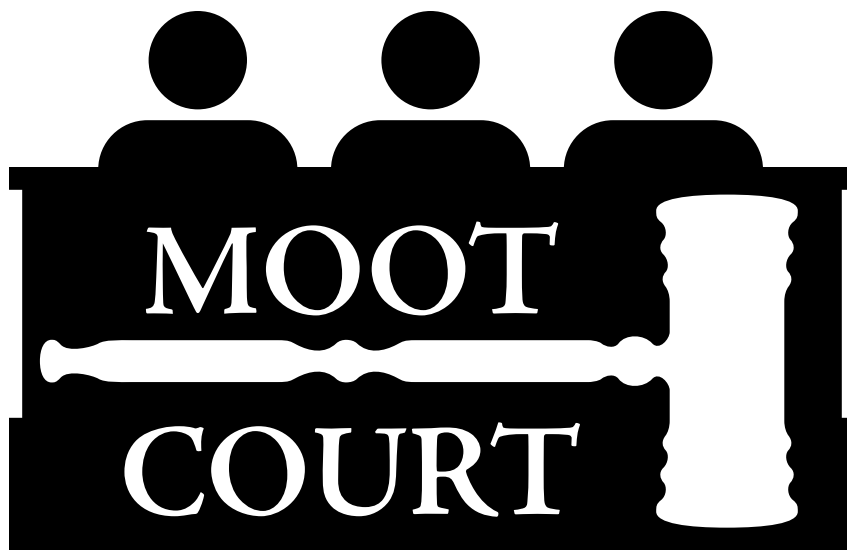


Artist Ron Leone

Student Packet



Artist Ron Leone

Exploring the Appellate Process

The Teacher's Guide and the hand-out materials for *Moot Court – Exploring the Appellate Process* have been excerpted and adapted from a simulation on the judicial branch called *Puttin' on the Robes – Exploring the Legal Process*. This simulation is available through our nonprofit corporation, Center for Economic and Civic Education (CE²). For more information see our Web site <http://cesqd.org/Cts.html>. All materials were developed by Carla Young Garrett, except for the Moot Court competition format and rules which were developed by Carla Young Garrett and Ron Leone. The U.S. Supreme Court case, *Morse v. Frederick* is a public record.

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Student Materials for Morse vs Frederick

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Moot Court Introduction

Getting There – The Appellate Courts

In the United States when one side loses or is unhappy with something about the outcome of their trial they have a right to appeal.¹ The lawyer representing the party or parties appealing (called the "appellant" or "petitioner") usually files a Notice of Intent to Appeal with the trial court. A transcript of the trial is prepared and sent to the appellate court.² The appellate lawyers file a brief laying out the legal³ errors made at trial and what law applies in this case. The lawyers representing the other party (called the "respondent" or "appellee") file a reply brief. Then there's oral argument, where the lawyers appear before a three-judge court to present their sides of the case. The appellate judges ask questions and then "take the case under submission" (reserve making a decision until a later date).

The judges have a conference to see where they stand on the cases they've heard. When two or three judges agree on the outcome (who wins), one of them volunteers to write the "opinion," which lays out not only the "holdings" (legal rulings) in the case, but also the legal rationale for their decision. A judge who agrees with the outcome but has other or different reasons, can write a "concurring" opinion. A judge who disagrees with the outcome can write a "dissenting" opinion.

What You Do (Classroom Instructions)

Student lawyers: You read the *Morse vs Frederick* case materials. Alone or in pairs, attorneys for Morse (Petitioner) write the appellate brief; attorneys for Frederick (Respondent) write the reply brief. There's a set of sample forms and a "Brief Writing Organizer" to use as a guide (see A1–A5). Additionally, your teacher may have you use the "Brief Template" which is an MS Word document that's designed for you to type your brief right into. You can download the file at <http://cesqd.org/mootcourt.html>.

After you've written and submitted your brief, you'll argue before a three-judge appellate court. This is called "oral argument." Be ready to respond to the judges' questions and to counter your opponents' arguments. Use the "Oral Argument Notemaker" (see A6–A8) to help you. Petitioner argues first, then the Respondent has a turn. After that, both sides have the chance to rebut the other side's arguments. (In real life only the Petitioner has rebuttal because they have the burden.)

Student judges: You need to read the briefs and case materials and then write out some good, tough, probing questions to ask the lawyers. Then, during the hearings, the lawyers argue their cases and the judges **interrupt** and ask them questions. This is called "oral argument."

After argument, each judge should write one opinion—majority (outcome, rule, and rationale), concurring (agreeing with the outcome but for different reasons), and/or dissenting (disagreeing with both the outcome and the reasoning).

1 In a criminal case, only the defendant can appeal a conviction. The state cannot appeal an acquittal, as this would violate the Fifth Amendment's "double jeopardy" provision.

2 Appellate courts are required to hear all the appeals filed within their jurisdiction, whereas the USSC—and the state supreme courts—only hear the cases they want to.

3 Appeals deal only with legal issues, not factual ones. For example, the factual finding that Frederick held up the banner would not be appealable. But the issue of whether or not he had the First Amendment right to hold up the banner, is a legal issue, and therefore subject to appeal.

What You Do (Competition Instructions)

Your team's job is to write two briefs (one for Petitioner/Appellant Morse and one for Respondent Frederick)¹ citing the facts, arguments and case law you think most persuasive for each side. In making your arguments, you need to use and quote from the case materials (pages 1–11.) You can use the "Oral Argument Notemaker" to help you organize your thoughts.

There is also a separate file called, "Brief Template" which can also be downloaded from our Web site at <http://cesqd.org/mootcourt.html>. This file (in MS Word format) is designed for you to type your brief right into it.

On competition day you'll come out to the courthouse and present your argument before a three-judge appellate court. This is called "oral argument." Be ready to respond to the judges' questions and counter your opponents' arguments. You'll have a total of six minutes (including rebuttal) to argue. You can divide the time up as you please. If you have a partner, each of you can do part of the argument-in-chief (main argument) and part of the rebuttal, or one of you can do the main argument and one can do the rebuttal. Rebuttal is used only to counter your opponents' argument, not to raise new issues. (In real life only the Petitioner has rebuttal because they have the burden.)

