Wabash College Moot Court Competition:
2003 Participant's Guide

Preliminary rounds of the Competition will be held in Baxter Hall on Saturday, October 25. The First Round will begin at 9:00 A.M., and the Second Round will begin at 11:00 A.M. Room assignments will be available outside of Baxter 101, beginning at 8:30 A.M. Each team, consisting of two (2) members, will argue in two rounds, once as Petitioner (Appellant in the court below, the Immigration and Naturalization Service through Melvin Allen) and once as Respondent (Appellee in the court below, The TSN Newsgroup).

1. THE PROBLEM:

1.1. The issue is whether certain immigration proceedings can be closed to the public. The INS closed a hearing, which the Newsgroups wanted to attend and upon which it wanted to report. The United States Supreme Court has developed a two-part test from a case called *Richmond Newspapers*. The decision's syllabus or synopsis is attached. The first part asks about whether such hearings or proceedings have historically been open – it's called the experience test. The second part is called the logic test and it asks whether opening or closing the proceedings would, in essence, be a good idea, that is, help or hinder the governmental function.

1.2. The Newsgroup sued and won. The Government appealed and lost. The Government is now appealing to the United States Supreme Court.

2. DIVISION OF THE ARGUMENT:

2.1. Government (or INS or Allen): First counsel: The Government agrees with the dissenting opinion. There is no history, or at least not a clear and unbroken history, of these types of proceedings being open to the public and there is a history of at least some proceedings being in private. Therefore, there is no "experience" which requires that they be open to the public. Second counsel: There are significant public policy reasons why we shouldn't open all of the proceedings. It could jeopardize national security in some cases. Logic tells us that we should not have all hearings be open.

2.2. TSN Newsgroups (or Newspapers): First counsel: The majority opinion got it right. Historically, there is evidence that deportation or exclusion hearings were open to the public. It therefore meets the historical requirement of *Richmond Newspapers*. Second counsel: Government operates best when it operates in the open. The Government is over-using the national security concerns. Logic tells us that we should have open proceedings.

3. ORAL ARGUMENT PROCEDURE:

3.1. You will be judged by a panel of three judges, usually made up of a mixture of practicing attorneys, professors and judges who have had moot court, trial and appellate experience.

3.2. Your argument should be stapled into a manila folder. It is NOT a crutch and DO NOT READ FROM IT VERBATIM. Use it for reference and to keep your place in your argument. Your folder should contain relevant facts, summaries of legal authorities or concepts, and other pertinent information.

3.3. When you enter the room, put your name and the side you will be arguing on the blackboard. If you are in a "courtroom" without a blackboard, the judges will ask your name and the respective side you are arguing and will write it on his/her evaluation sheet.

3.4. The Petitioner (Government's lawyers) always argues first. When the judges ask if you are ready to proceed, respond "Yes, Your Honor."

3.5. The introduction both sides should use is "May it please the Court. My name is _____, and I represent _____, the [Petitioner or Respondent] in this appeal." The Petitioner is allowed rebuttal and MUST reserve rebuttal time. You ask for rebuttal immediately after your introduction. "At this time, I would like to reserve (1 to 3) minutes of my time for rebuttal."

3.6. You will be timed by one of the three (3) judges. The timer will remind you how much time you have left. EACH person gets ten minutes. This may sound like an eternity, but it will go by quickly once you get into your argument. You will get a "5 minutes" left signal card, and "2 minutes" left signal card, and "1 minute" left signal card and a STOP card. You won't believe how quickly the 5-minute card will be flashed at you.

3.7. When the STOP card is flashed, it means STOP regardless where you are in your argument, but don't stop mid-sentence. The best way to handle this is to say, "I see my time is has expired. May I have a moment to conclude?" The judge will then grant you additional time to you to quickly finish your thought and cut to your prayer. More about the prayer later.

3.8. Pay respect to the Court. Be deferential, yet assert your client's position. Never interrupt a judge – let him/her get the question out before you start to answer it. Listen carefully to the question to ensure that you are really answering it. Never get mad at a judge or be argumentative – be respectful and assertive (have a conversation with the judges – don't run over them with a truck and call it advocacy!).

3.9. DON'T talk too fast. Speak clearly and in a moderate tone of voice.

3.10. Don't dance behind the lectern. It is distracting, unprofessional and makes you appear nervous and tentative. Appear confident and collected (even if you don't feel it). Be calm and alert – you'll be amazed with how much it will enhance your argument.

