Practicing Before the Court:
The Moot Court Program at Georgetown Law’s Supreme Court Institute

Arguing before the Supreme Court, says Georgetown Law Professor David Vladeck, “is like the Indy 500—you are going flat-out from the moment the Chief Justice says ‘go.’” The last time he argued before the Court, in a 1997 case called Richardson v. McKnight, he says, “I felt like a ping-pong ball because I would be three words into answering somebody’s question before another question came out. I thought my head was on a swivel.”

Or think of it as a tennis match, says Carter Phillips, a partner at Sidley Austin Brown & Wood LLP who has argued 36 cases before the Court. When a difficult shot comes their way, some tennis players swing at the ball and “flat-out miss,” he says. Others manage to hit the ball squarely and send it back over the net. The pros, however, not only return the ball but do so with some “top spin and serious quality.” The same is true in answering rapid-fire questions from nine jurists in the most intimidating court in the nation, he says.

“You’re not just deflecting questions,” Phillips says. “You’re taking the questions and using them affirmatively to make your case. The great tennis players are the ones who do that and the great Supreme Court lawyers are the ones who can do that.”

Unlike the Indianapolis 500, tennis’s Wimbledon, or the top event in any other sport, reaching the pinnacle of appellate advocacy—arguing before the Court—is not limited to only the most gifted or experienced. In fact, most attorneys who appear before the Court are first-timers, lucky enough to have worked on cases in which the Court eventually granted certiorari. But whether a rookie takes the podium through happenstance or a seasoned advocate is selected for his or her expertise, practice, as they say, makes perfect. And for many advocates, there is no better place to prepare than at Georgetown Law.
Today fully two-thirds of all cases argued before the Court are first mooted through the Supreme Court Moot Court Program at Georgetown Law’s Supreme Court Institute, according to the Institute’s faculty directors, Professors Steven Goldblatt and Richard Lazarus. The moots, which take place behind closed doors in a mock Supreme Court Chamber off the lobby of the new Eric E. Hotung International Law Center Building (see subsequent article), are designed to give advocates as realistic and insightful an experience as possible before they argue before the actual Court (which is a ten-minute walk away) a few days later. The program is known for assembling top-notch panelists (including none other than recently confirmed Chief Justice John Roberts, who, for obvious reasons, is no longer able to participate) to hear the arguments that advocates plan to present to the Court.

Word about the program has spread rapidly since Lazarus founded it in 1999. (Before then, Lazarus, Professor David Cole, and several other faculty members organized Georgetown Law-sponsored moots on a much more informal, ad-hoc basis.) Caitlin Halligan (L’95), New York State’s solicitor general, says lawyers in state attorneys general offices across the country know about the quality of the program. “It has a wide reputation among very experienced Supreme Court advocates, as well as people who are going into their first argument, which is a strong mark of the caliber of the program,” she says. Goldblatt says that because Georgetown Law moots only one side of a case, both parties often race to get on Georgetown’s schedule immediately after the Court grants cert. In 2004, before being nominated to the Supreme Court, John Roberts, who was then a judge on the U.S. Court of Appeals for the District of Columbia Circuit, lauded the Institute’s moot court program in a lecture he gave at the annual meeting of the Supreme Court Historical Society.

“The Georgetown University Supreme Court Institute provided rigorous moot court preparation for advocates in two-thirds of the cases argued before the Supreme Court during the 2003 term,” he said. “The Institute’s moot court program is highly

Supreme Court Chief Justice John Roberts, in a speech before the Supreme Court Historical Society before he joined the Court, said “The Institute’s moot court program is highly valued by novice and experienced advocates alike, because of the high quality and skill of the judges that [the] Institute … is able to attract to do the moot courts. These programs have made it easier both for first-timers and experienced advocates to do a more professional job before the Court.”
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An Expert Panel

What makes oral argument important, says Professor Michael Gottesman, a member of the Institute’s Faculty Advisory Board, is that it provides “the first opportunity you have to figure out what’s bothering the Court.” Georgetown’s moot court program is valuable, in large part, because its panelists are uniquely able to figure out ahead of time just what will concern the justices, enabling advocates to adjust accordingly.

“If you look at the roster of people who sit in on the moots, it’s the absolute top tier of the appellate bar in Washington, D.C.,” says Vladeck, who has argued before the Court numerous times and also sits on the Institute’s Faculty Advisory Board. “And there is not just one of them on every panel, but generally five or six of the best legal minds in the city.”
Each moot panel consists of a mix of highly experienced Supreme Court advocates, practicing attorneys who have clerked with sitting justices, and faculty members at Georgetown who typically have argued before the Court or clerked there as well. No other law school, Lazarus notes, has more faculty members who have argued before the Court. It’s not uncommon, he says, for a former clerk sitting on a panel to have drafted a Court opinion that is central to a case he or she is mooting.

“They are people who really have had a lot of exposure to and experience with the Court, and they know what they are talking about,” says Halligan, who mooted two cases—her first ever at the Court—at Georgetown last term. “Their instincts and responses are really valuable.”

Lazarus says he follows a secret “recipe”—which he will not divulge—in assembling this expertise for specific cases. “I think of it as like putting together a small orchestra,” he says. The idea, for the most part, is to bring together not a group of experts in the relevant area of substantive law, he says, but instead five or six attorneys who really can replicate how the Court thinks and pick apart an advocate’s case.

“We’re looking for people who understand Supreme Court advocacy; we’re looking for people who understand an argument,” Lazarus says. “We’re looking for an expert on the Court.”

