



CENTER FOR
ANIMAL LAW
STUDIES

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ANIMAL LEGAL DEFENSE FUND

NATIONAL ANIMAL LAW COMPETITIONS: APPELLATE MOOT COURT GUIDE

Thank you for participating in the 2009 National Animal Law Competitions. This event will benefit all law students, regardless of whether you someday practice law in a court room. The Appellate Moot Court Competition will help you develop your legal writing and oral advocacy skills.

Moot court involves the presentation of arguments to a panel of judges comprising of attorneys, professors and judges. Appellate advocacy mandates the use of different techniques of persuasion than one would employ arguing to a jury. While a jury may be persuaded by passion and may ignore the law altogether, an appellate tribunal is primarily motivated by different factors such as strong legal precedent and policy considerations.

In order to be successful, you must have a thorough understanding of the law and the ability to articulate the long-term ramifications of applying a particular ruling. Not every individual has the natural ability to speak eloquently in public, but hard work and thorough preparation overcome such shortcomings. The purpose of this guide is to help walk you through the steps of effective competition practices and provide tips to help you prepare for the February event.

We hope you will find the Appellate Moot Court Competition to be both educational and inspiring.

*This guide was inspired by and includes reproduced sections of the
"The Moot Court Attorney's Guide" by Sarah A. Schmidt (1991).*

THE RECORD ON APPEAL

Your record on appeal is made up of an “order” and a “briefing order.” These are your only sources of factual information. In order to effectively research your case and draft your arguments, it is crucial that you acquire a clear and thorough understanding of the record.

You should read the problem...over and over again. Read it before and during your research, as well as while you draft your brief. By the time you deliver your oral argument, you should be so familiar with the record on appeal that you will be able to tell the court on what page particular facts are presented. After you have read through the record several times, it is helpful to prepare a chronology of events, outlining both the factual and procedural order of your case.

Familiarize yourself with the statutes and cases noted in the record.

Examine the lower court’s reasoning and critically analyze their ruling. Look for errors in the court’s argument.

Understand the grounds for appeal and understand the arguments that were raised in the court below.

Remember that nothing will destroy your credibility more than a lack of knowledge of the facts or the use of incorrect facts.

RESEARCHING THE CASE

Although you will only brief one side of the case, the most effective strategy is to research both sides. Not only do you need to be prepared to argue both sides during the competition, the additional research will help you write a more thorough brief.

The following steps will help you effectively research the problem:

1. Read the law referred to in the Order. Familiarize yourself with the cases and statutes cited in the record. Also familiarize yourself with the cases and statutes that form the basis of the law cited.
2. Shepardize the cases.
3. Gain a general understanding of the subject matter involved. You may use secondary sources such as ALR (American Law Reports) or law review articles to gain stronger foundation in the various areas of law. You may also examine websites or read articles that help you better understand the subject matter of the case.

Tips. Formulate a research plan. Make lists of sources read, make copies. Highlight relevant cases and statutes, and mark why they are important. You may want to use different colored highlighters for different issues or different positions.

Do not shortcut your research. It is better to skim the entire text for relevant information rather than just reading headnotes or summaries.

Stay focused. Try not to go onto the next step of your research plan before accomplishing the prior step.

Never cite a case in your brief unless you have read it in its entirety and understand it thoroughly.

Keep the weight of authorities in mind. Some authorities will be more persuasive than others. Cases and statutes are more persuasive than secondary sources; a holding of a case will carry more authority than dictum; binding authority will be more persuasive than that of outside jurisdictions.

DRAFTING YOUR ARGUMENT

After developing a broad, thorough understanding of the law and the facts, begin a draft outline of your arguments. This is an essential step in achieving organization and avoiding a rambling presentation.

In general, headings should correspond to the issues presented.

When writing your argument, aim for succinctness and clarity. Make sure, however, to use formal language. Avoid colloquialisms and abbreviations. When drafting the argument, allow your creativity to make your brief interesting. Try to make your brief memorable, easy to understand and enjoyable to read.

You have probably heard the saying: *When the law is against you, argue the facts; when the facts are against you, argue the law.* The best briefs will argue both the facts and the law, as well as policy. Do not ignore what is against you. Confront it, refute it, and turn it into an asset for your case.

