TEACHING EFFECTIVE ORAL ARGUMENT SKILLS: FORGET ABOUT THE DRAMA COACH

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I. INTRODUCTION

Over twenty years ago, questions about lawyers’ competence led the American Bar Association (ABA) to study the adequacy of skills training in law schools. Along with a focus on skills generally, the ABA appointed a committee to study whether law schools were successfully teaching appellate advocacy skills. The ABA eventually agreed with the committee report, which was critical of both law school curricular offerings in appellate advocacy and traditional moot court competitions.

A 1984 ABA survey indicated that a significant majority of all law schools had moot court programs that failed to teach...
essential advocacy skills. I have found no similar data focusing on appellate advocacy and moot court courses since the ABA report. In light of that, I asked my research assistants to survey law schools around the country to assess whether the law schools have upgraded their advocacy training. The survey found that law schools have improved their advocacy programs. However, this raises questions of whether law schools have gone far enough to address the concerns raised by the ABA report.

The conclusion that law schools have not gone far enough in upgrading their oral advocacy training finds support in the continued criticism of student advocate and practicing lawyers' oral advocacy skills. Contemporary critics of moot court programs believe the programs reward the wrong skills—they are correct. The most significant lingering criticism of oral arguments is that attorneys fail to appreciate the primary purpose of their fifteen or twenty minutes before the court. Some commentators speculate that courts have limited oral argument, both in length and availability, because judges find the quality of those arguments poor.

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4 See id. at 141.
5 See infra App. A (reporting the results of an informal survey of web sites and interviews with appellate advocacy and legal writing faculty from forty-four law schools).
6 See infra App. B.
7 See Ruth Bader Ginsburg, Remarks on Appellate Advocacy, 50 S.C. L. REV. 567, 569 (1999) (discussing the importance of oral advocacy in addressing the judges' questions and concerns); William H. Rehnquist, Oral Advocacy: A Disappearing Art, 35 MERCER L. REV. 1015, 1021-1022 (1983) (emphasizing the ways in which oral argument assist the court); see also Frederick Bernays Wiener, Oral Advocacy 62 HARV. L. REV. 56, 58 (1948) (arguing that cases are won or lost on oral argument).
8 See DAVID C. FREDERICK, THE ART OF ORAL ADVOCACY 2 (2003) (arguing that if the Supreme Court and courts of appeals were to further limit "the availability of oral argument, a principal reason would be long-expressed disappointment by judges and justices with the quality of oral advocacy."). But see Mark R. Kravitz, Words to the Wise, 5 J. APP. PRAC. & PROCESS 534, 546 (2003) (arguing that "while lawyers certainly bear responsibility for the quality of their appellate advocacy, there is a certain circularity in such arguments. For as judges reduce the number of cases they set for argument, they also necessarily reduce the opportunities for lawyers to hone their skills and become better oral advocates.").
The fact that law schools have increased resources devoted to advocacy training begs the question why we still lack qualified oral advocates. That is the central question that this article explores. Absent empirical data that explain the poor state of oral advocacy, I rely on thirty years of experience as a law professor, as an advocate, and as a coach of numerous moot court teams and director of two different moot court-appellate advocacy programs to explore this question.9

First, while law schools have paid greater attention to advocacy training over the past twenty years, we still have a long way to go. Too many programs are still the province of inexperienced professors.10 Students have too few opportunities to give oral arguments, and involvement in advocacy is typically not required beyond the first year legal writing program.11 Second, I suspect that many programs still do not teach the “right stuff.” Instead, student advocates treat oral argument as a show.12

A less obvious explanation of poor advocacy skills is that law schools have become “kinder and gentler”13 places over

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9 Upon graduation from the University of Pennsylvania Law School, I clerked for the Honorable J. Sydney Hoffman, a judge on Pennsylvania’s Superior Court, that state’s intermediate appellate court. I began teaching at Loyola (New Orleans) Law School in 1977. While at Loyola, I handled a number of appeals and argued motions in federal and state trial courts. From 1986 until 1990, along with my colleague Patrick Hagg, I ran a moot court program designed to address many of the criticisms raised by the ABA report. In addition, I served as the faculty advisor to the National Moot Court team. Since beginning at McGeorge School of Law, I have coached a dozen National Appellate Advocacy Competition teams over a six year period, with half of them qualifying for the national competition rounds and five of them advancing at least as far as the semi-final round. In addition, for seven years, beginning in the mid-1990s, I designed and directed an appellate advocacy program. As with the program at Loyola, McGeorge’s program addresses many of the concerns expressed in the ABA report.

10 See infra App. B, tbl. 2 (summarizing the appellate advocacy experience of the faculty at some law schools within the survey).

11 See id. tbl. 1 (indicating that most of the required courses that included instruction in oral advocacy were first-year legal writing classes).

12 See HENRY D. GABRIEL & SIDNEY POWELL, FEDERAL APPELLATE PRACTICE: FIFTH CIRCUIT 7-7 (1994) (quoting Judge Henry Politz as stating that, “[t]he tone should be conversational and persuasive. Questions should be welcomed.”).

13 See Celestial S.D. Cassman & Lisa R. Pruitt, A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall, 38 U.C. DA-
the past thirty years. In many schools, the Socratic method is under attack.\textsuperscript{14} Used rigorously, the Socratic method is an effective tool for teaching essential skills of oral advocacy, especially the ability to respond thoughtfully to questions.\textsuperscript{15} Instead, many law professors, imbued with the notion that the Socratic method is bad for their students, conduct broad policy discussions where students' opinions are valued more than are carefully framed legal arguments.\textsuperscript{16}

Section II of this article reviews the ABA’s criticisms of moot court programs and summarizes our findings about the current state of moot court and appellate advocacy training. Section III discusses why, even though many law schools have upgraded their moot court courses, many judges and commentators still lament the relatively poor advocacy skills of lawyers appearing before them. Specifically, Section III discusses some of the myths about what constitutes effective oral advocacy. Further, it argues that the trend towards “kinder and gentler” legal education has led to a less rigorous use of the Socratic dialogue and that, when properly used, the Socratic method is an effective tool by which many lawyers learned the art of oral advocacy. By way of conclusion, Section IV offers some suggestions to improve the quality of oral advocacy training.


\textsuperscript{15} See Vitiello, supra note 14, at 987-88 (explaining that the Socratic method prepares students for future encounters with judges who will expect them to answer questions quickly and effectively while under pressure).

\textsuperscript{16} Id. at 972-73 (describing new practices of schools that have abandoned the Socratic method).
II. Teaching Appellate Advocacy

During the 1980s, the ABA closely focused "on the lawyering skills or lack thereof of members of the bar, whether and to what extent these skills can be taught in law school, and how much of the limited resources of the law schools should be devoted to teaching them." That focus produced a number of widely debated reports and a continuing debate about the importance of teaching practical skills in law school. Less widely reported was the ABA's consideration of appellate advocacy.

In 1984, the Appellate Judges' Conference of the ABA assigned a committee the task of studying the special problems related to training appellate lawyers. The committee's report, issued in 1985, was highly critical of traditional moot court programs and competitions.

Much of its report focused on appellate practice as a discrete sub-specialty. For example, the committee found that law schools failed to train lawyers in rules of appellate practice, rules such as those governing appeals, petitions for extraordinary relief, motions, settlement conferences, oral argument, rehearing, seeking review, and more. The committee also focused on other special aspects of appellate litigation,

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11 See Committee, supra note 2, at 130.
12 See id. at 131; see, e.g., Cramton, supra note 1; SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (1992) [hereinafter MACCRAE REPORT].
13 The February 2005 approval by the ABA House of Delegates of revised law school certification standards, including a strengthened skills requirement, shows that the ABA and, specifically, the Section on Legal Education and Admissions to the Bar have been focusing on improving skills training in law schools. A.B.A. House of Delegates Report 105B, at 2-3 (Feb. 2005) [hereinafter Delegates Report].
14 See Committee, supra note 2, at 131.
15 Id. at 137 ("[T]he appellate court as an institution and its relationship to the trial court is almost completely ignored in the normal law school curriculum."); id. at 141 ("It is clear that the traditional appellate advocacy program provides almost none of the fundamental or specialized knowledge or skills that are essential to an appellate litigator.").
16 Id. at 138.
such as the need for attorneys to learn how to extract facts from a full appellate record\textsuperscript{23} and to understand the standard of review on appeal.\textsuperscript{24}

Beyond identifying the failure to teach these specialized skills, the report criticized moot court programs and competitions at a more general level. The report focused on the fact that upper level students or instructors with little appellate experience taught most moot court classes.\textsuperscript{25} As the report concluded, “there must be training by a qualified instructor in the special skills of appellate brief writing and oral argument, particularly in working with a realistic appellate record.”\textsuperscript{26} While the report noted the addition of appellate litigation skills courses by some schools, such courses remained the exception.\textsuperscript{27}

Although the report recorded the expansion of interscholastic moot court competitions, it concluded that these failed to teach meaningful skills for many of the same reasons that traditional moot court classes also failed to do so.\textsuperscript{28} The report recommended that control be shifted from student moot court boards to experienced appellate instructors.\textsuperscript{29} For example, the report insists that meeting the recommendations of the report “demands . . . an instructor who has the knowledge and specialized skills in all aspects of appellate litigation.”\textsuperscript{30} The report made its conclusion explicit: “[I]t should be clear that the prevailing practice of assigning third year students or

\textsuperscript{23} See id. at 139 (focusing on the necessity for appellate advocates to be able to sift through a trial record).