Smart lawyers, he says, recognize the value in this approach. An attorney arguing MGM v. Grokster, a case from last term involving peer-to-peer file-sharing software, specifically asked for Georgetown professors with little technology background to serve on his moot panel, Lazarus says. The attorney knew he wouldn’t be arguing to a
group of computer programmers at the Court. “He had already had a zillion people who thought they knew the legal issues all over the place, but ultimately you are arguing to the Supreme Court, you are not arguing to a Ph.D,” says Lazarus. “You are dealing with people who aren’t experts and you are also trying to communicate to them.”

The justices think about more than just the subject matter of the case before them, Lazarus notes. They consider federalism issues, for example, or statutory construction. Therefore, moot panelists should, too. “They are dealing with a different set of cross-cutting issues than the experts in the area,” he says. “You’ve got to think like the justices.”

An Honest Moot

Another feature sets the Institute’s moots apart and helps attract the best possible panelists: it is nonpartisan. The program focuses on public service-improving the quality of arguments before the Court—and not on promoting a particular cause. Georgetown mooted Michael Newdow, an atheist who challenged the constitutionality of reciting the Pledge of Allegiance’s “under God” line in public schools, before he argued the case himself at the Court in 2004. Yet a few years before, it mooted then-Texas Attorney General John Cornyn, who argued in favor of allowing student-led prayers at high school football games in *Santa Fe Independent School District in San Antonio, Texas v. Doe*. The only factor determining whether a case is mooted at Georgetown is which side calls first, Lazarus says.

“In any one term we could be representing those who are challenging Nebraska’s law restricting partial birth abortions and the next month we could moot an attorney representing Operation Rescue,” he says. “That has made our program unique and very successful.”

Georgetown avoids choosing sides not only in the cases it moots, but in the panelists it selects: legal minds, as Vladeck puts it, “from every conceivable ideological strata.” Mixing panels up with liberal, conservative, moderate, or other viewpoints is part of Lazarus’s “recipe” for mimicking the makeup of the Court.

If all the panelists agree with the advocate’s position, he or she won’t get a good sense of what to expect at the Court, says Sidley Austin’s Phillips, who usually serves on one moot panel during each Court term.

“You do better if you don’t try to stack the bench with true believers,” Phillips says. “If you have true believers, they are just not going to stand up and ask the kinds of questions that the justices are going to ask; you aren’t going to have a measure of skepticism that you need unless you bring skeptics to the bench.”

Professor Gottesman remembers serving on the panel mootin Attorney General Cornyn (who is now a U.S. Senator). Although Gottesman personally was opposed to allowing prayer at public high school football games, he didn’t “feel like a traitor doing that,” he says. “We are committed to doing the best we can for the person. The Court is entitled to the best argument it can have from both sides, but our job is—whichever side asks us first—to give them the best advice we can.”
Professor Nina Pillard, who recently practiced her argument in a case that she knew “was going to be an uphill battle,” specifically asked for one of the field’s “leading conservative thinkers” to be on her moot court panel. The exchanges with him helped her figure out what “would fly and what wouldn’t fly with the justices whose votes I needed,” she says.

“It was just two different world views,” says Pillard, who sits on the Institute’s Faculty Advisory Board. “The normative center of gravity was just a different place for him than for me, and it was really helpful to feel that and hear his instincts and to figure out just how to bridge across to where he was, because that was what I was going to have to do in the Court.”

Panelists willingly work—without pay, for that matter—with lawyers who advocate issues they personally oppose because they know that they are, ultimately, helping to enhance the overall quality of oral advocacy at the Court.

“We all regard it as a part of our mission to improve the quality of the advocacy for the benefit of the Court,” Phillips says. “And so we spend a fair amount of time, for free, trying to improve how the advocates do when they show up.”

Georgetown’s moot court program, Halligan says, “helps ensure that lawyers who come before [the Court] are as well-prepared as they can be. Where the issues are well-honed and sharply presented, and the implications of each lawyer’s position are well-understood, that makes for better arguments.”

Besides the decision to remain nonpartisan, a few other “rules” help make the Institute’s moots successful. First, the Institute keeps them strictly confidential. Anyone who sits in on a moot—including students (see subsequent article)—is forbidden to discuss what happens. An obvious reason for this is to prevent advocates’ arguments from leaking out before oral argument day, Goldblatt says. In addition, confidentiality protects the political standing of those panel members who present “the other side;” partisans may equate serving on a moot panel with supporting the position being argued.

“We like to give our judges a level of anonymity in this process that is consistent with the view that we are doing this for the benefit of the Court,” Goldblatt says. “Everybody knows that everybody is doing this for the good of the development of the law and for the Supreme Court practice, and everybody is happy to do it, but that requires that nobody even know what strategizing went on and who was there to do the moot for whom.”

The Supreme Court Institute Fellow, who carries out much of the day-to-day tasks involved in running the program and stays in close contact with the counsel of record, helps line up between five and seven people for Institute moots. A full nine
is not necessary, Lazarus says, and moots with that many panelists tend to turn into a “free-for-all” anyway. “I’ve been at moots at other places where there will be 20 people in the room,” he says, “and it looks like a presidential press conference.”

The Fellow, who is traditionally an evening student (the most recent being Rebecca Cady (L’06) and, before her, Tina Drake (L’03)), schedules moots about a week before the actual argument is scheduled. Any earlier than that, and “the person is not ready—and we want them ready,” Lazarus says. Any later, and the panelists will pull their punches. “No one is going to give anyone an honest moot within a day or two of the argument,” he says, “because at that point it’s too late to actually pick apart someone’s argument—they don’t have enough time to put it back together again.”

