

Washington University Journal of Law & Policy

Volume 53 *WashULaw's 150th Anniversary*

2017

Wherefore Moot Court?

Richard E. Finneran

Follow this and additional works at: http://openscholarship.wustl.edu/law_journal_law_policy



Part of the [Judges Commons](#), [Legal Education Commons](#), [Legal Profession Commons](#), and the [Litigation Commons](#)

Recommended Citation

Richard E. Finneran, *Wherefore Moot Court?*, 53 WASH. U. J. L. & POL'Y 121 (2017), http://openscholarship.wustl.edu/law_journal_law_policy/vol53/iss1/15

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Wherefore Moot Court?

Richard E. Finneran^{*}

Moot court competitions are considered by some law students, and perhaps some law professors, mainly as a “résumé booster.” But as this Essay argues, legal employers are right to emphasize such qualifications in their hiring decisions, because moot court is among the most valuable experiences that a law student can have in terms of her professional development. The process of arguing, and preparing to argue, a hypothetical case in front of real-life judges and lawyers presents students with an opportunity to practice several skills that are too often neglected in classical law school education but which are essential to success in litigation. This Essay offers an examination of the benefits of moot court, while also offering some basic insights as to how to instruct students to become better appellate advocates.

I. IN DEFENSE OF THE ENTERPRISE

Appellate argument is in decline. In the past five years, the Supreme Court has heard oral argument in only 69 cases per year, less than half the average of 146 per year that it heard during the 1970s and 1980s, and an additional 25% drop from the 92 arguments

^{*} Adjunct Professor of Law at Washington University School of Law. Professor Finneran has, since 2008, coached Washington University’s National Moot Court Team, where he has helped guide his students to national championships in the ABA’s National Appellate Advocacy Competition (2012), the William E. McGee National Civil Rights Competition (2009, 2010, 2011), the Evan A. Evans Constitutional Law Moot Court Competition (2016), and the John R. Brown Admiralty Moot Court Competition (2017). He is also an instructor in appellate advocacy at the law school and a winner of the Missouri Bar Foundation’s 2016 David J. Dixon Appellate Advocacy Award. In his professional career, Professor Finneran serves as an Assistant United States Attorney for the Eastern District of Missouri. The views expressed in this Essay are those of the author and do not necessarily reflect the views or policies of the United States Department of Justice or the United States Attorney’s Office for the Eastern District of Missouri.

it heard annually during the 1990s.¹ Federal appellate courts have followed suit, with oral argument being ordered in only 20.5% of cases in 2015, a percentage only half as large as the 41% of cases in which oral argument was ordered as recently as 1998.² On average, federal appellate courts ordered oral argument in only 30% of cases during the 2000s.³ Today, an advocate in the Ninth Circuit has only a one-in-four chance of being ordered to appear for argument in her case, and she is among the luckier advocates in the country: in the Fourth Circuit, her chances would be less than one-in-ten.⁴

It gets worse. Even if our hypothetical advocate has the good fortune of having her case set for oral argument, her odds of successfully using the opportunity to change her judges' minds are longer still. Estimates vary, but there is near uniform agreement, at

1. Based upon data collected from Oyez.org. See IIT Chi.-Kent Coll. of Law, *Cases, OYEZ*, <http://www.oyez.org/cases/> (last visited Jan. 24, 2017). See app., tbl.1. See generally Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012) (arguing that the Court's dwindling caseload is a product of diminished mandatory jurisdiction and increased ideological unevenness in the Court's composition).

2. Based upon data collected from *Caseload Statistics and Data Tables*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> (last visited Jan. 24, 2017). See *infra* app., tbl.2. The frequency of oral argument is declining not only as a rate, but in real terms as well. The average of 6,954 oral arguments ordered by the federal courts of appeals between 2011 and 2015 represents a nearly 22% decline from the average of 8,911 arguments ordered by the courts of appeals in the preceding decade. See *infra* app., tbl.2.

3. Based upon data collected from *Caseload Statistics and Data Tables*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> (last visited Jan. 24, 2017).