\textsuperscript{24} See id. at 138 (discussing the important procedural rules that appellate advocates need to know including the proper standard of review).

\textsuperscript{25} See id. at 149; see also infra note 31 and accompanying text.

\textsuperscript{26} Committee, supra note 2, at 143.

\textsuperscript{27} See id. at 143-44 (summarizing the results of a survey of law school courses in appellate advocacy).

\textsuperscript{28} See id. at 145-46 (noting that moot court competitions, like appellate advocacy programs, suffer from inadequate instruction and limited application to professional appellate practice).

\textsuperscript{29} See id. at 146 (suggesting ways that moot court programs could be restructured to provide better appellate experience, including the use of appellate litigators instead of students as instructors).

\textsuperscript{30} Id. at 148.
new law school graduates the major responsibility to teach appellate advocacy programs or supervise moot court competitions is not desirable.\textsuperscript{31}

Finally, the report identified the lack of adequate teaching material as another source of concern. For example, it observed that "the two most widely adopted books for use in this program were prepared by law students."\textsuperscript{32} While the report recognized that some recently published material was better suited for upgraded appellate advocacy programs,\textsuperscript{33} it also found lacking the availability of realistic appellate litigation problems.\textsuperscript{34}

Significant changes have occurred in the more than twenty years since the ABA's adoption of the committee report. For example, many law schools have upgraded their legal writing programs.\textsuperscript{35} To comply with ABA requirements, law schools now give legal writing instructors tenure or, at a minimum, long term contracts.\textsuperscript{36} The result should be a more professional group of teachers, interested in making a career out of

\textsuperscript{31} Id. at 149. The report relied on a then-current survey indicating that "the large majority of instructors responsible for research and writing programs for first year students are recent law school graduates or third year law students."\textit{Id.} (citing \textit{Survey: Staffing of Legal Writing Programs in AALS Schools, 1982-1983} (Oct. 4, 1983) (conducted by Robert Cane, Director of Legal Writing, University of Puget Sound School of Law)).

\textsuperscript{32} Committee, \textit{supra} note 2, at 149.

\textsuperscript{33} Id. at 149-50.

\textsuperscript{34} Id. at 150-51.

\textsuperscript{35} See Kristin Gerdy & Toni Berres-Paul, 2004 \textit{Survey Results, 2004 A\textsuperscript{S}\textsuperscript{N} LEGAL WRITING DIRECTORS & LEGAL WRITING INST. 10, available at http://www.alwd.org/alwdresources/surveys/2004surveyresults.pdf} (last visited Feb. 23, 2006); see also Jill J. Ramsfield, \textit{Legal Writing in the Twenty-First Century: The First Images}, 1 \textit{LEGAL WRITING} 123, 129 (1991) (noting that seventy-five percent of responding schools "formally include moot court as part of the LRW program. . . Eighty-three percent include an appellate brief argument." (citation omitted)).

\textsuperscript{36} \textit{A.B.A., SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, STANDARDS: RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS} § 405(d) (2005-2006) ("A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction . . . and (2) safeguard academic freedom."). \textit{available at http://www.abanet.org/legaled/standards/standards.html} (last visited Feb. 23, 2006).
teaching.

Anecdotally, I am aware that some law schools have upgraded their moot court programs; however, in preparing this article, my research assistants and I could find no systematic report measuring the extent to which law schools have upgraded those programs. To fill that gap we surveyed roughly twenty-five percent of ABA accredited law schools to determine how each teaches oral advocacy skills. The survey included responses from forty-four schools, with schools included from each of the four tiers identified by the U.S. News and World Report's rankings of American law schools.

A full summary of our survey appears as Appendix A to this article. Although some areas of concern remain, law schools have upgraded their advocacy offerings since the publication of the ABA report: the typical program is no longer run by students, most courses are graded (instead of pass/fail), a majority of schools no longer pair students, and about seventy-five percent have students argue individually. A number of schools have created appellate practice courses and appellate clinics. Furthermore, a significant number of schools use actual transcripts or realistic appellate problems. In addition, advocacy teachers no longer face a lack of adequate teaching materials, which was one of the concerns raised by the ABA report. Today any number of good books on advocacy and realistic appellate problems are

37 I have been involved with upgrading the appellate advocacy-moot court class at two different law schools. For a description of the program that was implemented at McGeorge, see Michael R. Fontham, et al., Teacher's Manual for Persuasive Written and Oral Advocacy: In Trial and Appellate Courts 102-09 (2002) [hereinafter Teacher's Manual].
38 See infra App. B.
39 See id. tbl. 2 (reporting the type of instructors utilized for the courses surveyed).
40 See id. tbl. 1.
41 See id.
42 See id. (listing the courses surveyed).
43 See id. (indicating that nineteen schools, for which data on this question were available, use real case records to develop the oral argument).
44 Committee, supra note 2, at 149-51.
45 See Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral
available. These findings suggest that schools have been attentive to the concerns raised in the ABA report.

Our findings also suggest that law schools could go further in teaching advocacy skills. For example, the forty-four law schools surveyed offered a total of eighty-six courses that included some instruction on appellate advocacy. Some of those courses were upper level electives and appellate clinics. About half of the course offerings were required, but most of those are first-year legal research and writing courses. A number of the elective courses had enrollment caps, suggesting that they are not widely available to students.

The staffing of advocacy courses also presents a mixed picture. We found only one course still taught exclusively by students, while three other schools relied on students to supplement faculty instruction. Tenure and non-tenure track faculty co-teach a dozen of the courses, while the remaining courses are evenly split between tenure and non-tenure track faculty. Many of the non-tenure track faculty have long-term contracts, which is the minimum currently required by the ABA. The fact that many instructors have the ABA minimum of a long-term contracts is not surprising because many of the courses teaching advocacy skills are first-year legal writing classes.

Measuring whether those teaching advocacy have mean-

ARGUMENT (2d ed. 2003); MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY (2002); MICHAEL R. FONTHAM, ET AL., PERSUAIVE WRITTEN AND ORAL ADVOCACY: IN TRIAL AND APPELLATE COURTS (2002) [hereinafter ORAL ADVOCACY]; FREDERICK, supra note 8.

46 See Committee, supra note 2, at 151 (reporting the offer from clerks of the United States Courts of Appeals to identify and prepare records for use in appellate advocacy classes and competitions).
48 See id.
49 See id.
50 See id. (noting that eighteen courses had enrollment caps ranging from eight to forty-two students per semester).
51 See id. tbl. 2.
52 See id.
53 See supra note 36 and accompanying text.
54 See infra App. B, tbl. 1
ingful experience, as urged by the ABA report, proved difficult because we were not in a position to assess the quality of the professors’ appellate litigation experience. Instead, we looked at the professors’ biographies to determine whether they had appellate experience. We found that thirty-eight of the courses were taught by faculty with some appellate experience; in many cases, though, that was limited to work as a judicial law clerk or as counsel in a small number of appellate cases.

While our survey suggests that schools have upgraded their advocacy programs since the ABA report, at many schools training remains limited. For example, many schools do not require a course dedicated entirely to advocacy training. As a result, the only oral advocacy training that many students receive is a single argument in a first year legal writing course. This training is likely to be inadequate. When it occurs during a course in which a student must learn research, proper citation, and writing skills, the legal writing instructor has only a little time to teach a great deal about oral advocacy skills. At best, such a course may require a student to give a single graded oral argument.

Beyond the limited opportunities to present oral arguments, the high percentage of courses taught by non-tenure track faculty suggests another limitation on oral advocacy training. Our study suggests that many faculty members have limited appellate experience and students may interpret a school’s decision to leave advocacy training to non-tenure

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55 See supra note 2, at 151.
56 In order to determine the relevant appellate advocacy experience of the faculty teaching the courses surveyed, my research assistants searched Westlaw databases for instances of specific faculty members appearing “as counsel” before appellate courts and also examined the faculty biographies provided by the law schools on their web sites.
57 See infra App. B, tbl. 2 (summarizing our findings regarding the appellate advocacy experience for some faculty members, where such information was available).
58 See infra App. B.
59 Gerdy & Berres-Paul, supra note 35, at 6-19.
60 See supra note 57 and accompanying text.
track instructors with this limited experience as a signal that the course is not especially important.

