
Bringing the Appellate Court to the Classroom

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NOTE: *The raw material for this paper comes from courses that I taught in 2004 and 2005, and I thank the students of those courses for being experimental subjects. Since my work in formulating an appellate moot court exercise is far from complete, I also thank the students who have not yet crossed the threshold of my classroom.*

ABSTRACT: *This article describes the successful implementation of a classroom simulation exercise involving written and oral arguments before an intermediary court of appeals or a supreme court. The article first explains the mechanics of conducting an appellate moot court exercise and the resources available to professors and students. The article then discusses the pedagogical benefits of conducting an appellate moot court exercise*

INTRODUCTION

Conducting an appellate moot court¹ in a business law course or other undergraduate law course is a powerful tool for engaging students. An appellate moot court exercise can add a twist to the ordinary assignment of a paper in a way that makes the course a memorable one. In presenting such a twist, this paper has two objectives.

The first objective is to describe the mechanics of conducting an appellate moot court exercise and the resources available to professors and students. However, what is presented is not an absolute. Within the context of a small class, the moot court structure is flexible enough to allow numerous variations on a theme. Professors who do not teach business law courses can adapt the exercise to their disciplines, while all professors can eliminate or add various elements to make the exercise suitable for the unique dynamics of their classes.

The second objective is to demonstrate the pedagogical benefits of conducting an appellate moot court exercise. Not only will a thoughtfully selected topic capture stu-

dents' interest in the subject matter of the exercise, but the pedagogical elements inherent in an appellate court setting, such as assignments organized around a controversy, should motivate students to put time and energy into the various elements of the exercise.

THE MECHANICS OF CONDUCTING AN APPELLATE MOOT COURT

The mechanics of conducting an appellate moot court consist of selecting the issue, providing the students with background information on the issue, and organizing the exercise. Once the format of the exercise has been established, most of the work for the professor in updating or customizing the exercise for successive classes consists of selecting a new issue and developing the corresponding background materials.

Selecting an Issue for the Moot Court

The first and most critical decision in setting up an appellate moot court exercise is selecting the issue or case

that will be argued before and decided by the moot court. For an appellate moot court exercise, the issue needs to involve a question of law rather than a question of fact since appellate courts review errors in the application of the law and do not further develop the facts established at trial. If the exercise is used in a non-law business or economics course, the issue can be based on a policy debate within a discipline or on an issue that would involve the use of a person from that discipline as an expert witness.² In any context, the issue is important since it initially engages the students, although the dynamics of a moot court should sustain the students' interest throughout the exercise.

The issue also lets the professor tailor the exercise for a specific discipline and allows the professor to set the level of academic challenge represented by the exercise. For example, a statute of limitations issue centered on whether a breach of contract claim involved a service subject to contract law or a product subject to the Uniform Commercial Code is appropriate for a lower division business law course. However, a constitutional law issue involving an application of the Commerce Clause of the United States Constitution is more nuanced and complicated and thus suitable for an upper division business law or undergraduate law course. In an economics or business course, the issue could be based on free market and liberal economics approaches to the debate made famous by Milton Friedman about whether the social responsibility of business is to increase profits for shareholders or address the broader concerns of other stakeholders (1970, pp. 122-126).

Several bound resources offer straightforward methods for identifying potential issues, especially basic contract and commercial law issues. First, legal encyclopedias break-down a subject area into discrete topics and provide overview of the law within each topic along with citations to other primary and secondary sources, such as cases, and law journals. Two of the most commonly used legal encyclopedias are *American Jurisprudence, 2d* and *Corpus Juris Secundum*. Both are accessible to attorneys and laypersons seeking an issue in a specific subject area via their general indexes. Second, treatises, such as *Calamari and Perillo on Contracts* and the hornbooks by White and Summers on the Uniform Commercial Code, present thorough narratives on the basic principles and issues in their respective subject matters. Since legal encyclopedias and hornbooks provide objective statements of the law, they can also be used by professors to formulate model responses or templates for evaluation purposes. Unfortunately, both the general legal encyclopedias and multivolume treatises are expensive and are usually only available in law school libraries, although they may be found in the law libraries

of county courthouses or local bar associations.