3.11. Dress appropriately. Conservative, dark suit and tie.

4. PREPARING A SUCCESSFUL ARGUMENT:

4.1. An oral argument has three basic parts – the introduction, the body of the argument itself, and the prayer.

4.2. The Petitioner must briefly state the RELEVANT facts of the case which should only last about one to two minutes. They must be fair, but can be slanted toward your theory of the case. Don't give facts not contained in the record. DON'T ARGUE THE FACTS: ARGUE THE LAW! The factual argument was made at trial and has already been won or lost. This is the appeal, and the issues are now legal rather than factual.

4.3. The Respondent (Newspapers' lawyers) should do one of the following: (1) accept the appellant's statement of the facts; (2) make corrections in the appellant's statement of facts; (3) clarify or point out any ambiguity in the appellant's statement of the facts; or (4) make any necessary additions to the appellant's statement of the facts. Take issue with the facts to suit your theory of the case. Be brief! DON'T ARGUE THE FACTS: ARGUE THE LAW!

4.4. Road map your argument. State the issues for the court to consider in clear, concise terms. BE PERSUASIVE. That is the whole object of an appellate argument. Tell the Court <u>why</u> you should win. "The trial court erred in finding for the Respondent because…" or "the ruling of the trial court should be upheld because…" (The word "erred" is pronounced so that it rhymes with "bird").

4.5. After you have "road mapped" your issues for argument, go back to point one and begin your analysis of each point/reason why you should win.

4.6. The Prayer! Tell the Court in one sentence what you want them to do for your client. "We respectfully request that this Court reverse/affirm the lower/trial court's decision." After your prayer, close your folder and sit down.

4.7. For rebuttal, do not be verbose. Only one appellant gives a rebuttal. Your rebuttal should include one or two strong points. Listen to the Respondent's argument closely to pick up on what the judges are questioning him/her about. If it favors your side, hit it hard in your rebuttal. An example might be the correction of a case that the Respondent did not analyze or apply correctly.

Rebuttal is very important because it is a great way to win points, and a lawyer's favorite thing to do is to have the last word.

4.8. EYE CONTACT IS VERY IMPORTANT! Look directly at the judges as much as possible. This will also help you appear confident in your argument and enhance your overall advocacy style.

4.9. The most important thing to keep in mind is that you are very familiar with your case and you know what you are talking about. The best way to avoid feeling nervous is to prepare your argument well, think clearly and HAVE FUN!

4.10. You will receive feedback after both sides of the argument are completed (including rebuttal). The judges will give you helpful hints and comments that will be invaluable when you go on to the next round.

5. WHY SO MANY QUESTIONS?

5.1. The judges will ask you questions about the case. This will happen to EVERYONE, and the purpose is not to humiliate you or trip you up, but to see how well you know your material, how well you can think on your feet, and how well you respond and get back into the flow of your argument.

5.2. Anticipate what these questions might be and prepare to respond to them. Don't write out an answer to any possible questions and then just read it. That's not what the judges are looking for. Answer the question briefly and then get back into your argument. Remember, YOU control the flow of your argument as much as possible so don't open yourself up to distractions and interruptions if you can help it by silently fumbling around trying to figure out what to say next.

RICHMOND NEWSPAPERS, INC. v. VIRGINIA, 448 U.S. 555 (1980)

448 U.S. 555

RICHMOND NEWSPAPERS, INC., ET AL. v. VIRGINIA ET AL.
APPEAL FROM THE SUPREME COURT OF VIRGINIA.

No. 79-243.

Argued February 19, 1980.
Decided July 2, 1980.

At the commencement of a fourth trial on a murder charge (the defendant's conviction after the first trial having been reversed on appeal, and two subsequent retrials having ended in mistrials), the Virginia trial court granted defense counsel's motion that the trial be closed to the public without any objections having been made by the prosecutor or by appellants, a newspaper and two of its reporters who were present in the courtroom, defense counsel having stated that he did not "want any information being shuffled back and forth when we have a recess as to . . . who testified to what." Later that same day, however, the trial judge granted appellants' request for a hearing on a motion to vacate the closure order, and appellants' counsel contended that constitutional considerations mandated that before ordering closure the court should first decide that the defendant's rights could be protected in no other way. But the trial judge denied the motion, saying that if he felt that the defendant's rights were infringed in any way and others' rights were not overridden he was inclined to order closure, and ordered the trial to continue "with the press and public excluded." The next day, the court granted defendant's motion to strike the prosecution's evidence, excused the jury, and found the defendant not guilty. Thereafter, the court granted appellants' motion to intervene nunc pro tunc in the case, and the Virginia Supreme Court dismissed their mandamus and prohibition petitions and, finding no reversible error, denied their petition for appeal from the closure order.

