THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

MANUAL FOR PRE-PART PARTICIPANTS

I. INTRODUCTION

Welcome to the Spring 2012 Pre-Part program. Overseeing the Pre-Part program will be: Lewis Bollard <lewis.bollard@yale.edu>, Jed Glickstein <jed.glickstein@yale.edu>, Jonathan Siegel <jonathan.siegel@yale.edu>, and Daniel Young <daniel.young@yale.edu>. Please feel free to contact any of the Pre-Part coordinators if you have questions about the program.

This manual briefly describes the Pre-Part program, outlines the format of briefs and oral arguments, lists references for techniques of appellate advocacy, and provides a schedule of activities for the semester. Relevant information can also be found on the Moot Court webpage (http://www.law.yale.edu/stuorgs/mootcourt.htm) and on the Moot Court organization page on the YLS Inside Site.

The briefs are due according to the below schedule. You will be required to submit four copies of your brief. You will receive more information about submitting your briefs closer to the submission deadline. Please note that if participants drop out of the Pre-Part program after the drop deadline, or fail to submit the briefs or to present an oral argument, they will not be eligible to compete in Moot Court for the remainder of their time at the Law School.

Participants are paired in teams for the purpose of having matched sets of petitioners and respondents. Each participant will be assigned an Advisor to assist in answering general questions concerning the brief, provide specific guidance in the preparation of a final draft, and to help with the preparation for oral arguments. Each participant’s Advisor will contact his or her advisee(s) by the end of the week in which the teams are posted.

Spring 2012 Pre-Part Schedule

January 25, 7:00 p.m. – Information Session (Rm. 129)

February 3, 5:00 pm – Signup Deadline

March 9 – First Drafts Due (OPTIONAL)

March 26, noon – Final Drafts Due at the Table

April 9 and 10 – Oral Arguments

*Note: This schedule is tentative and may be changed slightly. In particular, we anticipate holding one brief-writing training session and one oral argument training session over the course of the semester. Information will be sent to participants once the dates are finalized.
II. BRIEFS

A. The Role of the Brief

The purpose of the brief is to acquaint the court thoroughly with the facts of the case and the issues raised on appeal. The brief should therefore present, in a clear and precise fashion, all relevant facts and points of law. It should also persuade the court that the advocate’s position is the correct one. The brief is counsel’s first and, perhaps, last opportunity to gain the court’s attention and to win its support. A well-argued brief will increase the chances that oral argument can be used to highlight and emphasize the strong points of the case. A weak brief may reduce oral argument to an effort to eliminate confusion caused by the brief. An advocate cannot expect to make points effectively at oral argument if they have not been made effectively in the brief.

B. Minimum Standards

Every Yale Law School student is capable of writing a fine brief, and it is expected that everyone will do so. A brief is clearly substandard if it fails to discuss major opinions and statutes that are relevant or if it fails to address important arguments that are present in the record of the case.

C. Brief Format

The assigned Pre-Part case will require 15 to 25 pages for adequate briefing. The brief may be no longer than 30 pages. Note that the cover page, Question Presented, Table of Contents, and Table of Authorities do NOT count towards your page limit. All other writing in the brief does count towards the limit. Also, be aware that most people find that, in order to do a good job, they must set aside at least a week for writing.

Briefs should be typewritten/printed on 8½ x 11-inch paper, with at least one-inch margins on all sides. The text should be double-spaced with the exception of quotations of fifty or more words, which should be indented and single spaced according to the Bluebook. It is required that all briefs be typeset in 12-point Times New Roman font, for the sake of uniformity. If you have a question about the format you want to use, contact your advisor. In all other respects the briefs should confirm to the Bluebook’s practitioner guidelines and the Supreme Court rules for briefs, selected provisions of which are set out below. Where the following rules and the Supreme Court rules conflict, these rules take precedence. You may obtain a Bluebook from the Yale Law Journal; copies can also be found at the library’s research desk, which is located next to the entrance of the main reading room. The Supreme Court rules for briefs can be found at http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf.