III. WHY THE QUALITY OF ORAL ARGUMENT HAS NOT IMPROVED

A. Myths About Effective Oral Advocacy

Our survey demonstrates an improvement in advocacy training since the ABA report. Despite this trend, judges and many commentators still complain about the poor quality of oral arguments.\footnote{See Ginsburg, supra note 7, at 569 (discussing advocates' unwillingness to respond to judges' questions); Wiener, supra note 7 ("Within the year I have been told by a justice of the Supreme Court of the United States that four out of every five arguments to which he must listen are 'not good.'").} We could find no empirical research that explains why the problem persists.\footnote{Most of the discussions of oral advocacy skills are anecdotal. See Alex Kozinski, In Praise of Moot Court – Not!, 97 COLUM. L. REV. 178 (1997) (discussing the many problems with moot court programs). But see Michael V. Hernandez, In Defense of Moot Court: A Response to "In Praise of Moot Court – Not!", 17 REV. LITIG. 69 (1998) (rebutting Judge Kozinski's arguments about moot court programs).}

This section considers why law schools are not doing a better job producing qualified oral advocates even though they are devoting more resources to their advocacy programs. Further, this section argues that many programs still reward the wrong skills.

Even as schools devote greater resources to advocacy training, some commentators still point to the poor quality of that training as the source of the problem. For example, in 1997, Judge Alex Kozinski stated that moot court programs and competitions taught student advocates to be "witty, charming, direct and forthright," but that those were the qualities of a "Boy Scout or a lapdog," not those of a persuasive advocate.\footnote{Kozinski, supra note 62, at 183.} He is not alone in that critical assessment.\footnote{William H. Kenety, Observations on Teaching Appellate Advocacy, 45 J. LEGAL EDUC. 582, 584 (1995) (discussing the skills taught by moot court programs versus those needed for appellate advocacy); see also BAZLEY, supra note 45, at 202.}
share the same concern.

Judge Ruggero Aldisert summarizes the prevailing view of why oral argument matters. Among several goals, the oral advocate should take advantage of this singular opportunity to talk directly to the decision maker. Taking advantage of that opportunity means emphasizing the pivotal issues in the brief and coming to "grids with real questions that trouble the court." Other commentators have suggested that lawyers misconstrue the purpose of oral argument and view it as high drama in which they are giving a theatrical performance. Instead, effective oral argument should amount to an engaged conversation with the court.

We cannot hope for better oral advocacy training until moot court classes and competitions recognize why oral advocacy matters. Were an educated novice to observe moot court arguments and listen to the post-argument critiques, the observer would have a skewed understanding about oral argument. Critics of traditional moot court programs and competitions have it right when they argue that "the moot court focus is often on scoring points and displaying verbal brilliance." In effect, they teach that style is more important than sub-

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63 ALDISERT, supra note 45, at 32-33.
64 See id. at 32 ("Oral argument is the only opportunity the lawyer has to personally motivate the judges by force of his or her personality, and convey what Bettinghaus described as [the] three factors that people use in judging a speaker's credibility--trustworthiness, qualifications and personal characteristics.").
65 Id. at 32-33 (listing as goals of oral argument, correcting misimpressions of fact or law held by the judges and demonstrating the logical soundness of the argument).
66 See Kenety supra note 64, at 584-85 (discussing the tendency of moot courts to reward verbal aptitude rather than substance); Kozinski, supra note 62, at 182 ("In moot court, the game consists of making yourself sound clever.").
67 GABRIEL & POWELL, supra note 12, at 7-7 (quoting Judge Henry Politz as stating that "counsel [should] approach the lectern as though she were going to discuss an interesting and important point of law with three of her senior law partners. The tone should be conversational and persuasive."); see also ALDISERT, supra note 45, at 311 (quoting Justice Ronald T.Y. Moon, "[oral argument is not a speech but a discussion with the appellate judges."). ORAL ADVOCACY, supra note 45, at 194 ("If you engage in give-and-take with the judges, you have the best opportunity to influence their views.").
68 Kenety, supra note 64, at 584.
stance. Such an approach misses the point of oral advocacy as a unique opportunity to speak directly to the decision maker in one’s case.\textsuperscript{71}

My experience as a moot court coach showed me many “ills” of traditional moot court programs and competitions. My observations are anecdotal, but based on years of involvement with moot court programs and competitions.\textsuperscript{72}

Consider the selection of moot court competition teams. At many schools, a student board runs the moot court competition program. Such boards often jealously guard their prerogative to select their successors and members of interscholastic teams. Members of student boards often view moot court to be in competition with law review.\textsuperscript{73} Board members may resent the academic success of their law review colleagues and view moot court as a place where less academically successful students can excel.\textsuperscript{74}

This attitude favors style over substance. Students who have not excelled academically are less able to assess an intellectually compelling argument than they are able to identify an argument that is delivered with flair. In selecting their successors, they are likely to favor students who share their skills and values. When I coached moot court teams but did not select the team members, I was often saddled with advocates who were stylish, but superficial.

I still shudder when I recall one of those advocates. In competition, one of the judges was a prominent civil rights lawyer who had argued some of the cases that were relevant to that year’s problem. I sat in discomfort as the judge derailed the student advocate. When the judge pressed the stu-

\textsuperscript{71} See infra note 95 and accompanying text.

\textsuperscript{72} See supra note 8.

\textsuperscript{73} M.A. Stapleton, Mootness the Issue in Student Court Contests, CHI. DAILY L. BULL., Feb. 21, 1997, at 3.

\textsuperscript{74} See Committee, supra note 2, at 145 (stating that this model originated at Harvard Law School in the early twentieth-century “to keep up the interest of those students who did not do well enough in the first year to rank high in the class.”), see also Stapleton, supra note 73, at 3 (holding up moot court programs as an alternative for those students who do not qualify for law review).
dent, he tried to go back to his canned answers and seemed to treat the questions as an unwelcome distraction. His failure to advance to the next round was appropriate; but had he not run into a well informed judge, the judges might have rewarded his slick presentation. This example is illustrative of the weaknesses in traditional moot court programs and classes.

First, too many competitions reward style over substance.\textsuperscript{75} This may result from poorly prepared judges who are often seen scanning the bench brief during the argument and, judging from the quality of their questions or from their silence, scanning it for the first time.\textsuperscript{76} Judges who lack familiarity with the nuances of the case are more likely to fall back on style as a basis to select a winner. They may also overvalue glib arguments that sound good at the moment but would not hold up if the judges were to examine the plausibility of the arguments in light of the controlling case law.\textsuperscript{77}

Overvaluing form over substance may also result from the grading criteria used in some competitions. The competition may give speaking style as much credit as substance of the argument. Below, I have attached a copy of a grading sheet used in McGeorge’s Appellate Advocacy program.\textsuperscript{78} We designed our program to reward substance and to focus on the advocate’s ability to answer the judges’ questions.\textsuperscript{79} It is inevitable that, to some extent, grading criteria in any course will tend to reflect forensic skills, but the McGeorge grading sheet gives less emphasis to style than do many similar grading sheets in use elsewhere.\textsuperscript{80}

\textsuperscript{75} See John T. Gaubatz, Moot Court in the Modern Law School, 31 J. LEGAL EDUC. 87 (1982); Kenety, supra note 64, at 584; Kozinski, supra note 62, at 182.
\textsuperscript{76} See Hernandez, supra note 62, at 84 (discussing the poor quality of moot court judges); Kenety, supra note 64, at 584-85 (noting “[m]oot court judges are far more likely than real judges to be unprepared or to ask off-the-wall questions.”).
\textsuperscript{77} See Gaubatz, supra note 75; Kenety, supra note 64, at 584; Kozinski, supra note 62, at 182.
\textsuperscript{78} See infra App. A.
\textsuperscript{79} For more on my views on teaching appellate advocacy, see TEACHER’S MANUAL, supra note 37.
\textsuperscript{80} Compared to the Oral Argument Grading Sheets of the Jessup Moot Court
Rewarding style over substance may also result from widely misunderstood instructions given to judges. Obviously, advocates should not win or lose as a result of being assigned the weaker substantive side of an argument.\textsuperscript{81} As a result, judges are typically instructed not to decide the case on the merits.\textsuperscript{82} Judges may interpret that to mean they should judge the case on the advocates' style. Instead, they ought to judge on the intellectual content of the argument. An effective advocate can make a stronger case out of a weak position than a less adept advocate.\textsuperscript{83}

The second lesson that I take from the anecdote recounted above is that many student-run programs reward style as well. Students who have done well in many programs do so because of style, rather than substance.\textsuperscript{84} In selecting their successors to run the next year's program, the student board is likely to favor people like themselves. No doubt, the student advocate whom I described above became a board member and, given his view of advocacy, would almost certainly select similar advocates to represent the school in the future.