Down the Garden Path

After months of living with a case—carefully crafting briefs and replies and agonizing over and fine-tuning positions—having a polished argument picked apart by a group of strangers just days before showtime would seem to be the last thing an attorney would want. But appellate lawyers know it will help make their oral arguments as persuasive as possible.
A thorough questioning at a moot, Vladeck says, provides advocates “tremendous insight” into their cases. “Sometimes you think you’ve got a really great answer to a question and everybody starts rolling their eyes,” he says. “Better to find that out before you start arguing a case.”

Moots can also alert advocates to possible traps, Halligan says. “They are a great object lesson in how you can get led down a garden path by a judge or justice who is bringing you along to a point in your analysis where you are really in trouble,” Halligan says. “It’s useful to see those mine fields, and the panelists are really talented at identifying those kinds of pitfalls.”

Facing any group of people intent on exposing the flaws in your presentation is daunting enough, but at the Supreme Court, it’s especially tough, advocates say. For one thing, says Donald Ayer, a partner at Jones Day and member of the Institute’s Outside Advisory Board, you rarely have an “easy case” to argue—the Court almost always grants certiorari to cases that offer no clear answer. “It’s not that easy to be completely persuasive all the time, mainly because the cases are just hard,” he says.

Also, “the justices tend to communicate their feelings about a case through the oral argument process more now than they used to,” says Phillips, who also serves on the Outside Advisory Board. Because of this, and the increased scrutiny oral argument generates in the press and public as a result, being able to “deal with the give and take” of the justices is more important now than ever, he says.

Such a vocal Court allows little or no time to make speeches, Ayer says. “You have to give quick answers—they don’t wait—and they have to be short,” he says. “You’ve got to start talking immediately and you have to pretty much have a coherent answer out of your mouth in 20 or 30 seconds at the most.”

Given the short time allotted for their arguments, advocates should—as elementary as it may sound—actually answer the questions posed, says Gottesman. One common, “terrible” mistake is “trying to hide the ball,” he says. Advocates should realize that every case has its weaknesses, he says, and trying to talk around those is futile.

“The Court is just too smart to let them get away with that,” he says. “There are nine of them, and they each have four law clerks, and everybody is prepared for this thing. The notion that you are going to be able to wiggle past the hard parts is ridiculous.”

But ultimately, “the biggest mistake a lawyer can have is not having good answers,” Gottesman says. “So our mission is to help identify the very best answer that’s possible with the question you have.”

For each moot, the process of identifying the best answers follows the same format: a formal period of questioning for up to an hour, followed by another hour or so of informal debriefing, feedback, and conversation. “You’ve got to have both parts,” Lazarus says. “You can’t have the conversation without the moot and you can’t have the moot without the conversation.”
At the Court, each side usually gets 30 minutes to argue its case, but at Georgetown questioning goes beyond that to allow panelists to dig deeper when they find answers unsatisfying. Advocates who give “a not-so-good answer,” Pillard says, are “pressed to give a better answer and pressed further to a better answer, so that, hopefully, on argument day it only takes one give and take, it’s more efficient, it’s more to the point, it’s more honed.”

Both advocates and judges come prepared as if it’s the actual argument. The advocates—being only days away from the real thing—don’t need much prompting. “When you have an argument that close,” says David Porter, a federal public defender in Sacramento, Calif. who mooted a habeas corpus case, Mayle v. Felix, “it really tends to focus one’s mind and one’s effort to the task at hand.”

Panelists prepare just as the justices and their clerks do, by reading—a lot. Vladeck says the judges read all the parties’ briefs in the case, several amici briefs, the decision below, other important and relevant decisions, statutory text in some cases, and more, amounting to hundreds of pages of material. Vladeck says it normally takes him “two nights of pretty intensive reading to get prepared. It’s not like reading Tom Clancy or something—these are not page-turners.”

Ayer says panelists read with an eye toward figuring out what prompted the Court to take the case. “You are trying to understand the case well enough that you have a pretty good idea of the real issue the case turns on and why it’s in the Supreme Court, why it is a difficult case.” Ayer says there’s no mystery to the process. “It’s not that you are so smart,” he says. “It’s that the case is a hard case; all you’ve done is figured out what’s hard about it.”
Anticipation of Questions

Moots are scheduled in the late afternoon. Before starting, panelists and the advocate or advocates take a few minutes to get acquainted, and students and other invitees trickle in. Soon the doors are closed, the panelists take their seats, the advocate steps to the podium, and the “chief justice”—usually a Georgetown Law professor—sees that everyone is ready. For the next hour, everyone stays “in character.”

If all goes according to plan, “the grilling that the lawyer gets at moot court is more intense than the grilling he or she is going to get when actually appearing before the whole Court,” Gottesman says. “We have a common mission to relentlessly bombard them with the hardest questions they might face.”

Porter says his moot was indeed more difficult than the actual argument. At his moot, he says, the panelists were “willing to let someone ask a question and do a follow-up and do another follow-up to that.” However, at oral argument, he found, the justices weren’t nearly as accommodating toward each other. “When you have nine people, eight of whom are active questioners [Justice Clarence Thomas often remains silent], there is less ability for them to really do follow-up questions because another justice is always waiting in the wings to ask another question.”