How Court Opinions Are Organized and Used in Real Life

In the legal world, after judges write their opinions, they're usually published in large books (often more than 1500 pages). The books are numbered consecutively, and contain opinions going back to the beginning of the court system. These opinions are then cited by later courts when those courts are in the process of deciding the same or a related issue. The earlier case opinions are precedent for the later ones. The books are organized as follows:

For the Federal District Court (which is the federal trial court) trial opinions can be found in volumes called "Federal Supplement," which is currently in its third series so it's called "F.Supp.3d." Similarly, the circuit court opinions (the intermediate appellate level) are published in Federal Reporter 3rd (F.3d). The fictitious Twentieth Circuit (which will be hearing *Morse vs Frederick* for this activity) would be at this level. The U.S. Supreme Court (USSC) opinions are published in the volumes "U.S." (United States).

For example, the case of *Brandenburg v. Ohio* (1969) 395 U.S. 444 would be found in the 395th volume of USSC cases. The case, which was decided in 1969, begins on page 444. State court decisions also follow a similar numbering system.

When and How to Cite Case Law

When you quote from a case, you need to include a case citation. Use the following rules:

- When writing a brief, the first time you reference a case, use the full citation. For example, *Brandenburg v. Ohio* (1969) 395 U.S. 444. Use italics for the case name and put the date in parenthesis.
- In oral argument, the first time you mention a case, use the full case name. For example you would say, "as the U.S. Supreme Court in *Brandenburg v. Ohio* said ..."
- After you've cited the case once, you can just use a short case name like *Brandenburg*.
As the court in *Brandenburg* held "...", or
As the court in the *Brandenburg* case held, "...", or
As the *Brandenburg* court held, "..."

¹ Written briefs are not required (nor accepted) for the competition, but they're good preparation.

Morse v. Frederick

Instructions

1 This is your case packet. The trial has already taken place. You are now in the fictitious 20th
2 Circuit Court of Appeal. The materials that follow have been taken from the court opinions in
3 the cases you will be citing when you make your arguments. To get the flavor of how judges
4 think and write, some of their actual words and turns of phrase have been kept, and they are
5 in quotation marks. In writing your briefs (one for Petitioner/Appellant Morse and one for
6 Respondent Frederick) cite the facts, reasoning and case law you think most persuasive for
7 each side. When making your arguments, you need to use, quote, and cite these materials.
8 Legal terms and other possibly unfamiliar words are defined in brackets [] where possible
9 (underlined words can be found in the glossary on page 11).

11
12 After you've written your briefs, you'll argue before a three-judge appellate court. This is
13 called "oral argument." Be ready to respond to the judges' questions and your opponents'
14 arguments. Petitioner argues first, then the Respondent has a turn. After that, both sides have
15 the chance to rebut the other side's arguments. (In real life only the Petitioner has rebuttal
16 because they have the burden.)

Parties

17
18
19 *Petitioner:* Deborah Morse, Principal of the Juneau-Douglas High School; the Juneau School District.

20
21 *Respondent:* Joseph Frederick, a student at the high school.

Facts

22
23
24 On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way
25 to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a
26 street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner
27 Deborah Morse, the school principal, decided to permit staff and students to participate in
28 the Torch Relay as an approved social event or class trip. Students were allowed to leave
29 class to observe the relay from either side of the street. Teachers and administrative officials
30 monitored the students' actions.

31
32 Respondent Joseph Frederick, a JDHS senior, stood across the street from the school to
33 watch the event. As the torchbearers and camera crews passed by, Frederick and his friends
34 unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS." The large banner was
35 easily readable by the students on the other side of the street.

36
37 Principal Morse immediately crossed the street and demanded that the banner be taken
38 down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick
39 to report to her office, where she suspended him for 10 days.

1 Morse later explained that she told Frederick to take the banner down because she thought
2 it encouraged illegal drug use, in violation of established school policy. The Olympic Torch
3 Relay gave Alaska residents a rare chance to appear on national television. As Joseph
4 Frederick repeatedly explained, he did not address the curious message—"BONG HiTS 4
5 JESUS"—to his fellow students. He just wanted to get the camera crews' attention.

6 7 **Legal/Procedural History**

8 Frederick appealed his suspension, but the Juneau School District Superintendent upheld it,
9 limiting it to time served (8 days). The superintendent decided that Frederick had displayed
10 his banner "in the midst of his fellow students, during school hours, at a school-approved
11 activity." Frederick took his case to court, where the suspension was reversed. The lower
12 court held that Frederick's First Amendment rights were violated because the school
13 punished Frederick without demonstrating that his speech gave rise to a "risk of substantial
14 disruption." The court further concluded that Frederick's right to display his banner was
15 "clearly established." Morse and the school district now appeal.

16 17 **Arguments**

18 **Morse** and the school district will argue that Frederick was disciplined not because she
19 disagreed with his message, but because his speech appeared to advocate [promote] the
20 use of illegal drugs. The common-sense understanding of the phrase "bong hits" is that it is
21 a reference to a means of smoking marijuana. Given Frederick's inability or unwillingness to
22 express any other credible meaning for the phrase, the banner should be seen as advocating
23 the use of illegal drugs. Frederick's speech was not political. He was not advocating the
24 legalization of marijuana or promoting a religious belief. He was displaying a fairly silly
25 message promoting illegal drug usage in the midst of a school activity, for the benefit of
26 television cameras covering the Torch Relay.

27
28 Frederick's speech was potentially disruptive to the event and clearly disruptive of and
29 inconsistent with the school's educational mission to educate students about the dangers of
30 illegal drugs and to discourage their use.

31
32 In most settings, the First Amendment strongly limits the government's ability to suppress
33 speech on the ground that it presents a threat of violence. But due to the special features
34 of the school environment, school officials must have greater authority to intervene before
35 speech leads to violence. And, in most cases, the "substantial disruption" standard of the
36 *Tinker* case (see page 4), permits school officials to step in before actual violence erupts.

