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# DRESS REHEARSAL: THE MOOT COURT PROGRAM AT GEORGETOWN LAW CENTER'S SUPREME COURT INSTITUTE\*

Gregory J. Langlois\*\*

## I. INTRODUCTION

Arguing before the Supreme Court “is like the Indy 500—You are going flat-out from the moment the Chief Justice says ‘Go.’”<sup>1</sup> The last time he argued before the Court, in *Richardson v. McKnight*,<sup>2</sup> David Vladeck says, “I felt like a ping-pong ball because I would be three words into answering somebody’s question before another question came out. I thought my head was on a swivel.”<sup>3</sup>

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\* © 2005 Georgetown Law Center. All rights reserved. This article is based on research used in the preparation of an update on the Institute’s work that appears in a recent issue of *Georgetown Law* magazine. See Greg Langlois, *Practicing Before the Court: The Moot Court Program at Georgetown Law’s Supreme Court Institute*, *Georgetown Law* 26 (Fall/Winter 2005).

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The editors of *The Journal of Appellate Practice and Process* initially asked Professor Richard J. Lazarus, who, with Professor Stephen H. Goldblatt, directs the Supreme Court Institute’s work, to write about its Moot Court Program for this issue. Because he knew that he would figure in the article, however, Professor Lazarus asked Mr. Langlois to write it, using as background a series of interviews with Professors Lazarus and Goldblatt, other Georgetown faculty, and several advocates who recently chose Institute moot courts when preparing for oral argument in the Supreme Court.

1. Interview with David C. Vladeck, Assoc. Prof., Georgetown U. L. Ctr. (May 4, 2005) (Notes relating to this and all other interviews cited in this article are on file with the author).

2. 521 U.S. 399 (1997).

3. Vladeck Interview, *supra* n. 1.

Or think of it as a tennis match, says Carter Phillips, who has argued thirty-six cases before the Court. When a difficult shot comes their way, the pros not only return the ball but do so with some “top spin and serious quality.” The same is true in answering rapid-fire questions from the nine members of the most intimidating court in the nation. “You’re not just deflecting questions,” Phillips says. “You’re taking the questions and using them affirmatively to make your case. The great tennis players are the ones who do that, and the great Supreme Court lawyers are the ones who can do that.”<sup>4</sup>

But reaching the pinnacle of appellate advocacy—arguing before the Court—is not like reaching the top in the world of sports, because access to the Court is not limited to only the most gifted or experienced. In fact, most attorneys who appear before the Court are first-timers, lucky enough to have worked on cases in which the Court eventually granted certiorari. Whether they are rookies taking the podium through happenstance or seasoned advocates selected for their expertise, however, many lawyers choose to prepare for their arguments in the Supreme Court Moot Court Program at the Georgetown Law Center’s Supreme Court Institute.

## II. AN OVERVIEW OF THE PROGRAM

The Institute’s Moot Court Program was founded only in 1999,<sup>5</sup> yet two-thirds of all cases argued before the Court in at least one recent Term were mooted at the Institute.<sup>6</sup> The moots, which take place behind closed doors in a courtroom specially designed to recreate the atmosphere in the Supreme Court chamber, are designed to give advocates as realistic and insightful an experience as possible before they argue a few days later. The program is known for assembling top-notch panelists

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4. Telephone Interview with Carter G. Phillips, Managing Partner, Washington Office, Sidley Austin Brown & Wood LLP (May 5, 2005). Mr. Phillips is a member of the Institute’s Outside Advisory Board.

5. Before then, Professors Lazarus, David D. Cole, and others organized Georgetown Law-sponsored moots on a more informal basis.

6. See John G. Roberts, Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 2005 J. S. Ct. History 68, 78 (citing statistics for 2003).

(including experienced Supreme Court litigators and federal appellate judges) to hear the advocates' arguments.