Use quotations with restraint. Incorporate only the most persuasive and clearly applicable quotes. Never use extremely long excerpts.

For greater impact, keep statements in the affirmative. For example, "He testified falsely," rather than, "He did not testify truthfully." Also, avoid being equivocal. Instead of saying,

“It seems that no blood alcohol test was taken here,” say, “No blood alcohol test was taken here.”

Proofread. Then, proofread again.

THE BRIEF IN FINAL FORM

Moot court competitions follow the format required for briefs presented to the United States Supreme Court. This includes citation form pursuant to the Harvard Blue Book or ALWD Citation Manual.

The text of the brief must be black print on white 8.5” x 11” paper and must be in 12-point Times New Roman font, double-spaced, with 1-inch margins. Citations should be within the body of the document, not as footnotes. Footnotes for explanatory information should be single-spaced with 10-point font. You may use number-lined or blank paper. All briefs must be bound along the left side.

The order of your brief should be:

1. Cover: The cover is the court’s first impression of your brief. **Use the proper color of stock paper: light blue for appellant, red for respondent.** The cover must have the following information:

1. Name of the court and case number;
2. Title of the case;
3. Nature of the proceeding in this court;
4. Title of the document;
5. Counsel’s name must only appear on the measuring brief;
Team numbers must appear on all briefs.

2. Table of Contents: The Table of Contents should list each element of the brief (with the exclusion of the title page and the table of contents) as well as the page on which each element begins. The Argument is the most complex part of the brief. Therefore, the headings and subheadings used within the Argument section should also be listed in the Table of Contents with the corresponding page number. Usually this is done in outline form.

3. Table of Authorities: The Table of Authorities lists all materials used to support the Argument. It includes every page in the brief where the particular excerpt is found. The authorities should be grouped by statutes, case law, Constitutional provisions, and other materials.

This list not only verifies the sources used by the attorney, but is useful for the court and for other attorneys to quickly determine what cases, statutes or other materials are being

cited, and to easily locate these references in the original research materials used in preparing the case. Again, correct citation format must be used (either Harvard Bluebook or ALWD format).

4. Statement of the Issues: This is a very short introductory statement of the legal issues or points of law involved in the case. It tells the judges precisely what legal issues the attorney team wants the court to decide. These statements should be phrased to help one argue for a particular conclusion rather than simply against the other side.

These issues are stated in question form and should be phrased in such a way that a "yes" answer will support one's position. These statements are very short, generally no more than one sentence per issue.

5. Statement of the Facts: This section is a retelling of the facts from the client's point of view. The facts, however, provided in the problem are not to be added to or disputed. This section should be about one page long, and not more than two pages.

Attorneys explain the situation in a way that helps their client. This is a very important part of the brief that sets the stage for the argument, and should be presented both to help the court understand the case and show the client in the best possible light. Remember not to assume facts not given, and do not distort, change, or add to the facts.

6. Argument: This is the core of the brief. Every part of the argument must be supported by legal authority. Arguments should be well-organized and convincing. Each point the team wants the court to consider in deciding the case must be described, the reasons explained with appropriate references to research materials used, and text citations should be inserted as frequently as needed. Arguments should address legal precedent and policy issues.

Structurally, each part of the argument should first address the issues supporting one's own case. Then, address contentions anticipated to be brought up by the opposing party. Stylistically, the argument should be written in forceful, active, positive language. It is best to avoid the passive tense.

Headings and subheadings are used to help clearly organize the argument. The same structure of headings and subheadings should be summarized in the Table of Contents. The idea is to do everything in terms of both form and substance to help the court understand the reasonableness and logic of the argument, and thus decide in one's favor.

The following outline style is commonly used when writing arguments:

I. ISSUE (bold and all caps)

A. Main Point (Bold, Underlined, First Letter Caps)

1. Supporting Points (Bold, First Letter Caps)

7. Conclusion: This is where the team summarizes their argument and specifically states the desired result. The conclusion can be as short as one sentence and should not exceed a single short paragraph. The signatures of the Attorney team follow the conclusion.

DEVELOPING ORAL ADVOCACY SKILLS

Some people have a great deal of natural ability when it comes to public speaking. Even if you do not, you can maximize your effectiveness in oral argument by developing your skills in four critical areas:

Attitude
Delivery
Extemporaneous Ability (thinking on your feet)
Appearance

All of these areas are important to the impression you will make on the court. They are also factors that contribute to a speaker's credibility.