4. *Table B-10. U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2015*, U.S. COURTS, <http://www.uscourts.gov/file/19503/> (last visited Jan. 24, 2017). Evidence from state courts is harder to come by, but the data that are available suggest similar trends. Consider, for example, the Indiana Court of Appeals, the state's intermediate courts. A review of the court's annual reports shows that oral arguments in that court have declined from 102 in 2000 to only 68 in 2015. See *Court of Appeals Publications*, IND. JUDICIAL BRANCH (2015), <http://www.in.gov/judiciary/appeals/2343.htm> (last visited Jan. 3, 2017). In the Virginia Supreme Court, meanwhile, where notices of appeal were filed in 454 cases in 2015, only 37 had oral argument granted. *Supreme Court of Virginia Statistical Review 2015*, JUDICIAL PLANNING DEP'T, OFFICE EXECUTIVE SEC'Y, SUP. CT. VA. 4 (2015), http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/scv/scv_caseload_rpt_2015.pdf. That represents a propitious decline from even 2013, where oral argument was granted in 94 of the court's 374 cases. *Supreme Court of Virginia Statistical Review 2013*, JUDICIAL PLANNING DEP'T, OFFICE OF THE EXECUTIVE SEC'Y, SUP. CT. VA. 4 (2013), http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/scv/scv_caseload_rpt_2013.pdf.

least among those appellate judges who have seen fit to comment on the matter, that oral argument sways their judgment in only a handful of cases. Some judges have placed the number as low as 5%; 31% appears to be the most generous of the available estimates.⁵ When one considers the fact that, since most federal appellate court decisions are unanimous, a dispositive oral argument would have to be so successful that it turns not just one judge, but two, then one might begin to wonder why law schools bother preparing law students for oral argument at all.

These numbers may be staggering, but they should not be surprising, at least not to an experienced appellate attorney. As lawyers, we know that most of our cases are winners or losers before they ever reach the appellate stage (let alone the oral argument), and that our particular skills as appellate advocates therefore will often fail to make a decisive impact in the case. The standards of review under which we operate are marked by deference to the trial court: “clear error” on facts⁶ and “abuse of discretion” on most questions of trial administration and the admission of evidence,⁷ each of which serves to place a heavy thumb on the scale in favor of upholding the judgment below. Even when we are blessed as appellants with a pure question of law upon which the appellate court owes no deference to the court below, as experienced advocates we know that it will be much harder to convince our judges to overturn their lower-court colleague than to affirm her judgment. And even if we are successful

5. Lawrence T. Gresser & Elizabeth F. Bernhardt, *Oral Argument: An Endangered Species?*, N.Y. L.J. (Aug. 22, 2011), <https://www.cohengresser.com/assets/publications/25.pdf>; Warren D. Wolfson, *Oral Argument: Does It Matter?*, 35 IND. L. REV. 451, 453 (2002) (describing estimates among Illinois Supreme Court justices ranging from 0 to 20%); Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 38–40 (1986) (collecting various judicial estimates on the importance of oral argument). Judge Alex Kozinski expressed a typical sentiment when he noted that “[c]ases are seldom won—but occasionally lost—at oral argument.” Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178, 186 (1997).

6. See *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (“A finding is ‘clearly erroneous’ when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”).

7. See, e.g., *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999) (“Thus, whether *Daubert’s* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.”).

at persuading our judges that the court below has erred, in most cases we must still persuade them that the error was not so insubstantial as to have been harmless.⁸ Thus, we should think it rather unremarkable that the oral argument, which usually represents the final skirmish in a long and bitter war, should only rarely produce the sort of reversal that would turn the vanquished into the victor.⁹

To any experienced appellate practitioner, these observations are familiar. “Especially at the appellate level,” as Justice William Brennan once famously opined, “for the most part good claims will be vindicated and bad claims rejected, with truly skillful advocacy making a difference only in a handful of cases.”¹⁰ That is because most cases are characterized by the application of settled law to new facts, which, while they may be unique in their particulars, are usually no more than slight variations on a theme to which the law has already set the tune.¹¹ The process of litigation is thus only rarely an exposition of new and groundbreaking principles of law; it is much more commonly the gradual discovery of the facts that will determine the outcome the law dictates, which was written in the stars long before the attorneys even entered the scene.

While any experienced litigator would be rather cocksure not to confess as much, these admissions are no indictment of the value of advocacy. To the contrary, they illustrate how urgent and pressing the need is to hone our skills as advocates, in order to ensure that we are capable of overcoming such overwhelming odds. That is because our value to our clients, and indeed, our duty to our clients, is to make the difference in those cases that *could* go either way. Even Justice Brennan’s dictum on the subject comes with an important caveat: “I do not mean to suggest,” he said, “that this ‘handful’ of cases is not important—it may well include many cases that shape the law.”¹²

8. See, e.g., *Neder v. United States*, 527 U.S. 1, 15 (1999).

9. Indeed, while the numbers for oral argument may be bad, the chances of reversal are yet worse. In the past decade, the reversal rate has varied between 6.7% and 9.3% across the courts of appeals. See *Caseload Statistics and Data Tables*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> (last visited Jan. 24, 2017).