However, several online resources are readily available to anyone with a computer and Internet access. First, the subscription-based LexisNexis Academic Universe can locate court opinions on specific issues by clicking on "Legal Research," and then clicking on "Area of Law by Topic," and then doing a keyword search. The LexisNexis Academic Universe and the *Index to Legal Periodicals & Books* both allow, respectively, keyword and subject matter searches of law review articles discussing contemporary, cutting edge legal issues. Second, the Web site for the Legal Information Institute at the Cornell University Law School contains specific, searchable sections on commercial transactions, business associations, and laws relating to particular activities and business sectors. This free, online service links users to relevant federal and state appellate court decisions. Third, the FindLaw Web site has a wealth of information about cases before federal and state courts. Through the FindLaw Web site, a professor can subscribe to free opinion summaries by federal and state (California, Delaware, Florida, Illinois, New York, and Texas) appellate courts and by topic areas, such as contracts (<http://newsletters.findlaw.com/nl/>). In addition, a professor can use the Web site to review complete court opinions (<http://findlaw.com/cascode/>) or search practice areas, including contracts and commercial law (<http://findlaw.com/01topics/>).

Another source for issues that engage students are constitutional law issues currently before the United States Supreme Court. Although the Supreme Court is known mostly for its opinions on civil rights and individual liberties, the Supreme Court's docket in any given term contains a number of cases that address commercial matters. For instance, in the 2004-2005 term, the Supreme Court decided the following commercial cases: (i) whether the taking of private property for economic development is a "public use" under the Takings Clause³; (ii) whether state commercial rent controls constitute a taking of private property under the Takings Clause⁴; (iii) whether states allowing in-state wineries to ship alcohol directly to consumers while prohibiting such shipments from out-of-state wineries violates the Commerce Clause⁵; (iv) whether an amendment to the Truth-in-Lending Act removed a cap on recoveries for violations involving loans secured by personal property⁶; and (v) whether the distributor of a product with both lawful and infringing uses is liable under the copyright laws for the infringing activities of the product's users⁷. The challenge is to select a relevant issue that will interest students, that is not too arcane or technical, and that will not be decided by the Supreme Court before the exercise ends.⁸

Three Web sites provide detailed information on the Supreme Court's docket. First, the FindLaw Web site has a "Supreme Court Center" that describes the general subject matter and issue for each case scheduled for oral arguments and provides links to the lower court opinions and actual briefs filed in the case (<http://supreme.lp.findlaw.com>). Second, the Division for Public Education of the American Bar Association sponsors a Web site that summarizes the cases and issues in the Supreme Court's then-current term and provides copies of the parties' briefs. The American Bar Association also sells an inexpensive preview publication that covers each case on the Supreme Court's docket in detail. On both of these Web sites, the cases are presented chronologically based on the oral argument schedule for that term. Third, the Legal Information Institute Web site has a "Supreme Court Collection" that contains previews of selected cases currently before the Supreme Court written by second- and third-year law students (<http://www.law.cornell.edu/supct/cert/>). These previews describe the issues of the case and provide both factual background and an analysis of the parties' arguments. Using all these sources of information not only allows a professor to choose an issue currently before the Supreme Court, but the Web sites also give professors access to background information to set up the appellate moot court exercise and to evaluate student work product. Of course, students have the same access to this information, so professors either need to inform students about the existence of the Web sites and require students not to visit them or keep the Web sites confidential.

Once the issue has been generally identified, the issue should be distilled down to a single question or a series of questions that can be answered either "yes" or "no." The issue is then ready to present to the students along with the necessary background information.

Developing Background Information for the Moot Court

The background information consists, at a minimum, of the facts of the hypothetical case and its procedural history. Both can be presented in narrative form, and, depending on the complexity of the issue, may be anywhere from a few paragraphs to a longer narrative of several pages. The goal is to provide the students with the legally relevant facts needed to address the issue of law that has been presented, since an appellate court accepts the facts as developed at trial and resolve issues of law.

The same resources that were used to develop the issue can also be used to develop the background information. For more basic legal issues, the fact scenarios can be drawn

verbatim from past cases discovered while researching the issue or changed slightly from those cases to reflect the nuances of the issue. If the appellate moot court exercise will be based on a case currently before the United States Supreme Court, then the facts and procedural history described in the lower court opinions and the parties' briefs can supply the background information.