Attitude

Above all, your attitude must exude respect for the court. The appellate argument is no place for rude or over-aggressive behavior.

If you are normally very respectful and on the borderline of not being aggressive enough (to the point of being too easily manipulated by questioning), you may need to bolster your confidence level.

Confidence comes from preparation. The better prepared you are, the more sure you will be confident of your position. Do not be a "pushover." If a judge says something that is incorrect, it is your role to respectfully bring this to his or her attention. You also need to remember that if you perceive that something has gone drastically wrong with your presentation (i.e., you do not know the facts or you have been "led down the primrose path" by a judge), put it behind you and move on. Do not let such incidents shake you up and affect the rest of your performance. Remember two things:

1. It is not over until it is over; and
2. These things probably feel a lot worse to you than they actually look to your audience.

Remember that in most cases, if you have done your job, you will know the facts and finer points of the law better than your judges, who have probably only reviewed a bench brief before hearing your argument.

Also, you must convince yourself that no matter what question is asked, you will be able to handle it. You have studied hard and you have the intelligence and analytical abilities to assist the court with an answer. If you honestly have no idea how to answer a question, it is appropriate to say that you do not know. The judges will appreciate this candor far more than an attempt to talk around a direct question.

The moot court attorney who borders on being meek needs to learn to relax. Relaxation allows you to be animated, forceful and responsive. Rigidity impairs your ability to think on your feet and makes your performance far less persuasive. If you are naturally aggressive, you may wish to “tone down” your style. For instance, one should never interrupt a judge but always allow a judge to interrupt. Also, be aware of your facial expressions and avoid showing irritation. The over-aggressive advocate tends to show dissatisfaction with judges’ questioning through facial expressions, and this can be fatal. Treat the court with the respect it is entitled. Avoid disrespectful comments.

Properly view your role as an oral advocate. You have a dual purpose: as an officer of the court, your duty is to assist the court in understanding the case and law; as an advocate for your client, you must seek what is best for them.

You should strive to identify with your client. Further, just as an actor must “get into character” before a performance, so must you put yourself in the proper frame of mind before oral argument. Make yourself feel the emotional interest that your client has in the case and use that emotion to add power to your argument. At the same time, being over-emotional will not win a case.

Delivery

Your delivery skills can be maximized by rehearsal and self-criticism. Be aware that the following are important concerns:

Diction, Enunciation, and Pronunciation
Pace
Time, Inflection, and Volume

Diction refers to a speaker’s choice of words and the arrangement of them as well as the force, accuracy and distinction with which they are used. Good diction is not something one is necessarily born with. It is a skill that should be developed. Diction does not necessarily mean using baroque language. It means using powerful language - words and sentences that are clear, easily understood and memorable.

“Enunciation” means that each sound of a particular word is carefully spoken. Be careful are not to employ lazy speech, which has the effect of slurred speech.

The pace of your delivery is very important. Your delivery should not be the same throughout your presentation. It should vary according to what you are saying. The pace at which you deliver your argument should be suggestive of comprehension. When you are discussing an elementary point/issue, you may speak more rapidly. When explaining a complex analysis, however, you will want to speak slowly to make sure the court grasps what you are saying. Your rate of speech is a useful tool to enhance persuasiveness. At critical points in your presentation, speak more slowly. You may even want to pause at points (during which time you make eye contact with each judge) to emphasize what you are saying.

A rapid pace throughout a presentation can also be a sign of nervousness or anxiety. The nervous advocate may feel that a one-second pause lasts for a minute. Self evaluation will help you to see that moments of silence are not as long as they seem, and in fact, that their planned use can be quite effective. Tape recording your practice deliveries will dramatically help.

Extemporaneous Ability

Developing the ability to “think on your feet” is critical to success in appellate advocacy.

One exercise that is helpful to prepare for moot court is impromptu speaking. In forensic tournaments, the impromptu participant is given seven minutes and three topics. Speakers ideally use two minutes or less to prepare a speech and the remaining time is used for delivery. This kind of exercise trains a speaker to quickly organize ideas and additionally builds confidence.