D. What Should Be in Your Brief

Moot Court briefs generally follow the rules for the filing of actual Supreme Court briefs, with a few exceptions as noted below. From front to back, your brief should have the following elements. (Please also see the sample briefs available on the Moot Court website: http://www.law.yale.edu/stuorgs/mootcourt.htm. Note, however, that the final-round briefs
presented on the website had a different page limit than briefs for the preliminary rounds, which may be no longer than thirty pages.)

1. **Cover Page**: The cover should contain, in the following order, from the top of the page: (1) the number of the case or, if there is none, a space for one; (2) the name of this Court (THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE); (3) the caption of the case; (4) the nature of the proceeding and the name of the court from which the action is brought (e.g., On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit); (5) the title of the filing (e.g., Brief for Respondent); and (6) the name, post office address (use the law school’s), and telephone number of the counsel of record (again, choose a law school number). The color of the cover for briefs for Appellants/Petitioners shall be light blue; the color of the cover for briefs for Appellees/Respondents shall be red. **All 4 copies of your brief must have the appropriate color covers.**

For an example of what a cover page should look like, refer to the briefs on reserve in the library, or email your advisor.

2. **Question(s) Presented**: Note that the phrasing of the questions presented need not—and probably should not—be identical with that set forth in the petition for certiorari. You may re-phrase the question presented in the way you feel is best for your client’s needs. If there is confusion over the issues to be addressed in the brief, bring this to the attention of your advisor as soon as possible.

3. **A list of all parties** to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all such parties. This listing may be done in a footnote, usually a footnote to the question presented.

4. **Table of Contents and Table of Authorities**: Both of these must include (correct) page number references. The table of authorities should be divided by type of authority (e.g., cases, statutes, law review articles, treatises, etc.) and the references should be alphabetized within each type.

5. **Opinions Below**: This involves brief citations to the opinions and judgments delivered in the courts below, including both the Court of Appeals and the trial court. State how each lower court resolved the case, but do not expand on their holdings.

6. **Statement of Jurisdiction**: The brief must contain a concise statement of the grounds on which the jurisdiction of the Court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests.

7. **The constitutional provisions, treaties, statutes, ordinances, and regulations** that the case involves, setting them out verbatim, and giving the appropriate citations. If the provisions involved are lengthy, citation of the most pertinent portions will suffice at the beginning of the brief and the relevant text can be placed in an appendix. Such an appendix does not count toward your overall page length, but should be included only if this section cannot fit on one single-spaced page.
8. **Facts:** The brief must contain a concise statement of the facts of the case containing the factual background necessary for the consideration of the questions presented. You should provide citations for your factual assertions. Normally you would cite the record, but for our purposes you may cite facts from the lower court opinions or news accounts about your case. **ALL** facts that are cited in the Argument must be included in the Facts section.

9. **Summary of Argument:** This should be a succinct, accurate, and clear condensation of the argument actually made in the body of the brief. The summary of argument should not be a verbatim compilation of all of the various headings from within the Argument section.

10. **Argument:** This section should explain clearly the points of fact and of law being presented, and cite the authorities and statutes which are relied upon. The Argument should be broken down into various headings and subheadings, as appropriate to the structure of the questions at issue.

11. **Conclusion:** This should specify with particularity the result you wish the Court to reach.

12. **Signatures:** The last page of every brief shall bear the ID number of counsel listed on the cover of the brief, along with the date submitted, and be signed in ink by that person.

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**E. Writing the Brief**

There are many ways to present the argument of a brief. The form and style of the argument will depend on the facts of the particular case, the strength of the precedents, the existence of alternative grounds that might support one's position, tactical considerations, etc. There are, however, certain stylistic conventions which must be observed, notably regarding headings and subheadings. Furthermore, advice on the use of authorities, quotations, etc. can be applied regardless of the form of one's argument. The following discussion of these matters is adopted from *Introduction to Advocacy: Brief Writing and Oral Argument in Moot Court Competition*, (Foundation Press, 4th ed. 1985), prepared by the board of Student Advisors at Harvard Law School.