The extent to which the background information also includes the cases and statutes that the students will research determines the difficulty and pedagogical orientation of the exercise. If the business law or other undergraduate law course includes a unit on legal research, then the appellate moot court exercise can reinforce these skills by requiring the students to locate the relevant cases and statutes. In this scenario, the legal research component of the exercise is as important as the quality of the written and oral work. However, more appropriate for most undergraduate courses is a closed research approach that is typically used for the first legal writing assignment during the first year of law school. Instead of requiring students to identify and locate the legal authorities relevant to the issue, the students are given the cases, statutes, and secondary sources that comprise the sum total of what they need to use and what they can use in their briefs, oral arguments, and judicial opinions. The legal authorities can either be a package photocopied from public domain sources or a list that allows students to locate the materials using on-line resources, such as the Lexis-Nexis Academic Universe or the FindLaw Web site, or bound case reporters and statutory codes in a library. The legal authorities do not have to be comprehensive. However, the package or list should include the key cases that comprise the precedents underlying the issue and enough variety in the precedents to provide each side of the case with enough legal authority to form arguments. A closed research exercise places the focus on the students' written and oral work product rather than on their researching skills. Whether the students perform their own legal research or work from a closed list of authorities, incorporating a legal issue currently before a court can simplify the process of identifying the relevant legal authorities. For example, with a current United States Supreme Court case, the FindLaw Web site allows a professor to review the lower court opinions and the parties' briefs and select the relevant legal authorities from them.

Organizing and Implementing the Moot Court

An appellate moot court exercise is organized and implemented by dividing the class into teams of attorneys and judges, creating the rules and assignments, and estab-

lishing the schedule.

Students need to assume one of the roles in the appellate moot court exercise. At a minimum, the roles should include judges who form the appellate court panel and the attorneys who represent each side of the case. Additional roles, such as a journalist who reports on the proceedings and the outcome, can be created at the discretion of the professor.

The exercise and its roles can be adapted for the number of students in the class. In a class as small as five students, three students can be judges and two students can be the attorneys. In a larger class of 13 students, nine students can be judges, thus composing a panel that represents the number of justices on the United States Supreme Court, and four students divided into two teams of two students each can be the attorneys. With larger classes between fourteen and 26 students, the class can be divided into two smaller sections that undertake the exercise simultaneously. Even larger classes would require a professor to run more than two sections of the exercise simultaneously, which, while feasible, could be difficult.

Assignments must be created for each of the roles. For an attorney or teams of attorneys, a typical assignment includes drafting a brief and participating in 15 to 30 minutes of oral arguments per side. A brief presents a side's best arguments using the available legal authorities and applying them to the facts of the hypothetical case. The tone of a brief should be primarily argumentative and persuasive rather than just explanative. A typical brief consists of a statement of the legally relevant facts, a statement of the issue formulated previously by the professor, an argument that forms the bulk of the brief, a conclusion, and a table of authorities. The length of the brief helps to determine the degree of difficulty for the assignment. To ensure that the attorneys' arguments have not digressed from exercises in legal reasoning to personal editorials, the students can be required to submit outlines and rough drafts of the briefs.

The judicial work product is different from, but should ultimately be equivalent to, the attorneys' work product. Students who are judges can draft short individual position papers based on their own legal research. The focus of the position paper should be on the legal reasoning that gets a judge from the issue to the judge's decision. The position papers of each judge can be shared with the other judges on the panel. Judges can also prepare questions for oral arguments and can provide peer reviews of the attorneys' briefs. Most importantly, a judge works with other judges to draft an opinion after reviewing the attorneys' briefs, participating in oral arguments, and discussing the case with other judges in judicial conferences before

and after the oral arguments. Whether a judge joins in a majority opinion or drafts a separate concurring or dissenting opinion is determined by the voting patterns of the judges. A typical judicial opinion consists of a statement of the legally relevant facts, a statement of the issue formulated previously by the professor, a rationale based on the relevant legal authorities, a holding (i.e., the decision) with the action ordered, and a table of authorities. A good opinion explains how the application of legal principles to the facts of the case results in the holding and cites decisions and rationales from prior cases for support.

Oral arguments are the climax of the appellate moot court exercise. The room should be configured so that the judges sit behind tables at the front of the room and the attorneys sit at tables in front of the judges with a single lectern between the attorneys' tables. Judges and attorneys should wear business attire, and the air of formality can be enhanced if the professor can find black robes for the judges.