37
38 **Frederick** will argue that while a public school may restrict speech that a reasonable observer
39 would interpret as advocating illegal drug use, it cannot restrict speech that can plausibly
40 [reasonably] be interpreted as commenting on any political or social issue, including speech

1 on issues such as the war on drugs or legalization of marijuana. The First Amendment should
2 not permit public school officials to censor student speech for the reason that an official
3 thinks the speech interferes with a school's "educational mission." The "educational mission"
4 of any given public school is defined by the elected and appointed public officials with
5 authority over the schools and by the school administrators and faculty. Therefore, these
6 officials would be free to define their educational missions according to whatever political
7 and social views they hold and students might lose their free speech rights as a result.
8

9 The public schools are invaluable and beneficent institutions. When public school authorities
10 regulate student speech, they act as agents of the State; they do not stand in the shoes of the
11 students' parents and are, therefore, subject to constitutional limitations.
12

13 Frederick will also argue that "BONG HiTS 4 JESUS" is a nonsense message, not advocacy;
14 that neither did he intend for it to persuade his fellow students, nor would this message be
15 likely to persuade any of them to use drugs.
16

17 **Question Presented**

18 Did Frederick have a First Amendment right to display his banner?
19

20 **Legal Authorities**

21 *Juneau School Board Policies*

22 "Students will not be disturbed in the exercise of their constitutionally guaranteed rights to
23 assemble peaceably and to express ideas and opinions, privately or publicly, provided that
24 their activities do not infringe on the rights of others and do not interfere with the operation
25 of the educational program. (Policy 5520, paragraph 1)
26

27
28 "The Board will not permit the conduct on school premises of any willful activity ... that
29 interferes with the orderly operation of the educational program or offends the rights of others.
30 The Board specifically prohibits ... any assembly or public expression that. . . advocates the
31 use of substances that are illegal to minors" (Policy 5520, paragraph 2)
32

33 Pupils who participate in approved social events and class trips are subject to district rules for
34 student conduct; infractions of those rules will be subject to discipline in the same manner
35 as are infractions of rules during the regular school program. (Policy 5850, paragraph 3)
36

37 **The U.S. Supreme Court (USSC)'s major and primary case on student free speech rights**

38
39 *Tinker v. Des Moines Independent Community School Dist.*, (1969) 393 U. S. 503

40 **Facts:** The essential facts of *Tinker* are quite stark [basic, harsh], involving concerns at the

1 heart of the First Amendment. In December 1965, we were engaged in a controversial
2 war, a war that “divided this country as few other issues ever have.” Having learned that
3 some students planned to wear black armbands as a symbol of opposition to the country’s
4 involvement in Vietnam, officials of the Des Moines public school district adopted a policy
5 calling for the suspension of any student who refused to remove the armband. When several
6 students nonetheless wore armbands to school, they were suspended. The students sued,
7 claiming that their First Amendment rights had been violated.

8
9 **Issue:** To what extent can school officials suppress students’ First Amendment (free speech)
10 rights while at school?

11
12 **Holding/Quotes:** “First Amendment rights, applied in light of the special characteristics of
13 the school environment, are available to teachers and students.” Student expression may not
14 be suppressed [censored] unless school officials reasonably conclude that it will “materially
15 and substantially disrupt the work and discipline of the school.” Further, Our cases make
16 clear that students do not “shed their constitutional rights to freedom of speech or expression
17 at the schoolhouse gate.”

18
19 In 1965, when the Des Moines students wore their armbands, the school district’s fear that
20 they might “start an argument or cause a disturbance” was well founded. Given that context,
21 there is special force to the Court’s insistence that “our Constitution says we must take that
22 risk; and our history says that it is this sort of hazardous freedom—this kind of openness—
23 that is the basis of our national strength and of the independence and vigor of Americans
24 who grow up and live in this relatively permissive, often disputatious, society.”

25
26 The students sought to engage in political speech, using the armbands to express their
27 “disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views
28 known, and, by their example, to influence others to adopt them.” Political speech, of course,
29 is “at the heart of what the First Amendment is designed to protect.” The only interest the
30 Court found underlying the school’s actions was the “desire to avoid the discomfort and
31 unpleasantness that always accompany [go with] an unpopular viewpoint,” or “an urgent
32 wish to avoid the controversy which might result from the expression.”

33
34 As we explained when we considered the propriety of that policy, “[t]he school officials banned
35 and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied
36 by any disorder or disturbance on the part of petitioners.” The district justified its censorship
37 on the ground that it feared that the expression of a controversial and unpopular opinion
38 would generate disturbances. Because the school officials had insufficient reason to believe
39 that those disturbances would “materially and substantially interfere with the requirements
40

1 of discipline in the operation of the school," we found the justification for the rule to lack
2 any foundation and therefore held that the censorship violated the First Amendment.

3
4 "In order for the State in the person of school officials to justify prohibition of a particular
5 expression of opinion, it must be able to show that its action was caused by something more
6 than a mere desire to avoid the discomfort and unpleasantness that always accompany an
7 unpopular viewpoint. Certainly where there is no finding and no showing that engaging in that
8 conduct would materially and substantially [almost completely] interfere with the requirements
9 of appropriate discipline in the operation of the school, the prohibition cannot be sustained."

10 11 **Later School Free Speech Cases**

12
13 *Bethel School Dist. No. 403 v. Fraser*, (1986) 478 U. S. 675

14 **Facts:** Matthew Fraser was suspended for delivering a speech before a high school assembly
15 in which he used "an elaborate, graphic, and explicit sexual metaphor."

16
17 **Issue:** Did the school district act within its authority in punishing Fraser in response to his
18 offensively lewd [obscene, crude] and indecent speech?

19
20 **Holding/Quotes:** The Court said that there was a "marked distinction between the political
21 message of the armbands in *Tinker* and the sexual content of Fraser's speech." But the USSC
22 also reasoned that school boards have the authority to determine "what manner of speech in
23 the classroom or in school assembly is inappropriate." The Court found that "In the present
24 case, school officials only wanted to make sure that a high school assembly proceed in an
25 orderly manner. There is no suggestion that school officials attempted to regulate [control]
26 Fraser's speech because they disagreed with his views."

27
28 The Court set forth two basic principles. First, that "the constitutional rights of students in
29 public school are not automatically the same with the rights of adults in other settings." Had
30 Fraser delivered the same speech in a public forum outside the school context, it would have
31 been protected. In school, however, Fraser's First Amendment rights were circumscribed "in
32 light of the special characteristics of the school environment." Second, it established that the
33 mode of analysis set forth in *Tinker* is not absolute.

34
35 *Hazelwood School Dist. v. Kuhlmeier* (1988) 484 U.S. 258

36 **Facts:** Student staff members of a high school newspaper sued their school when it chose
37 not to publish two of their articles (one on a student's experience with pregnancy and the
38 other on the affect of divorce on students at the school). The school was concerned that
39 students, parents, and members of the public might reasonably perceive articles in a school
40 newspaper to bear the imprimatur [stamp of approval] of the school.