1. **Headings and Subheadings**

   The major function of argument headings and subheadings is to inform the reader of the position of the writer by giving a concise explanation of how a specific legal principle applies to the facts of the case. Headings also mark off sections of the argument both in the body of the brief and in the table of contents, where they permit the reader to grasp the entire structure of the argument in a few moments.
Headings should be argumentative; they should take the reader from a statement of the governing law, through its application in the present case, to the writer’s conclusion. Only when the case is thoroughly understood is it possible to develop adequate headings, since it is only at that point that the advocate will be able to separate the major issues in the case and determine the facts that are important to each issue. The terse, all-inclusive phrasing is demanding, and the student may find it necessary to rewrite his/her headings several times.

Subheadings may profitably be used to clarify a complex argument by singling out the individual threads of a long line of legal reasoning. Yet when an argument is relatively simple, subheadings should be restricted so that the general flow of the argument is not interrupted. As in good outline form, subheadings are never to be used singly.

2. Arguments Under Headings and Subheadings

Each argument in the brief should be structured to present a short introductory statement, supporting material applying law to the factual situation, and perhaps a short summation. Direct references to the facts of the case are essential. The court must apply principles of law to the particular facts of the case, not to some general situation. It is therefore best to deal first with the contentions and facts arising out of particular cases before moving on to generalizations. Such generalizations and abstract principles only help to persuade a court when they are related to the particular fact situation.

If it is appropriate, the relationship between the issues in the case can be indicated either in the argument headings or in the structure of the brief. The advocate may wish to distinguish issues which must be decided in his favor in order for his position to prevail, from those where the court may reach the desired result on several alternative grounds. Frequently a party denied complete victory on one issue may still win a partial victory on another.

The tone of the entire brief should be direct and positive. Phrases such as “It would seem that...” weaken the effect of counsel’s argument. Of course, any contention made should be reasonable. The best argument is one that impresses the court with its objectivity while always leading toward the conclusion desired. Although it will be necessary, upon occasion, to anticipate and negate the contentions of the other party, this should be done without creating a negative tone in the brief. Even when an opposing contention is to be criticized in the brief, the criticism should be based, insofar as possible, on the strength of the contrary contentions rather than on the other’s weakness. A brief should not be split into affirmative and negative or rebuttal sections. It should be a positive whole.

Frequently a lawyer must decide whether to argue a litigable issue or to concede it. A brief is made forceful if its arguments are not split up so that the main thrust is blunted, especially when the inclusion of an issue will probably hinder counsel’s strategy. The decision to concede an issue, like strategic decisions generally, is a matter of personal judgment. However, it is generally a good idea to consult with one’s assigned advisor if you plan to concede or abandon arguments that played a major role in the case below.

An outline can be an exceedingly useful device for organizing your arguments. Some
writers find that the best way to prepare a brief is to make a detailed, paragraph-by-paragraph outline before writing a single sentence. The brief writer can then put the flesh on the bones, bearing in mind the relationship of each to the overall structure, the facts of the case, and the precise disposition desired.

While the writing style is necessarily highly personal, general standards of good composition should always be kept in mind. Because the purpose of a brief is to persuade a court to accept a disputed proposition of law, clarity is most important. Normally, short sentences are great aids to clarity. The use of rhetorical questions can be perilous because the judge may be tempted to give an unfavorable answer. In the brief, counsel may refer to his or her side as “we”; opposing counsel may be referred to as “counsel for [petitioner] [respondent].” The appellate court should be referred to as “this Court.”

3. Using Authorities in the Brief

Authorities are not meant to function as footnotes to a college thesis or a law review article. A brief is a tool of persuasion in which the court is asked to believe certain propositions put forth by the brief writer. Logical analysis and appeal to policy considerations constitute the methods by which judges are led to certain beliefs. Authorities should be used to support such analysis and considerations.