How to do an impromptu speech:

1. Read through your topics quickly;
2. If one “grabs” you, focus immediately on it. If nothing stands out, select the one you feel most comfortable with. Spend 10-15 seconds getting to this point;
3. Do some quick brainstorming and develop a mental outline. Do not panic. Do not think about time but work quickly;
4. Take a mental picture of your outline. Imprint that outline in your mind so that you can move from one step in your speech to the next;
5. Try to think of a good introduction and maybe a good closing thought;
6. Deliver your speech.

When delivering your oral argument in moot court, you should have this same type of framework or outline of your argument in your mind. This will allow you to draw from your prepared argument to answer the judges’ questions.

Of course, developing skill in extemporaneous ability means practicing. This is why the moot court situation is ideal—students can drill by asking questions over and over again so that when they get to the competition, they will have built up a memory bank of responses.

One important thing to keep in mind is that you are not necessarily going to be trying to memorize answers to questions. Rather, you are memorizing a philosophy and your responses should always tie back to that philosophy.

Appearance

Your appearance is an important part of the impression that you create as an advocate. It can add to or detract from your credibility.

Blue, grey, or black suits are always appropriate. Aim for a clean and neat appearance. Use high contrast in color choice and keep clothing simple. It is good to avoid wearing anything that will detract from your face.

Look your best. It is best to dress conservatively so that the judges' attention will be focused on your performance rather than your clothes.

PREPARING FOR AND DELIVERING AN ORAL ARGUMENT

The Role of the Oral Advocate

The purpose of the written appellate brief is to give the court a meticulous exposition of your case, thoroughly addressing important aspects of different authorities and drawing them all together to support the steps of your analysis. The brief is the place where pages of authorities are referenced, full citations are given, and intricate points are covered. The brief is, in itself, a complete package with which the court should be able to decide the case.

If you approach oral argument with the same aims, your presentation will be ineffective. Oral argument plays a different role in the appellate process. Stated simply, you have two missions in oral argument:

1. To persuasively and memorably articulate your strongest arguments; and
2. To address the particular areas of the court's concern.

You obviously cannot be successful in oral argument unless you have a strong foundational knowledge and understanding of the facts and law of your case.

Persuasively and Memorably Articulating Your Strongest Arguments

As if figuring out how to “persuasively and memorably” articulate your arguments is not difficult enough, the moot court attorney is also challenged by the format of oral argument. In 15 minutes, the moot court attorney may undergo constant questioning from the bench. Sometimes he or she is barely able to state the reason for his or her appearance before questioning begins. On the contrary, no questions may come from the bench. How does one prepare for oral argument when they do not know if they will essentially be giving a 15-minute speech or simply answering questions? The solution, of course, is to be fully prepared either scenario.

It is a best to have a 10-12 minute speech prepared. This means that you have thought through your strongest points, caged them in memorable language and memorized the speech, complete with variations in pace, inflection and tone. This way, if you are faced with a “dead bench,” you will have the opportunity to use your best public speaking efforts to create a strong impression of your case. Although dreaded by most moot court attorneys, the “dead bench” provides the easiest opportunity to persuasively articulate your case.

The other extreme is the panel of judges that does not let the moot court attorney say more than a few words without interjecting another question. The most important thing in this setting is to be able to answer questions directly and succinctly. Also, you can, with practice, mold the court’s questions into your argument. In addition to having a prepared speech, as discussed above, you should also know the ten or so “critical areas” of your case.

When you learn your case well, you will see that there are obvious areas that will prompt questions. Perhaps the analysis in these areas is simply not as strong as one would like, or compelling policy arguments exist to the contrary. The moot court attorney should carefully identify these critical areas and determine what their position is in response. This is something that needs to be worked through with co-counsel, to avoid contradicting one another in oral argument. By questioning one another, moot court attorneys can develop succinct, persuasive responses to questions in these “critical areas” and, once the court’s specific questions have been answered, they can elaborate on particular “critical areas.”

Obviously, this involves a tremendous amount of flexibility. If you look back to the impromptu speaking exercise, this is akin to having a memorized outline of your presentation and drawing from the topics in the outline out of order and on a moment’s notice. Although this may sound difficult, it certainly can be done and with great success.