1 **Issue:** Do “educators offend the First Amendment by controlling the style and content
2 of student speech in school-sponsored expressive activities so long as their actions are
3 reasonably related to legitimate pedagogical [real educational] concerns.”
4

5 **Holding/Quotes:** The Court held that schools may regulate some speech “even though the
6 government could not censor similar speech outside the school.” And, like *Fraser*, it confirms
7 that the rule of *Tinker* is not the only basis for restricting student speech.
8

9 **USSC Cases on Student Fourth Amendment Rights**

10
11 *New Jersey v. T. L. O.* (1985) 469 U.S. 325

12 **Facts:** A teacher saw a student smoking a cigarette in the bathroom (which was against
13 school rules) and took her to the office. The principal then searched her purse. Marijuana
14 was found and she was arrested.
15

16 **Issue:** Was this search a violation of the student’s Fourth Amendment rights?
17

18 **Holding/Quotes:** In particular, “the school setting requires some easing of the restrictions to
19 which searches by public authorities are ordinarily subject.” The new standard articulated
20 [spelled out] by the USSC is that school officials only need “reasonable suspicion” in order
21 to search rather than “probable cause” as required by the Constitution.
22

23 *Vernonia School Dist. 47J v. Acton.* (1995) 515 U.S. 646

24 This was a random (suspicionless) drug testing case where the Court made analogies between
25 First and Fourth Amendment cases saying that lower standards applied in school settings.
26

27 **Quotes/Holding:** Drawing on the principles applied in our student speech cases, we have
28 held in the Fourth Amendment context that “while children assuredly do not ‘shed their
29 constitutional rights ... at the schoolhouse gate,’ ... (*Tinker*), the nature of those rights is
30 what is appropriate for children in school.”
31

32 “Special needs inhere [apply] in the public school context.” “While schoolchildren do not
33 shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights ...
34 are different in public schools than elsewhere; the reasonableness inquiry cannot disregard
35 the schools’ custodial [protective] and tutelary [educational] responsibility for children”
36

37 Deterring drug use by schoolchildren is an “important—indeed, perhaps compelling” interest.
38 Drug abuse can cause severe and permanent damage to the health and well-being of young
39 people. “School years are the time when the physical, psychological, and addictive effects
40 of drugs are most severe. Maturing nervous systems are more critically impaired [harmed]

1 by intoxicants [drugs and alcohol] than mature ones are; childhood losses in learning
2 are lifelong and profound [major]; children grow chemically dependent more quickly than
3 adults, and their record of recovery is depressingly poor. And of course the effects of a drug-
4 infested school are visited [dropped] not just upon the users, but upon the entire student
5 body and faculty, as the educational process is disrupted.”

6
7 *Saxe v. State College Area School Dist.*, (CA3 2001) 240 F. 3d 200, 211

8 **Holding/Quotes:** “Regulation of student speech is generally permissible only when the
9 speech would substantially disrupt or interfere with the work of the school or the rights of
10 other students. ... *Tinker* requires a specific and significant fear of disruption, not just some
11 remote apprehension [unlikely worry] of disturbance.”

12 13 **The USSC on Drug Abuse in Schools**

14
15 *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls*.(2002) 536 U. S. 822
16 This was another random drug testing case that was decided five years after *Vernonia*.

17
18 **Holding/Quotes:** “The drug abuse problem among our Nation’s youth has hardly abated since
19 *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse.”

20
21 Thousands of school boards throughout the country have adopted policies aimed at
22 effectuating [putting into effect] this message. Those school boards know that peer pressure
23 is perhaps “the single most important factor leading schoolchildren to take drugs,” and
24 that students are more likely to use drugs when the norms [standards] in school appear to
25 tolerate such behavior.

26 27 **Drug Use In Schools Reports**

28
29 National Institute on Drug Abuse, National Institutes of Health, Monitoring the Future:
30 National Survey Results on Drug Use, 1975-2005, Secondary School Students (2006). About
31 half of American 12th graders have used an illicit drug, as have more than a third of 10th
32 graders and about one-fifth of 8th graders. Nearly one in four 12th graders has used an illicit
33 drug in the past month. Some 25% of high schoolers say that they have been offered, sold,
34 or given an illegal drug on school property within the past year. Dept. of Health and Human
35 Services, Centers for Disease Control and Prevention, Youth Risk Behavior Surveillance—
36 United States, 2005, 55 Morbidity and Mortality Weekly Report, Surveillance Summaries,
37 No. SS-5, (June 9, 2006).

1 **Adult Freedom of Expression Cases**

2
3 *Rosenberger v. Rector and Visitors of University of Virginia.* (1995) 515 U.S. 819

4 **Issue:** Should censorship based on the content of speech, particularly censorship that depends
5 on the viewpoint of the speaker, be subject to the most rigorous burden of justification?

6
7 **Holding/Quotes:** Yes. “Discrimination against speech because of its message is presumed
8 to be unconstitutional ... When the government targets not subject matter, but particular
9 views taken by speakers on a subject, the violation of the First Amendment is all the more
10 blatant [obvious]. Viewpoint discrimination is thus an egregious [shocking] form of content
11 discrimination. The government must abstain from [avoid] regulating speech when the
12 specific motivating ideology or the opinion or perspective [attitude, outlook] of the speaker
13 is the rationale [reason] for the restriction.” Second, punishing someone for advocating
14 illegal conduct is constitutional only when the advocacy is likely to provoke the harm that
15 the government seeks to avoid.

16
17 *Brandenburg v. Ohio* (1969) 395 U.S. 444

18 **Facts:** Brandenburg, a Klu Klux Klan member made a speech advocating the use of crime
19 and violence to accomplish political change. He was convicted.

20
21 **Issue:** Was Brandenburg’s speech protected by the Fourth Amendment?

22
23 **Holding/Quotes:** Yes. The USSC in *Brandenburg* distinguished “mere advocacy” of illegal
24 conduct from “incitement to imminent lawless action.” It held that “the constitutional
25 guarantees of free speech and free press do not permit a state to forbid advocacy of the use
26 of force or law violation except where such advocacy is directed to inciting or producing
27 imminent lawless action and is likely to incite such action.”

28
29 *Texas v. Johnson* (1989) 491 U.S. 397

30 **Facts:** Johnson burned a flag at the Republican National Convention. He was convicted for
31 doing so under Texas’ anti-flag-burning law. The USSC reversed his conviction.

32
33 **Issue:** Can the government prohibit expression of an unpopular or offensive idea?