Authorities may help persuade a court in several ways. First, the fact that other courts have accepted a proposition on the basis of the analysis is worthy of serious thought. Since judges are human, they are inclined to feel a certain sense of support when others who judged similar cases accepted similar propositions. Second, authorities indicate the existing framework of the law. Within any given jurisdiction, the doctrine of stare decisis operates to give greater persuasive weight to earlier decisions than they might otherwise have. This doctrine is based on the importance of fulfilling people’s expectations and on the commonly held belief that a sense of fairness and a respect for law depend upon similar fact situations producing similar legal results. Consequently, even if logical analysis and factual considerations might lead a court to reach one result, it may feel constrained by prior decisions to reach the opposite result. However, stare decisis does not always dictate that prior decisions should be followed. It is only one factor, albeit an important one, to be weighed in reaching a result.

Authorities are also used to show the existing framework of the law in another sense. A court must fit its results into the whole of the existing legal framework, and no court desires to reach an anomalous result. Consequently, any analysis should show that the implications of the result would fit logically with the existing case law in other areas. What the law is in the other areas must be indicated by citations to authority.

From this short discussion, it should have become apparent that authorities should be used in a supporting role. Do not present a treatise-like abstract discussion of relevant law. Present an argument based on the facts of your particular case interwoven with the relevant law.

In choosing among the cases to be included, consideration of the jurisdiction of the court from which a case comes is essential. Unless you are told otherwise, you should argue the case
as if it were before the Supreme Court of the United States. On questions of federal law, then, the most persuasive citations will be U.S. Supreme Court decisions. Next most persuasive will be decisions of the Circuit Courts of Appeal. If there is a point of law that has not been ruled upon by the U.S. Supreme Court, but has been ruled upon in several circuits, it is useful to cite several of the circuits to show that they are in accord with your position. District Court citations are also useful, but should be used mostly when there is no higher authority or when the facts of the case are similar to the earlier case, so that the logic and holding of the earlier case are readily applicable to the case.

Since, in a busy court, not all of the judges will have read all the cited cases prior to oral argument, a bare citation to a case name and reporter will not be helpful to the court. If a case is important to a fact situation and can help support an argument, the case can be abstracted in three or four lines. To demonstrate a range of law or facts among several cases in a minimum of space, parenthetical abstracts of less than two lines can be helpful. When a case is offered to support a general principle or fact not necessarily dependent on the special circumstances of any single situation, an abstract is not necessary.

When a case is essential to an argument, an abstract may not be enough. If a court is to follow the rule of the case it must be shown why the facts cannot reasonably be distinguished from those of the case before it. A legal principle applicable to one set of facts may be quite inappropriate to another. It is also important to show that the rule of the cited case is a good one. This is particularly true where an issue is to be decided for the first time. A court will not adopt a rule simply because another court has done so; it must be convinced that so holding will produce a just result.

The handling of dicta is a recurrent problem for a lawyer. In theory, dicta are discussions by the court of matters not necessary to its resolution of the case before it. However, the line between dicta and holdings is not as clear in fact as in theory. Indeed, even the courts act with some flexibility in our system of case law. Thus, a bare statement in passing in a decision may be later proclaimed “the basic implication inherent in that case,” or a holding may be later eroded by a process of interpretation. Conclusions generally accepted as holdings have been dismissed by the court that made them as mere dicta of “remarks”. Familiarity with decisions increases a lawyer’s ability to observe the many different ways that, on occasion, the same court may treat precedent and authority. He or she must always be alert to avoid being led astray by written scholarly comments as to what was holding and what was dicta.

Where a case is used for any reason other than the force of its holding, proper limitations should be cited. These cases will surely be cited by the opposition, and opposing counsel may reduce their impact by undermining their logic and by introducing rebutting authority. Also, the citation of contrary authority lends an objective tone to the brief that may enhance the arguments. Moreover, such disclosure is required by ethical cannons when opposing counsel has not provided the court with such cases. “An attorney should advise the court of decisions adverse to his case which opposing counsel has not raised if the decision is one which the court should clearly consider in deciding the case, if the judge might consider himself [or herself] misled by the attorney’s silence, or if a reasonable judge would consider an attorney who advanced a proposition contrary to the undisclosed opinion lacking in candor and fairness to him or her.”
In conducting research, the student should check Shepard’s Citations and other tools available electronically for checking citations to make sure that cases cited have not been overruled or severely criticized. It is irresponsible to rely on a case that later is shown to have been overruled. The discovery of such loose practices raises doubts in the court’s mind as to the accuracy of other citations.

