The Argument

Considered a vanishing breed, skilled practitioners of the oral argument command attention from Moot Court to the Supreme Court.
for Oral Advocacy

By Devin Powell
The crowd of spectators in the cherry-paneled courtroom listens intently to the details of the gruesome case: A man has been found guilty of raping his 8-year-old stepdaughter and leaving her unconscious, bleeding, and requiring emergency surgery. All eyes are on Erin Frazee, advocate for the state, who is explaining the constitutionality of Rutherford Harrison's death sentence and why it should not be overturned on appeal. It's true, she argues calmly and forcefully, that the death penalty was ruled unconstitutional for cases of adult rape by the 1977 Supreme Court case Coker v. Georgia; but in the wake of this decision, six states have either kept or enacted new statutes in favor of maintaining the extreme punishment for the horrific act of child rape. “The trend,” Frazee says with an emphatic chop of the hand, “is pronounced.”

But not all three judges seem convinced. Cutting Frazee off in mid-sentence, the judge sporting the purple polka-dotted bowtie—Robert M. Bell, Chief Judge of Maryland’s highest court—comments, “Here you have a situation in which six states have moved in this direction rather recently ... when does that become the trend?”

Brian Robinson, co-counsel for the petitioner, sees his opportunity. While the state continues its argument, he quietly flips through the stack of case law that he printed out in preparation for his day in court. As the state wraps up its argument, he approaches the podium for his rebuttal. “You have a minute and a half,” the Hon. John Bates says. “Use those 90 seconds well.” Laughter breaks the tension in the courtroom. Robinson smiles. “Opposing counsel addressed the consensus among the states and the trend,” he begins. “I would also note that there are a number of states that have considered the issue and gone the other way—among these are Virginia, Pennsylvania, and several other states.” The judges don’t interrupt him; they nod. In fact, they later laud his sharp rebuttal when they name him the winner of the day’s proceedings.

It would have been a great day in court for Rutherford Harrison, with a victory that would have put Robinson’s name in national headlines. Though based loosely on a U.S. Supreme Court case from last term, Kennedy v. Louisiana, Harrison is fictional. The state—Alivita—doesn’t exist. The case took place in the ceremonial courtroom at the University of Maryland School of Law, during the final round of the 2008 Morris Brown Myerowitz Moot Court Competition. Frazee and Robinson are second-year law students, and this was their first time arguing in such a public setting.

But you would be forgiven for mistaking them for the real thing, says Judge Deborah Eyler ‘81, one of this year’s volunteer judges.

Eyler, who won the Myerowitz competition herself in 1980, usually spends her days presiding over cases in the Maryland Court of Special Appeals. She was impressed by this year’s four finalists (honed from an initial pool of 16), she says, and “wowed” by how composed and articulate they were. “They demonstrated all of the qualities of oral advocacy we’d want to see.” In fact, Eyler adds, they often did a better job than the career lawyers who argue in her court on a daily basis.

Eyler’s sentiment hints at what some critics describe as a growing problem in the legal profession. The art of oral advocacy, they worry, is in danger. The ability to build a logical argument not on paper but verbally, in front of a live courtroom, has become a skill that is in short supply among many of today’s lawyers.

“A lot of lawyers can write well, but lawyers who can effectively communicate orally are hard to find,” says criminal defense attorney Ken Ravenell ’85, who has successfully argued a series of high-profile cases, including a Miranda Rights case that took him before the Supreme Court in 2005.

During his 20-plus years as an attorney,
Ravenell has noticed a decline in the ability of advocates to command the spoken word. The most common problem, says Ravenell: a tendency to speak in the same style used for writing. Many lawyers structure their verbal arguments carefully, including every detail in an effort to buttress their point. Instead, says Ravenell, they lose the attention of their captive audience—whether that audience is a panel of appellate judges or the jury of a criminal trial. "A good oral argument commands and controls a courtroom," he says.

Ravenell blames a shift in legal education for the dearth of good orators. Twenty years ago, law students spent a significant amount of time honing their verbal skill. The focus of many law schools today, he says, has shifted to written forms of communication; even the bar examination does not include an oral section. He prefers pedagogies that put students on the spot. "The Socratic Method used to mean that a single student stood up and faced questions on a given topic," he says. "Now, professors toss out questions to the classroom as a whole and wait for raised hands."

