

# Montana YMCA Youth & Government Program

*Model Supreme Court Manual*  
2006 Edition

*“Democracy must be learned by each generation.”*

## Acknowledgements

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Acknowledgements

Program concept and materials adapted in part from:

Previous versions of the Montana YMCA Youth and Government Program Manual

- Florida YMCA Youth in Government Program
- Idaho YMCA Youth Government Program
- Minnesota YMCA Youth in Government Program
- Pennsylvania YMCA Model Judicial Program
- Texas YMCA Youth and Government Program
- Wisconsin YMCA Youth in Government Program

The Montana YMCA Youth and Government Program wishes to thank the following individuals and organizations for their assistance and support of our Model Supreme Court:

Montana Supreme Court:

The Honorable Karla M. Gray, Chief Justice

The Honorable William Leaphart, The Honorable James C. Nelson, The Honorable John Warner, The Honorable Brian Morris, The Honorable Patricia Cotter, The Honorable James Rice

- Montana Law Foundation, George Bousliman, Executive Director
- Ed Smith, Clerk of the Montana Supreme Court\*
- State Bar of Montana Law-Related Education Committee, Michael Dahlem, chair
- Geralyn Driscoll, Legal Counsel, Office of Public Instruction
- Loey Werking Wells, Executive Director, Oregon Women Lawyers; 1986 Montana Youth Governor\*
- Ellen Beldner, Advisor, Pennsylvania YMCA Model Judicial Program; Florida YMCA Youth In Government Program 1996 Chief Justice
- Montana Office of the Court Administrator
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## *Table of Contents*

Introduction and Overview .....	7.4
The Montana Judicial System .....	7.5
Guidelines and Participant Rules .....	7.7
Justices .....	7.7
Attorneys.....	7.7
Cases and Briefs.....	7.8
Oral Arguments.....	7.8
Other Appointed Officers .....	7.8
Research Guidelines.....	7.9
Brief Writing Guidelines.....	7.9
Sample Brief .....	7.10
Brief Writing in Detail .....	7.19
Citation Format .....	7.23
General Abbreviations .....	7.24
Examples.....	7.26
Oral Arguments Guidelines .....	7.27
Organizing an Oral Argument .....	7.27
Time Limits for Oral Arguments .....	7.28
Structure and Content of the Oral Argument.....	7.29
Introductory Statements .....	7.29
The Argument Itself.....	7.29
Concluding Statements .....	7.30
The Appellant’s Rebuttal .....	7.30
How to Present an Oral Argument.....	7.30
Suggestions on Appearance, Speaking Style, and Manner.....	7.31
Handling Questions from Justices .....	7.31
Model Supreme Court Courtroom Protocol and Procedures .....	7.33
Rules of Courtroom Procedure .....	7.34
Presentation of Oral Arguments.....	7.34
Courtroom Protocol and Procedures.....	7.35
Supreme Court Justices.....	7.37
Becoming a Justice .....	7.37
Preparation of Appointed and Elected Justices.....	7.38
Guidelines for Visiting Justices .....	7.38
Preparation, Case review .....	7.38
Oath of Office .....	7.39
The Case Hearing.....	7.39
Avoiding Conflicts of Interest .....	7.39
Deliberation and Vote.....	7.40
Writing Opinions .....	7.40
Sample Opinion .....	7.41
Bench Memoranda.....	7.42
Bench Memoranda Outline.....	7.43
Sample Bench Memoranda #1 .....	7.44
Sample Bench Memoranda #2.....	7.45

## Introduction

In the Montana YMCA Model Supreme Court, cases are developed which are similar in nature to an actual case that might be appealed to the real Montana Supreme Court:

- Youth Attorneys must study research materials provided and apply that law to their assigned case in both written and oral arguments.
- Youth Justices are selected who will study the briefs and listen to the oral arguments of the Attorneys, rendering decisions and written opinions on each case hearing.
- A Marshall and Clerk are appointed to assist the court proceedings.

Consistent with the guidelines for Law-Related Education recommended by the Montana Office of Public Instruction (OPI), the Montana YMCA Model Supreme Court program is not designed to deliver specialized legal education, but rather is intended to develop in participants an understanding of the values and principles on which the legal system is based.