10. *Jones v. Barnes*, 463 U.S. 745, 762 (Brennan, J., dissenting).

11. As Judge Kozinski reminds us, “Most cases . . . are decided by courts bristling with controlling authority.” Kozinski, *supra* note 5, at 191.

12. *Jones*, 463 U.S. at 762 n.6 (Brennan, J., dissenting).

And there is no surer indicator of which cases have that potential than a setting for oral argument. If an appeal is set for argument, it is usually because there is an unsettled question in the minds of the judges, which they have seen fit to seek the parties' help in resolving. Thus, those cases in which the skills of the oral advocate are brought to bear are the very cases that are the most likely to affect the growth and development of the law.¹³

In any event, even if appellate argument were useless, or useful in so few cases as to make its study more academic than practical, appellate courts nonetheless order it in nearly a quarter of cases.¹⁴ Even if the oral argument does not ultimately turn the case or change the law, a setting for oral argument usually at least means that the panel has not been entirely convinced by either of the briefs, that is, they are at least tentatively open to being persuaded. And if, therefore, we are to stand in front of a court on behalf of our clients, we should at least have some sense of what we are trying to achieve, and how we might plausibly seek to achieve it.

II. THE PROMISE OF THE PODIUM

Which brings us to moot court. For most law students, moot court serves as their singular introduction to the art of appellate advocacy during their time in law school.¹⁵ For some, it may be their sole orientation to oral advocacy altogether. It is thus essential that law schools endeavor to maximize the value of the moot court experience

13. Indeed, Justice Jackson once opined that advocates appearing before the Supreme Court should "make [their] preparations for oral argument on the principle that it always is of the highest, and often of controlling, importance." Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 CORNELL L. REV. 1 (1951); see also Michael Duvall, *When Is Oral Argument Important? A Judicial Clerk's View of the Debate*, 9 J. APP. PRAC. & PROCESS 121, 126 (2007) ("[T]o say that oral argument is unimportant because it rarely matters or because it only matters in a few cases misses the point. In the few cases in which oral argument matters, it is critical.").

14. See *infra* app., tbl.2.

15. For a short introduction to moot court competitions generally, see Darby Dickerson, *In Re Moot Court*, 29 STETSON L. REV. 1217 (2000), in which moot court competitions are explained through the voice of a fictional advocate appearing before an unusually uninformed Supreme Court of the United States.

for their students, especially considering the many advantages it offers as a pedagogical tool.¹⁶

The skills that moot court teaches happen also to be the very skills that law students will need as future lawyers, especially if they become litigation associates. Foremost among these is strategic thinking. Traditional law school classes are effective at teaching fundamental principles of law and introducing students to the process of legal reasoning, but they do rather little to teach students how to make the innumerable strategic choices that lawyers are faced with every day. It is one thing (and a very valuable thing) to spot all of the legal issues that may inhere in a given factual scenario, but it is quite another to determine, from among those legal issues, which to select and the order in which to present them in order to maximize one's likelihood of success before a court.

The latter task is precisely what moot court teaches. Students are required not only to identify the possible arguments, but to pick the winning arguments, and to adapt their theories to be responsive to the arguments that are likely to be put forward by their opponents. Likewise, they must anticipate and react to issues that have not been advanced by their opponents but which may be raised by the judges. Thus, moot court requires students to do something they may otherwise be poorly equipped to do during law school: not merely to identify the best arguments, but to structure those arguments into a coherent and persuasive legal theory of the case.