34
35 **Holding/Quotes:** “If there is a bedrock [basic] principle underlying the First Amendment, it
36 is that the Government may not prohibit the expression of an idea simply because society
37 finds the idea itself offensive or disagreeable.”

1 *Cantwell v. Connecticut* (1940) 310 U.S. 296

2 **Holding/Quote:** When First Amendment rights are at stake [at risk], a rule that “sweeps in a
3 great variety of conduct under a general and indefinite characterization” may not leave “too
4 wide a discretion in its application.”
5

6 *Federal Election Commission v. Wisconsin Right to Life, Inc.*, (2007) 551 U. S. ____ (slip op. at 21)

7 **Holding/Quotes:** Where “First Amendment is implicated [involved in], the tie goes to the
8 speaker,” and that “when it comes to defining what speech qualifies as the functional equivalent
9 of express advocacy ... we give the benefit of the doubt to speech, not censorship.”
10

11 *Thomas v. Collins* (1945) 323 U.S. 516

12 **Facts:** A union organizer was convicted for giving a speech that could possibly have been
13 interpreted as incitement to violence.
14

15 **Issue:** Can conviction of incitement to violence depend on how an audience member might
16 understand a speech?
17

18 **Holding/Quotes:** The USSC overturned the conviction, saying that such an interpretation of
19 the First Amendment would “put the speaker in these circumstances wholly at the mercy
20 of the varied understanding of his hearers and consequently of whatever inference may be
21 drawn as to his intent and meaning.”
22

23 In a different case, the Court also vacated a civil rights leader’s conviction for disturbing
24 the peace, even though a Baton Rouge sheriff had deemed that the leader’s “appeal to ...
25 students to sit in at the lunch counters to be inflammatory.”
26
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Texas v. Johnson (1989) 491 U.S. 397 [page 8]

Cantwell v. Connecticut (1940) 310 U.S. 296 [page 9]

Federal Election Commission v. Wisconsin Right to Life, Inc., (2007) 551 U. S. ____ (slip op. at 21) [page 9]

Thomas v. Collins (1945) 323 U.S. 516 [page 9]

Drug Abuse Reports [page 7]

Glossary

Educational mission

What school districts say they are trying to do, what their job is [page 3]

First Amendment rights, applied in light of the special characteristics of the school environment

Courts have looked at First Amendment rights for students *at school* and said they are different than they would be outside of school. [page 4]

Disputatious

Fond of having heated, loud, intense arguments. [page 4]

State in the person of school officials

School officials are state employees and are treated as part of the government. [page 5]

Expressive activities

Speech in the First Amendment sense, is more than just talking. It usually includes activities like marching, holding up signs or banners, holding sit-ins, wearing armbands, ribbons, bracelets and the like. [page 6]

Rigorous burden of justification

A hard-to-meet responsibility to show that a person's actions are correct. [page 8]

Viewpoint discrimination

Having a bias against a person or preventing a person from speaking because of what the *listener* thinks the speaker is saying. [page 8]

Motivating ideology

Beliefs or ideas that cause a person to act; a belief that moves or drives a person's actions. [page 8]

Functional equivalent of express advocacy

Actions that are considered to be the same as free speech (see "expressive activities" above). [page 9]

Appellate Brief Format

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2 1 Wright Way
Cityville, CA 00000
3 (000) 999-0000

4 Attorney for Petitioner DEBORAH MORSE

5

6 IN THE TWENTIETH CIRCUIT COURT OF APPEALS

7 IN AND FOR THE UNITED STATES OF AMERICA

8 DEBORAH MORSE,)

9 Petitioner)

NO. 07-456

10 vs.)

APPELLATE BRIEF

11)

12 JOSEPH FREDERICK,)

Respondent)

13 _____)

14 Introduction/Legal History

15 Respondent Joseph Frederick was suspended for refusing to take down a 14 foot banner
16 that he unfurled across the street from his high school during a school-sponsored event. The
17 lower court reversed his suspension on First Amendment grounds. We appeal.

18 Facts

19 While most of the student body was assembled watching the Olympic Torch Relay,
20 Joseph Frederick opened a 14 foot banner with the pro-drug message, "Bong HiTS 4 Jesus." ...

21 Legal Argument

22 Numerous U.S. Supreme Court cases including *Vernonia School Dist. 47J v. Acton*.
23 (1995) 515 U.S. 646 permit school officials to limit the constitutional rights of students ...

24 Wherefore, Petitioner prays that the decision of the lower court be reversed, and the
25 suspension of Joseph Frederick be reinstated.

26 Dated: October 17, 2007

Adam Smythe
Adam Smythe
Attorney for Petitioner

28

Reply Brief Format

1 José Martinez
LaKisha Johnston
2 1 Green Street
Cityville, CA 00000
3 (000) 999-1111

4 Attorneys for Respondent JOSEPH FREDERICK

5

6 IN THE TWENTIETH CIRCUIT COURT OF APPEALS

7 IN AND FOR THE UNITED STATES OF AMERICA

8	DEBORAH MORSE,)	
)	
9	Petitioner)	NO. 07-456
)	
10	vs.)	
)	REPLY BRIEF
11)	
	JOSEPH FREDERICK,)	
12	Respondent)	
)	
13	_____)	

14 **Introduction/Legal History**

15 Respondent Joseph Frederick was suspended for refusing the principal’s request to take
16 down his banner. The lower court reversed his suspension on First Amendment grounds ...

17 **Facts**

18 Frederick displayed a banner with a nonsense phrase he hoped with catch the attention
19 of the camera crew filming the Olympic Torch Relay which was passing his school ...

20 **Legal Argument**

21 The U.S. Supreme Court quite clearly and unequivocally stated that, students do
22 not “shed their constitutional rights ... at the schoolhouse gate.” *Tinker v. Des Moines*
23 *Independent Community School District*, (1969) 393 U.S. 503 ...

24 Wherefore, Respondent prays that the lower court’s decision to overturn Joseph
25 Frederick’s suspension, be upheld.

26 Dated: October 17, 2007

27		<u>La Kisha Johnston</u>
28		La Kisha Johnston
		Attorney for Respondent

Writing a Legal Brief – Overview

Parts of a Brief¹

A legal brief should consist of four parts.

- Introduction/Legal History
- Short statement of facts
- Body of the legal argument(s) with citations
- Conclusion (summary of grounds with request restated)

INTRODUCTION/LEGAL HISTORY

Give a brief legal/procedural history (see case packet, page 2), Then tell the Court what you want it to do (for example, overturn the lower court ruling) and a give a very short summary of the legal grounds (reasons) for this request.