The Program has a national reputation,<sup>7</sup> and because Georgetown moots only one side of a case, the parties sometimes race to get on the Institute's schedule immediately after the Court grants certiorari. They do so believing that the preparation available at the Institute is worth securing

because of the high quality and skill of the judges that [the] Institute . . . is able to attract to do the moot courts. These programs have made it easier for both first-timers and experienced advocates to do a more professional job before the Court.<sup>8</sup>

As Vladeck points out, the Institute is able to call upon "the absolute top tier of the appellate bar in Washington, D.C.," putting "five or six of the best legal minds in the city" on the panel for each moot.<sup>9</sup>

Professor Richard Lazarus, who co-directs the Institute along with professor Steve Goldblatt, assembles the right combination of these experts for each case: "I think of it as like putting together a small orchestra," he says. The idea, for the most part, is to bring together not a group of experts in the relevant area of substantive law, but instead five or six attorneys who can replicate how the Court thinks and pick apart an advocate's case.<sup>10</sup>

Lawyers recognize the value in this approach. An attorney arguing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*,<sup>11</sup> which involved peer-to-peer file-sharing software, specifically asked for Georgetown professors with little technology

7. See e.g. Telephone Interview with Caitlin Halligan, Solicitor Gen., St. of N.Y. (Apr. 6, 2005) (noting of the Institute that "[i]t has a wide reputation among very experienced Supreme Court advocates, as well as people who are going into their first argument, which is a strong mark of the caliber of the program").

8. Roberts, *supra* n. 6, at 78.

9. Vladeck Interview, *supra* n. 1. Each moot panel consists of a mix of highly experienced Supreme Court advocates, practicing attorneys who have clerked with sitting justices, and faculty members at Georgetown, typically those who have argued before the Court and perhaps clerked there as well. Interview with Richard J. Lazarus, Prof., Georgetown U. L. Ctr. (Apr. 15, 2005) (noting that it is not uncommon for a former clerk sitting on a moot panel to have drafted an opinion central to the case he or she is mooted). Professor Lazarus is one of the two faculty directors of the Institute.

10. Lazarus Interview, *supra* n. 9.

11. 125 S. Ct. 2764 (2005).

background to serve on his moot panel. He knew that he wouldn't be arguing to a group of computer programmers at the Court, but to the Justices, who think about more than just the subject matter of the case before them.<sup>12</sup> They consider federalism issues, for example, or statutory construction. Moot panelists should consider them too, because these issues are part of what makes oral argument important: It provides Supreme Court advocates with "the first opportunity [they] have to figure out what's bothering the Court."<sup>13</sup> And the best moots will be staffed by panelists who are able to figure out ahead of time which issues those will be, enabling advocates to adjust their arguments accordingly.<sup>14</sup>

### III. THE PROGRAM'S PHILOSOPHY

#### *A. An Even-Handed Approach*

Another feature sets the Program's moots apart and helps attract the best possible panelists: The Institute is nonpartisan. The Program focuses on public service—improving the quality of arguments before the Court—and not on promoting a particular cause. The Institute mooted Michael Newdow, an atheist who challenged the constitutionality of reciting the Pledge of Allegiance's "under God" line in public schools, before he argued his own case at the Court in a recent term.<sup>15</sup> Yet a few years before, it had mooted then-Texas Attorney General John Cornyn, who argued in favor of allowing student-led prayers at high school football games in *Santa Fe Independent School District v. Doe*.<sup>16</sup>

The only factor determining which side of a case is mooted at the Institute is which side calls first. Lazarus highlights the resulting diversity in its caseload, noting that

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12. Lazarus Interview, *supra* n. 9 ("They are dealing with a different set of cross-cutting issues than [are] the experts in the area.").

13. Interview with Michael H. Gottesman, Prof., Georgetown U. L. Ctr. (May 4, 2005). Professor Gottesman is a member of the Institute's Faculty Advisory Board.

14. *Id.*

15. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

16. 530 U.S. 290 (2000).

[i]n any one term we could be representing those who are challenging Nebraska's law restricting partial-birth abortions, and the next month we could moot an attorney representing Operation Rescue. That has made our program unique and very successful.<sup>17</sup>

The Program also avoids choosing sides by selecting moot panelists "from every conceivable ideological stratum."<sup>18</sup> Mixing panels up with liberal, conservative, moderate, or other viewpoints is part of Lazarus's recipe for mimicking the makeup of the Court.<sup>19</sup>

The advocates who prepare at the Institute benefit from that even-handed approach. If all the panelists agree with the advocate's position, he or she won't get a good sense of what to expect at the Court, says Phillips, who usually serves on one moot panel during each Court term. As he puts it,

You do better if you don't try to stack the bench with true believers, [because] if you have true believers, they are just not going to stand up and ask the kinds of questions that the Justices are going to ask; you aren't going to have the measure of skepticism that you need unless you bring skeptics to the bench.<sup>20</sup>

And Nina Pillard, who recently chose an Institute moot for her argument in a case that she knew would be "an uphill battle," specifically asked for one of the field's leading conservative thinkers to be on her moot panel. The exchanges with him helped her figure out what "would fly and what wouldn't fly with the Justices whose votes I needed," she says.<sup>21</sup>

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17. Lazarus Interview, *supra* n. 9.