Moot court also affords students an opportunity to develop a skill that is rarely cultivated in law school, to the point even of being endangered: teamwork. With the possible exception of legal journals, most traditional law school classes and activities are focused on individual achievement, with students frequently being placed in uneasy competition with one another for grades. As a result, sometimes the most successful students in law school are the worst team players. Yet teamwork is an essential component in any successful law practice. Most law firms assign new lawyers to work under the supervision of more senior partners, with whom they are

16. For a general discussion of the value of moot court as a pedagogical tool, see Eric E. Bergsten, *Experiential Education Through the Vis Moot*, 34 J.L. & COM. 1, 1-2 (2015).

constantly asked to collaborate. Public agencies likewise generally employ corporate models of administration, resulting in new hires working as part of a team on a given case. Even if a law student's first post-graduate employer gives her an unusual degree of autonomy, she will still have to collaborate with administrative staff or investigators to divide the labor on the case. And even the loneliest of solo practitioners must work together, at least on occasion, with the attorneys representing other parties in a given case. As a result, the ability to work together with others is a critical aspect of a new attorney's practice of law, which moot court, almost uniquely among law school activities, teaches students in spades.

At the same time that it builds teamwork skills, moot court gives students a unique opportunity to develop their own personal styles of persuasion. Although I shall mention some principles common to good oral advocacy below, persuasion is rarely a simple matter of "right" techniques and "wrong" techniques. Instead, the best advocates are usually those who have taken the time to cultivate their own personality and style at the podium. The only way for students to achieve this is by practice. It is not something that can be taught in a lecture hall or a seminar room. Moot court allows students to hone their persuasive abilities in front of real-life judges and to test those abilities in the crucible of competition, where the actual persuasion of human beings, and not merely compliance with a particular professor's proclivities, determines success or failure.

Other traditional law school "advocacy" programs, like mock trial programs, might be argued to convey similar benefits. But it is the atypical first-year associate who is asked to try a case by herself, or even to conduct a witness examination during a trial.¹⁷ Far more

17. As a former mock trial student in high school and college, I regard those experiences as invaluable as well. But the value of those experiences became apparent only later in my career, after I had proven to my partners and supervisors that I could be effective in the courtroom through my successful arguments on motions and appeals.

Mock trial is also, in some respects, less faithful a simulation of a trial than moot court is of an oral argument. Due to time constraints that are necessary for a mock trial competition, witness examinations are unrealistically limited in length, as are closing arguments and opening statements. The entire mock trial takes place, more or less, in a single sitting, which in the real world is true of only the simplest matters. And mock trial's greatest (though unavoidable) drawback is that the witnesses are not, of course, real people. It is quite a different thing to

commonly, a young associate might be asked to head to court to cover a motion hearing, often on an insignificant matter, but sometimes on an important one. Moot court is an exceptional preparation for that task. Every year, I receive at least one email from a former student who reports to me her first experience arguing a disputed motion in a trial court, and such emails always extol how well the student's moot court experience prepared her for the task.¹⁸ While others might approach such an experience with trepidation, a trained moot court advocate enters the arena armed with the skills she needs to engage in the difficult and often trying work of persuasion.¹⁹

III. TO ARGUE WELL

Although participation in a moot court competition carries with it its own inherent rewards, students will fare best when they are given a proper rubric for success. Too often, however, instruction is limited to the most basic “do’s and don’ts,” without contextualizing those recommendations in the overall objectives of the exercise itself. As a result, beginning students sometimes wrongly believe that the goal of the oral argument is simply to reiterate the arguments set forth in their briefs, and thus they often fall into the trap of following their briefs’ logic and structure in presenting their arguments, almost as if by rote. Occasionally this wrongheaded impulse is encouraged in the formal instruction that the students receive, where reference is sometimes made to the competitors’ “outlines,” by which the instructor intends to refer to the order of reasoning in the competitors’ anticipated arguments. Recommending that the

prepare an actor to play a role as a witness in a mock trial than it is to prepare a real-life human being for the stressful and often intimidating experience of testifying in court.

While most moot courts rely upon attorneys to play the role of judges in most rounds of the competition, attorneys are often quite successful at mimicking the sort of questioning that an advocate would be likely to receive from judges. Likewise, the time given to advocates in moot court competitions (typically fifteen minutes per student) is a much closer approximation of the time provided for oral argument in the real world.

18. For a similar sentiment expressed in print, see Sam Butler, *The Very Real Benefits of Moot Court*, 82 Jun J. KAN. B. ASS’N 12 (2013).

19. For a dimmer view, see generally Kozinski, *supra* note 5, and for a rather persuasive rebuttal, Michael M. Hernandez, *In Defense of Moot Court: A Response to “In Praise of Moot Court—Not!”*, 17 REV. LITIG. 69 (1998).

competitors have such an outline in front of them is bad enough. But too often the “outline” is mentioned as something that competitors should seek to “get back to” after they have concluded answering the judges’ questions, as if the questions were some sort of distraction from the argument itself.