The main goal for the panelists is to mimic, as closely as possible, the questions the real justices will ask, Phillips says. “If you are in a serious moot with serious participants who have done their homework and know the Court reasonably well,” he says, “you can pretty closely replicate the kinds of questions you can expect to get from the Court.”

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Says Gottesman, “The way to be helpful is to think about the biggest problems with [an advocate’s] case, because that is what they are going to have to deal with at the argument – the weak spot. [We] in effect try to predict what kinds of questions the Court will ask about those problem areas.”

Halligan says that in her moot for *Granholm v. Heald*, a highly publicized case that involved a challenge to discriminatory state regulations that permit in-state wineries to ship directly to customers but prohibit the same practice to out-of-state wineries, panel members questioned her on a number of points that the Court ended up asking about. For example, panelists pressed her on the usefulness of New York’s requirement that out-of-state wineries have some sort of “in-state presence.” She sought to argue that the in-state presence requirement allows state regulators to determine whether wine is being diverted into “illegal sales channels,” she says. “They had a number of very probing questions at the moot court about whether that was truly the case and how in fact the inspections were conducted and why it was that an in-state presence was so critical, and those questions came up at oral argument as well.”

Halligan also found the Institute helpful in her moot for *Sherrill v. Oneida Indian Nation of New York*, which involved an American Indian tribe that had purchased a plot of land in an upstate New York city and refused to pay taxes on it, claiming that the land had never lost its status as an Indian reservation. “It was an area that had been subject to state and local sovereignty for 150 years,” she says. “Having an opportunity to talk through in the moot court the ramifications of allowing continued sovereignty was really helpful because that was the point that the Court was most focused on at oral argument and was in fact the point on which they ruled in our favor.”

Matthew Shors, counsel with O’Melveny & Meyers LLP, who argued *Bell v. Thompson*, said his moot panelists asked him questions he “hadn’t thought about at all before.” His case involved an extraordinary decision by the Sixth Circuit Court of Appeals to reverse one of its own prior decisions. The court had originally ruled in 2003 that a capital defendant’s lawyers were not negligent in how they presented mental illness information to the jury during sentencing. The Supreme Court refused to grant certiorari in an appeal from that decision, and an execution date was set in 2004. However, a “mandate” officially closing the case was never filed, and some 18 months after the original decision, the court, relying on information a court intern discovered, reversed itself, holding that there was indeed evidence available during sentencing that could have shown that the defendant suffered from severe mental illness.

“Our whole case is about what happens if cert is denied, and one of the justices at the moot asked, ‘Well, if cert is granted, what effect will your rule have?’” Shors says, “It seems odd in retrospect, but I was so focused on the actual facts of this case that I hadn’t thought about that. I had plenty of time to think about it over the weekend, and sure enough Justice Scalia asked me that.”
thought about that. I had plenty of time to think about it over the weekend, and sure enough Justice Scalia asked me that and asked a couple of follow-up questions on it.”

Asking probing questions like these helps advocates and panelists later think about the best ways of responding, Pillard says. “Time and time again I have seen the hard question asked at the moot and the exact same hard question asked at argument,” she says. “If it’s working well, then the planned answer, the answer that came out of the collective wisdom of the moot court, is the answer that comes out on argument day.”

Panelists tend to fire right away from the start, Vladeck says—and if they don’t, he will get the ball rolling.

“If you go watch the Supreme Court, it is not simply a hot bench; it’s an inferno,” Vladeck says. “There are a lot of impatient justices, and while you want to give lawyers, particularly those without a lot of experience, a chance to get their sea legs under them, you don’t want to give them three minutes [of opening] because the Court won’t.”

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

Debriefing and Strategy

After the grilling is finished, the panelists and advocate relax again and discuss how it all went. This feedback portion of a moot “is really the key,” Phillips says. It allows the group to think through the difficult legal problems presented, come up with better answers where needed, and establish the top two or three points the advocate will want to reinforce.

The opportunity to hear someone else’s reaction is crucial when an advocate has essentially lived with a case for months, Ayer says.

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

Ironically, Lazarus says, experienced advocates are more likely to change their arguments after a moot than newer advocates. “Some of the single best Supreme Court advocates in the country are the ones who change their arguments the most,” he says. “They know how to listen to a moot and take advantage of a moot. They are so confident, they actually can take advice. They are much more adaptable.”

Sometimes the changes can be dramatic, Pillard says. “It’s remarkable to me the improvement between a moot and an actual argument, three, four, five days later,” she says. “It’s really stunning sometimes to see someone who had caused you to kind of sit on the edge of your seat and hold your breath really get in there and do the case credit.”

A moot court can improve an advocate’s argument in a number of ways, Pillard says. He or she may be relying on a theory of the case that is counterproductive, for
example, or relying too rigidly on precedent, without “explaining why their outcome is right in a broader context.”

In his moot for \textit{Bell}, Shors says, “everybody told me I was doing a great job and not losing the case, but that I needed to think about how to win the case and be a little more aggressive.”

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

In Porter’s case, the Court did focus on a rule central to his case, \textit{Mayle v. Felix}, which involved a prisoner sentenced to a life term seeking to amend his petition for \textit{habeas corpus}. The issue was whether the amended claim “related back” to his original petition. The justices asked Porter to defend the rule the Ninth Circuit adopted, which said that a felon’s trial and conviction in state court amounts to one “conduct, transaction or occurrence” within the Federal Rules of Civil Procedure, enabling him or her to amend a \textit{habeas} petition if the amendment “relates back” to the original petition. At the moot, one panelist felt Porter’s position wasn’t clear: it seemed as if he were advocating a different rule than the one adopted by the Ninth Circuit. In response, he says, he and his team prepared a list of answers to clarify his position—essentially, that he supported the rule, but that in this case, the petitioner’s claims fell within an even narrower test. They also came up with some contingency plans.