The anecdote also suggests that, even though law schools have upgraded their programs, the quality of oral advocacy

\textsuperscript{81} See Hernandez, supra note 62, at 75 (stating that “[a] truly bad case deserves to lose given the law and facts. It is hardly admirable for attorneys to pursue, much less win, cases that can lead to a miscarriage of justice and ever-increasing cynicism among the public.”).

\textsuperscript{82} See Niagara Moot Court Tournament 2003-2004 Official Rules 23 (2003), http://www.law.case.edu/student_life/journals/canada_us/new/2003-04\%20NiagaraRules.doc (telling judges that “scoring should not reflect the actual merits of the case but only the advocacy skill and legal analysis of the participant.”) (last visited Feb. 23, 2006); see also Kozinski, supra note 62, at 181-82.

\textsuperscript{83} Kozinski, supra note 62, at 196 (arguing that moot court competitions should be judged on the merits because even a bad case can be advanced, or at least a bad outcome mitigated, by a good advocate).

\textsuperscript{84} Judges who select the top advocates are likely to overvalue style, not substance. Rewarding substance requires a thorough understanding of the legal issues in the case. Given the limited amount of time that many judges, often young lawyers, have to devote to preparing to judge, many of them simply lack that kind of thorough familiarity with the merits of the case.
has not improved at the same rate partially because the judges come from the old tradition. Interscholastic competitions have proliferated and it is hard to find volunteers to serve as judges for moot court programs and competitions. Finding qualified judges, even for otherwise prestigious competitions, is a challenge. Within a legal community, moot court programs are likely to have their best success in soliciting young lawyers to serve as judges. Among young lawyers, those most likely to agree to serve as judges are those who have been involved in their alma mater’s moot court program. Old habits die hard. Not surprisingly, my former student remained active in the program after he began practicing law. Lawyers who were part of a student run program are likely to share the values of that program. Despite upgrades in its program, those judges will select as winners advocates who resemble themselves. They will also deliver critiques to the advocates that are likely to reinforce bad habits. No doubt, that perpetuates a system that values style over substance.

The anecdote suggests a third problem with traditional moot court programs and competitions. The judge’s questions flustered the student advocate. After each question, he tried to go back to his argument. But the judge would not accept glib answers to his questions. In fairness to the student, because of the judge’s expertise, the judge had a far greater understanding of the legal issue than did most of the other judges. But the questions went to the core of the legal issue and his insis-

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85 Based on a survey of Internet sites, there are at least fifty national moot court competitions running currently, at least eleven of them have been running for fifteen years or less (on file with author).

tence reflected that he was not satisfied with the student's answers. Because the questions did raise critical weaknesses in the advocate's position, the student should have been prepared to answer them.87

Many student advocates return to canned answers because, given the poor quality of judging, glib answers are often sufficient.88 Further, many in the moot court business advocate that stratagem. I have listened to countless critiques in which judges tell advocates that their job is to control the argument. Judges are often explicit in advising that, when the questioning gets tough, the advocate should segue back into her main points.89 But students interpret this as an invitation to divert the court's attention and return to their presentation. Students often come away from their moot court experience believing the goal of oral argument is for them to give their presentation, not to address the court's concerns.90

Indeed, even some otherwise credible texts on advocacy contribute to this state of affairs. Many texts state that oral advocates should develop a clear theme.91 But the authors'

87 See ORAL ADVOCACY, supra note 45, at 171 (arguing that an effective advocate will anticipate and prepare responses to his or her opponent's best points and issues that may trouble the judges): see also FREDERICK, supra note 8 ("[V]irtually every great advocate will devote a substantial portion of time to thinking of as many questions as possible about the record, the parties' positions, the opponent's arguments, the cases, the statutory and regulatory context, and the policies underlying the advocated rule.").
88 See supra notes 74-75 and accompanying text.
89 See FREDERICK, supra note 8, at 90 (challenging the advocate "to anticipate opportunities ... to segue from questions designed to probe weak points in the case back to affirmative points that persuade the court of the soundness of the position being pressed."). See generally ALDSELT, supra note 45, at 373 (quoting Justice John M. Walker, Jr., in response to a question of how to deal with a single judge who is bombarding you with questions you feel are irrelevant) ("Say, 'I want to answer your question but then turn to the other critical points, (x) and (y), raised by this appeal.' Then answer the question briefly and move rapidly to (x) and (y). Then hope that this maneuver works."); id. at 375 (quoting Justice Douglas H. Ginsburg) ("[A] lawyer should answer the question as succinctly and briefly as possible. Once an answer as [sic] been provided, the lawyer should immediately go back to his argument and continue with points he would like to address.").
90 Kozinski, supra note 62, at 187 (lamenting that students think speaking is so important that they will cut off the judges' questions).
91 See ALAN D. HORNSTEIN, APPELLATE ADVOCACY IN A NUTSHELL 11 (2d ed.
examples often suggest that oral argument is more theatrical than substantive. One commonly cited example of a good theme is the late Johnnie Cochran's famous line in his closing argument to the jury in People v. Simpson: "if the glove doesn't fit, you must acquit." As a theme for a jury trial, Cochran's phrase was brilliant, but it fails as a theme for an argument to a judge. Judges are more skeptical than are juries and have more time to reflect on the merits of a case and more experience in sorting out legally relevant material. Advising student advocates to model their themes on examples like Cochran's suggests that oral argument is a show where cleverness and glibness are more important than substance.

For many years when I directed McGeorge's Appellate Advocacy program, I participated in our orientation program for incoming students by setting up a mock oral argument. Inevitably, after watching the judges grill the advocates, students in the audience asked why the judges did not allow the advocates to give their prepared presentations. Questions like that are understandable from novices but they reflect a more general problem: too many participants in traditional moot court continue to believe that the goal is for the advocates to give presentations. That kind of thinking leads to bad advocacy.

As developed above, many schools have upgraded their moot court offerings, yet judges still lament the poor advocacy skills of many lawyers appearing before them. I have argued why that may be. In the next subsection, I want to explore another reason why oral advocacy skills are still lacking. Four words sum it up: kinder, gentler law schools.

1998) ("Perhaps the most important and helpful rhetorical device for effective appellate advocacy is the argument's theme—the phrase that pays."); see also ORAL ADVOCACY, supra note 45, at 191 (showing that a central theme "provides strength and focus to the argument").

92 See HORNSTEIN, supra note 91, at 16-16 (quoting Johnnie Cochran).
93 See FREDERICK, supra note 8, at 142 (stating that without the substance underlying the theme, "the advocate has no case," no matter how clever the theme is); see also ORAL ADVOCACY, supra note 45, at 151 ("Judges are usually intelligent and experienced, and are rarely impressed by slick contentions. Only a logical argument, backed by sincere belief, is likely to persuade them.").
B. Effective Oral Advocacy and the "Kinder,"
Gentler Law School

Understanding the inverse correlation between effective advocacy skills and today's kinder, gentler law schools requires an examination of what judges and critics of traditional moot court programs find objectionable about the canned, slick presentations that so many advocates give and that often lead to success in competitions. To make the point, one must ask why oral advocacy matters and then compare moot and real arguments to see how different they are.

Oral advocacy matters because it is the only opportunity that counsel has to talk directly to the decision-maker in the case.\textsuperscript{94} In many courts, judges have read the briefs submitted by counsel and may have prepared a tentative ruling.\textsuperscript{95} Often, attorneys read the court's opinion and are frustrated that the judges misunderstood the case. Oral argument is the opportunity to correct misunderstandings and to address the judges' concerns.\textsuperscript{96}

Prior to oral argument, judges have had the chance to read counsel's brief, in which she should have developed her best arguments. As a result, oral argument may influence the court's decision in relatively few cases.\textsuperscript{97} But the way in

\textsuperscript{94} See ALDISERT, supra note 45, at 32 (stating that oral argument "is the only opportunity of the lawyer to face the court eyeball to eyeball without 'filtering' by the law clerks"); FREDERICK, supra note 8, at 3 ("Ordinarily, oral argument is [an advocate's] only chance to stand face to face with the court and plead their case directly without the filter of a written brief."); see also ORAL ADVOCACY, supra note 45, at 152 (discussing oral argument as the "single opportunity to address the decisionmakers face-to-face").