Secondary sources can be helpful if used with discretion. Although they have no precedential value, the student may cite treatises, law review articles, notes, for example, to summarize broad rules of the law, to indicate their history or to suggest future extrapolations. Such secondary sources often are a good place to start research; they can provide a quick overview of unfamiliar legal terrain.

4. Quotations in the Brief

A word of caution on the use of quotations is advisable. It is easy to get into the habit of using lengthy quotations; a long quotation is frequently ineffective, however, because it often breaks the flow of the argument. Quotations are of value to the brief writer only when they are from the one or two decisions that come close to controlling the case or when they are short and pithy. In the former case the quotation is of value in setting forth the precise words within which or beyond which the advocate claims the case lies. In the latter case the quotation will point up and emphasize the advocate’s argument rather than intrude upon it.

One effective method of dealing with long quotations that support an argument is to summarize them in one or two lines, including just enough of an extract to whet the court’s appetite to read the entire section in the case itself. All quotations must fairly represent the proposition for which they stood in the original work. When an omission is made, the quotation that remains must not convey an impression different from the full quotation. Such omissions must always be noted by the inclusion of ellipses. Quotations over fifty words in length should be single-spaced and indented from the body of the brief. Cite all quotations according to the Blue Book.

F. References

As a general principle, one can learn more about the techniques of advocacy by reading briefs and listening to oral arguments than by reading manuals and treatises on the subject. The best sources on brief-writing available to the student are therefore Moot Court briefs on reserve in the library (those of recent Cardozo Prize finalists) and federal appellate briefs which are found on the level BM, the basement mezzanine in the library. Westlaw and Lexis also offer access to Supreme Court briefs.

Outstanding examples of appellate advocacy include the following:

Griswold v. Connecticut, 381 U.S. 479 (1965) (argued for Griswold by Prof. Thomas I. Emerson)

One may find it useful to take a Supreme Court or Circuit Court case which was argued by a competent lawyer and read through the case in chronological order, i.e., read the lower court opinion, the briefs of the two counsel, and the opinion of the appellate court. Through this exercise one should be able to analyze how counsel argued the cases on appeal and perhaps why each succeeded or failed.

NOTE: Please DO NOT make use of documents that have been filed with the Supreme Court (or any lower court) relating to the case you are arguing. These include, for example, briefs, other court filings, oral argument transcripts, etc. If you have questions as to whether it is proper to consult a source, please ask your advisor or the Pre-Part Director.

III. ORAL ARGUMENT

A. The Role of Oral Argument

“Oral argument should undertake to emphasize and clarify written argument appearing in the briefs theretofore filed. The court looks with disfavor on any oral argument that is read from a prepared text.” Sup.Ct.R. 38.1. Apart from this rule, the Supreme Court has been silent on the nature or content of oral argument. However, the importance of oral argument is clear from pronouncements of judges off the bench.

For example, Chief Justice Charles Evan Hughes wrote:

[T]he desirability . . . of a full exposition by oral argument in the highest court is not to be gainsaid. It is a great saving of time of the court in the examination of extended records and briefs, to obtain the grasp of the case that is made possible by oral discussion and to be able more quickly to separate the wheat from the chaff . . . . I suppose that, aside from cases of exceptional difficulty, the impression that a judge has at the close of a full oral argument accords with the conviction which controls his final vote.


Oral argument provides judges the opportunity to have their particular doubts and
misunderstandings cleared up by counsel. It gives them a chance to probe the soundness of the advocates’ arguments and, through the use of hypothetical questions, to discover the limits of their implications. Oral argument also provides counsel an opportunity to be as persuasive as possible in a face-to-face encounter with the bench. As Chief Justice Hughes indicated, such persuasion can be highly effective.