“We asked people at the moot to try to develop other tests that might be attractive for the Court in case they didn’t want to go with the Ninth Circuit’s rule,” Porter says. “I thought the Court would question me more about line drawing, about where the line should be drawn in terms of relation back and what should be the proper ‘conduct, transaction or occurrence,’ whereas in actuality they seemed to take as a given either the Ninth Circuit’s rule would prevail or the warden’s rule would prevail.”

In the feedback session of Ayer’s moot for \textit{Koons Buick Pontiac GMC, Inc. v. Nigh}, decided last term, he and his panelists sat around trying to come up with just the right metaphor. In preparing for the case, which involved an interpretation of the Truth in Lending Act, his team had found support for their interpretation of a specific word in the statute, “subparagraph,” in manuals used by staff members in the legislative counsel’s office of the House and Senate. The question was how to refer to these supportive materials. “If you try to make too much of them, the Court would say, ‘Well it’s not a dictionary [and] it’s not a law,’” he says. “It’s not like the decision of a court, and it’s not a statute. It wasn’t enacted by Congress, and yet it’s pretty significant that the people that are the technical people that draft the laws essentially have a very clear and

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unambiguous way of using words like ‘paragraph’ and ‘subparagraph.’” Eventually, a panel member came up with “Rosetta Stone,” the stone tablet discovered in Egypt that enabled hieroglyphics to be deciphered.

Often the panelists’ advice involves simple, “nuts and bolts” issues, Golblatt says. When Chief Justice Rehnquist was absent from oral argument last term, for example, advocates had to know how to address Justice Stevens, who sat in Rehnquist’s place. Pillard remembers one moot in which a male panelist asked the advocate what she planned to wear at oral argument. In any other courtroom, he explained, a pantsuit would be fine, but the Court remains very conventional and prefers traditional attire. “To go up and even offer her that specific a level of advice I actually thought was quite a supportive thing to do,” Pillard says.

Another time, she says, “I even had a lawyer who wanted to use a prop, and we said, ‘No, you really don’t want to do that.’ Various dramatic flourishes that are very honed in a trial court are really risky and likely to go over like a lead balloon in the Supreme Court.”

Some advocates need to realize that when justices “ask you a ‘yes or no’ question, they want to hear ‘yes’ or ‘no,’” Vladeck says. “We had a guy here, a really smart guy, who was not an experienced advocate, and he could not answer a question quickly,” he says. “He would sort of put his toe in the water, and there was an enormous amount of wind-up.” The panelists emphasized the need to be much quicker in responding, he says. An advocate can go on to explain an answer, Vladeck notes, but first must answer with a direct “yes” or “no.”

“I saw a transcript of the argument,” Vladeck says. “He was so much better. There were still a couple of times where he took too long, but he got asked some very difficult questions and his first answer was ‘Yes, your honor’ or ‘No, your honor.’”

Pillard says advocates often begin oral argument ineffectively—a major drawback in the Court, where no one gets more than a few sentences out before the interrogation begins. “One of the things we focus on is the one sentence or three sentences that you know you are going to get to say at the very beginning to get a little bit of attention,” she says.

Halligan’s moot for Sherrill prompted her to change her opening somewhat. The panel was focused on the possible consequences of the rule the opposing side was advocating, she says. That led her to emphasize and lead with those points, then follow with the textual arguments she had planned to stress. “That turned out to be an effective strategy,” she says, “since it was what seemed to persuade the Court.”

Moot court panelists may also help advocates prepare for justices’ hypothetical questions. Although it may seem unfair to have to answer challenges to your argument based on different facts, “to fight with the Court over hypotheticals is always a short road towards real trouble,” Vladeck warns. Advocates often fail to realize that the Court is not necessarily as interested in the particular case before them as in the implications a decision will have, he says. Justices ask hypothetical questions to test the waters, he says.

“If you understand what theory you have to win on and what theory you most want to win on, hypotheticals shouldn’t be that frightening.”
Hypos are only a problem, Phillips says, if an advocate doesn’t fully understand his or her case. “If you understand what theory you have to win on and what theory you most want to win on, hypotheticals shouldn’t be that frightening,” he says. “It takes a second to make sure you understand a hypothetical—where it fits into your view of the world, given the legal issue that’s in front of you—and then you can either give it up or you can’t give it up.”

Naturally, individual panelists won’t always offer the same advice. Some panelists, for example, discuss specific justices and the likelihood of getting their votes. But although an advocate may feel he or she can predict—based on prior decisions—how
the justices will decide a particular case regardless of the quality of the oral argument, Goldblatt says, “you never give up hope.”

Vladeck agrees. “These people are not robots,” he says, “and they don’t behave the way you think they are going to behave. I would like to think people put ideologies aside, they put their preconceptions aside, and they give you a fair shake.” In INS v. Chadha, which struck down the legislative veto, Vladeck recalls that a colleague of his at Public Citizen who argued the case received a “meatball”—a question an advocate is hoping to have asked—from a justice whom they expected to vote against him (and whom in fact did vote against him). It was an important question that needed to be asked, Vladeck says, and the justice was impatient and simply wanted to hear the answer. The lesson, Vladeck says, is not to enter into oral argument with preconceptions. “It’s important that you go in not with a chip on your shoulder,” he says. “You might see a meatball as a dart.”