18. Vladeck Interview, *supra* n. 1.

19. Professor Gottesman, for example, remembers serving on the panel mooting Attorney General Cornyn (who is now a United States Senator). Although opposed himself to allowing prayer at public high school football games, Gottesman didn't "feel like a traitor doing that," he says. "We are committed to doing the best we can for the person. The Court is entitled to the best argument it can have from both sides, but our job is—whichever side asks us first—to give them the best advice we can." Gottesman Interview, *supra* n. 13.

20. Phillips Interview, *supra* n. 4.

21. Interview with Nina Pillard, Prof., Georgetown U. L. Ctr. (May 4, 2005). Professor Pillard, who is a member of the Institute's Faculty Advisory Board, found the panelist's questions to be of significant practical value: "It was just two different world views. The normative center of gravity was just a different place for him than it was for me, and it was

Panelists willingly work—without pay—to prepare lawyers who advocate issues they personally oppose because they know that they are helping to enhance the overall quality of oral argument at the Court. “We all regard it as a part of our mission to improve the quality of the advocacy for the benefit of the Court,” Phillips says.<sup>22</sup>

### *B. An Assurance of Confidentiality*

The Program’s moots are strictly confidential. Anyone who sits in on a moot is forbidden to discuss what happens there. No one wants the advocates’ arguments to leak out before argument day, but confidentiality also protects the political standing of panel members who present the side opposed to the advocate’s position. In today’s political climate, those inclined to partisanship might otherwise equate a panelist’s serving on a moot panel with supporting the position being argued.

“We like to give our judges a level of anonymity in this process that is consistent with the view that we are doing this for the benefit of the Court,” says Goldblatt. Indeed, as he points out,

[e]verybody knows that everybody is doing this for the good of the development of the law and for the Supreme Court practice, and everybody is happy to do it, but that requires that nobody even know what strategizing went on and who was there to do the moot for whom.<sup>23</sup>

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really helpful to feel that and hear his instincts and to figure out just how to bridge across to where he is, because that is what I was going to have to do in the Court.” *Id.*

22. Phillips Interview, *supra* n. 4; *see also* Halligan Interview, *supra* n. 7 (acknowledging that the Program “helps ensure that lawyers who come before [the Court] are as well-prepared as they can be,” and that “[w]here the issues are well-honed and sharply presented, and the implications of each lawyer’s position are well understood, that makes for better arguments”).

23. Interview with Stephen H. Goldblatt, Prof., Georgetown U. L. Ctr. (Mar. 31, 2005). Professor Goldblatt is one of the two faculty directors of the Institute.

When permission is given by the advocate, the Institute invites law students enrolled in classes related to the subject matter of the case to observe the moot. Before attending, students are screened for possible conflicts of interest and are required to subscribe to the Program’s policy of strict confidentiality. And in order to maintain that confidentiality, only about fifteen students are allowed to observe a typical moot. *Id.*

Georgetown also offers a Supreme Court Advocacy class tied directly to the moots, in which students study several of the cases being mooted by the Program, attend the

### *C. A Commitment to Efficiency*

The Supreme Court Institute Fellow, typically a student in the Law Center's evening program, carries out many of the day-to-day tasks involved in running the Program, and stays in close contact with the counsel of record. And, in close consultation with Professor Lazarus, he or she helps line up the necessary five to seven panelists for each moot.<sup>24</sup>

Once the panel is set, the Fellow schedules the moot about a week before the actual argument. Any earlier than that, and "the person is not ready. And we want them ready," Lazarus says. Any later, and the panelists will pull their punches. "No one is going to give anyone an honest moot within a day or two of the argument," he says, "because at that point it's too late to actually pick apart someone's argument—they don't have enough time to put it back together again."<sup>25</sup> Thus, the Program's schedule strikes the right balance, allowing the advocate sufficient time in which to prepare the argument, and then sufficient time in which to adjust it as the moot suggests is necessary.