Held: The judgment is reversed. Pp. 563-581; 584-598; 598-601; 601-604. Reversed.

MR. CHIEF JUSTICE BURGER, joined by MR. JUSTICE WHITE and MR. JUSTICE STEVENS, concluded that the right of the public and press to attend criminal trials is guaranteed under the First and Fourteenth Amendments. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public. Gannett Co. v. DePasquale, 443 U.S. 368 , distinguished. Pp. 563-581. [448 U.S. 555, 556]

(a) The historical evidence of the evolution of the criminal trial in Anglo-American justice demonstrates conclusively that at the time this Nation's organic laws were adopted, criminal trials both here and in England had long been presumptively open, thus giving assurance that the proceedings were conducted fairly to all concerned and discouraging perjury, the misconduct of participants, or decisions based on secret bias or partiality. In addition, the significant community therapeutic value of public trials was recognized: when a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," Offutt v. United States, 348 U.S. 11, 14 , which can best be provided by allowing people to observe such process. From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, it must be concluded that a presumption of openness inheres in the very nature of a criminal trial under this Nation's system of justice. Cf., e. g., Levine v. United States, 362 U.S. 610 . Pp. 563-575.

(b) The freedoms of speech, press, and assembly, expressly guaranteed by the First Amendment, share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees; the First Amendment right to receive information and ideas means, in the context of trials, that the guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time the First Amendment was adopted. Moreover, the right of assembly is also relevant, having been regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen. A trial courtroom is a public place where the people

generally - and representatives of the media - have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place. Pp. 575-578.

(c) Even though the Constitution contains no provision which by its terms guarantees to the public the right to attend criminal trials, various fundamental rights, not expressly guaranteed, have been recognized as indispensable to the enjoyment of enumerated rights. The right to attend criminal trials is implicit in the guarantees of the First Amendment: [448 U.S. 555, 557] without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated. Pp. 579-580.

(d) With respect to the closure order in this case, despite the fact that this was the accused's fourth trial, the trial judge made no findings to support closure: no inquiry was made as to whether alternative solutions would have met the need to ensure fairness: there was no recognition of any right under the Constitution for the public or press to attend the trial: and there was no suggestion that any problems with witnesses could not have been dealt with by exclusion from the courtroom or sequestration during the trial, or that sequestration of the jurors would not have guarded against their being subjected to any improper information. Pp. 580-581.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE MARSHALL, concluded that the First Amendment - of itself and as applied to the States through the Fourteenth Amendment - secures the public a right of access to trial proceedings, and that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public. Historically and functionally, open trials have been closely associated with the development of the fundamental procedure of trial by jury, and trial access assumes structural importance in this Nation's government of laws by assuring the public that procedural rights are respected and that justice is afforded equally, by serving as an effective restraint on possible abuse of judicial power, and by aiding the accuracy of the trial factfinding process. It was further concluded that it was not necessary to consider in this case what countervailing interests might be sufficiently compelling to reverse the presumption of openness of trials, since the Virginia statute involved - authorizing trial closures at the unfettered discretion of the judge and parties - violated the First and Fourteenth Amendments. Pp. 584-598.

MR. JUSTICE STEWART concluded that the First and Fourteenth Amendments clearly give the press and the public a right of access to trials, civil as well as criminal; that such right is not absolute, since various considerations may sometimes justify limitations upon the unrestricted presence of spectators in the courtroom; but that in the present case the trial judge apparently gave no recognition to the right of representatives of the press and members of the public to be present at the trial. Pp. 598-601.

MR. JUSTICE BLACKMUN, while being of the view that Gannett Co. v. DePasquale, supra, was in error, both in its interpretation of the Sixth Amendment generally, and in its application to the suppression hearing [448 U.S. 555, 558] involved there, and that the right to a public trial is to be found in the Sixth Amendment, concluded, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial, and that here, by closing the trial, the trial judge abridged these First Amendment interests of the public. Pp. 601-604.