Sometimes the best advice is simply how best to lose. Panelists will be candid when they think an advocate’s case is bound to fail, no matter how much eloquence and passion is spent trying to save it. As Porter puts it, “The panelists were not as enamored with my arguments as I was.” The panel told Porter he had a tough road ahead of him because of a “general perception that the Court is not too friendly a ground for habeas petitioners, especially when they come from a win in the Ninth Circuit.”

Lazarus says an advocate can sometimes lose strategically by aiming for a “soft landing”: losing the case, but on less sweeping grounds or on an issue that won’t hurt the client’s interests on remand. “I’ve had a case which I lost 9-0 and my client was ecstatic,” Lazarus says. “Justice Scalia wrote a separate concurring opinion, apoplectic that the Court hadn’t reached this other issue [that] clearly was the issue he was hoping they would reach when they granted cert. You could see at oral argument Justice Stevens figured out exactly what we were doing in the case…. Sometimes the strategy is not necessarily winning, but damage control.”

Win or lose, Halligan says, each of the two times she has come seeking to persuade the highest court in the land, mooting her cases at Georgetown helped her present the best possible arguments that she could. “There is still something intimidating about getting up in the Supreme Court to start an argument,” she says. “No moot court could ever take that away. But I think it does leave you much better prepared.”
Justice Stevens’s 30th Year Honored

Supreme Court Justice John Stevens meets with students (below) at the Supreme Court Institute’s Annual End-of-Term Reception, held in the Eric E. Hotung International Law Center Building’s atrium on April 28. Each year the Institute honors a distinguished member of the Supreme Court community, and at this year’s celebration, the Institute commemorated Justice Stevens and his 30th year on the bench.

The event attracted about 200 people, including leading members of the Supreme Court bar who served on Institute moot panels throughout the previous year. Speakers included Paul Clement, now solicitor general of the United States; Clifford Sloan of Washington Post/Newsweek Interactive; and Georgetown Law Professors Richard Lazarus and Nina Pillard.

Lazarus presented Justice Stevens, a Chicago native and longtime Chicago Cubs fan, with a Cubs jersey bearing his name and the number 7—representing the U.S. Court of Appeals for the 7th Circuit, on which Stevens served as a judge. A determined Justice Stevens wore the jersey while delivering the ceremonial first pitch at Chicago’s Wrigley Field on September 14, 2005.

In his remarks at Georgetown Law, Stevens said that programs such as the Supreme Court Institute’s moot court have enabled advocates to better answer questions he and the other justices pitch from the bench.

“The quality of advocacy in the Supreme Court is far higher now than when I started, and I think one of the reasons for that is the help the advocates have received in these moot court programs.”
While attending an oral argument at the Supreme Court last year, Professor Richard Lazarus found himself sitting next to Drew Days, U.S. solicitor general under President Clinton and now a Yale Law School professor. According to Lazarus, Days—who has served on several of the Institute’s moot panels—glanced around the majestic Court Chamber, looked at Lazarus, smiled, and said, “Kind of looks like Georgetown.”

Maybe it’s a bit of a stretch to say the Supreme Court thoroughly resembles the Law Center’s Supreme Court Institute Moot Courtroom, but Days’ joke wasn’t completely absurd: Visitors have marveled at how much Georgetown Law’s courtroom, located in the new Eric E. Hotung International Law Center Building, replicates the real thing. As those involved in the Institute will tell you, that’s exactly the point.

“All good litigators or actors or any kind of public speaker will tell you that it’s important to feel comfortable in the space where you’re performing, and you need to be comfortable with the audience you’re going to be addressing,” says Professor Wallace Mlyniec, who, as chair of Georgetown Law’s Campus Completion Committee, oversaw the construction of the new moot courtroom. “So we get comfort for the audience by bringing in experienced Supreme Court litigators and former clerks to the justices, and we also bring the physical setting as close to the Court as possible.”

The resemblance is convincing, says New York State Solicitor General Caitlin Halligan (L’95), who spent plenty of time inside the real Court while serving as a law clerk there. Halligan mooted two cases in Georgetown Law’s new courtroom during the Court’s last term. “It’s fabulous because it’s exactly like what you see when you go into the Court,” she says.

The Court itself helped Georgetown create as authentic a room as possible, Mlyniec says, by giving the designers a rare opportunity to inspect the Chamber up close. Over a series of visits, they photographed the Court’s tall columns, distinctive red carpet, curtains, and other
features, and measured the Chamber’s spaces and angles, he says. Only the area behind the bench itself was off-limits; no one except the justices and Court staff are allowed there. Not that Mlyniec is complaining: “We were very fortunate to get that far,” he says.

Armed with detailed photographs and measurements, the designers and Institute staff set out to create a realistic replica—within reason, of course. Building a 44-foot ceiling or importing marble from Italy, Spain, and Africa was out of the question. But by using a few design tricks, Mlyniec says, they were largely successful.

Perhaps most significantly, the advocate’s podium was set as close to the justices’ bench as it is in the real Chamber—which, it turns out, is really close: only a few feet separate the advocate from the justices. The placement helps litigators unfamiliar with the Court prepare for the sometimes jarring sense of being in a grand, expansive room, yet relatively nose-to-nose with the justices. It’s an aspect of the Court that makes it unlike any other in the nation, says Lazarus, who serves as one of the Institute’s faculty directors.