## IV. INSIDE AN INSTITUTE MOOT

### *A. Preparing for the Moot*

Both advocates and panelists come to the moot prepared as if it's the actual argument. The advocates—only days away from the real thing—don't need much prompting. "When you have an

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Program moots, and then attend oral argument before the Court in some of those cases. Other Georgetown classes, among them a course on the Office of the Solicitor General, use the Program's moots as an academic resource as well. *Id.*

24. A full nine is not necessary, Lazarus says, and a moot with that many panelists could turn into a "free-for-all." "I've been at moots at other places where there will be twenty people in the room," he says, "and it looks like a presidential press conference." Lazarus Interview, *supra* n. 9.

25. *Id.*



argument that close, it really tends to focus one's mind and one's effort to the task at hand."<sup>26</sup>

Panelists prepare just as the justices and their clerks do, by reading—a lot. Vladeck says the panelists read all the parties' briefs in the case, several amicus briefs, the decision below, other important and relevant decisions, statutory text in some cases, and more, amounting to hundreds of pages of material.<sup>27</sup> And they read with an eye toward figuring out what prompted the Court to take the case. As one veteran panelist puts it,

You are trying to understand the case well enough that you have a pretty good idea of the real issue the case turns on and why it's in the Supreme Court, why it is a difficult case. . . . It's not that you are so smart. It's that the case is a hard case; all you've done is figured out what's hard about it.<sup>28</sup>

### *B. Providing Thorough Questioning*

After months of living with a case—carefully crafting briefs and replies and agonizing over and fine-tuning positions—having a polished argument picked apart by a group of strangers would seem to be the last thing an attorney would want. But appellate lawyers know that it will help make their oral arguments as persuasive as possible.

A thorough questioning at a moot, Vladeck says, provides advocates “tremendous insight” into their cases. “Sometimes you think you've got a really great answer to a question and everybody starts rolling their eyes,” he says. “Better to find that out before you start arguing a case.”<sup>29</sup>

Moots can also alert advocates to possible traps. “They are a great object lesson in how you can get led down the garden

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26. Telephone Interview with David M. Porter, Fed. Pub. Defender, Sacramento, Cal. (Apr. 20, 2005). Mr. Porter mooted a *habeas* case, *Mayle v. Felix*, 125 S. Ct. 2562 (2005), at the Institute.

27. Vladeck Interview, *supra* n. 1 (noting that it normally takes “two nights of pretty intensive reading to get prepared. It's not like reading Tom Clancy or something. These are not page-turners”).

28. Telephone Interview with Donald B. Ayer, Partner, Jones Day (May 4, 2005). Mr. Ayer, a member of the Institute's Outside Advisory Board, teaches a section of the Supreme Court Advocacy class described in note 23, *supra*.

29. Vladeck Interview, *supra* n. 1.

path by a judge or justice who is bringing you along to a point in your analysis where you are really in trouble,” according to Halligan. “It’s useful to see those mine fields, and the panelists are really talented at identifying those kinds of pitfalls.”<sup>30</sup>

Facing any group of people intent on exposing the flaws in your presentation is daunting enough, but at the Supreme Court, it’s especially tough, advocates say. For one thing, you rarely have an easy case to argue. The Court almost always grants certiorari in cases that offer no clear answer, which leads Ayer to say that Supreme Court advocates are likely to discover that “[i]t’s not that easy to be completely persuasive all the time, mainly because the cases are just hard.”<sup>31</sup> And “the Justices tend to communicate their feelings about a case through the oral argument process more now than they used to,” says Phillips. Because of this, and because of the increased scrutiny of oral argument by the press and public that results, being able to “deal with the give and take” of the Justices is more important now than ever.<sup>32</sup>

Ayer points out that such a vocal Court allows little or no time to make speeches: “You have to give quick answers ... and they have to be short. You’ve got to start talking immediately and you have to pretty much have a coherent answer out of your mouth in twenty or thirty seconds at the most.”<sup>33</sup>

### *C. Developing the Best Answers*

Because answering the Justices’ questions is critical to advocates’ success, helping advocates develop good answers for the expected questions is one of the Program’s primary missions. Indeed, “the biggest mistake a lawyer can have is not having good answers. So [the Program’s] mission is to help

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30. Halligan Interview, *supra* n. 7.