But any experienced advocate knows that answering the judges’ questions, far from being a distraction from her presentation, is the heart of it. If one walks into a courtroom with the misimpression that the judge wishes to be impressed by a well-crafted speech, she will have been all but laughed out of the courtroom by the time she finishes.²⁰ A good advocate yearns for interruption, because with interruption comes questioning, and with questioning comes the opportunity for persuasion. As Justice Robert Jackson famously said, “A question is an invitation to persuade.”²¹ Learning to relish the opportunity to answer questions is therefore a necessary lesson for anyone who wishes to succeed in that endeavor. As one commentator has noted:

There is no greater difference between the novice and the veteran oral advocate than in the way they respond to questioning from the bench. The former is almost put off that the court would dare intrude on his or her time by interrupting, or is visibly nervous by the interchange from the court. The latter, however, views questions from the court as a godsend because he or she knows that questions are windows on the court’s concerns about the issues in the case, and that every question carries with it an invitation to persuade the court that your position, and not your opponent’s, is the one that should prevail.²²

Thus, the key technique to teach a would-be advocate about to enter her first moot court round is not how to “get back” to her “outline” after answering a question, but rather how to successfully integrate

20. As Justice Jackson memorably said, “If one’s oral argument is simply reading his printed brief aloud, he could as well stay at home.” Jackson, *supra* note 13, at 9.

21. Brian Wice, *Oral Argument in Criminal Cases: 10 Tips for Winning the Moot Court Round*, 69 TEX. BAR J. 224, 228 (2006).

22. *Id.*

her answers into her broader theory of the case. If, as amateur (and amateurish) advocates often do, the advocate instead, upon answering a question, looks down to the podium to find her place in her prefabricated outline, she will turn in a disjointed and disengaging presentation.²³ Such an advocate must learn the basic and essential lesson that every answer given in an oral argument simultaneously does two things: *first*, and most obviously, it addresses the concern posited by the question; but *second*, and far more importantly, it also states a premise within the advocate's larger argument. A good advocate will therefore view her answers to the judges' questions not as a distraction from her broader points, but as a springboard to propel her forward to her ultimate conclusions.

To assist students in grasping these fundamental concepts, they should be taught not to think of their arguments in a linear fashion—as though they are telling a story that has a beginning, a middle, and an end, as they might in a brief—but instead to focus on their main themes and ultimate conclusions and strive constantly to connect their answers to those themes and conclusions.²⁴ Thus, when an advocate answers a question, she must realize that she is not simply addressing the judge's concern as presented to her, but that she is developing an answer that will ultimately help to show why the court should grant her the relief she seeks.

For that same reason, the principal skill that beginning advocates should learn is how to give short, structured answers to judges' questions. A good answer to a question in an appellate argument has three parts: a direct answer, a justification that supports that answer, and a restatement of the direct answer. Each step is critical to responding persuasively to the judges' concerns.

23. Justice Jackson shares a similar sentiment:

We like to meet the eye of the advocate, and sometimes when one starts reading his argument from a manuscript he will be interrupted, to wean him from his essay; but it does not often succeed. If you have confidence to address the Court only by reading to it, you really should not argue there.

Jackson, *supra* note 13, at 9.

24. *Accord* Gerald Lebovits et al., *Winning the Moot Court Argument: A Guide for Intramural and Intermural Moot Court Competitors*, 41 CAP. U. L. REV. 887, 934 (2013) (“At a minimum, advocates should strive to relate their answer to their theme and to use the theme to transition back to their argument.”).

First, the direct answer. Often, when beginning advocates are asked a question, they feel the need to take several steps back to explain their premises before they feel comfortable giving a direct answer to the judge's question. Sometimes that is because they have not thought about the subject deeply enough prior to the argument and need to stall, which is a problem all its own. But more often than not, they are simply laboring under a misunderstanding of how detailed an explanation the judge is looking for by her question. Instead of beginning by justifying why the answer will turn out to be "yes" or "no," the advocate should begin simply by saying "yes" or "no," followed by a short "headline" of the principal reason supporting the answer (or, if the question is not a yes-or-no question, with just the "headline" answer).²⁵ The worst thing that can happen at that point is that the judge asks the advocate "why?" or "how so?"—which, luckily for the properly trained advocate, is the justification she was about to provide anyway.²⁶