Joseph Frederick was suspended for refusing to take down a 14 foot banner that he unfurled across the street from his high school during a school sponsored event. The lower court overturned his suspension. Petitioner Deborah Morse, Principal of the Juneau-Douglas High School (JDHS) and the Juneau School District (JDSD) requests that this Court reverse the lower court’s ruling and reinstate Frederick’s suspension on the grounds that ...”

FACTS

Use the facts most helpful to your side.

- Petitioner (Morse/JDSD): give some details about the pro-drug message and that it was a school-sponsored event.
- Respondent (Joseph Frederick): explain that even though he was a student, he still has First Amendment rights.

BODY OF THE LEGAL ARGUMENT WITH CITATIONS

Address each issue. Begin each one with a topic sentence (very short summary) in your own words. Use the “Brief Writing Organizer” to help you. Address the issue of what constitutional rights does a high school student, participating in a school-sponsored event, have.

CONCLUSION

Summarize the ground for relief (the legal reasons why the court should grant your prayer (request) and the relief sought (what you want the court to do).

Use “Wherefore, the Petitioner or the Respondent respectfully requests that ...”

Citing Case Law in Your Argument

HOW TO CITE CASES

There are fairly standard ways that cases are cited in briefs (see page iv of your Moot Court “Introduction”).

USING CATCH PHRASES

the instant case (this case, *Morse v. Frederick*)

¹ There is a sample brief and format in this packet (see pages A1–A2).

Brief Writing Organizer

Use this organizer to brainstorm and organize your thoughts before typing your brief.

INTRODUCTION

The introduction gives a brief legal/procedural background (see case packet, page 2). Then it tells the court what you want it to do and gives a short explanation of the legal reasons why. "Joseph Frederick was suspended when he ... Petitioner/Respondent requests that ... (insert what court should do) on the grounds that ... (insert reasons)."

FACTS

Use the facts most helpful to your side.

- Petitioner: The pro-drug message and that it was a school-sponsored event.
- Respondent: Even though he's a student, he has still has First Amendment rights.

LEGAL ARGUMENTS

You should argue the points and cite cases as you see fit. Begin each argument with a topic sentence and end with a conclusion (see next page for more writing space). For example:

"School authorities have the right to limit students' constitutional rights because ..."

LEGAL ARGUMENTS

Continue your argument here and then use the back, if needed.

CONCLUSION

Summarize your legal points and end with a what you want the court to do.

“Wherefore, the Petitioner/Respondent respectfully requests that the court ...”

Giving an Oral Argument – Overview

Parts of an Argument

Your oral argument will be very similar to your brief. The main differences are that you will be addressing the judges in person, you'll have to respond to their questions and your opponents arguments, and you'll have time for rebuttal (a presentation where you explain what's wrong with your opponents' arguments).

An oral argument consists of the same four parts as the brief.

- Introduction/Legal History
- Short statement of facts
- Body of the legal argument(s) with citations
- Conclusion (summary of grounds with request restated)

INTRODUCTION/LEGAL HISTORY

The introduction tells the Court what you want it to do (i.e., overturn the lower court ruling) and a gives a very short summary of the legal grounds (reasons) for this request. The judges are addressed as "Your Honors."

"Your Honors, Deborah Morse, Principal of the Juneau-Douglas High School, on behalf of the herself and the JDSC request that this Court reverse the lower court's ruling and reinstate Frederick's suspension, on the grounds that ..."

FACTS

Use the facts most helpful to your side.

- Petitioner: The pro-drug message and that it was a school-sponsored event.
- Respondent: Even though he's a student, he has still has First Amendment rights.

BODY OF THE LEGAL ARGUMENT WITH CITATIONS

Use the "Oral Argument Notemaker" to brainstorm what questions the judges might ask and your responses to your opponents' arguments.

CONCLUSION

Summarize the ground for relief (the legal reasons why the court should grant your prayer (request) and the relief sought (what you want the court to do).

"In conclusion, Frederick's First Amendment rights were violated by the school district ... Therefore, Mr. Frederick respectfully requests that lower court's ruling be upheld. Thank you."

Citing Case Law in Your Argument

Cases are cited in oral argument in the same way they're cited in briefs (see page iv of your Moot Court "Introduction"). You can use legal "catch phrases" like "the instant case", "on point"

Speaking

Oral argument is a persuasive speech designed to get the judges to rule in your favor. Good lawyers:

- Make eye contact
- Speak slowly and clearly
- Advocate for their side, have passion

Oral Argument Notemaker

Use this form to make notes on how to answer the judges' questions and respond to your opponents' arguments (use back if necessary). You can also outline your rebuttal here.

Judge Questions	Your Responses	Your Rebuttal and/or Response to Opponents' Arguments

Oral Argument Notemaker page 2

Judge Questions	Your Responses	Your Rebuttal and/or Response to Opponents' Arguments

Oral Argument Notemaker page 3

Judge Questions	Your Responses	Your Rebuttal and/or Response to Opponents' Arguments

Sample Courtroom Dialog for Appellate Argument

The room is arranged as a courtroom (see Appellate Court Diagram, Appendix D). The lawyers are seated at counsel table (appellant at the right, respondent on the left).

All are present except the three judges. The Clerk/Timer (CI/Timer) stand and speaks.

CI/Timer	All rise. The Court of Appeal for the Twentieth Circuit is now in session. The Honorable Luke George, Presiding Judge; the Honorable June Sommers and Stan Nord presiding.
-----------------	---

All three judges enter the courtroom and sit down. The PJ (presiding judge) raps the gavel once.

CI/Timer	Please be seated and come to order. Calling the case of Morse v. Frederick.
PJ	Counsel, please state your names and appearances for the record.

Lawyers stand. (Lawyers ALWAYS stand when addressing the judges.)

Each in turn says:

Attys	Good morning your honors, Adam Smythe, representing the Petitioner in this action. I will be delivering the argument-in-chief (main argument). Good morning your honors, Chau Nguyen, representing the Petitioner in this action. I will be delivering the rebuttal argument. Good morning your honors, José Martinez, representing the Respondent in this action. I will be delivering part of both the argument-in-chief and the rebuttal. Good morning your honors, LaKisha Johnston, representing the Respondent in this action. I will also be delivering part of both the argument-in-chief and the rebuttal. Good morning your honors, Dalbir Singh, I'll be your clerk and official timer this morning. Good morning your honors, Fran Jones, I'm the unofficial timer.
PJ	Before we begin, I'm going to read some preliminary instructions.