“The Supreme Court is this incredible combination of majesty and intimacy,” Lazarus says. “You don’t normally see that. The Court is this very majestic setting, but you are right next to the justices—they are not incredibly far away, like in most courts. It’s very conversational.”

Matthew Shors, who argued his first case before the Court in the spring, a few days after mooting it at Georgetown, says the podium’s close proximity can easily throw off a first-timer—even one who has sat in on proceedings in the Chamber before.

“I was surprised when I got up,” he says. “I had been in the Supreme Court a lot of times, but never that close, and it really is that close. And so [practicing at Georgetown] was helpful.”

Another distinctive feature of Georgetown’s moot courtroom is the justices’ bench, which, like the actual Court’s, angles inward at each end. The Institute included this detail, Mlyniec says, to let attorneys learn to handle a complication that trips up many litigators before the Court—not knowing who has asked a question.

“If a lawyer is standing at the podium and looking at the Supreme Court chief justice, [he or she] cannot clearly see the justices that sit at the end of each of the benches,” he says. “If you’re facing one to the right, and a question comes from the left, unless you recognize the voice and are experienced, you might not know where that voice is coming from. [Advocates] need to do a quick look over there so they don’t call the justice by the wrong name, which has been known to occur from time to time.”

Although he didn’t mix up any names during his argument before the Court, Shors says the disorientation can be confusing, and he had to pause a few times before proceeding with an answer.

“I did feel like sometimes I started looking the wrong way before realizing who was actually talking,” he says. “There were a couple of times where my eyes were not leading me to the correct justice right away, and I had to kind of keep looking until I found a mouth moving.”

The conspicuous gold clock hanging from the ceiling directly behind the “Chief Justice’s” chair in Georgetown’s courtroom helps advocates practice avoiding another pitfall. The clock is modeled after one that hangs in the Court (though much higher up) that at one time served as a useful way for advocates to keep track of their time. Today, however, the Court specifically instructs attorneys to keep their eyes off of it.

“The clerk [of the Court] said the justices are really annoyed when people look up at the clock,” Shors says. “So I did not ever look up.”
That’s a lesson the Institute tries to instill in every advocate unfamiliar with the rule, Mlyniec says. With Georgetown’s clock set so prominently, he says, if an attorney can keep from gazing at it during his moot, there is little risk of such a faux pas happening during the real thing.

“Ours is lower, [so] it’s more visible,” Mlyniec says, “and our goal is teach the lawyers not to look at it.”

A rudimentary light bulb system, controllable at the bench, marks official time at the Court. The white light tells an advocate he or she has time left; red means “stop.” The Institute recently added a similar system in its courtroom.

Designers also pulled from their “bag of tricks” in decorating the rest of the room. Replicating the Court Chamber’s ornate columns would have taken up too much space, Mlyniec says, so simple pilasters protruding from the walls were built instead. The combined effect of the pilasters and the five sets of burgundy curtains (which match the color of the Supreme Court’s) set behind the bench gives advocates a decent approximation of what they’ll see when they stand at the real podium, Mlyniec says.

The Institute didn’t attempt to copy the Court’s ceiling, featuring intricate designs within recessed panels, but some creative use of round lighting helps, he notes.

“You don’t see the wonderful, ornate, coffered medallion ceiling,” he says “but when you walk in there, you see a coffered ceiling that has a light fixture that is medallion-like, and it’s designed to make the ceiling look taller than it actually is.”

Georgetown did try to replicate the Court’s carpet, and in fact it got an almost exact match. Officials at the Court were willing to let their carpet manufacturer provide Georgetown with the same design, Mlyniec says, but they wanted Chief Justice William Rehnquist to sign off on the idea first. Rather than trouble the Chief Justice, the Institute instead agreed to install a carpet with slight design differences. The colors are slightly off, as are the medallion patterns, but the differences are largely undetectable, Mlyniec says.

The carpet even fooled a Pulitzer Prize-winning Supreme Court correspondent. “When [the New York Times’s] Linda Greenhouse walked into our Supreme Court, [it was] the first thing that caught her eye,” Mlyniec recalls. “She said, ‘How did you get the Supreme Court’s carpet?’ Because to a layman’s eye, or even to Linda, it was the exact carpet.”

Visitors don’t need to be completely faked out for the room’s podium, bench, curtains, clock, ceiling, carpet, and other features to be effective, Institute officials say. As long as Georgetown’s courtroom looks somewhat like the actual one, attorneys who become comfortable arguing in it will have one less thing to think about when the heat is on, says Professor Steven Goldblatt, also faculty director of the Institute.

“It’s helpful for anybody, before they argue a case, to have as few surprises from their physical surroundings as possible,” Goldblatt says. “Anything that operates as a distraction gets in the way of your ability to do what you have to do when you’re up there—which is answer rapid-fire questions and be able to think on your feet very quickly.”
Etched in the mind of Georgetown Law Professor Richard Lazarus, one of the Supreme Court Institute’s two faculty directors, is an image of a group of upperclass law students leaving the Supreme Court in 2004 after watching—in person—Michael Newdow argue before the Court in *Elk Grove Unified School District v. Newdow*, a highly publicized case challenging references to God in the Pledge of Allegiance. Just days earlier, the students had attended Newdow’s moot at Georgetown.

“I saw them going down the [Court’s] steps afterwards, and they were just bouncing and saying, ‘He did this! He did that! Remember at the moot he said this, and everyone said “Don’t do it,” and he actually changed! And that worked!’” Lazarus says. “It was quite wonderful for the students.”