31. Ayer Interview, *supra* n. 28.

32. Phillips Interview, *supra* n. 4.

33. Ayer Interview, *supra* n. 28; *see also* Gottesman Interview, *supra* n. 13 (indicating that advocates must actually answer the questions posed by the Court and acknowledge the weaknesses in their cases, and characterizing efforts to “hide the ball” as a “terrible” mistake: “The Court is just too smart to let [advocates] get away with that. There are nine of them, and they each have four law clerks, and everybody is prepared.... The notion that you are going to be able to wiggle past the hard parts is ridiculous”).

identify the very best answer that's possible with the question you have."<sup>34</sup>

For each moot, the process of identifying the best answers follows the same format: a formal period of questioning for up to an hour, followed by another hour or so of informal debriefing, feedback, and conversation. "You've got to have both parts," Lazarus says. "You can't have the conversation without the moot and you can't have the moot without the conversation."<sup>35</sup>

At the Court, each side usually gets thirty minutes to argue its case, but at the Institute, questioning goes beyond that to allow advocates to dig deeper when they and their panelists find their answers unsatisfying. Pillard, who speaks from experience, says that advocates who give "a not-so-good answer" are "pressed to give a better answer and pressed further to a better answer, so that ... on argument day it only takes one give and take. It's more efficient, it's more to the point, it's more honed."<sup>36</sup>

#### *D. Replicating the Conditions of Argument*

Moots are scheduled in the late afternoon. Before starting, panelists and advocates take a few minutes to get acquainted, and the invited observers trickle in. Soon the doors are closed, the panelists take their seats, the advocate steps to the podium, and the designated chief justice—usually a Georgetown professor—sees that everyone is ready. For the next hour, everyone stays in character. And if all goes according to plan,

the grilling that the lawyer gets at moot court is more intense than the grilling he or she is going to get when actually appearing before the whole Court. We have a common mission to relentlessly bombard them with the hardest questions they might face.<sup>37</sup>

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34. Gottesman Interview, *supra* n. 13.

35. Lazarus Interview, *supra* n. 9.

36. Pillard Interview, *supra* n. 21.

37. Gottesman Interview, *supra* n. 13 (noting in addition that "[t]he way to be helpful is to think about the biggest problems with [an advocate's] case, because that is what they are going to have to deal with at the argument—the weak spot. [We] in effect try to predict what kinds of questions the Court will ask about those problem areas").

The panelists usually succeed in that mission: Porter says that his moot was in fact more difficult than the actual argument. The panelists were “willing to let someone ask a question and do a follow-up, and do another follow-up to that.” At his oral argument, in contrast, the Justices weren’t nearly as accommodating toward each other: “When you have nine people, eight of whom were active questioners, there is less ability for them to really do follow-up questions because another justice is always waiting in the wings to ask another question.”<sup>38</sup> It’s that rapid-fire style of questioning that the Program’s panels try to reproduce.

Phillips points out another advantage of the Institute’s moots, noting that “[i]f you are in a serious moot with serious participants who have done their homework and know the Court reasonably well, you can pretty closely replicate the kinds of questions you can expect to get from the Court.”<sup>39</sup> Halligan agrees, saying that in her moot for *Granholm v. Heald*,<sup>40</sup> which involved a challenge to state regulations treating in-state wineries more favorably than out-of-state wineries, panel members questioned her on a number of points that the Court asked about. For example, panelists pressed her on the usefulness of New York’s requirement that out-of-state wineries have some sort of in-state presence. She sought to argue that the in-state-presence requirement allows state regulators to determine whether wine is being diverted into illegal sales channels, and the panelists, she says,

had a number of very probing questions at the moot court about whether that was truly the case, and how in fact the inspections were conducted, and why it was that an in-state presence was so critical. And those questions came up at oral argument as well.<sup>41</sup>

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38. Porter Interview, *supra* n. 26.

39. Phillips Interview, *supra* n. 4.

40. 125 S. Ct. 1885 (2005).

41. Halligan Interview, *supra* n. 7 (also referring to her Program moot for *City of Sherrill v. Oneida Indian Nation*, 125 U.S. 1478 (2005), in which she found that “[h]aving an opportunity to talk through in the moot court the ramifications of [a particular issue] was really helpful because that was the point that the Court was most focused on at oral argument, and [it] was in fact the point on which they ruled in our favor”).

