

**NEW YORK STATE
BAR ASSOCIATION**

**COMMITTEE ON COURTS OF
APPELLATE JURISDICTION**

March 26, 2014

**REPORT
ON A
MOOT COURT PROGRAM FOR
APPELLATE COUNSEL**

I. Background of the Subcommittee Formed to Draft a Report and the Issue

At the Committee's November 13, 2012 meeting (See Addendum #1) Co-Chair Cynthia Feathers described how members of the Committee recently researched well-known moot court programs in other jurisdictions, notably the programs at the law schools at Berkeley and Georgetown, and the Indiana State Bar, and suggested that this Committee investigate creating a similar moot court program in New York. The Co-Chairs envisioned that the CCAJ moot court program would involve rehearsals of arguments shortly before the actual arguments in court in front of practitioners and others (e.g., professors, former judges and clerks) steeped in appellate culture. According to Ms. Hartman, such a program would benefit the lawyers who are mooted, as well as the law school and its students if the program were tied to one or more law schools in the State.

Several members of the Committee volunteered to serve on a Subcommittee to study various moot court models and to recommend how to set one up in New York. As a result, Stuart Cohen prepared a December 13, 2012 Memorandum of the Subcommittee's initial investigation and thoughts. See Addendum #1.

The Subcommittee subsequently conferred and presented this Report and the Recommendations below, ultimately adopted by the full Committee and endorsed by the Association's Executive Committee.

II. Summary of Known Moot Court Programs Nationwide

Since the initial discussion of this program in 2012 and 2013, we have learned of the existence of additional moot court programs. Each of the programs is briefly summarized here.

A. Georgetown, Berkeley, and Indianapolis Bar Association

The three programs are very similar in that they allow only one side of an appeal to argue, and they require all participants and spectators to subscribe to a confidentiality agreement. Moot sessions are held about a week before the actual court argument, and include both a simulated argument and a candid evaluation session in which strengths and weaknesses of counsel's presentation are discussed with the judges.

The Georgetown program is limited to United States Supreme Court arguments, and it “moots” approximately 90-95% of the Supreme Court cases in each session.

Berkeley launched its moot court program in 2012 through the Executive Director of its new California Constitution Center. It is limited to cases pending before the Supreme Court of California. Second- and third-year students prepare bench memoranda and act as law clerks to mock jurists on eight chosen cases, as part of a three-unit seminar. One side of each case is presented, with a mix of scholars, experienced lawyers, and retired judges forming the panel.

The Indianapolis Bar Association’s moot court program is operated by the Association’s Appellate Practice Section, which runs it through a newly created “Indiana Appellate Institute.” The program is available to lawyers throughout the state who have oral arguments scheduled before the Indiana Supreme Court or Court of Appeals. It is modeled after the Supreme Court Institute at Georgetown, and “moot” sessions are held

before a panel of experienced appellate advocates, former judicial clerks, and law professors well-versed in the subject matter of the case and general appellate court procedures.

B. Judge Rosenblatt’s “Moots” in his Class at NYU

At the November 2012 meeting Nick Tishler discussed that he participated in a “bilateral” moot court in connection with a course former Court of Appeals Judge Albert Rosenblatt teaches at NYU School of Law. The Rosenblatt model brings in both lawyers, which is a more realistic simulation of the actual argument, and does not require adherence to a confidentiality agreement, though it may inhibit participation by lawyers who do not want to show their hands in advance. Mr. Tishler expressed no reservations about participating in the bilateral moot court argument, and said he found it helpful.

C. Moot Programs Sponsored by the University of New Hampshire and Golden Gate University Law Schools

The Subcommittee subsequently found additional moot court programs sponsored by the University of New Hampshire and Golden Gate University Law Schools. The UNH program held its first moot sessions in 2013. The “UNH Attorney Mooting Program” invites any bar member with an appellate argument coming up to inquire about scheduling a moot court session. At the second session, held in October 2013, Law School Dean John Broderick reprised his former role as Chief Justice of the NH Supreme Court. When the moot argument was completed, the panel of five moot judges discussed the lawyer’s performance. The two sessions held so far were for cases in the US Supreme Court and the New Hampshire Supreme Court. Although we

cannot determine with any certainty, it clearly appears that this is a “unilateral” moot court program.

The program at Golden Gate is called “Moot Court for Practicing Lawyers” and allows lawyers to practice their oral arguments before panels of law professors and lawyers who serve as “judges” of cases pending in the California Supreme Court, Courts of Appeal, 9th Circuit, and the US Supreme Court. Again, although the website does not say so specifically, it clearly appears that this is a “unilateral” moot program. The moot sessions are held at the law school in San Francisco, they are free, and the arguing lawyer receives MCLE credit so long as he/she allows law school students to watch to educate them.