Time limits for oral arguments should be strictly observed as they are in real appellate courts. Attorneys can be given warnings by a timekeeper when five minutes and/or one minute of their allotted time are left. In a real appellate court, the losing party in the lower court goes first but can reserve time for rebuttal. The professor should inform the attorneys that they need to be clear, concise, and conversational in presenting their oral arguments. While notes can be used by the attorneys, the oral argument should not be read to the judges. The professor should also inform both the judges and the attorneys that the judges are expected to interrupt oral arguments with questions, so the attorneys should be flexible enough to change their presentation to address a judge's question.

Prior to the oral arguments in the appellate moot court exercise, students can become familiar with oral arguments generally in one of three ways. First, if a state or federal appellate court is nearby, the class can attend the oral arguments. An appellate court's calendar is typically available online. Second, if a law school is nearby, the class can observe an appellate advocacy class's moot court or an appellate moot court competition. Third, the Oyez Web site contains downloadable recordings of oral arguments before the United States Supreme Court that can be played in the class or listened to by the students outside class.

At the outset, the professor needs to develop a schedule. Assuming that the background information and directions are provided on day X, a typical schedule would be as follows: attorneys' argument outlines due on X+14; attorneys' draft briefs and justices' position papers due on X+21; justices' brief reviews due on X+28; attorneys' final

briefs due on X+35; oral arguments and justices' questions due on X+ 40; judicial conferences on X+42; and justices' opinions due on X+49. These deadlines can be expanded or contracted based on the needs of the course and to avoid conflicts with other items on the academic calendar.

THE PEDAGOGICAL BENEFITS OF AN APPELLATE MOOT COURT

When an appellate moot court exercise is used in a course, the student evaluations often highlight the positive impact of the exercise. The following comments from student evaluations are typical: "Court simulation: a lot of work, but an excellent means of obtaining practical experience;" and "the moot court simulation was particularly effective in giving us a taste of the job of a justice or attorney in the Supreme Court. The court simulation allowed us to use what we learned..." Underlying these positive comments are the powerful pedagogical benefits of an appellate moot court exercise.

An appellate court oral argument represents the apex of the adversarial legal system found in the United States, and the adversarial nature of the appellate moot court exercise engages students. According to Light (2001), effective small classes are those organized around a controversy (p. 48). When asked about their most memorable small classes, many undergraduates "described classes in which the professor created opposing arguments and built homework assignments that pitted two groups of students against each other on opposite sides of an argument" (Light, 2001, p. 48). Light (2001) notes that "if a professor's goal is to engage students, this idea of a structured disagreement holds promise" (p. 48). An appellate moot court exercise is at its core a structured disagreement, and when that disagreement arises from an issue currently before a court with real world consequences at stake, the sense of excitement is heightened.

In this adversarial setting, the appellate moot court exercise requires students to combine the various skill sets that colleges and universities claim to teach, such as reading, critical thinking⁹, writing, and oral presentation. According to Light (2001), "of all the skills students say they want to strengthen, writing is mentioned three times more than any other" (p. 54). When asked, seniors indicated that they learned "most effectively when writing instruction is organized around a substantive discipline" (Light, 2001, p. 59). The appellate moot court exercise, like its real world counterpart, by its nature involves a lot of writing by all the participants around the subject matter chosen by the professor. At the same time, the students' writ-

ten work is integrated into the larger context of a legal proceeding with challenges beyond writing. The variety of roles and the variety of assignments, from the written work to solo oral arguments by attorneys to small group discussions among judges, allow different students to demonstrate their varying God-given gifts and talents at different times. For example, extroverted students with strong oral presentation skills often make excellent attorneys, while quieter, more introverted students appreciate judicial roles.

Another pedagogical benefit inherent in an appellate moot court exercise is that much of the work by students is not just reviewed by the professor, but is read by and spoken before fellow students. "Students identify the courses that had the most profound impact on them as courses in which they were required to write papers, not just for the professor, as usual, but for their fellow students as well" (Light, 2001, p. 64). The peer-to-peer interaction in an appellate moot court exercise is high. Drafts of the attorneys' briefs are critiqued by the judges. Final drafts of the attorneys' briefs are read by justices before oral arguments and while writing opinions. Oral arguments are made before the judges and the other attorneys. A judge's position paper is shared with other judges and those positions are discussed with other judges in small group settings during the judicial conferences. The judges' opinions are read by the attorneys who understand the issues and arguments well. All these interactions lead most students to produce work that represents their best efforts.