Some advocates even find that the panelists at their Program moots ask them questions that they “hadn’t thought about at all.”<sup>42</sup> Pillard says that those difficult and probing questions help advocates and panelists think together about the best ways of responding:

Time and time again I have seen the hard question asked at the moot, and the exact same hard question asked at argument. If it’s working well, then the planned answer, the answer that came out of the collective wisdom of the moot court, is the answer that comes out on argument day.<sup>43</sup>

Because having the answers to the hard questions is so important, and because the Justices typically begin asking questions immediately, panelists at Program moots tend to fire away right from the start. As Vladeck notes,

[i]f you go watch the Supreme Court, it is not simply a hot bench; it’s an inferno. There are a lot of impatient Justices, and while you want to give lawyers, particularly those without a lot of experience, a chance to get their sea legs under them, you don’t want to give them three minutes [of opening] because the Court won’t.<sup>44</sup>

There’s no sense in being overly nice, says Phillips, who as a moot panelist tries “to be fairly aggressive without being overbearing” because that’s what advocates can expect from the Court. “I don’t think it helps them to have a smiling face; smiles are not necessarily a positive thing,” he says. “I’ve been at forty-five oral arguments, and the only time they smile is when they think they’ve got you.”<sup>45</sup>

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42. Telephone Interview with Matthew M. Shors, Counsel, O’Melveny & Meyers LLP (Apr. 27, 2005) (reporting that, in his unusual and procedurally complex case, one of the panelists at the moot asked, “Well, if cert is granted, what effect will your rule have?” and that he “was so focused on the actual facts ... that [he] hadn’t thought about that,” but that he “had plenty of time to think about it over the weekend [after the moot], and ... Justice Scalia asked [him] that and asked a couple of follow-up questions on it”). Mr. Shors mooted *Bell v. Thompson*, 125 U.S. 2825 (2005) at the Institute.

43. Pillard Interview, *supra* n. 21.

44. Vladeck Interview, *supra* n. 1.

45. Phillips Interview, *supra* n. 4.

### *E. Debriefing the Advocate and Constructing a Strategy*

After the grilling is finished, the panelists and the advocate discuss how it all went. This feedback portion of a moot is “really the key,” Phillips says.<sup>46</sup> It allows the group to think through the difficult legal problems presented, to come up with better answers where needed, and to establish the top two or three points that the advocate will want to reinforce. This opportunity to hear someone else’s reaction is crucial when an advocate has essentially lived with a case for months, because

[s]ometimes you’re just charging down a road thinking you got this thing all figured out, and everybody looks as if you don’t make any sense. You are well-advised with a group of people like [a moot panel] to take it pretty seriously. If they don’t get it, they probably aren’t the only ones who aren’t going to get it.<sup>47</sup>

In cases like that, advocates may find it advisable to re-work their arguments. Perhaps ironically, however, experienced advocates are more likely to change their arguments after a moot than are newer advocates. “Some of the . . . best Supreme Court advocates in the country are the ones who change their arguments the most,” Lazarus says. “They know how to listen to a moot and take advantage of a moot. They are so confident, they actually can take advice. They are much more adaptable.”<sup>48</sup>

#### *1. Fine-Tuning the Approach*

Sometimes the changes in an advocate’s argument after the moot can be dramatic. As Pillard says,

It’s remarkable to me the improvement between a moot and an actual argument, three, four, five days later. It’s really stunning sometimes to see someone who had caused you to kind of sit on the edge of your seat and hold your breath really get in there and do the case credit.<sup>49</sup>

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46. *Id.*

47. Ayer Interview, *supra* n. 28.

48. Lazarus Interview, *supra* n. 9.

49. Pillard Interview, *supra* n. 21 (pointing out that a moot can improve an advocate’s argument in a number of ways, because he or she may be relying on a theory of the case

And sometimes, of course, the adjustments are less spectacular. In his moot for *Bell*, Shors says, “everybody told me I was doing a great job and not losing the case, but that I needed to think about how to win the case and be a little more aggressive.”<sup>50</sup>

## 2. *Focusing on the Right Issue*

Goldblatt says inexperienced advocates sometimes try to focus on Constitutional issues, when the Court would prefer to decide the case on the basis of statutory construction or on how a rule is construed. “The Court as a general rule is not going to decide a Constitutional question if it can be avoided, and sometimes advocates come in thinking that is what the Court is there for,” he says. “But one of their basic rules of procedure is that if they can avoid Constitutional adjudication, they will.”<sup>51</sup>