B. Format

Each student will be allotted 12 minutes for oral argument. The party who opens the argument (the petitioner or appellant) may request that the court allow him or her a portion of this allotted time for rebuttal. Time limits may be extended at the discretion of the presiding judge.

At the beginning of the oral argument, the student should say, “Mr. (or Madam) Chief Justice, may it please the court, my name is X. I represent Y in the case of Z v. Z.” If appropriate, the student may then give the procedural status of the case, indicating both the question it raises and the relief sought. In the Supreme Court, it’s common for the first party to go forward (petitioner or appellant) to then state the facts of the case. As in the brief, a clear and concise statement is ideal, for the court will find the argument much more compelling if it fully understands the factual context in which the legal issues arise. Similarly, in a Supreme Court argument, the appellant or respondent should not simply restate the facts, but rather refocus the court’s attention. If the facts have been accurately stated by opposing counsel, that statement should be relied upon (with a statement to the bench to that effect). If, on the other hand, the facts have been slanted too much, or important facts have been left out, the respondent (or appellee) should call the court’s attention to these points. In Moot Court, the judges often do not want to hear the facts of the case, so it is most common to dispense with this unless specifically asked by one of the judges.

At the outset of the argument, you may find it helpful to give a concise outline of the argument (a “road map”). This outline gives the judge a pattern into which to fit later arguments, indicates the order in which matters will be discussed, and enables the court to defer its questions until the appropriate time. The outline also give the attorney a framework to work around, and to gently move back into when the Court’s questions get too far afield.

The key to oral argument, in the evocative words of John W. Davis, is to “go for the jugular vein.” The task is to stress the major points of the argument, distinguish or refute the case of opposing counsel, and clear up any ambiguities, all in a logical, coherent, and, if possible, eloquent fashion. Put the best points forward first. Don’t “save” major arguments, for the chance may never arise to discuss them. State all conclusions first, then support them with case law and argument. If the court asks a direct question, give a direct answer -- a simple “yes, your Honor” or “no, your Honor” is recommended if the question can be answered that way. Then explain your reasons. It is (exceedingly) unwise for the student to tell the court that he/she prefers to deal with a question later in the argument. Address the issues as they arise. Also, never interrupt a judge. As soon as a judge’s lips begin to move, stop talking and listen. This deference to the bench is extremely difficult to get comfortable with, but it is very important. Even if you are in the middle of a sentence, stop and listen to the judge’s question. Failure to
show deference will disturb and sometimes anger judges. Also note that, as a matter of deference, it is best to always address the members of the bench as “Your Honor,” for example, by answering a question “Yes, your Honor,” instead of merely “Yes.”

Remember that oral argument gives the court a chance to ask counsel questions on anything pertaining to their brief. Therefore, while one may choose not to include certain points in the prepared oral presentation, one must be prepared to deal with questions encompassing the entire brief. If a question exposes weakness in the argument, it is better to acknowledge it than to evade the question. Acknowledging the weakness is especially true if the question strikes at a point that is not essential to the argument. It can be the better part of valor to concede a weak point and show why it is not dispositive, rather than waste energy defending it and making it appear as if the case turns upon it.

The main skill in oral argument is being able to answer questions from the bench, while at the same time maintaining the progression and logic of the argument. To so control the flow of the argument, the student must be flexible. The student must know the case well enough to restructure the argument as it proceeds. For example, if while discussing the first point, a judge asks a question which relates to what one had envisioned as the third point, the student may be better off by switching completely to the third point. Alternatively, the student may be able to answer the question quickly and directly, then return to the earlier argument.

In concluding oral arguments, it is not necessary to give a formal summary of the argument, but it is helpful to re-emphasize the main points. The final sentence before sitting down should be one asking the court for the relief desired in a manner similar to the “Conclusion” printed in the brief. A bailiff will keep time and let the student know when the allotted time has expired. If the student has not finished when the time expires, the student should immediately ask the court’s permission for time to conclude. If on the other hand, the student has completed the argument with time remaining, and no questions seem forthcoming, it is perfectly acceptable to ask the court if there are any further questions, and, if not, conclude.