PJ reads instructions or asks to skip reading them. Then the PJ addresses the P Attys.

PJ	Mr. Smythe, please proceed with your argument.
P Atty	Yes, your honor

Adam Smythe stands and delivers his argument-in-chief.

On this team only Mr. Smythe is delivering the main argument.

Personnel are:

(PJ) Presiding Judge (P Atty) P Petitioner's attorney; (R Atty) Respondent's attorney; (Attys) All or some of the attorneys

After Mr. Smythe has delivered his arguments-in-chief, then the PJ asks the R Atty(s) to give their arguments.

PJ	Mr. Martinez please proceed with your argument.
P Atty	Yes, your honor.

Mr. Martinez and then Ms. Johnston stand and deliver their arguments-in-chief.

On the Martinez/Johnston team, Martinez and Johnston are sharing both the main argument and the rebuttal.

Then the PJ addresses P Attys

PJ	Ms. Nguyen you may proceed with rebuttal. Remember that this time may only be used to rebut opposing counsel's argument and not to raise new issues.
-----------	--

Ms. Nguyen delivers her rebuttal.

On the Smythe/Nguyen team, only Ms. Nguyen is doing the rebuttal.

When she is finished (or time is called) the PJ addresses the R Attys

PJ	Ms. Johnston you may proceed with rebuttal.
-----------	---

When Ms. Johnston and then Mr. Martinez have finished rebuttal (or time is called) the PJ addresses everyone:

PJ	This concludes the oral argument in Morse v. Frederick. Thank you counsel. Before we make any comments , would my fellow justices please put their score sheets in this envelope? <i>Now seal the envelope and hand it to the official timer/clerk.</i> Would the clerk please take this envelope with the score sheets and bring it to the Moot Court staff?
CI/Timer	All rise.

After the judges are off the bench.

CI/Timer	You may be seated.
-----------------	--------------------

Fill-in Courtroom Dialog for Appellate Argument

The room is arranged as a courtroom (see Appellate Court Diagram, Appendix D). The lawyers are seated at counsel table (appellant at the right, respondent on the left).

All are present except the three judges. The Clerk/Timer (CI/Timer) stand and speaks.

CI/Timer	All rise. The Court of Appeal for the Twentieth Circuit is now in session. The Honorable _____ presiding.
-----------------	--

All three judges enter the courtroom and sit down. The PJ (presiding judge) raps the gavel once.

CI/Timer	Please be seated and come to order. Calling the case of _____.
PJ	Counsel, please state your names and appearances for the record.

Lawyers stand. (Lawyers ALWAYS stand when addressing the judges.)

Each in turn says:

Attys	<p>Good morning your honors, _____, representing the Petitioner in this action. I will be delivering the _____.</p> <p>Good morning your honors, _____, representing the Petitioner in this action. I will be delivering the _____.</p> <p>Good morning your honors, _____, representing the Respondent in this action. I will be delivering the _____.</p> <p>Good morning your honors, _____, representing the Respondent in this action. I will be delivering the _____.</p> <p>Good morning your honors, _____, I'll be your clerk and official timer this morning.</p> <p>Good morning your honors, _____, I'm the unofficial timer.</p>
PJ	Before we begin, I'm going to read some preliminary instructions.

PJ reads instructions or asks to skip reading them. Then the PJ addresses the P Attys

PJ	_____, please proceed with your argument.
P Atty	Yes, your honor

One of the P Attys stands and delivers his/her argument-in-chief (main argument). Then, if appropriate, the other P Atty stands and delivers his/her argument-in-chief.

Personnel are:

(PJ) Presiding Judge (P Atty) P Petitioner's attorney; (R Atty) Respondent's attorney; (Attys) All or some of the attorneys

After the P Atty(s) have delivered their arguments-in-chief, then the PJ asks the R Atty(s) to give their arguments.

PJ	_____, please proceed with your argument.
P Atty	Yes, your honor.

The R Atty(s) stand and deliver their arguments-in-chief. Then the PJ addresses P Atty(s):

PJ	_____, you may proceed with rebuttal. Remember that this time may only be used to rebut opposing counsel's argument and not to raise new issues.
-----------	--

When P Atty(s) have finished rebuttal, (or time is called) the PJ addresses R Atty:

PJ	_____, you may proceed with rebuttal.
-----------	---------------------------------------

When R Atty(s) have finished rebuttal (or time is called) the PJ addresses everyone:

PJ	This concludes the oral argument in _____. Thank you counsel. Before we make any comments , would my fellow justices please put their score sheets in this envelope? <i>Now seal the envelope and hand it to the official timer/clerk.</i> Would the clerk please take this envelope with the score sheets and bring it to the Moot Court staff?
Cl/Timer	All rise.

After the judges are off the bench:

Cl/Timer	You may be seated.
-----------------	--------------------

Name _____

Overall Grade _____

Grade/Rubric Sheet for Moot Court the Appellate Process

PERFORMANCE AND WORK PRODUCT

Attorneys:

Oral Argument _____ /50

- Had well organized argument that was easy to follow
- Appeared knowledgeable on issues; was able to respond well to questions
- Showed poise, passion and persuasiveness
- Countered opponents arguments in rebuttal
- Cited cases (if required)

Written Brief _____ /50

- Showed clear reasoning
- Made all important arguments
- Was well written and edited
- Used proper format
- Cited cases to support arguments (if required)

Total _____ /100

Judges:

Bench Performance _____ /50

- Asked the lawyers good questions
- Had good judicial temperament (looked an acted like a judge)

Written Opinion _____ /50

- Showed clear reasoning
- Covered all important issues
- Was well written and edited
- Used proper format
- Cited cases to support arguments (if required)

Total _____ /100

SUMMARY AND ANALYSIS GRADE () _____

- A) Summary of Appellate Process
- B) Activity and Learning Evaluation
- C) Analysis of participant performance

SELF GRADE () _____

- Self-Assessment Sheet

Name _____

Due on _____

Self-Assessment for Moot Court Exploring the Appellate Process

YOUR JOURNAL

- 1 Describe your ideas on how appellate process works. Tell whether you think it is effective and fair and your reasons for your opinion.
- 2 Write about your personal experiences, impressions, and thoughts during and after participating in the appellate process.