## 3. *Finding an Effective Illustration*

In the feedback session of Ayer’s moot for *Koons Buick Pontiac GMC, Inc. v. Nigh*,<sup>52</sup> he and his panelists spent time trying to come up with just the right metaphor for one of the points he had to make. The team that initially prepared him for argument had found support for his interpretation of “subparagraph” as used in the Truth in Lending Act in manuals used by the legislative counsel’s office of the House and Senate. The question, then, was how to refer to these manuals at the argument. As Ayer describes their quandary, the manuals weren’t “enacted by Congress, and yet it’s pretty significant that ... the technical people ... have a very clear and unambiguous way of using words like ‘paragraph’ and ‘subparagraph.’” Eventually, a member of his moot panel came up with the idea of comparing the manuals to the Rosetta Stone, which first enabled archeologists to decipher Egyptian hieroglyphics.<sup>53</sup>

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that is counterproductive, for example, or relying too rigidly on precedent, without “explaining why their outcome is right in a broader context”).

50. Shors Interview, *supra* n. 42.

51. Goldblatt Interview, *supra* n. 23.

52. 543 U.S. 50 (2004).

53. Ayer Interview, *supra* n. 28.

#### 4. *Addressing Procedural Matters*

Often the panelists' advice addresses nuts-and-bolts issues: When Chief Justice Rehnquist was absent from oral argument last term, for example, advocates had to know how to address Justice Stevens, who sat in his place. And Pillard remembers one moot in which a male panelist asked the advocate what she planned to wear at oral argument. In any other courtroom, he explained, a pantsuit would be fine, but the Court remains very conventional, and prefers traditional attire.<sup>54</sup> She also remembers a moot panel that, confronted with an advocate who wanted to use a prop, discouraged the plan, because "dramatic flourishes ... are really risky and likely to go over like a lead balloon in the Supreme Court."<sup>55</sup>

#### 5. *Getting to Yes (or No)*

Some advocates need coaching before they understand that when justices ask a yes-or-no question, they want a direct answer. An advocate can go on to explain that answer, Vladeck notes, but must first answer the question with "yes" or "no." He remembers a relatively inexperienced advocate who "could not answer a question quickly," so his moot panelists emphasized the need to be much quicker in responding. And when Vladeck saw a transcript of the argument, the advocate "was so much better. There were still a couple of times where he took too long, but he got asked some very difficult questions and his first answer was 'Yes, your honor' or 'No, your honor.'"<sup>56</sup>

#### 6. *Composing a Strong Opening*

Pillard says that advocates often begin oral argument ineffectively, which is a major drawback because no one gets more than a few sentences out before the interrogation begins. She reports that "[o]ne of the things we focus on is the one sentence or three sentences that you know you are going to get

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54. Pillard Interview, *supra* n. 21.

55. *Id.*

56. Vladeck Interview, *supra* n. 1.



to say at the very beginning to get a little bit of attention.”<sup>57</sup> Halligan can vouch for this approach, for it prompted her to change her opening in *Sherrill*. Her moot panel was focused on the possible consequences of the rule that the opposing side was advocating. This led her to emphasize and lead with those points, and to follow them with the textual arguments she had planned to stress. That “turned out to be an effective strategy,” she says, “since it was what seemed to persuade the Court.”<sup>58</sup>

### 7. *Preparing for Hypothetical Questions*

Moot panelists may also help advocates prepare for hypothetical questions. Advocates can be intimidated by hypotheticals, often failing to realize that the Justices are not necessarily as interested in the particular case before them as they are in the implications that a decision will have, and that they ask hypothetical questions to test the waters.<sup>59</sup> Hypothetical questions are only a problem, then, if an advocate doesn’t fully understand his or her case:

If you understand what theory you have to win on and what theory you most want to win on, hypotheticals shouldn’t be that frightening. It takes a second to make sure you understand a hypothetical—where it fits into your view of the world, given the legal issue that’s in front of you—and then you can either give it up or you can’t give it up.<sup>60</sup>

### 8. *Developing a Contingency Plan*

A moot panel can also prepare an advocate for the unexpected, developing an outline of what to do if things don’t go as planned. In Porter’s case, for example, the issue was whether a prisoner’s amended claim “related back” to his original *habeas* petition, and one of his moot panelists felt that Porter’s position wasn’t clear. After learning at the moot that he might be seen to be advocating a different rule than the one

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57. Pillard Interview, *supra* n. 21.