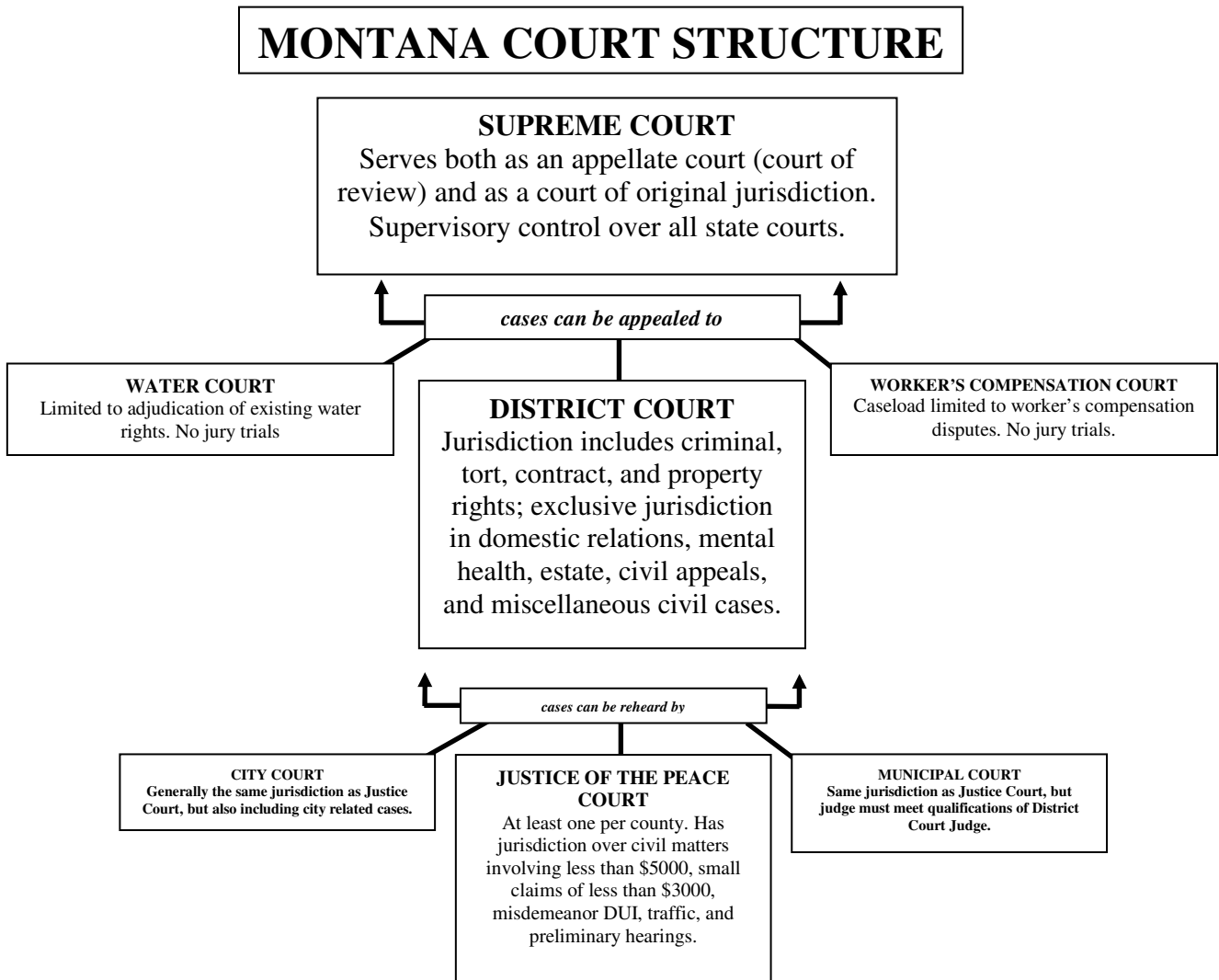
Cooperating with the focus of the YMCA on Character Development, the Model Supreme Court program challenges participants to accept and demonstrate the positive values of caring, honesty, responsibility and respect.

## Program Overview

- This program is modeled on an appeal to the Montana Supreme Court. In other words, this is not a Mock Trial competition; it is somewhat like a Law School's Moot Court.
- Participants who are Attorneys write a brief, present at least two oral arguments and participate as “Visiting” Justices for the hearing of at least one case.
- There is no competitive elimination of participants. All participants are involved throughout the session.
- At least two cases are developed. Cases and the side of the case argued are assigned to participants on a random basis.
- Participants who are Attorneys write a short legal brief for ONE side of the case. Samples and guidelines are provided in this manual.
- Attorneys prepare oral arguments for BOTH sides of their assigned case.
- Participants are provided all pertinent research material for their cases, thus keeping the program fair to those who may not have access to a Law Library.
- Attorneys argue their case in teams of two.
- Selected Applicants will serve as Model Supreme Court Justices. (The position of Chief Justice may be elected by participants in future years.)
- Justices elected or appointed as noted above serve full time on the bench, and their numbers are supplemented by Attorney participants, each of whom is given the opportunity to serve as a “Visiting” Justice for at least one hearing.
- A Marshall and 1-2 Clerks are appointed. These positions are allocated to participating schools in the same manner as other appointed offices.
- Participants will do all written work prior to the session. No additional writing will be required during the session.
- A Brief Writing Award is given, to be judged by qualified adult volunteers.
- An Attorney Team of the year award is given.