Jerome Deise, the school's National Trial Team coach, agrees that the educational system needs to place more emphasis on the oral argument, though he sees the problem in a different light. Jerome Deise says courtroom appeals to *pathos* (emotion) are replacing the intellectual *logos* (logic) of an argument.

There is a growing awareness, he says, that lawyers rely too much on intuition and anecdotal stories in their oral advocacy and not enough on solid, well-structured argumentation. In the parlance of Socrates, appeals to *pathos* (emotion) are replacing the intellectual *logos* (logic) of an argument.

During his 30 years as a trial lawyer, Deise has witnessed this shift from logic to emotion in courtrooms across America, where plaintiffs in criminal trials often guilt trip their juries, calling upon jurors to do their "patriotic duty" in the "war on crime." He has noticed it in the pre-trial discovery process, where lawyers are becoming increasingly disagreeable and at times combative toward judges, trying to "obfuscate" and "misstate the object" instead of convincing through honest argumentation. "The extent to which lawyers are unable to recognize logically fallacious arguments boggles the mind," says Deise, who teaches a Criminal Defense Clinic and a course in Trial Evidence at the school.

This shift in the legal profession is only a reflection of a larger cultural phenomenon, Deise believes. We are trained, he says, to accept rhetoric and sloppy logic; television commercials, for example, are able to convince us that we should buy a product simply by showing a famous person holding it and smiling. When our rhetoric is challenged, says Deise, we tend to fall back on the line, "I'm entitled to my own opinion," instead of debating the evidence. This strategy effectively cuts off any possibility of honest argumentation. At its worst, this behavior devolves into what Deise calls "the Jerry Springer Syndrome"—lacking the skills to settle disputes with their words, two parties in conflict may resort simply to violence.
The Makings of an Advocate

Against this backdrop, the opportunities provided by moot court competitions like the Myerowitz are more important than ever, say Deise and others. These opportunities provide a rare opportunity for fledgling lawyers to face off toe-to-toe in front of a panel of judges and to learn to think on their feet.

The experience can be terrifying for first-timers; the verbal sparring that goes on between a lawyer and a judge is something that takes time to master, says Marc DeSimone ’04, who won the Myerowitz five years ago. But jumping in feet first is vital. “If you wanted to learn how to play guitar, you can’t just read a book,” he says. “You have to pick up a guitar, build up the calluses, and scare the neighbor’s cat.”

In his current job as a public defender for the Maryland Court of Special Appeals, DeSimone works to establish a “rapport” with the judges, to “build a relationship” both within the context of a specific case and across years of arguing cases in front of the same judges.

The first step in building this connection is to establish credibility, DeSimone says. “Not every case I argue is a winner ... but I’m always honest, forthright and straightforward.” If the judges know that an advocate is there to present a well-prepared, thought-out argument firmly grounded in case law, he’s found they’ll listen.

Student Brian Robinson knew that he was doing well during this year’s competition when his interactions with the judges felt like a “heated conversation”; the room full of spectators at his back disappeared from his consciousness as he focused on his three interrogators. He grew accustomed to being interrupted, to the quick back-and-forth that differentiates an oral argument from a written one. By the end of the competition, in fact, he expected only to be able to speak in small, focused chunks. “In one of my rounds the judges stopped interrupting me and let me speak for close to a minute,” he recalls. “That made me nervous; I couldn’t tell if they were agreeing or disagreeing with me.”

Faculty member Susan Hankin, who coaches the school’s moot court team, is quick to note that the skills of persuasion her students hone in competition will serve them well. “Writing and speaking are the bread and butter of being a lawyer,” she says. The good advocate doesn’t spend all of his time communicating with a judge; he has to know how to talk to his client, and to his peers.

Some past winners of the Myerowitz remember their day in moot court as a pivotal moment in their lives. Sometimes it’s a moment in which they discover how much they like thinking on their feet; sometimes it’s their introduction to future colleagues. Marc DeSimone, for example, earned his first clerkship by impressing Vanessa Cruz, one of his Myerowitz judges.

Judge Deborah Eyler, wrapping up the final round of the 2008 Myerowitz, told the competitors that she still has never been as nervous in court as she was during her final round of the moot court competition. “I don’t think you will ever be this nervous again in your whole life,” she said, “even trying cases and arguing in front of the Court of Appeals.”