For students who are considering law school, the exercise gives them a glimpse into the nature of a first-year law school writing assignment and an appellate advocacy course. However, more importantly, by taking on the roles of attorneys and judges, students are given the opportunity to think like a lawyer or a judge. Undergraduate students remember professors who showed them how to think like professionals in their field (Light, 2001, p. 117). Using an actual case or a real open issue in a subject matter such as contracts strengthens this tie between academia and the real world of the law.

Forcing students to think like a lawyer or a judge also provides an opportunity after the exercise to discuss with the students any differences between what is just in legal terms and what is just under Christian ideas of shalom. Wolterstorff (2004) calls on Christian professors, especially those in Christian colleges, to move beyond models of Christian education that only introduce students to academic disciplines from a Christian perspective to teaching for shalom (pp. 21-23). The foundation for shalom is justice in which each person "enjoys his or her rights. If persons do not enjoy and possess what is due them, if their

rightful claims on others are not acknowledged by those others, then shalom is absent.” (Wolterstorff, 2004, p. 23). However, according to Wolterstorff, shalom is more than justice and encompasses delighting in right relationships. “Shalom incorporates right relationships in general, whether or not those are required by justice: right relationships to God, to one’s fellow human beings, to nature, and to oneself. The shalom community is not merely the *just* community but is the responsible community in which God’s laws for our multifaceted existence are obeyed.” (Wolterstorff, 2004, p. 23). For Wolterstorff (2004), the Bible’s mandates on shalom require Christians to “pray and struggle for the release of the captives” and “for the release of the enriching potentials of God’s creation.” (p. 23).

Law by its nature, and especially business law, goes beyond letting simply letting a “yes” be “yes” and a “no” be “no” and so reflects fallen human nature.¹⁰ As a result, judicial decisions will fall short of shalom. By teaching for shalom in this manner and teaching students “to mourn shalom’s shortfall” (Wolterstorff, 2004, p. 23), Christian professors can use the appellate moot court exercise to move beyond teaching an academic discipline or socializing students for the legal profession to producing students who seek both justice and shalom.

CONCLUSION

An appellate moot court exercise is a creative instructional method that engages students on many levels. The effort a professor puts into developing and organizing such an exercise is more than repaid in the dynamics among the students during the exercise and the reactions of students after the exercise. A former student who had been an attorney in an appellate moot court exercise involving a then-current case before the United States Supreme Court is now teaching high school. In a recent e-mail, he states: “I just had to write and tell you that I am doing a court simulation in my high school government class this year ... Well, I just had to write and tell you of your inspiration to me.” His e-mail demonstrates the powerful pedagogical benefits of the appellate moot court format. In this case, imitation is not just a form of flattery, but a lesson well remembered after many others in college are forgotten.

ENDNOTES

¹ According to Black’s Law Dictionary, the phrase “moot court” means “a fictitious court held usually in law schools to argue moot or hypothetical cases, especially at the appellate level.”

² See, for example, Bonello, Frank J. (Ed.). (2006). *Taking Sides: Clashing Views on Economic Issues* (12th ed.). Guilford, CT: McGraw-Hill/Dushkin; and other volumes in the McGraw/Hill Duskin *Taking Sides* series.

³ *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

⁴ *Lingle v. Chevron U.S.A.*, 125 S. Ct. 2074 (2005).

⁵ *Granholm v. Heald*, 125 S. Ct. 1885 (2005).

⁶ *Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460 (2004).

⁷ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764 (2005).

⁸ Several months usually elapse between oral arguments and when the United States Supreme Court announces a decision in a case.

⁹ Per Light (2001), critical thinking is “the ability to synthesize arguments and evidence from multiple sources, sources that often disagree” (p. 37). Judicial opinions often conflict, both between majority, concurring, and dissenting opinions in a single case, and among majority opinions in cases with similar factual situations. Legal research, thinking, and writing often involve working through these conflicts.

¹⁰ Matthew 5:37.

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