As an example of how this flexible outline works, consider the following. Suppose you are dealing with a right to die question. Suppose you are arguing for the petitioner in a case where the lower court has held that a comatose patient in a persistent vegetative state can have a feeding tube removed, allowing the patient to die. You are the guardian ad litem and you want to keep that patient alive. The biggest obstacle you face is that the lower

court has relied on the case of *Quinlan* and its progeny, which establish a clear right to die. The case law, in general, is certainly against you. You distinguish *Quinlan* because it dealt with a respirator, not a feeding tube. Your outline of arguments to cover in oral arguments is as follows:

1. The balance at issue is the right of privacy of the patient versus the state of interest in preserving human life;
2. The United States Supreme Court has articulated that “viable life” must be protected over the individual rights of privacy;
3. In allowing the right to die over the right of privacy in *Quinlan*, the New Jersey court was faced with the removal of a respirator only, not with a feeding tube;
4. Removal of a feeding tube, causing the patient to starve to death, shocks the conscience per the *Rochin* case and is unacceptable.

Assume that the court begins questioning by saying, “Counsel, what you are doing here is trying to prolong life. Doctors have indicated that this patient is in a persistent vegetative state and that even if the patient did recover, the patient would have nothing less than grossly severe brain damage. What interest does the state have in preserving this misery?”

The speaker is given a perfect opportunity to flow into No. 2 in his or her outline above. The attorney should first provide a direct and succinct answer such as, “Respectfully, your honor, the state has never held that a severely retarded life is any less worthy of preserving than what we may call a ‘normal’ life.” He or she should then elaborate, “As the United States Supreme Court has recently articulated that all viable life must be protected and any life that is viable must be allowed to continue even in contravention of the right to privacy.” The attorney would then discuss various recent cases on point.

Suppose during that discussion the court interjects another question, “Isn’t it really humane though in these circumstances to merely let this patient die? The entire country was in support of the *Quinlan* family when they sought court approval for the right to die. The response calls on the advocate to move to Numbers 3 and 4 the above outline and respond, “But, your honor, the facts of the instant case are critically distinct from the *Quinlan* case. We are dealing with the removal of a feeding tube. The validity of death by starvation was never addressed by the *Quinlan* Court and in fact it was specifically recognized that the patient’s feeding tube would remain intact indefinitely.” The attorney would then move on to the *Rochin* discussion to illustrate how starving to death cannot be allowed as an acceptable end because it is offensive to human dignity.

The outline given above can be developed by working with co-counsel, discussing the case in depth and testing it through questioning. To effectively use this “flexible outline” strategy during questioning, you must be flexible, able to understand the areas of the court’s concern and responsive to those concerns. For instance, in the above, although Number 1 in the attorney’s outline is that the state has an interest in preserving life, the

court seemed to recognize this in its first question and so, an elaborate discussion on the state's interest would be out of place in this round.

For completion, the attorney may want to reiterate that the court has correctly implied that the state has a strong interest in preserving life. If any of the members of the bench disagree with this statement or would like support for the contention, they are compelled to ask the attorney at this point. To go on and argue the background of the state interest and its development in the law would be detrimental in the above scenario.

Use of a Core Theory

One of the most important and often ineffectively used tools in oral argument is the use of a core theory. The outline in our example above alludes to a good core theory. Remember that your job is to persuasively and memorably articulate your strongest arguments. You do this through use of a core theory and development and repetition of "buzz words."

The example outline of arguments given above illustrates use of a core theory. The phrase "death by starvation" is a good example of a memorable group of "buzz words" that should be emphasized by delivery and repetition. Reiteration is important.

Effectively Answering Questions

Answering questions effectively is perhaps the most critical part of oral argument. It is an area of performance that can cause the loss of a round just as easily as it can cause a win.

Answering questions directly and succinctly is critical to credibility and effectiveness. Although it can be one of the most stressful areas of the oral argument experience, by practice and developing an understanding of the questioning procedure, it can be handled optimally.

Understand that there are different types of questions a judge may ask:

1. **Fact Questions.** Examples: "Counsel, did the defendant in this case have a pretrial conference?" or, "How many experts testified here?"

WHAT THE JUDGE IS ASKING FOR: The judge is asking for a specific fact or group of facts in your record. The judge also wants to know where in the record that fact or group of facts is referenced.

WHY THE JUDGE IS ASKING: Two general reasons: either he or she is unclear on a particular fact deemed relevant to the discussion at hand, or the judge is setting you up to make an argumentative point. For instance, after replying, "There were four experts here," the court may ask something like, "Well, doesn't the X case say that only one is necessary?"