58. Halligan Interview, *supra* n. 7.

59. Vladeck Interview, *supra* n. 1 (pointing out that “to fight with the Court over hypotheticals is always a short road towards real trouble”).

60. Phillips Interview, *supra* n. 4.

adopted by the Ninth Circuit, Porter and his team prepared a list of answers to clarify his position—essentially, that he supported the rule, but that in his case, the petitioner’s claims fell within an even narrower test.

His moot panel also came up with some contingency plans. As Porter describes it, he “asked people at the moot to try to develop other tests that might be attractive for the Court in case they didn’t want to go with the Ninth Circuit’s rule.” Fortunately, however, those plans turned out to be unnecessary:

I thought the Court would question me more about line drawing, about where the line should be drawn in terms of relation back and what should be the proper ‘conduct, transaction or occurrence,’ whereas in actuality they seemed to take as a given either the Ninth Circuit’s rule would prevail or the warden’s rule would prevail.<sup>61</sup>

### 9. *Resolving to Persevere*

Naturally, all the members of a particular panel won’t necessarily offer the same advice. Some panelists, for example, discuss specific Justices and the likelihood of getting their votes. But although an advocate may feel he or she can predict—based on prior decisions—how the Justices will decide a particular case regardless of the quality of the oral argument, Goldblatt says that “you never give up hope.”<sup>62</sup> Vladeck agrees. “These people are not robots,” he says, “and they don’t behave the way you think they are going to behave. I would like to think [that they] put ideologies aside, they put their preconceptions aside, and they give you a fair shake.”<sup>63</sup> The lesson to remember is not to go in “with a chip on your shoulder.”<sup>64</sup>

### 9. *Preparing for a Loss*

Sometimes the most valuable advice is simply how best to lose. Panelists will be candid when they think that an advocate’s

61. Porter Interview, *supra* n. 26.

62. Goldblatt Interview, *supra* n. 23.

63. Vladeck Interview, *supra* n. 1.

64. *Id.* (commenting that an advocate who is unduly defensive might mistake a “meatball” (a relatively easy question for which he or she is prepared) for a “dart” (a question for which the advocate has no good answer)).

case is bound to fail, no matter how much eloquence and passion is spent trying to save it. As Porter puts it, “the panelists were not as enamored with my arguments as I was.” His moot panel told him that he had a tough road ahead of him because of a “general perception that the Court is not too friendly a ground for *habeas* petitioners, especially when they come from a win in the Ninth Circuit.”<sup>65</sup>

Lazarus says an advocate can sometimes plan for a strategic loss by aiming for a soft landing: a result that involves losing the case, but on less sweeping grounds, or on an issue that won't hurt the client's interests on remand. “I've had a case which I lost nine-to-nothing, and my client was ecstatic,” Lazarus says. He recalls that his soft-landing strategy in that case led Justice Scalia to write a concurring opinion that revealed him to be “apoplectic” about the Court's failure to reach “this other issue [that] clearly was the issue he was hoping they would reach when they granted cert.” And Lazarus sums up his point by acknowledging that “[s]ometimes the strategy is not . . . winning, but damage control.”<sup>66</sup>

## V. CONCLUSION

Once the moot panel has been assembled and the tough questions have been asked, once the debriefing is over, the trouble spots have been addressed, and the argument has been revised, the advocate's trip to the Supreme Court still looms. It's nerve-racking every time, no matter how comprehensive the moot and how well prepared the advocate. But Halligan speaks for many Supreme Court advocates when she says that mooting each of her cases at the Institute has helped her present the best possible arguments. “There is still something intimidating about getting up in the Supreme Court to start an argument,” she says. “No moot court could ever take that away. But I think it does leave you much better prepared.”<sup>67</sup> Everyone associated with the Institute's work would agree, because offering better preparation for Supreme Court advocates is the Program's single mission.

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65. Porter Interview, *supra* n. 26.

66. Lazarus Interview, *supra* n. 9.

67. Halligan Interview, *supra* n. 7.