\textsuperscript{95} See ALDISERT, supra note 45, at 305 (recounting that the author's practice is to reach a tentative decision after reading the briefs, but before oral argument); id. at 309 (quoting Judge Carlos F. Lucero as saying that he comes to a "preliminary opinion" after reading the briefs).

\textsuperscript{96} See HORNSTEIN, supra note 91, at 277 (stating that the goal of oral argument is "to dispel any uncertainties and clarify any doubts about the correctness of one's position."); see also ORAL ADVOCACY, supra note 45, at 194 (suggesting that because "[m]istaken impressions may result from reading the cold, written page," the advocate should use oral argument "to clear up misunderstandings").

\textsuperscript{97} GABRIEL & POWELL, supra note 12, at 7-7 ("[U]ndoubtedly estimates that oral argument may alter the outcome in no more than 10 percent of the cases ar-
which an advocate can change the court’s mind is by going to the heart of the case: recognizing the weaknesses in the advocate’s position and the judges’ concerns about the case. The advocate’s role is to help the judges resolve those difficulties. The only way that counsel can help the court is by engaging in a dialogue with the bench.

Style may help an advocate by demonstrating that she is open to questions from the court. Thus, eye contact and other principles of good speaking will invite questions from the bench. But a nice style is only peripheral. What matters is the attorney’s ability to answer the court’s questions thoroughly.

Commentators are uniform on the components of good oral argument: counsel needs to present a clear opening, providing a roadmap of her argument, including signposts that signal the different components of the argument.

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98 See Ginsburg, supra note 7, at 569 (“As between briefing and argument, there is near-universal agreement among federal appellate judges that the brief is more important . . . . In some federal circuits the brief is all the court will receive in a high percentage of appeals.”).

99 See Ginsburg, supra note 7, at 569 (stating that oral argument can “give counsel a chance to satisfy the court on matters the judges think significant, issues the judges might puzzle over in chambers, and resolve less satisfactorily without counsel’s aid”); Michel, supra note 97, at 22 (“Oral argument can win cases when counsel effectively answers questions. Effective answers are direct, dispassionate, specific and candid.”).

100 See Beazley, supra note 45, at 193 (directing that an advocate should “maintain eye contact so that [he] can see any nonverbal signals that one of the judges has a question.”); Oral Advocacy, supra note 45, at 168 (“Eye contact establishes rapport and enables you to communicate conviction.”).

101 See Aldisert, supra note 45, at 357 (“Ultimately, judges are interested in what you say; not how you said it. [Judges] are not out there judging a debate or a law school moot court competition. [They] have asked for oral argument because [they] need a little more substantive help from the lawyers, not an Oscar-worthy performance.”); Michel, supra note 97, at 22 (“Success seldom depends on eloquence. It turns instead on anticipating the inevitable, skeptical questions, and preparing effective answers.”).

102 See Beazley, supra note 45, at 189 (discussing the advantages of present-
should develop a theme wherever possible that unites her several arguments. The attorney should aim for a flexible style that allows her to move to the part of the argument that most concerns the court. Real judges want help writing their opinions and need to understand, if they are leaning towards the attorney's position, how to overcome legitimate weaknesses in the case. Counsel must prepare in advance to answer hard questions about her position. Counsel must never put off answering the court's questions; instead,
she should give a direct "yes" or "no" answer and then seek to elaborate on her answer. 107 Failing to do so causes counsel to miss the opportunity to persuade the court. Further, counsel must be fully candid with the court. Misstating the facts or the law leads to a loss of the credibility that is so invaluable in getting the court to accept one's legal position. 108

Successful oral advocates should try to use the court's questions to their advantage. In that sense, an oral advocate should try to control the argument; if an advocate can successfully understand the weakness of her case and thus anticipate the judges' concerns, she can explain why her case can win nonetheless. 109 She can do so only if she listens carefully to the questions and understands the law and the facts. Undoubtedly, counsel cannot anticipate all of the judges' questions; however, through preparation counsel should be able to anticipate most questions and have thoughtful answers. 110 If counsel's argument really has fatal flaws to which she cannot respond, one wonders why the case is before the court at all. On the premise that the case is not frivolous, successful counsel should be able to deal with the weakest part of her case. 111

107 See id. at 599 ("Respond immediately to a question with a 'yes,' 'no,' 'it depends,' or 'I don't know.' Follow the short answer with a concise explanation and citation to the record or precedent as necessary."); see also BEAZLEY, supra note 45, at 194 ("The court will be much better able to listen to your explanation if you first satisfy the court's need for an answer to its question.").

108 See ORAL ADVOCACY, supra note 45, at 186; FREDERICK, supra note 8, at 150 ("The worst sin of all is knowingly to mis-cite authority to a court or to take a snippet in an opinion and represent that as the holding of the court." These types of errors "can detract from the substance of the argument and diminish the credibility of the advocate in the eyes of the court.").

109 See ALDISERT, supra note 45, at 360 (remarking that "you, not your opponent, must control the direction of your argument," and to that end the advocate must mention adverse facts and case law "up front and tell [the court] why they do not hurt you."); ORAL ADVOCACY, supra note 45, at 195 (suggesting that when dealing with "[questions that reveal troubling issues . . .] you must prepare . . . by considering weaknesses in advance and planning the best possible responses").

110 See ORAL ADVOCACY, supra note 45, at 171; FREDERICK, supra note 8, at 62-64 (reminding advocates to "identify [their] opponent's best points." Try to think of issues that may trouble the judges "and then create arguments for these points and rehearse the responses.").

111 See Renety, supra note 64 ("Practicing attorneys will often discuss the
No doubt, effective oral argument includes other skills. Developing a compelling conclusion that summarizes the most persuasive points in the argument is one such skill, as is the ability to deliver an effective rebuttal.\footnote{See supra note 99 and accompanying text.} But engaging the court in a dialogue during which counsel effectively addresses the court’s concerns is the primary tool of the successful oral advocate.\footnote{See supra note 69-96 and accompanying text.}

Implicit in the discussion above is the fact that success in moot court differs from success in real arguments.\footnote{See supra note 37; see also Ginsburg, \textit{supra} note 7 ("Questions should not be resented as intrusions into a well-planned lecture.").} Style counts too much in moot court arguments, whereas the ability to answer hard questions counts most of all in real arguments. Student advocates often believe that controlling the argument means avoiding hard questions and getting back to their canned arguments.\footnote{See\textsc{ALDISERT}, \textit{supra} note 45, at 369 (arguing that concessions can serve two goals. First, concessions can help avoid wasting time arguing over trivial points. Second, concessions planned out during preparation will be better thought out.); \textsc{FREDERICK}, \textit{supra} note 8, at 59 (stating "A skillfully made concession ... can make the advocate more credible to the court by demonstrating the reasonableness of the advocate’s position.").} Grading criteria in student competitions may even reward an advocate’s ability to get through major arguments.\footnote{See supra Part II(a).} Student advocates avoid making concessions, despite the fact that real judges expect sensible concessions.\footnote{\textsc{BEAZLEY}, \textit{supra} note 45, at 192, 195-96; \textsc{ORAL ADVOCACY}, \textit{supra} note 45, 198-201.}

Student advocates may fall back on style, apart from the lessons that they are taught in their moot court programs.
because answering questions is difficult.\textsuperscript{119} Hence even if a
law school has in place an effective advocacy program, students need more experience in the kind of flexible interchange
that produces good oral argument.

That begs the question of how else law schools might teach this all important skill. In considering this question, I
offer my own experience. When I went to law school, the only
required advocacy course was a first year legal writing course
taught by upper level students. During the second semester, a
classmate and I submitted a joint brief and gave a mock argu-
ment to a panel of upper level students. Beyond that, moot
court was an extracurricular activity. I learned something
about advocacy in the program, but I am not sure how much.

Shortly after graduating from law school, I served as
counsel in cases before federal district courts in Philadelphia,
New Orleans, and before the United States Court of Appeals
for the Fifth Circuit. In thinking about my experience, I ques-
tion how I was able to function as an effective oral advocate.
As unpleasant as I found the Socratic method as a stu-
dent,\textsuperscript{120} I concluded that I had learned invaluable lessons

\footnotesize
\textsuperscript{119} Kenety, \textit{supra} note 64, at 584 (“Law students often dread questions for fear
they may not be able to answer them.”).