Are law school students supposed to have this much fun? If all goes according to plan, they’re either “worked to death” in the second year or “bored to death” as 3Ls. But for Georgetown students, the chance to see Supreme Court litigators test their cases out on campus—and later attend the actual argument—makes related schoolwork (almost) enjoyable and serves as an antidote to the daily grind.

With the growth of the Supreme Court Institute’s moot court program, and with the Supreme Court itself within walking distance, Georgetown Law professors and
administrators find they have a truly unique educational resource on their hands. When advocates mooting high court cases at Georgetown Law allow students to sit in, Lazarus says, those students get to observe how arguments are picked apart, probed, challenged, and improved by the “pros”–leading members of the Supreme Court bar. Advocates are not obligated to allow students to attend, but almost all allow them in anyway. The number of students permitted to observe a moot is small—usually fewer than 15—to underscore the strictly confidential nature of the proceedings, Lazarus says. Students must also satisfy an Institute review for possible conflicts and must agree to maintain confidentiality, he says.

“To watch an argument candidly unfold, to see—at the highest level—the construction of a legal argument in a concrete setting, where it’s going to be argued a few days later in the Supreme Court, that’s a pretty amazing experience,” Lazarus says.

“It is a tremendous teaching vehicle for students,” says Professor Steven Goldblatt, who is also faculty director for the Institute and director of the Appellate Litigation Clinic, “and I think we are just beginning to figure out what the teaching ramifications of this are and how to do it. There are all sorts of directions we can go.”

Students’ immersion in a case mooted at Georgetown currently varies. Students from a range of substantive law classes often observe moots related to the subject they’re studying—criminal law, environmental law, or intellectual property, for example. Goldblatt invites former Appellate Litigation Clinic fellows to moot upcoming Supreme Court cases with his students, has students observe the SCI moot and attend the actual argument before the Court, and then brings the advocate back to the class for a “post-mortem” session to discuss how the argument unfolded.

Other classes, such as Lazarus’s Supreme Court advocacy seminar and seminar courses on the Court taught by Professors Susan Bloch and Vicki Jackson, tap directly into SCI’s moot court program and involve in-depth study of cases mooted at Georgetown. Despite its heavy reading load, Lazarus’s seminar is so popular that dozens of students are turned away after its 20 seats are filled, says Kathryn Watson (L’05). “When I mentioned I was in this class, I got a lot of jealous stares,” she says. (Before his nomination and confirmation, Chief Justice John Roberts was scheduled to teach another Supreme Court advocacy section in the spring, and no doubt his class would have been popular, too. Now that he’s unable to teach the class, another leading Supreme Court advocate will take his place, Lazarus says.) Another new popular offering at the Law Center, initiated by the Institute several years ago, is a seminar on the Solicitor General’s Office taught by current and former attorneys from that office.

In Lazarus’s class, students first spend several weeks becoming steeped in the inner workings of Supreme Court advocacy, learning such things as how justices write opinions, how the Court’s docket load has changed over time, and how to write a potentially successful petition for certiorari. Then they study intensively four cases that will be mooted at Georgetown, reading the petitions for and in opposition to certiorari, the lower court opinions, and the briefs and reply briefs, before attending

‘He did this! He did that! Remember at the moot he said this, and everyone said “Don’t do it,” and he actually changed? And that worked!’
the moot itself (where Lazarus will frequently ask questions they’ve submitted to him). Often they’ll meet beforehand with the advocate scheduled to moot at Georgetown, and they’ll watch at least one advocate argue his case before the Court itself. Lazarus has even arranged for students to talk with the advocates for both sides of a case in the Solicitor General’s Office, directly off the courtroom, immediately after they have duked it out at the Court.

Studying the cases from start to finish allows students to see just how much arguments can evolve, says Kimberly Perrotta (L’05).

“You usually get to see how their positions change from the brief to when they come talk to you to when they argue at the moot and then in the actual courtroom, and it actually changes quite a bit,” Perrotta says. “You can even start to identify alternative strategies and realize that they could have gone this way; but had they gone that way, another problem with the case would have been the next question out of the justices’ mouths. You can begin to start working your way through why they chose the strategy that they chose.”

Sometimes students even get involved in the strategizing. In one case the class studied last year, an advocate representing a death row inmate was set to argue before the Court for the first time, and the class and moot panelists agreed that her oral argument wasn’t effective. In particular, her introduction was weak, Watson says. It focused on her client’s childhood and other mitigating factors that might be persuasive to a trial court but that would not concern the Supreme Court, she said. So at the moot, Lazarus had students work with the moot panelists for about 20 minutes to develop a more effective introduction, one that focused specifically on her due process argument: that the defendant’s appearance before the sentencing jury in shackles had prejudiced the jury. The advocate’s argument changed dramatically.

“In her actual argument, she was much improved, and her intro was nearly perfect,” Perrotta says. “You got to see the way she worked everyone’s feedback into the actual introduction, and it changed completely. She made sure to hit every element that would be really important to the justices. And her responses all seemed to try to incorporate the fact that it was a capital defendant, which she did not do a good job of in the beginning.”

Even if students only observe a moot, as they do in most cases, without getting involved in suggesting improvements, simply being in the room with the advocates and panelists and watching them struggle is enlightening in itself, says Professor Nina Pillard.

“They see real human beings with anxieties and imperfections practicing for an argument before the highest court in the land, and I think there is something just wonderfully empowering about that,” she says. “They don’t have all the answers, they are not super-geniuses from another planet. These are just people who are working through hard issues and doing the best they can.”