is another level of excellence to reach. After this session, I typically need to sit down and debrief my student and offer reassurance.

The Fifth Moot

The fifth moot is before a panel of three mock judges. By now my student has prepared argument notes. This is a single sheet of paper with text in a large font or written with felt-tip pen. The first line is a reminder: “May it please the court, my name is _____ I represent _____.” The second line contains the first words of the argument written out word for word. This is typically a statement of the issues, a short “road map” of the argument, and the theme of the argument.

The second line is followed by a list of key words or key phrases. At a glance, these words or phrases trigger the sequence of thought for the argument. This prevents the new lawyer from trying to remember what he said in the most recent rehearsal, a reaction that is a chief cause of freezing up.

The final lines of the argument notes contain the last sentence or two of the argument, written out word for word. (“The affidavit of X, therefore shows that there was a significant issue of material fact.”) It always contains a statement of the relief sought. (“For these reasons we ask the court to...”) Without these final sentences, inexperienced appellate attorneys will reach the end of the argument and begin repeating themselves. The argument notes are inserted as the first page of the argument notebook.

The University of Montana’s Blewett School of Law has a wonderful stable of volunteers, former students and others, who give their time to the law school. As a result, at this stage I call on former Ninth Circuit clerks, experienced Ninth Circuit practitioners, and retired appellate judges to act as our panel. The panel of three also includes one or more of my colleagues. In other words, the panel’s level of expertise and knowledge is similar to that of the judges my student will meet. A panel of strangers is critical because I am too close to the case, and they can think of things that I have overlooked. The panel also raises the student’s stress level. We have one to two rehearsals with this panel, depending on their time and the student’s need.

In this moot, I again present the opposition’s argument. Now, however, the panel also asks questions of me, giving the student the opportunity to give more accurate answers to the judges’ questions. I always answer one question with, “I don’t know.” This demonstrates to my student that it is not a disaster to plead ignorance. It also gives my student the opportunity to answer the question when he or she takes the podium.

Now the clock becomes significant. My students learn that the 15 minutes allotted for argument passes quickly. They learn what to do when time runs out leaving no time for rebuttal. (“Your Honor, I see my time has expired, may I have two minutes for rebuttal?”) Nevertheless, my panels will nearly always do what the Court of Appeals does: “I see we have used your time. You may have a minute or two for rebuttal.”

The Sixth and Seventh Moots

The sixth moot takes place before a new panel of lawyers. This is the opportunity for the students to get past their stress and to correct the deficiencies and reinforce the successes of the previous argument. This is sometimes the last moot panel. In my experience, a seventh is only necessary if the student wants one more rehearsal or if the sixth moot went poorly.

At one sixth moot, my student had a “hot” panel. We were representing a San Quentin Prison inmate who won a trial against prison guard defendants who had denied him medical care. We were

defending the verdict. We were also presenting the argument in his cross-appeal contending that the district court had improperly granted summary judgment to other defendants. The moot court panel's questions came fast. She was answering them well. Then a panel member hit her with a question and she drew a blank (as we all do). She started to cry. We broke for a couple of minutes, she composed herself, returned, and knocked the question out of the park. All four of us reassured her that the blank moment happens. Although she was ready to face the Court of Appeals, I held a seventh moot in order to restore her confidence.

The last moot is held no later than a few days before the oral argument. This offers time for the student to reflect, to revise notes, and to review that portion of the record that offered difficulty. We have learned that, after six to seven moots, my students will have heard 95 percent of the questions that will be asked by the panel.

I never conducted an eighth moot for my students. It would have been unnecessary and the students would have lost some of the spontaneity that electrifies oral argument. Although we arrive at the location of the court the day before oral argument is to take place, I do not conduct a rehearsal then because rest is more necessary than repetition. I do, however, ensure that we visit the courtroom where the argument will take place to play with the podium, to move the chairs back and forth, and to generally get a feel for the venue. (I confess that on one or two occasions, my students sat in the judges' chairs.) If possible, we sit in on arguments the day before. (This is

less important now that courts of appeals make recordings of oral argument available online.)