\textsuperscript{120} I memorialized my views of law school in a letter that I wrote to Professor
Roland Pennock at Swarthmore College. Professor Pennock was organizing a panel
discussion on law school and he solicited views from those of us currently in law
school. On February 20, 1973, I wrote, in part:

The transition from [high school] teaching to being a student was not
very easy: teaching provided me with frequent and positive feedback; the
result of my energy was measurable in human growth; being a first year
law student is a hazing . . . . Because you want to counsel undergraduates and do not anticipate changing the law school atmosphere, you
might make students aware of the intensity of the competitive environ-
ment and of the limited success that is built into the system (few ex-
ams; the majority of grades deferred until June; training in the Socratic
method which is aimed at [stripping] down inefficient thinking and re-
building minds in a new shape - a device frequently used to embarrass,
if not humiliate, first year students; the ten percent cut off point for
Law Review which leaves many striving and ambitio[us] and bright
students feeling like failures).

Letter from Professor Michael Vitiello, Professor of Law at The University of the
Pacific, McGeorge School of Law, to Professor Roland Pennock, Professor Emeritus
about oral advocacy through the rigorous grilling that my best professors provided.\textsuperscript{121}

An effective Socratic dialogue is an invaluable tool to teach advocacy skills. A professor's questions ought to be similar to those that a judge would ask an attorney. Good law professors and judges expect answers to be responsive. The Socratic dialogue should teach students the importance of listening to questions and framing thoughtful answers. Students should realize that their answers will in turn inspire follow up questions and that they must be able to think through the implications of their answers.\textsuperscript{122} Like oral argument where judges ask probing questions to bring out the specific issues in the case,\textsuperscript{123} a classroom discussion should focus on the strengths and weaknesses of different legal positions.

Students in law school today are far less likely than students in my generation to receive a similarly rigorous education.\textsuperscript{124} That is so because the Socratic method has been under attack for over thirty years and, although clear empirical evidence is unavailable, professors today are almost certainly more likely to use a modified, less demanding So-

\textsuperscript{121} Vitiello, supra note 14, at 971.

\textsuperscript{122} Cf. Frederick, supra note 8, at 59 (stating that a "critical dimension to the court's decision-making process is understanding the likely consequences that will flow from its ruling" and thus an effective advocate must be able to answer hypothetical questions that test "the parameters of the applicable rule").

\textsuperscript{123} In an exercise sponsored by the ABA, Justice Stephen Breyer, then a judge for the United States Court of Appeals for the First Circuit, discussed his expectations of lawyers during oral argument. Videotape: Effective Arguments to the Court: Arguments to the Supreme Court, Tape 3 (A.B.A. Consortium for Professional Education and the Section of Litigation 1999). Justice Breyer explained that he relies on oral argument to discover "the lawyer's characterisation of the issue from their point of view." Id. He also stated:

[We've read the briefs, we're trying to think about the issues in the case. . . . And the lawyers, although they want to win for their clients, we feel they are there to help us, and therefore by trying to get these questions out, there's something either that is really bothering me or I want to use the best argument of the other side to elicit the response.

\textit{Id.}

ocratic teaching method than did the previous generation of law professors.125

Commentators have leveled numerous attacks on the Socratic Method. For example, one study concluded that “the Socratic method alienates, oppresses, traumatizes and silences women.”126 Some critics argue that the method is ineffective for all students because it “fails to prepare the student for work as an attorney”127 and suggest that it may be responsible for lawyers’ incompetence128 and incivility.129 Further, critics allege that it causes students to become cynical: the Socratic method and other traditional techniques “set students’ moral compasses adrift on a sea of relativism, in which all positions are viewed as ‘defensible’ or ‘arguable’ and none as ‘right’ or ‘just.’”130 In effect, the Socratic method leads to moral numbing. As summarized by one writer, the Socratic method is “infantilizing, demeaning, dehumanizing, sadistic” and “destructive of positive ideological values.”131

125 Id. at 681 (“The traditional Socratic method . . . has vanished from American law schools.”).
128 See Stropus, supra note 14, at 460-62 (discussing the allegations that the Socratic method fails to prepare students to practice); Rodney J. Uphoff et al., Preparing the New Law Graduate to Practice Law: A View From the Trenches, 66 U. CIN. L. REV 381, 391 (1997) (quoting a recent graduate stating that the Socratic method did not teach him what to do in court).
129 Paul T. Hayden, Applying Client Lawyer Models in Legal Education, 21 LEGAL STUD. F. 301, 303 (1997) (positing that students emulate their professors behavior and “[a] Kingsfieldian professor, for example, may send the message to students that the super-competent lawyer is brusque, dominating, and often condescending to those less competent (a category which certainly includes clients).”); Roger E. Schechter, Changing Law Schools Make Less Nasty Lawyers, 21 GEO. J. LEGAL ETHICS 367, 381 (1996) (“The rigor of the Socratic method can all too often slide into a dismissive or sarcastic exchange in which the teacher communicates an unspoken but nonetheless powerful message that rude or mean-spirited wise cracks, and even temper tantrums, are entirely appropriate behavior”).
131 Alan A. Stone, Legal Education on the Couch, 85 HARV. L. REV. 392, 407
So anathema is the Socratic method that many law schools now distance themselves from the historical image of law school and advertise themselves as “kinder and gentler,” than the traditional law school where Professor Kingsfield, the archetypal law professor in *The Paper Chase*, roams the halls.132  

The literature is replete with suggested remedies, including allowing students to demur if called upon or giving advance notice when a professor will call upon a particular student.133 Further, critics of the Socratic method and law school education generally urge that we validate our students.134 Professors must tailor their teaching to reach the current generation raised on the media, with shorter attention spans, and less motivation than previous generations of students.135 Critics argue that law professors ought to allow their students to voice their own views and not force them to take positions in which they do not believe.136

(1971).


133 See Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 82 (1996) (suggesting professors give introverted students advance notice of being called on, advance notice of questions, or time to think before answering to improve their performance); Sarah E. Ricks, *Some Strategies to Teach Reluctant Talkers to Talk About Law*, 54 J. LEGAL EDUC. 570, 573 (2004) (discussing ways teachers can modify the Socratic method to make students more comfortable speaking in class).


136 Ann J. Iijima, *Lessons Learned: Legal Education and Law Student*
Measuring the extent to which law professors have responded to these criticisms by adopting gentler teaching techniques is difficult.\textsuperscript{137} Even though critics continue to rail against the Socratic method,\textsuperscript{138} I suspect that many law professors have abandoned the more demanding version of the Socratic method in favor of a “kinder and gentler” classroom style. That is a shame.

Elsewhere, I have written extensively about the Socratic method and attempted to address the main criticisms leveled against its use.\textsuperscript{139} Here, I want to explore the kind of teaching that critics of the demanding form of the Socratic method propose in its place and discuss why that kind of classroom experience is ineffective in training students to be effective oral advocates.

Judges expect precise answers from advocates.\textsuperscript{140} They

\textit{Dysfunction}, 48 J. LEGAL EDUC. 524, 529 (1998) (arguing that forcing students to advocate for ideas they do not support leads to “moral neutering”).

\textsuperscript{137} Stephen I. Freidland attempted to quantify how often the Socratic method was used in classrooms and found that most professors use a combination of methods. Stephen I. Freidland, \textit{How We Teach: A Survey of Teaching Techniques in American Law Schools}, 20 SEATTLE U. L. REV. 1, 28 (1996) (explaining an overview of the results of his survey showing that “[t]hirty percent of those who used the Socratic method did so ‘most of the time,’ and forty-one percent used it ‘often.’ Of those remaining, twenty-one percent used it ‘sometimes’ and only five percent stated that they ‘rarely’ used it.”). This task is also made more difficult by the problem of identifying exactly what people mean when they use the term “Socratic method.” See Vitiello, supra note 14, at 961-62 (discussing the various definitions of the term “Socratic method”).

\textsuperscript{138} See e.g. Andrew Moore, \textit{Conversion and the Socratic Method in Legal Education: Some Advice for Prospective Law Students}, 80 U. DET. MERCY L. REV. 505, 506-509 (2004) (warning prospective law students about the dangers of the Socratic method to their mental health); Morrison Torrey, \textit{You Call That Education?}, 19 WIS. WOMEN’S L. J. 93, 94 (2004) (stating that “mainstream legal pedagogy (essentially the case method and Socratic Method) is full of flaws and, well, let’s face it, just plain bad teaching.”).

\textsuperscript{139} Vitiello, supra note 14, at 955 (giving an overview of the criticisms of the Socratic method and arguing that they are not only misinformed, but that removing the Socratic method from law school harms students and leaves them less prepared for the challenges of the legal profession).

\textsuperscript{140} See ALDISERT, supra note 45, at 318. Justice Deanell Reece Tacha of the Tenth Circuit stated:

The most common failing I see in both oral argument and brief writing
care little about the personal views of attorneys appearing before them and even less about their feelings. Judges may bruise an advocate's ego when the advocate's performance is inadequate. The most common complaints I hear from appellate judges relate to . . . lack of focus, covering too many issues, and scattering case authority and facts throughout the brief and argument so that they lose their impact on the issues to which they are most germane.