D. Moot Program Sponsored by the Appellate Practice Committee of the Erie County Bar Association

We recently learned from Committee member Timothy P. Murphy of Lipsitz Green Scime Cambria LLP and Edward J. Markarian of Magavern Magavern Grimm LLP that the Appellate Practice Committee of the Erie County Bar Association (“ECBA”) established a moot court program approximately one year ago. It was created so that attorneys making their first appellate argument or making sophisticated arguments in major cases could benefit from testing their argument before other appellate practitioners.

Members of the ECBA Appellate Practice Committee reached out to local appellate practitioners to serve as moot judges, and 45 attorneys agreed. The program was then announced in the ECBA’s monthly bulletin, at CLE programs, and committee meetings. These moots are “unilateral,” and it is informally understood that all moot arguments are strictly confidential; if any participant requires a formal confidentiality

agreement it will be provided. The program is a great success and has had four (4) moot arguments to date: (1) by a newly-admitted attorney making his first argument at the Fourth Department; (2) by an experienced attorney preparing to argue before the New York Court of Appeals; and (3) two by an experienced attorney preparing for arguments at the Second Circuit. All of the participants have commented that the moot argument helped them greatly.

One strength of the ECBA program is its flexibility. The person requesting the argument can select the attorneys he or she wishes to serve as moot judges or the moot judges can be selected for them. The Administrative Judge for the 8th Judicial District allows the program to use the ceremonial courtroom in Buffalo, which is helpful for newly-admitted attorneys making their first argument because it provided a courtroom format so that he/she could get used to it. The moot arguments by experienced practitioners have been at law offices, often at convenient times late in the day. The experienced attorneys have focused on substance rather than form. Sometimes, the “practice argument” is structured; e.g. for the attorney preparing for his first argument. Other times, the practice argument is interrupted for a more general strategy discussion.

As a final bonus, the moot judges receive CLE credit through the Erie Institute of Law, the CLE provider of the ECBA.

III. Preliminary Recommendations and Discussion

The Subcommittee’s preliminary recommendations at the March 5, 2013 meeting included consideration of two phases – an initial program that focuses solely on the NY

Court of Appeals, and a second, regional program that permits moots for Appellate Division and Court of Appeals arguments:

A. Phase I

1. The Committee (and the NYSBA) acting as sole sponsor rather than affiliating with a law school;
2. Limiting the program at the outset to Court of Appeals cases; there are many solo practitioners and small-office lawyers who may be making their first appearance at the Court who would particularly benefit greatly from the program. The limited number of Court of Appeals argument dates and the setting of those dates well in advance would allow the program to pin down moot session dates well in advance, which might help obtain commitments from potential moot court “judges”;
3. Announcing as soon as possible the Committee's commitment to start the program and solicit statements of interest from prospective judges, and cases for argument. Responses to our publication of the program would allow us to determine the potential pool of judges and therefore gauge how many sessions we can offer, which in turn will help define case selection criteria; and
4. Hold the moot court sessions approximately 7-14 days before the case is scheduled for argument at the Court of Appeals.

B. Phase II

The general sentiment among the Committee members was that less experienced practitioners, especially those from smaller or solo firms, would benefit from a regional program available throughout the state. There was some discussion about whether the program should include Appellate Division, as well as Court of Appeals, cases. This regional program can take one of several forms. It could be

affiliated with one or more law schools, or could involve a less formal “cooperative” of appellate attorneys willing to trade mootings and judging among themselves.

IV. Final Recommendations

The Subcommittee recommended that we commence our Moot Court program in the Fall of 2014 and that we announce the creation of the program as soon as possible so that we begin to get the word out throughout the State among attorneys, appellate practitioners, and appellate judges. Our specific recommendations are as follows:

1. The Committee should be the sole sponsor, at least initially, for many of the reasons described in Mr. Cohen’s December 2012 Memorandum. The “pros” of affiliating with a law school are that it can provide administrative support, appropriate physical facilities, and unpaid student “law clerks” to provide the judges with bench memoranda and other assistance. On the down side, however, a law school participating in the program will have as its primary objective the furtherance of its own goals, which may or may not completely coincide with ours. For example, since it appears that moot sessions should precede the actual argument by about a week, there may be conflicts between desired moot court dates and classes, reading periods and exams that would be difficult to accommodate. To the extent participation in this program would increase a law school’s prestige or be seen as furthering its program goals, fairness might dictate opening the selection process to all the law schools in the state. Either way, working through a law school would definitely delay the start of the program, perhaps for an extensive period of time. Our goal is to get this program going now. We can always re-visit this issue once we are up and running;