Which brings us to the second part of a good answer: the justification. After stating a short and direct answer to the judge's question, a good advocate will provide a justification for the claim made in her short answer, usually in no more than two to three sentences. The justification should be logical and complete, but it need not be exhaustive. The well-trained advocate knows that, if the judges are not satisfied that one of the advocate's supporting claims is true, then they will question her on it. Thus, rather than provide a long-winded explanation, the advocate should endeavor to directly and concisely state the most immediate reasons that support her short answer, realizing (and indeed hoping) that that justification may be interrupted by further questions seeking support for those claims as well. The undesirable alternative would be to spend too much time discussing an issue which may be tangential to the advocate's main themes and conclusions, when the advocate should instead be

25. For example, "No, your Honor, because that would contradict this Court's holding in *Marx*. In *Marx*, the Court held"

26. Justice Jackson offers similar advice: "I advise you never to postpone answer to a question, for that always gives an impression of evasion. It is better immediately to answer the question, even though you do so in short form and suggest that you expect to amplify and support your answer later." Jackson, *supra* note 13, at 12.

preparing to logically connect the answer she has given to those themes and conclusions.

Finally, the advocate should conclude her answer with a restatement of her direct answer. This is the step most often omitted by novices (and even many experienced advocates), but it is perhaps the most important. On the one hand, repeating the direct answer serves a persuasive function by emphasizing the point that the advocate has just made. On the other hand, it permits the advocate a ready point of transition back to her main themes. By restating the claim just proven, the advocate establishes the first premise for a new line of reasoning that, if she has structured her theory well, will start her on the path back towards her ultimate conclusions. If done successfully, such techniques will permit the advocate to turn in a dynamic and engaging performance that is at once responsive to the concerns of the judges and persuasive on the points the advocate wishes to prove.

To be sure, there are many things that go into a good oral argument beyond what can be said in the short space given to me here, but it is at least a start. If we teach beginning advocates to free themselves from the constraints of logic imposed by their briefs and encourage them to engage extemporaneously and succinctly with the questions from their judges, we will have gone quite some distance in improving their skills as appellate advocates and, hopefully, their value to judges once they begin the practice of law.

IV. TURNING THE TIDE

The state of oral advocacy in the legal profession might lead one to conclude that good advocacy is a product more of natural talent than training, for if it could be learned, surely we would more commonly observe it. Instead, if you were to attend a morning's docket before any of the federal or state courts of appeals, the performances you would see would generally range from stilted to downright stumbly. If you were to ask a non-lawyer watching such a performance to describe what she saw, she would probably call it a clumsy speech, made clumsier by the frequent interruption of questions. Needless to say, there are greater heights to be reached.

Yet I am convinced that the paucity of good oral advocacy can be attributed more to its lack of study by those who practice it than to the innate qualities of either the advocates or the exercise itself. There is value to investigating, as undertaken in moot court competitions, what techniques are common to persuasive advocacy or, perhaps equally importantly, to poor advocacy. And we owe it to our students—and to the profession as a whole—to emphasize the value of such competitions and to improve their execution in order to fully prepare our students for the professional challenges that await them.

Edmund Burke once said, “To make us love our country, our country ought to be lovely.”²⁷ A similar remark could be made about appellate argument. The decline in its popularity might suggest that appellate judges today take a sour view of the usefulness of oral argument.²⁸ If that is the case, we have no one to blame for that perception but ourselves. Oral argument, when done well, is of immense value both to courts and the litigants who practice before them. Rather than be discouraged by the downward trend, we should, like the advocate receiving a question from the appellate bench, view it as both a challenge and an opportunity: an opportunity to improve our students’ skills in oral advocacy and maybe, just maybe, to increase the usefulness—and thereby, the popularity—of oral argument to our appellate courts. Like oral argument itself, it is an opportunity we should not let go to waste.

27. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 67 (J. G. A. Pocock ed., Hackett Pub. Co. 1987) (1790).

28. A more likely explanation is that the increase in workload among federal appellate courts (without a corresponding increase in resources) has hampered the courts from being able to grant oral argument where they might wish to do so with far greater frequency. See Shay Lavie, *Appellate Courts and Caseload Pressure*, 27 STAN. L. & POL’Y REV. 57, 63–64 (2016) (identifying curtailment of oral argument as a common strategy employed by appellate courts to deal with increased caseloads); accord Wolfson, *supra* note 5, at 451; Robert J. Martineau, *The Value of Appellate Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 1 (1986).

APPENDIX