C. Preparing for Oral Argument

The assigned advisor will conduct at least one practice argument with his or her team in the week preceding the Pre-Part oral argument. This practice “mooting” will give you an opportunity to see the weak spots in your arguments, and familiarize yourself with the process of oral argument. Your advisors will help you become accustomed to dealing with numerous interruptions and questions. Lastly, the mooting will provide a chance to exercise the fundamentals of good public speaking: speak loudly enough to be heard, avoid mumbling, use proper emphasis, and use pauses. Remember that when you move on to the competition, you will be judged on style as well as substance.

Before the argument, you should outline the major points of your argument; this outline will serve as a checklist when proceeding through the argument. Note cards containing important facts and quotations can help but do not rely too heavily on them. Do not stand before the bench with a sheaf of notes. Occasionally glancing at an outline to remind oneself of the direction of the argument or using notes to refresh one's memory about a case one which the
bench has cornered one on is acceptable but don’t make a habit of it. Obviously, only occasional reliance on notes demands extensive preparation. You must be thoroughly familiar with the facts of the case, its procedural history, and all major cases. There are no shortcuts.

IV. ADDITIONAL RESOURCES


David C. Frederick, Supreme Court and Appellate Advocacy (2002) (Forward by Ruth Bader Ginsburg). A very recent addition to the literature on Supreme Court and appellate advocacy by a seasoned advocate and former Assistant to the Solicitor General. It covers all the nuts and bolts of appellate advocacy, including compiling materials, stating the issue, and finishing an argument by putting one’s opponent on the defensive. Included are examples from actual Supreme Court arguments of what to do and what not to do.

John M. Harlan, What Part Does the Oral Argument Play in the Conduct of an Appeal?, 41 Cornell L.Q. 6 (1955). An address by the Associate Justice, with some emphasis on how to deal with the questions from the bench. Reprinted in Pittoni.

Introduction to Advocacy: Brief Writing and Oral Argument in Moot Court Competition, Prepared by the Board of Student Advisors, Harvard Law School. (4th ed. 1985). This source is the manual used for Moot Court at Harvard. Because Moot Court at Harvard is a required first year program, much of the manual is addressed to the fundamentals of legal research and not specifically to advocacy. The first part of Chapter IV, Writing the Brief, and Chapter V, Oral Advocacy, are worth reading. A copy is on Reserve in the Law Library.

Robert H. Jackson, Advocacy Before the Supreme Court, 37 A.B.A.J. 801 (1951). An address by the Associate Justice with some emphasis on the importance of discussing the facts.

Frank R. Kenison, Some Aspects of Appellate Arguments, 1 N.H.B.J. 5 (1959). An essay by the Chief Justice of the New Hampshire Supreme Court, with some emphasis on the role a brief can play in the writing of a judge’s opinion.


Karl N. Llewellyn, A Lecture on Appellate Advocacy, 29 U. Chi. L. Rev. 627 (1962). A lecture by the professor contrasting oral argument with the brief.


Edward D. Re, Brief Writing and Oral Argument (1965). A manual by a professor at St. John’s University School of Law.

Walter V. Schaefer, The Advocate as a Lawmaker, 1065 U. Ill. L.Rev. 203 (19xx). A discussion by a Justice of the Supreme Court of Illinois focused on the problems faced by counsel arguing that the court should depart from earlier precedent. Reprinted the Appendix of
INTRODUCTION OF ADVOCACY.


R. Stern, et al., *Supreme Court Practice*, (6th ed. 1986). The standard treatise on all aspects of Supreme Court practice. While it is specifically directed toward counsel in the U.S. Supreme Court, the chapters on the Briefs (Chap 11) and Oral Arguments (Chap. 12) are useful for all appellate work.

APPENDIX A: TIPS ON BRIEFWRITING

These tips are from Michael E. Robinson, YLS ’76. Michael is an attorney in the U.S. Department of Justice, Civil Division, Appellate Staff.