2. Initially the program should be limited to Court of Appeals cases, with the program to expand to Appellate Division appeals as soon as possible once the program is in place and operating, preferably in 2015. At that time we should try to have an infrastructure in place so that moots can be scheduled throughout the State for the convenience of the arguing attorney and the moot judges vis-à-vis travel;

3. The Committee should plan to have our first “moots” this Fall related to the Court of Appeals sessions already scheduled for October 14-16, 21-23, and November 17-19. The appeals during these sessions should be fully briefed by September 1st and available for review by the moot judges;

4. The program will follow the “unilateral” approach (only one side to the appeal will be heard and evaluated) that every existing program follows except Judge Rosenblatt’s NYU course, which has “bilateral” arguments. Consistent with this we will take the first party to an appeal who requests a “moot” (“first come, first served”) and require all participants and spectators to subscribe to a Confidentiality Agreement; **EXCEPT**: If both parties to an appeal consent to a bilateral moot we will do that and provide separate evaluation time for each lawyer after the moot so the evaluation remains honest and forthcoming, but confidential from the adverse party;

While we see several advantages to the bilateral model (no risk of disgruntling an adversary who is shut out; limiting of number of applicants for spots; more realistic and hence possibly more helpful sessions; and no need to worry about inadvertent leaks), our concern is that this model may be so unattractive to the majority of counsel that we will not receive many requests for a moot. Judge Rosenblatt already provides one bilateral moot session and we will allow bilateral moots if both parties agree;

5. Initially, moot sessions will be held at the NYSBA Bar Center in Albany;

6. The moot court sessions would be held approximately 7-14 days before the case is scheduled for argument at the Court. Each moot session will consist of at least 3 and no more than 7 judges;

7. We immediately develop a list of potential moot “judges” from among this Committee and outside of it of seasoned appellate lawyers and retired appellate judges; the list should be revised and supplemented regularly; prospective judges will be asked to indicate what dates (or Court sessions) they contemplate being available and whether they wish to be considered for any case or only for cases in certain subject areas (i.e., civil vs. criminal). Responses will allow us to determine the potential pool of judges and therefore gauge how many moot sessions we can offer;

8. Forms are being prepared to solicit moot judges and to allow attorneys to request a moot from the Committee – they will be available before the May 1, 2013 meeting of the Committee; and

9. The Committee should retain some ability to reject requested moots based on the Subcommittee’s view that the case in question is not moot-worthy. However, acceptance into the program should not be based on the subject matter or the attorney requesting the moot.

March 26, 2014

Members of the Moot Court Program Subcommittee:

Alan Pierce (Chair); Stuart Cohen, Cynthia Feathers, Denise Hartman, Warren Hecht, George Hoffman, Michael Hutter, Hon. Bernard Malone, Norman Olch, Sharyn Rootenberg, Elliott Scheinberg, Nicholas Tishler

Addendum 1

December 13, 2012

To: Cynthia Feathers
Denise Hartman

From: Stuart Cohen

Re: Appellate moot court programs

I. Background and summary of features of existing programs

After the meeting of the "Meet the Justices" subcommittee on November 28, 2012 at the Bar Center, you asked me to review some materials you had assembled on the appellate moot court programs at Georgetown and UC Berkeley law schools and at the Indianapolis Bar Association, and to look for other programs. I took this mandate also to include evaluating the pros and cons of these programs and to suggest considerations relevant to us in formulating a program.

A quick search on Google failed to come up with any other similar programs. I suggest perhaps contacting someone at Georgetown or the Indybar who would likely be aware of other programs. I have not contacted anyone, since I am aware that Cynthia has spoken with someone at Indybar and I did not want to harass anyone with repeated questions. If you want me to pursue personal questioning, I'd like to discuss with you what you've already asked and been told before doing so.

The three programs appear similar in that they allow only one side of an appeal to argue, and they require all participants and spectators to subscribe to a confidentiality agreement. Moot sessions are held about a week before the actual court argument, and include both a simulated argument and a candid evaluation session in which strengths and weaknesses of counsel's presentation are discussed with the judges.

At the November meeting, Nick Tishler mentioned that he participated in a bilateral moot court in connection with a course former Judge Albert Rosenblatt teaches at NYU School of Law. I am somewhat familiar with the course (Jim Pelzer and I were invited to speak to his class a few years ago about the functions of an appellate court clerk's office), and I can serve as a contact point with the Judge should we require more information about his class.