Apart from the missed opportunity to acclimate students to the demands of the courtroom and law practice general-

is the failure to be analytically precise about the issues addressed on appeal . . . The lack of concern for an attorney's feelings was demonstrated by a letter from United States District Court Judge William Harold Cox, a notorious segregationist, to John Doar, the head of the Civil Rights Division of the Justice Department during the early 1960s and upon whom Gene Hackman's character in the movie Mississippi Burning, was based. See generally Douglas O. Linder, Bending Toward Justice: John Doar and the "Mississippi Burning" Trial, 72 MISS. L. J. 731 (2002). No doubt, this is an extreme example, but the letter illustrates the kind of attitude lawyers may have to face:

Dear Mr. Doar,
I have a copy of your letter of October 12 . . . [I] thought I had made it clear to you . . . that I was not in the least impressed with your prudence in reciting the chronology of the case before me with which I am completely familiar. If you need to build such transcripts for your boss man, you had better do that by interoffice memoranda because I am not favorably impressed with you or your tactics in undertaking to push one of your cases before me. I spend most of my time fooling with lousy cases brought before me by your department in the civil rights field, and I do not intend to turn my docket over to your department for your political advancement . . . . You are completely stupid if you do not fully realize that each of the judges in this court understands the importance of this case to all litigants. I do not intend to be hurried or harassed by you or any of your underlings in this or any court where I sit and the sooner you get that through your head the better you will get along with me, if that is of any interest to you . . . .

Id. at 755-56.

See Stropus, supra note 14, at 472 (emphasizing the loss to law students from teachers and schools that do not use the Socratic method to teach students to think analytically).
ly, the professor who allows students to state their own views for fear of moral numbing, by forcing them to support positions contrary to their own values, disserves his students. Implicit in the discussion about the appropriate solicitation of students' personal views is that much of a classroom discussion is devoted to individuals' value choices. That suggests a misuse of the classroom.

The failure to have students argue positions that they do not believe in amounts to educational malpractice. As I have stated elsewhere, "[t]he most important feature of a legal education is that it challenges our views and forces us to examine them with care." Students must be able to argue those positions because lawyers must be able to anticipate and rebut their opponents' arguments. A lawyer who lacks that skill cannot adequately represent her clients. Further, students ought to recognize the reality that advocating a position

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143 Even if a person chooses not to be a litigator, she will need oral advocacy skills in many other settings as well. Judges expect their law clerks to present competing arguments to help the judge decide how to vote. A senior partner expects a junior associate to explain the law concisely to the partner and perhaps to the client. A transactional lawyer must make presentations to clients and to counsel representing the other side in the transaction.

144 Gerald Hess, a leading advocate of the "kinder, gentler law school," suggests using student interests and ideas to build the class. He quotes his students complaining that their views are not included:

We've come across some cases where race was an issue or women's rights should have been an issue and we could have fleshed it out more. Some people might look at that as getting sidetracked. But we also have to understand that we are learning law in a vacuum, but when we get out in the real world we are dealing with people who are not the same color, that are not the same gender and religion or sexual orientation.

And we need to learn to deal with that effectively.

Hess, supra note 134, at 100 (quoting a student interviewee). Professor Hess also advocates allowing students some role in designing the course, from choosing coursework to designing the evaluation method. Id. at 97-98.


146 Vitiello, supra note 14, at 997.
contrary to her own beliefs may be necessary as part of her professional responsibility to advocate zealously on behalf of her client.\textsuperscript{147}

Other problems exist when law professors solicit students' views. Envision a class in which the professor is teaching the law of rape. Soliciting students' views may invite the expression of some boorish, hurtful points of view.\textsuperscript{148} But even more importantly, the solicitation of students' views is distracting from the core function of the classroom. If professors are using the classroom to educate lawyers, professors ought to ask for legally relevant arguments and demand carefully focused answers, the kinds of answers that judges expect during oral argument.\textsuperscript{149} I have found that students often interpret a question about their views of the case as an invitation to talk about feelings and positions that are only tangentially related to the subject at hand.

Teaching the relevance of mistake as to consent in rape cases offers an illustration. Courts have divided on the law governing the relevance of a man's mistake of fact as to the woman's consent.\textsuperscript{150} Following the advice laid out above, a

\textsuperscript{147} See Model Rules of Prof'l. Conduct Preamble (2006). The Preamble states:

In the nature of law practice, however, conflicting responsibilities are encountered. . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

\textit{Id.}


\textsuperscript{149} See supra notes 140-42 and accompanying text.

\textsuperscript{150} That issue was before the Supreme Judicial Court of Massachusetts on several occasions. See Commonwealth v. Ascolillo, 541 N.E.2d 570, 575 (Mass. 1989) (upholding the trial court's refusal to instruct the jury that an honest and reasonable mistake as to consent was a defense to rape); Commonwealth v. Sherry, 437 N.E.2d 224, 233 (Mass. 1982) (rejecting a claim that an honest but unreasonable mistake that the victim consent negated the \textit{mens rea} of rape). Cf. Regina v. Morgan, (1976) A.C. 183 (H.L.) (holding that a good faith mistake negates
professor might ask for students to express their views on the subject. No doubt, the professor can generate a freewheeling discussion with some interesting points. In my experience, much of the discussion will be off the point and will fail to reinforce the need for rigorous analysis of precise legal issues.

When I taught the issue of consent, I had to push students hard to see that the relevance of mistake of fact has long standing roots in the criminal law, that the courts needed to interpret language in the rape statute, and that the effect of one interpretation might be to make the crime of rape a strict liability offense, despite the grading of the punishment as a crime of violence.¹⁵¹ Long before I considered opening up the discussion to students' personal views, I found that I had to devote a great deal of time simply getting students to explicate the holdings of the cases and to see the very real difference between the results of following one rule as opposed to another. Many students would prefer to talk in broad theoretical terms about feminist theory and power relationships. It takes far less time and effort to form those kinds of opinions than it does to do the close reading and careful exegesis of the courts' opinions. But professors miss the opportunity to teach the essential skills needed for effective oral advocacy when they allow students to spend too much time discussing their views as opposed to legal analysis and reasoning.

Open-ended discussion of students' personal views may be affirming for students but it fails to focus the discussion and thereby fails to train them in critical oral advocacy skills.¹⁵²

¹⁵¹ Compare State v. Christensen, 414 N.W.2d 843, 846 (Iowa App. 1987) (holding that because prior case law had established that "a defendant's knowledge of his or her partner's lack of consent is not an element" of the crime of rape, it follows that "a defendant's mistake of fact as to that consent would not negate an element of the offense."), and State v. Tague, 310 N.W.2d 209, 211 (Iowa 1981) (holding that despite the general disfavor of strict liability offenses, "[s]tatutes regarding sex offenses are common examples of employment of strict liability intended to protect the public welfare."), with People v. Mayberry, 15 Cal. 3d 143, 155 (1975) (arguing that the legislature most likely did not intend rape to be a strict liability offense because of the severe penalty and "serious loss of reputation following conviction").

¹⁵² Without knowing how this lawyer was taught, this excerpt from the oral
Thus, affirming students may also be inappropriate for a second reason: too much concern about affirming students invites tolerance of superficiality. For example, even advocates of the gentler classroom who want to avoid embarrassing students, also recognize the importance of setting high academic standards. A professor who adheres to the modern view of a gentler classroom and who invites freewheeling discussions of students’ personal views may err on the side of allowing poor legal arguments in an effort to avoid hurting students’ feelings.

A professor like Kingsfield showed no hesitation to bruise the ego of his students when they made poor legal arguments. Critics have railed against the Kingsfields of the world for such boorish behavior. But allowing students to make poorly reasoned arguments does not serve them or their future clients well. For example, in The Paper Chase, Professor Kingsfield shows little patience with Mr. Bell when Mr.

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argument in United States v. Johnson before the Seventh Circuit Court of Appeals is an excellent example of practicing attorneys thinking that their views and arguments deserve the court’s time without a legally relevant basis:

Judge Sykes: Any way to distinguish [Caballes]? I mean I understand that you object to the premise.
Lawyer: I hope you can find one.
Judge Bauer: Well, what you want us to do is overrule the Supreme Court.
Lawyer: I want you to help me distinguish it, Judge. I am very disturbed.
Judge Bauer: You can be disturbed on your own free time. Why are you intruding on mine?


133 Hess, supra note 134, at 100 (advocating the importance of setting high expectations so that students have something to strive for and achieve).