HOW TO HANDLE IT: Give the judge what he or she is looking for, ideally include a specific reference in the record. For instance, “The record at page four indicates that there were four experts at the trial court level.” Do not elaborate on the fact unless:

1. The judge impliedly is asking for more information than simply how many experts there were; or
2. Providing more information into your argument.

For instance, “There were four experts at the trial court level and not one of them found that the plaintiff in this case had any neurological deficit of any kind.” Assuming you were talking about the significance of the fact that there was no evidence of a neurological deficit when you were interrupted with the question, this is a good route back to your argument.

If the judge is only asking you a fact question because he is trying to set up an argumentative point, an overly-expansive response that does not provide useful information to the court would be wasteful and may irritate the judges. Do not let your thorough knowledge interfere with your effectiveness. Providing extra information can hurt you if it is not done at an appropriate time.

2. **Authority Questions.** Examples: “Is there any authority for that position?” or “Have any courts ever adopted that language?”

WHAT THE COURT IS ASKING FOR: Case law or other authority that supports the point you are making.

WHY THE JUDGE IS ASKING: Even if a judge has not read the bench brief before the round, it is simple to ask this type of question. This is the type of question that is asked to test the moot court attorney’s knowledge of the applicable law.

HOW TO RESPOND: Never preface this answer with a commentary. Give the court the authority. A good response would be, “Yes, Your Honor. The First Circuit adopted this view in *Patterson* in 1988 and similar precedents exist in the Second and Sixth Circuits.”

3. **Questions asking you to distinguish authority.** Examples: “How does this case differ from the facts of *People v. Polk*?” or “Isn’t *Martin v. Martin* controlling here?”

WHAT THE JUDGE IS ASKING FOR: The court is asking you to overcome some other authority and is really looking for an ability to do a good analysis in distinguishing cases.

WHY THE JUDGE IS ASKING: The judge may be asking you to refute an authority relied on by opposing counsel or an entirely new authority he or she brings into the argument. Some judges ask these questions because they want to test the moot court

attorney's ability to analyze and distinguish cases. Occasionally, a judge may ask about a case that he or she is particularly familiar with. Careful analysis is important in those instances.

HOW TO RESPOND: If you have never heard of the case before or if the facts have slipped your mind and you are unable to effectively answer the question without further information, simply respond, "Your Honor, regrettably, I am not familiar with the facts of that case." It is best not to bluff your way through if you are unfamiliar with an authority. If you do know the case, try to distinguish it quickly and not waste too much time. After answering, get back on track to your own core theory.

4. Policy Questions. Examples: "What about future patients in a persistent vegetative state who would want to be kept alive and not want to die?," "Isn't that an unreasonable burden to put on the court system?" or "How is law enforcement supposed to operate effectively and still meet these constitutional requirements you are espousing?"

WHAT THE JUDGE IS ASKING FOR: The policy question is an important and yet often mishandled question. Many moot court attorneys are afraid of the policy question and therefore do not provide an adequate or meaningful answer. The reality of our legal system is that case law is molded with great consideration of policy. The court wants to know the ramifications of your paradigm. Therefore, be sure to prepare yourself to answer these questions in a manner favorable to your client.

WHY THE JUDGE IS ASKING: It is one thing to master legal analysis and to be able to discuss legal precedent. These things can be learned by reading cases and treatises. To discuss ramifications of an argument, however, takes some creativity and some deep thinking.

HOW TO RESPOND: There are always two levels which should be addressed. In discussing ramifications of an argument, you must consider its impact on: a) the whole world; and b) your client.

5. Hypothetical Questions. Examples: "What would happen if the police in this case had not advised the Defendant of his *Miranda* rights?" or "What if the patient in this case had once written a letter to her sister indicating that she would want 'the plug pulled' if she were ever in a persistent vegetative state?"

WHAT THE JUDGE IS ASKING FOR: An example of your ability to quickly analyze a different set of facts and get back on track with your own argument.

WHY THE JUDGE IS ASKING: Typically, it is either because the judge has a particular interest in the hypothetical which is not necessarily germane to the decision of the case

before it; the court feels that perhaps the hypothetical encompasses a situation the court is obliged to address; or the judge is trying to throw the speaker off track or “trap” him or her.