In our San Quentin case, because we were cross-appellants, my student presented the second argument and the fourth (and final). Going second, she had the difficult job of responding to the prison's appeal and presenting our affirmative arguments in the cross-appeal. As with the moot court arguments, the panel's questions came fast and went to the difficult parts of our case. She answered them all well. As she sat down, I leaned over and asked, "How are you doing?" She answered, "I can't wait to get back up there." She won the case. She now practices law in a Montana town of 8,400. ☺



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Endnotes

¹Jason Steed, *Your Chances on Appeal—And How to Improve Them*, FED. LAW. 4 (Jan./Feb. 2016).

²Rule 34(a)(2), Fed. R. App. P. (2019).

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INTERNATIONAL CRIMINAL COURT 3-8 (2011), https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

¹¹See Human Rights Council, *supra* note 8.

¹²The Commission of Inquiry was established on Aug. 22, 2011, by the Human Rights Council through Resolution S-17/1 adopted at its 17th special session with a mandate to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic.

¹³HUMAN RIGHTS COUNCIL, "I LOST MY DIGNITY": SEXUAL AND GENDER-BASED VIOLENCE IN THE SYRIAN ARAB REPUBLIC (Mar. 8, 2018), A/HRC/37/CRP.3, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A-HRC-37-CRP-3.pdf>.

¹⁴It was approved and proposed for signature and ratification or accession by General Assembly resolution 260 A(III) of Dec. 9, 1948. Entry into force: Jan. 12, 1951, in accordance with article XIII.

¹⁵FIDH/KINYAT, IRAQ—SEXUAL AND GENDER-BASED CRIMES AGAINST THE YAZIDI COMMUNITY: THE ROLE OF ISIL FOREIGN FIGHTERS 5 (Oct. 2018).

¹⁶*Id.*

¹⁷See Human Rights Council, *supra* note 8, at ¶ 174.

¹⁸Cathy Otten, *Slaves of ISIS: The Long Walk of the Yazidi Women*, GUARDIAN (July 25, 2017, 1:00 AM), <https://www.theguardian.com/world/2017/jul/25/slaves-of-isis-the-long-walk-of-the-yazidi-women>; see also Annie Hylton, *Study: 85 Percent of Yazidi Women Interviewed Describe Unethical Journalism Practices*, WOMEN'S MEDIA CTR. (Feb. 26, 2018), <https://www.womensmediacenter.com/women-under-siege/study-85-percent-of-yazidi-women-interviewed-describe-unethical-journalism-practices>.

¹⁹See Human Rights Council, *supra* note 8, at ¶¶ 2, 64.

²⁰*Id.*

²¹*Id.* at ¶ 205.

²²See FIDH/KINYAT, *supra* note 15, at 40.

²³Lin Taylor, *Nearly 10,000 Yazidis Killed, Kidnapped by Islamic State in 2014, Study Finds*, REUTERS (May 9, 2017, 1:04 PM), <https://www.reuters.com/article/us-mideast-crisis-iraq-yazidis/nearly-10000-yazidis-killed-kidnapped-by-islamic-state-in-2014-study-finds-idUSKBN18527I>.

²⁴Katy Fallon, *After Condemning the Yazidi Genocide, How Can the Government Then Deny Its Victims Asylum?*, INDEPENDENT (July 30, 2018, 3:45 PM), <https://www.independent.co.uk/voices/yazidis-isis-asylum-home-office-amal-clooney-a8470071.html>.

²⁵Niamh Hayes, *Gender Crimes in International Criminal Law*, Training Session Presented by the Association of Defence Counsel (Sept. 1, 2018) (on file with author).

²⁶*Id.*

²⁷*Id.*

²⁸Article 1 of the Rome Statute. *Supra* note 12, at 2.

²⁹*Justice Now: Ending Impunity for Sexual and Gender-Based Violence as International Crimes*, U.N. WOMEN & JUST. RAPID RESPONSE, <http://interactive.unwomen.org/multimedia/infostory/justicenow/en/index.html> (last visited Aug. 7, 2019).

³⁰Kiran Nazish, *Nobel Laureate Nadia Murad Taught Me to the True Meaning of Courage*, TIME (Oct. 5, 2018), <http://time.com/5417220/nadia-murad-nobel-prize-courage>.