134 Vitiello, supra note 14, at 998-99 (recounting a scene in The Paper Chase where Professor Kingsfield rebukes Mr. Bell for a weak argument and pointing out that teachers do their students a disservice when they do not correct wrong behaviors or weak arguments in school because those traits will hurt the student and their clients when they appear in court after graduation).

Bell argues that application of the Deadman's Statute is "unfair."¹⁵⁶ Students often appeal to such basic feelings of fairness in class. But leaving such "arguments" unchallenged does not serve students well, despite the fact that challenging such superficial statements may cause students to feel insecure or uncomfortable. Judges expect more than gut reactions.

A primary virtue of the Socratic method is that it challenges students' views and forces them to think more deeply than they may have done before attending law school.¹⁵⁷ Being challenged may be painful; it may cause us to realize that we are not as smart or as well prepared as we would like to believe. It may make us rethink our comfortable assumptions about the world. But as painful as that may be, the intellectual challenge posed by the rigorous application of the Socratic method is essential to training competent professionals.¹⁵⁸ Students, like lawyers, must be able to articulate opposing arguments if they want to be effective advocates. If that is morally numbing, so be it.

Today, I surmise that too much, not too little, time is spent soliciting students' views. Discussion of personal views may come at the expense of much more important lessons, including the ability to state with precision the holding and reasoning of complicated cases, competing arguments to the majority opinion, and the application of the court's ruling to new sets of facts. Some students may interpret the emphasis on the expression of personal opinions as an invitation to prepare poorly, because they are confident that they can talk about their own view of the subject rather than explicating the court's view.¹⁵⁹ By making class gentler or more fun, profes-

¹⁵⁷ Stropus, supra note 14, at 465-68 (advocating for the use of the Socratic method as a needed bridge between undergraduate work and working in the legal field).
¹⁵⁸ See, e.g., Stropus, supra note 14, at 470-72; Vitiello, supra note 14, at 987-91.
¹⁵⁹ As one of my upper level students said in class this past semester, when I asked him what the Supreme Court said, "I don't know what the Court thought, but what I think is . . ."
sors miss the opportunity to teach essential oral advocacy skills.

IV. CONCLUSION: WHERE DO WE GO FROM HERE?

My argument thus far begs a question: where do we go from here? Many of us recognize that law schools still provide inadequate training in oral advocacy. But simply pointing out the problem is not especially helpful.

Programs like this symposium are encouraging. So too are clinical programs like the University of Mississippi’s Criminal Appeals Program where faculty can teach meaningful advocacy skills. But schools often limit enrollment in clinics because clinics require a low student to faculty ratio to guarantee meaningful supervision.

Judges have a significant role in educating the profession about the need for improved oral advocacy skills. Some judges educate the profession through their writings about advocacy. Many judges volunteer their time by judging moot court competitions. However, at least according to Judge Kozinski, some of them are not forthcoming with the student advocates but instead play right into the conceit that student competitions are teaching the right stuff. Judges who share Judge Kozinski’s view of moot court would do well to end the charade and give more meaningful criticism of student advocates. Were prominent judges to award top honors to the advocate who stayed with the judges’ questions and who entered into a meaningful dialogue, rather than trying to score debating points, and were those judges to explain their criteria, competition organizers and faculty involved in moot court programs would get the message.

Motivated professors can introduce oral advocacy into

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160 I do not mean to suggest that we have gone far enough in teaching other skills. I suspect that we still have a ways to go in improving other skills.

161 See MacCrate Report, supra note 18, at 250-51 (discussing the high costs of live client clinics in light of the need to provide a low faculty-to-student ratio).

162 See generally Aldisert, supra note 46; Ginsburg, supra note 7; Rehnquist, supra note 7; Wiener, supra note 7.

163 See Kozinski, supra note 62, at 178.
their classes through the use of simulation exercises. My own hobby horse is to provoke a dialogue in the legal academy about whether we have been too quick to advocate in favor of kinder gentler legal education. At a minimum, I hope that professors who use the Socratic dialogue explain to their students the essential skill that they are learning through the process. That explanation might make students less resistant to the method.

These suggestions are at best incremental. For a wider impact, I would encourage the ABA to commission another study of oral advocacy training in our nation’s law schools. Its previous study produced marked changes in advocacy programs. But as indicated above, law schools still have a way to go. Our study was necessarily limited in scope. An ABA study might examine programs at all accredited law schools. Additional resources might allow it to study more closely the content of the courses around the country to assess the quality of instruction. Among proposals that a committee might study is the need for mandatory oral advocacy training beyond the limited training now required at most schools.

Law schools would almost certainly pay attention to an ABA report and many schools would likely follow recommendations for upgrading advocacy training. Such an effort might result in better oral advocacy, with more lawyers who truly understand the role of oral argument and who attempt to engage in a meaningful dialogue with the bench.

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165 Vitiello, supra note 14, at 956-58.

166 If Planet Law School is typical, many students misunderstand the important skill that they are learning when a professor questions them thoroughly. ATTICUS FALCON, ESQ., PLANET LAW SCHOOL 27-31 (1998). I certainly did not fully appreciate the benefits from the experience until I began practicing law. Vitiello, supra note 14, at 971.

167 See supra notes 35-60 and accompanying text.

168 See supra Part III.
EVALUATION SHEET FOR ORAL ARGUMENTS

I. Substantive Content and Analysis
   A. Introduction
      1. Opening Statement
         Did you introduce yourself?
         Did you tell the court whom you represent?
         Did you tell the court the relief your client is requesting?
      2. Theme
         Did you start with a statement which, by weaving the applicable law and facts together, tells the judge what is at stake in your case?
      3. Road map
         Did you give the court in a few sentences a brief overview of how your argument will be organized?
   B. Argument
      1. Opening Statement
         Did you tell the court where your client stands on this issue and what your client wants?
      2. Organization
         Did you start with the strongest argument and continue in a logical and comprehensive manner?
      3. Support of Argument
         Did you make effective use of authority, reasoning, and policy to support your arguments?
      4. Application of Law to Fact
         Did you effectively apply the legal arguments to your client's situation?
      5. Response to Questions
         When the court asked a question, did you
first reply with a “yes” or “no”? Did you then explain your answer? Did you make a smooth transition back into your argument?

6. Conclusion
   Did you concisely and effectively summarize your argument?

C. Closing
   1. Theme
      Did you briefly restate your theme and explain why you should win?
   2. Relief requested
      Did you state what you want the court to do?

II. Speech and Delivery
   A. Volume
      Was the court able to hear you?
   B. Speed and Clarity
      Was your speech clear and deliberate? Did you vary the pace and pause occasionally?
   C. Body Language
      Did you maintain eye contact with the judge? Did you use appropriate gestures for emphasis?
   D. Verbal Language
      Did you use correct vocabulary and grammar Did you avoid excessive informality of speech
   E. Notes
      Did you present your argument without relying excessively on notes?

III. Overall Impression
   A. Coherence
      Was your argument well organized? Was your argument logical?
   B. Comprehensiveness
      Was your argument thorough? How well did you discuss and analyze the substantive issues?
   C. Persuasiveness
      Did you treat the court with respect?
Did your argument appeal appropriately to public policy, justice, and fair play? Did you effectively maximize your strengths and minimize your weaknesses?

D. Time

Did you manage your allotted time effectively to enable you to present and support your major arguments? Had you decided in advance how much time to spend on each issue? Did you move from questions to arguments and from point to point with awareness of the time?
<table>
<thead>
<tr>
<th>School</th>
<th>Course Name</th>
<th>Req'd</th>
<th>Credits</th>
<th>Graded or P/F</th>
<th>Year taken</th>
<th>Students participating</th>
<th>Teams/Individ.</th>
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<td>P/F</td>
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<td>teams</td>
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<td>2</td>
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<td>Credits</td>
<td>Graded or P/F</td>
<td>Year Taken</td>
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<td>Teams/Individ.</td>
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<td>1st</td>
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<td>teams</td>
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<td>3</td>
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<td>School</td>
<td>Course Name</td>
<td>Req'd</td>
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<td>Year Taken</td>
<td>Students participating</td>
<td>Teams/Individ.</td>
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<td>graded</td>
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<td>100%</td>
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<td></td>
<td>Appellate Advocacy</td>
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<td>upper</td>
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<td>TX Trial and Appellate Procedure</td>
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<td>upper</td>
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<td>6</td>
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<td>100%</td>
<td>teams</td>
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<td></td>
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<td>100%</td>
<td>individuals</td>
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<td></td>
<td>Appellate Practice and Procedure</td>
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<td></td>
<td>Clinic</td>
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APPENDIX B
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<td>TX Trial and Appellate Procedure</td>
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2006

APPENDIX B

EFFECTIVE ORAL ARGUMENT SKILLS

915