HOW TO RESPOND: The most important thing to keep in mind when responding to a hypothetical question is that the answer to the question is not going to be part of the holding of the decision. Do not, however give these questions short shrift on this basis alone.

Consider the right to die question above where an attorney is asked, “What if a patient had once written a letter to his or her sister indicating that he or she would want ‘the plug pulled’ if he or she were ever in a persistent vegetative state?” This is a hypothetical question in the case where you have no evidence of the patient’s desires.

In the right to die cases, the law is much different where there is evidence of the patient’s wishes. Accordingly, you would respond, “The law is much different when there is evidence of a patient’s wishes. Unfortunately, we do not have that kind of helpful evidence here and we are left with the analysis I have just discussed.”

Assuming there is no distinction in the case law in right to die cases where there is or is not evidence of the patient’s desire, and the court is merely interjecting a new fact, the best response when the judge asks if this new fact “would change your answer” is to respond, “Perhaps, but that fact does not exist in the case before the court.” Then get back on track to your core theory.

6. Overly Broad Questions. Example: In a case where you have spent 50 pages in your brief addressing why the case of *Frye v. United States* should not apply, the court asks, “Why is *Frye* not applicable?”

WHAT THE COURT IS LOOKING FOR: A short answer.

WHY THE COURT IS ASKING: If the court asks early in your presentation, he or she likely wants an overview of your strongest point. If the question comes later in your argument, this may be a sign that you are rambling too much and not getting your key points across. The judge, in this case, is asking for some clarification, and may be trying to signal you to make your points more clearly.

HOW TO RESPOND: The first time a moot court attorney hears an over-broad question, he or she probably thinks, “If they let me continue, I would get to it.” A terrible response is, “I will be addressing that later on.” An even worse response is, “My co-counsel will address that.” If you have done in-depth analysis, you should be able to summarize in a sentence or two, using your core theory and the appropriate buzz words.

7. Unanswerable Questions. Example: when the judge asks a fact question that simply cannot be answered in the breadth of the record;

for instance, “Why didn’t the district attorney offer to settle this case?”

WHAT THE JUDGE IS LOOKING FOR: How the speaker handles stress.

WHY THE JUDGE IS ASKING: Either the judge does not have a thorough knowledge of the record and speculates this information may be contained therein or the judge is simply testing the speaker’s ability to handle this difficult situation.

HOW TO RESPOND: The best response will be, “The reason is not set forth in the record...”, or “The record does not indicate...” Never make up facts or far reaching inferences.

8. Argumentative Questions. Example: “Child molestation is a very serious crime, isn’t it counsel? We are dealing here with a young victim of incest whose life is permanently destroyed and who, miraculously was able to recount the explicit details of the lewd attack. It seems to me, counsel, that your client is trying to escape liability by finding some questionable expert. How do you justify this attempt to escape liability on a technicality?”

WHAT THE JUDGE IS LOOKING FOR: A compelling argument to the contrary.

WHY THE JUDGE IS ASKING: Either this is an important personal viewpoint of the judge or the judge is confronting you with a compelling argument of the opposition.

HOW TO RESPOND: Be concise and make a hard, strong, compelling point. Often judges hold strong to these argumentative questions and will come back with an equally argumentative follow-up question. The best way to handle this is to have a strong response tying back to your core theory Then, move quickly back to your argument.

9. Proponent Questions. Examples: You are arguing that your client should be granted a new criminal trial. Your primary argument is that juror misconduct existed. The judge asks, “Doesn’t X [a case you have not yet addressed] tell us we must remand for a new trial?” Or, “Isn’t that reversible error?”

WHAT THE JUDGE IS LOOKING FOR: A demonstration of your ability to “shift gears” from an opponent to proponent type question.

WHY THE JUDGE IS ASKING: In appellate practice, judges sometimes ask questions because they are already convinced of the validity of your argument and they want a fellow judge to hear the answer to the question as an attempt to persuade that judge.

HOW TO RESPOND: Agree with the justice, elaborate a bit, integrating the point into your argument, and move on. The skilled advocate will even refer back to the court's proponent question later on by saying, "As Justice Black pointed out earlier, the X case mandates that this case be remanded."

Good luck and have fun!