II. Questions for our program

I am sending this memorandum sooner rather than later because I believe we need to settle certain preliminary questions before proceeding further.

1. Goal or mission statement -- is it our goal to serve any member of the Bar, or of the Association, or of the committee? Is it also our goal to promote awareness of the appellate process to the public, non-appellate lawyers, and law students?

2. Associate with a law school or, at least initially, go it alone? A law school can provide administrative support, appropriate physical facilities and unpaid student "law clerks" to provide the judges with bench memoranda and other assistance. On the down side, a law school participating in the program will have as its primary objective the furtherance of its own goals, which may or may not

completely coincide with ours. For example, since it appears that moot sessions should precede the actual argument by about a week, there may be conflicts between desired moot court dates and classes, reading periods and exams that would be difficult to accommodate. To the extent participation in this program would increase a law school's prestige or be seen as furthering its program goals, fairness might dictate opening the selection process to all the law schools in the state, which could delay the start of the program. It's also possible that no law school will be interested in the program, which would require re-planning on the fly to go it alone.

I recommend going it alone, at least initially. Not being tied to a law school -- and to its fixed physical location -- would allow us to schedule sessions around the state for the convenience of the judges and other participants. Of course, we would have to locate appropriate facilities (I imagine that law firm conference rooms or the like would, in most cases, be sufficient) and provide administrative support (unless the State Bar could help us), but I see these as relatively small burdens, at least in the beginning.

3. Case selection -- the extant models appear to be either first come, first served, or selection by program administration of cases that best meet the goals of the program (e.g., for school programs, cases with issues that present pedagogical opportunities). If the primary purpose of our program is to be service to the Bar, first come, first served might be appropriate, as might reserving the limited spots to attorneys who appear not to have other moot court opportunities within their large offices or elsewhere.

A subsidiary consideration is whether the program should be limited to cases in a particular court. I recommend starting with the Court of Appeals, which serves a natural limiting function and in which oral arguments are generally more lengthy and substantive than in intermediate appellate courts. Counsel tend to be more experienced (at the very least, in most cases they already have argued the case in the Appellate Division) and thus can be expected to be at least minimally prepared. In my experience, though many advocates at the Court are from large private sector and government offices, there are plenty of solos and small-office lawyers who may be making their first appearance at the Court who would be great candidates for the program. The limited number of Court of Appeals argument dates and the setting of those dates well in advance would allow us to pin down moot session dates well in advance, which might help obtain commitments from potential judges.

4. Unilateral or bilateral arguments -- the prevailing model appears to afford access to the program to only one side in a case, and requires all participants and spectators to subscribe to a confidentiality agreement. The Rosenblatt model brings in both lawyers, which is a more realistic simulation of the actual argument, and does not require adherence to a confidentiality agreement, though it may inhibit participation by lawyers who do not want to show their hands in advance. Nick Tishler expressed no reservations about participating in the bilateral moot court argument, and said he found it helpful. I think the bilateral model offers several advantages for a pilot program: (a) no risk of disgruntling an adversary who is shut out; (b) possible self-limiting of number of applicants for spots; (c) more realistic and hence, hopefully, more helpful sessions; and (d) no need to worry about inadvertent leaks, especially if in a law school environment,

where there may be many spectators who do not fully appreciate the need for confidentiality.

III. Getting started

One step we can take immediately is to announce our intent to start the program and solicit statements of interest from prospective judges, perhaps first limiting the announcement to members of the committee but stating that non-members also would be welcome. It would be helpful -- though not necessary -- if we could state that we are at least considering initially limiting the program to Court of Appeals cases, and advising that sessions will take place approximately seven to 14 days before the case is scheduled for argument at the Court, and if we could provide the Court's calendar of argument days for 2013 (copy attached). Prospective judges could be asked to indicate for what dates (or Court session months) they contemplate being available and whether they wish to be considered for any case or only for cases in certain subject areas. Responses would allow us to determine the potential pool of judges and therefore gauge how many sessions we can offer, which in turn will help define case selection criteria.

I will await word from you before proceeding further. Please feel free to share this memorandum with anyone else on the committee you deem appropriate.

attachment



State of New York
Court of Appeals
 20 Eagle Street
 Albany, New York 12207-1095
www.nycourts.gov/courts/appeals

**Schedule of Argument Dates
 2013**

JANUARY	FEBRUARY	MARCH
S M T W Th F S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	S M T W Th F S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	S M T W Th F S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31
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OCTOBER	NOVEMBER	DECEMBER
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