I. GENERAL OBSERVATIONS
   • Use short sentences and short paragraphs.
   • Use active voice.
     1. Passive: The ruling was made by the trial judge that…
        Active: The trial judge ruled that…
     2. Passive: This interpretation is supported by the legislative history…
        Active: The legislative history supports this interpretation.
     3. Passive: A complaint was filed by the union…
        Active: The Union filed a complaint…
   • Omit surplus words. Examples:
     Complicated                                  Simple
     At that point in time                        Then
     By means of                                  By
     By reason of                                 By
     For the purpose of                           To
     In accordance with                           By, Under
     In relation to                               About, concerning
     In the event that                            If
     For the reason that                          Because
   • Avoid excessive use of underlining, capitalizing, italicizing, etc.
   • Avoid long block quotes (better to break up and weave them into discussion).
   • Avoid string cites when one or two will do.
   • Simplify, simplify, simplify!
     o Avoid overuse of abbreviations and acronyms (e.g., instead of “NLRB” use “the Board”; instead of initials, give the statute a name that sounds favorable—e.g., Freedom of Access to Clinic Entrances Act (FACEA) is “the Access Act”).
     o Avoid technical jargon. If you use technical terms, explain what they mean. Don’t assume the court knows (e.g., rather than Title VI, say Title VI of the Civil Rights Act).
     o Limit your use of footnotes.
     o Use subheadings.
   • Never ignore your opponent’s strong arguments or bury your response in a footnote. Deal with them up front.
   • Avoid personal or vitriolic attacks on counsel or district court.

II. OBSERVATIONS ABOUT SPECIFIC PARTS OF A TYPICAL BRIEF
   A. Statement of Issues
      • Do not use too many.
      • Do not follow your opponent’s statement. Do your own issues more favorably phrased.
      • They should NOT be argumentative.
      • Do not put in excessive facts or minutiae.
      • Use introduction if it is a complicated issue.
   B. Statement of Jurisdiction
      • Include date of judgment and notice of appeal; statutory basis of jurisdiction.
      • If necessary, refer to argument if jurisdiction is contested.
   C. Statement of the Case
      • Consider a section on the statutory or regulatory scheme—this is a necessity if the case involves the interpretation of a statute or regulation; helps place in context.
      • Statement of Facts
        µ usually in chronological order
        µ non-argumentative.
- narrative form; tell a story, try to make it interesting.
- do not ignore damaging or harmful facts—the court will be aware of them anyway; it is best to include them and portray them in the best possible light.
- leave out irrelevant facts, dates, etc.
- leave out long discussion of prior proceedings that are no longer at issue (e.g., original preliminary injunction or summary judgment proceedings that are not the subject of the appeal).
- use subheadings if appropriate, to guide the court
- cite liberally to the record—know and master the record.
- most important, be clear and candid, and let the facts show why your side acted reasonably.
- when to write the statement? opinions vary; we recommend writing the statement first to enhance understanding of the facts and record before proceeding to the argument (subject to later editing in light of the argument).

D. Summary of Argument
- **Very important.** Judges read it right before the argument to refresh their memory.
- Succinct condensation of argument, but not just a repetition of argument headings.
- Include an introductory paragraph that captures the “theme” of your argument.
- Best if written after the argument is written.
- Can eliminate cites, concentrate on the bare essentials.

E. Argument Headings
- Short, affirmative statements of how the Court should rule.
- Phrase them differently from questions presented.
- Should be amplified by effective use of subheadings.

F. Argument
- **IRAC**
  - Make your affirmative argument first, even if you are appellee; then respond to district court or opponent’s contentions.
  - Deal with diverse authority after making affirmative case; you can begin that section by saying something like: “Smith v. Jones is not to the contrary…” or “Plaintiff’s reliance on Smith v. Jones is misplaced.”
  - Have a theory of the case, a theme you can emphasize.
  - Explain why your argument makes sense—i.e., why it is supported by sound public policy or by the underlying statutory purpose.
  - Discard weak arguments if you can; they take the focus off of your strong arguments and weaken your credibility.

Pay attention to structure—strong arguments first; logical flow (point A leads to point B).