SELF GRADE

Please grade yourself on a scale of 1 to 5 (with 5 being the best) for your **participation** in the “Moot Court – Exploring the Appellate Process,” focusing on how well you prepared for and performed your part.

I feel my grade for Moot Court should be _____ because....

Questionnaire for Moot Court Exploring the Appellate Process

- A. Summarize the appellate process. Use graphs, flowcharts, pictures, graphics, essays, music, dance, electronics media, or a combination of these. Be creative!
- B. Evaluate the activity and your learning style (Please attach sheet.)

The Activity

1. How valuable was the simulation in helping you understand the appeals process?
2. What worked well in the simulation? Why?
3. What didn't work well? Why?
4. What was your favorite part? Least favorite? Explain why.
5. What things made you most frustrated about oral arguments? The appeals process in general?
6. Did participating in this activity change any preconceived ideas you had about how the appeals process works? What were they and how did they change?
7. How would you improve this activity for next year?

Your Learning Style

Think about how you like to learn (reading, listening to lectures, participating in simulations, a combination of those) when you answer the following questions.

8. Did taking part in this activity give you a better overall idea of how the appeals process works than reading or listening to lectures would have. Why/why not?
9. In terms of remembering details and vocabulary (for example, what "brief" means), which form(s) of learning works best for you? Why?
10. Five years from now, do you think you'll remember more about how appeals work than you would have from just reading and lectures? Explain.
11. Is your understanding of the appeals process deeper and/or broader than it would have been had you learned about it through reading and lectures? Why/why not?
12. Was doing this activity more enjoyable than reading and lectures? Why/why not?
13. Did doing this activity make you want to come to class more? Why/why not?

C. Analyze the Participants

List the judges and the lawyers whose courtroom presentations you watched and/or participated in. Comment on each person's overall performance. Include specific examples. (Use the back if necessary.)

Name _____

Overall Grade _____

Rubric for Oral Argument

Evaluate the presentation on a 1 to 5 scale (5 is the highest) using the following criteria:

Preparation and Organization of Main Argument

Introduces all attorneys using introduction form _____

Begins with overview of issues _____

Gives brief summary of facts _____

Makes request for relief (what you want the court to do) _____

Has clear main argument that shows good grasp of legal principles _____

Cites authorities (cases) _____

Answering questions

Shows ability to think on feet _____

Responds well to the judges (shows understanding of judges' questions) _____

Weaves questions into argument _____

Transitions smoothly between answers and prepared argument _____

Uses questions to his/her advantage (ie to point out weaknesses in opponent's position) _____

Performance and Persuasiveness

Makes eye contact _____

Has pleasant and audible tone of voice _____

Has good rate of speaking, pronunciation, grammar _____

Uses advocacy tone (strongly arguing one's side without being obnoxious) _____

Avoids reading as much as possible _____

Uses notes effectively (ie to get quotes exactly right) _____

Uses time effectively _____

Uses natural gestures, abstains from annoying mannerisms, has good posture _____

Courtroom Conduct

Has appropriate attire _____

Exhibits proper counsel table behavior (assists co-counsel, pays attention when not presenting) _____

Avoids inappropriate use of first person and slang _____

Is deferential towards the bench _____

Name of speaker _____

Listening/Speaking Rubric for Speech or Oral Argument

While listening to your classmates speak, evaluate the speeches on a 1 to 5 scale (5 is the highest) using the following criteria:

1. The speech/argument was well organized. _____
2. The speaker presented evidence (cited cases) to back up his/her points and quoted from the materials. _____
3. The arguments were logical and coherent. _____
4. The speech anticipated your concerns and addressed them. _____
5. The speaker used language that was correct, clear and appropriate. _____
6. The speaker did not use logical fallacies in the speech (e.g. false cause and effect, red herring, overgeneralization, bandwagon effect. _____
7. The speaker had good diction (pronounced words clearly and spoke loudly enough to be heard). _____
8. The speaker used effective and interesting language and had a speaking style that was enjoyable to listen to. _____
9. You were persuaded by what the speaker said and/or the manner in which he/she delivered the speech. _____

Name _____

Overall Grade _____

Brief Writing Rubric

Evaluate the brief on a 1 to 5 scale (5 is the highest) using the following criteria:

The brief:

Used proper format (see Brief Formats pages A1-A2) _____

Followed Brief Writing Organizer pages A3–A5 as follows:

- Introduction included short legal history
- Introduction made clear request for relief (what you want the court to do) _____
- Introduction gave short overview of issues _____
- Presented the facts most helpful to your side of the case _____
- Addressed all arguments _____
- Had a conclusion that restated what you want the court to do _____

Had clear arguments that showed good grasp of legal principles _____

Was well structured and easy to follow _____

Was well written and carefully edited _____

Cited precedent (cases, treaties, etc.) to support each conclusion _____

Name _____

Overall Grade _____

Rubric for Student Justice Performance

Evaluate the presentation on a 1-5 scale (5 is the highest) using the following criteria:

Preparation and Organization of Main Argument

Introduces himself/herself using introduction form _____

Asking Questions

Shows ability to think on feet _____

Interrupts speaker in an appropriate manner _____

Weaves in hypothetical questions _____

Asks questions that pertain to the point being argued _____

Uses questions to point out strengths in opponent's position _____

Gives verbal prompts to provide smooth transitions in each part of the oral arguments _____

Clearly indicates when the attorneys are to proceed with their argument _____

Performance and Persuasiveness

Makes eye contact _____

Has pleasant and audible tone of voice _____

Has good rate of speaking, pronunciation, grammar _____

Uses professional tone (does not indicate favoritism) _____

Uses natural gestures, abstains from annoying mannerisms, has good posture _____

Courtroom Conduct

Has appropriate attire _____

Exhibits proper behavior during oral arguments _____

Avoids inappropriate use of first person and slang _____

Name _____

Overall Grade _____

Opinion Writing Rubric (for Student Justices)

Evaluate the brief on a 1 to 5 scale (5 is the highest) using the following criteria:

The opinion:

Used proper format (see Opinion Format and Sample) _____

- Introduction included short legal history
- Introduction gave short overview of issues _____
- Introduction indicated what the justice thought the outcome should be _____

Covered all relevant issues addressed by the attorneys _____

Had clear arguments that showed good grasp of legal principles _____

Was well structured and easy to follow _____

Was well written and carefully edited _____

Cited precedent (cases, treaties, etc.) to support each conclusion _____