**The Montana Judicial System**

The “real world” Montana Judicial System has three basic levels: the City and Justice Courts, District Courts and the Supreme Court. The 21 District Courts have jurisdiction over most civil and criminal cases that involve state law, and they rehear some cases originating in City and Justice Courts. The Montana Supreme Court is the only appellate court in the state. There is no intermediate appeals court. Decisions made by trial courts are generally appealable to the Supreme Court.



*Adapted from 1996 Annual Report of the Montana Judiciary.*

### ***Judicial System Continued...***

Many people are familiar with trial courts from television and movies. But, while the decisions of the Montana Supreme Court are often newsworthy events, in general it (and other appeals courts) has little public contact, and its proceedings are not well understood—even though the hearings of oral arguments are open to the public.

Basically, if a trial court decides against either party in a civil case, that party may appeal, contending that legal errors were made during the previous court proceedings. In a criminal case, the State generally cannot appeal a finding of not guilty, but a defendant may appeal a conviction. In Montana, all cases resulting in a death penalty sentence are automatically reviewed by the Montana Supreme Court.

An appellate court, such as the Montana Supreme Court, is quite different from a trial court. Appellate courts review a trial court's findings of fact, conclusions of law, and procedures employed, but it does not engage in independent fact-finding (for example, there are no witnesses called or physical evidence presented).

Attorneys submit a written brief and sometimes also present oral arguments. At the appellate level, attorneys argue points of law. The appellant's counsel attempts to demonstrate that the trial court either made a mistake or violated a legal principle, and that therefore the Court should overturn the previous decision. The respondent's counsel argues that the decision of the trial court was correct.

Upon consideration of the case, the Montana Supreme Court may uphold the decision of the trial court, or they may find that the court erred in some manner and choose to reverse the previous decision. In some cases, the Supreme Court may send the case back to the District Court for a new trial.

The Justices of the real Montana Supreme Court currently are asked to review over 700 of the more than 30,000 cases filed annually at the District Court level. The Court considers, in some manner, every case which is appealed to it. The Court issues written opinions in over 300 cases per year. The vast majority of cases are decided based solely on review of written briefs. Oral arguments are heard on about 40 cases per year.

Very rarely, a case decided by the Montana Supreme Court can be taken into Federal District Court (in essence starting over at the Federal level), and then could be appealed to the Federal 9th Circuit Court of Appeals and possibly the U.S. Supreme Court. Violation of a federal Constitutional right is generally the basis for a Federal appeal. Unlike the Montana Supreme Court, which has to consider all cases appealed to it in some form, the U.S. Supreme Court has the power to determine which among the many appeals it receives each year it will decide (or in legal language, to grant certiorari).

## Model Supreme Court Guidelines and Participant Roles

### *General Information*

- The Model Supreme Court is designed for Sophomores, Juniors and Seniors.
- Freshmen are not prohibited from being Attorneys, but due to the near-college-level writing and research requirements of the program, it is not recommended.
- Participants must meet all deadlines for submission of applications and briefs. Under exceptional circumstances, specific permission for an extension prior to the deadline may be requested from the state office.
- A “Brief Book” containing all submitted briefs is made available to Court participants when they arrive at the Youth and Government session.
- Participants in the Model Supreme Court are to uphold the Code of Conduct and observe the general rules of the Montana YMCA Youth and Government Program.

### *Justices*

Whenever possible, all cases will be heard by a Court of seven Justices, chosen as described below:

- Only Juniors and Seniors may apply to be full time Appointed Supreme Court Justices. A minimum of four full time Justices will be selected, more if overall preregistration numbers warrant.
- At the discretion of the Youth and Government Board of Directors, a Chief Justice may be elected at each session to serve the following year.
- Appointed and Elected Justices will be required to prepare a Bench Memorandum on the cases they will hear, based on the guidelines and samples in this manual.
- In each case hearing, three to four individuals on the bench will be the full time Justices, with the remaining “Visiting Justices” rotated amongst Attorney participants.
- All attorney participants will get to serve on the bench as a Visiting Justice for at least one hearing of a case.

### *Attorneys*

- Youth Attorneys will prepare briefs and argue their case in teams of two. Team members may be from the same delegation or from different delegations.
- If one member of a team cannot attend the Youth and Government session, the remaining member will be allowed to argue the case solo if they wish, or they may team up with another individual who also lost a teammate.
- All Attorneys will have the opportunity to sit on the bench as an Visiting Supreme Court Justice to hear at least one case.
- Team membership cannot be changed after briefs are submitted, save as noted above.
- When not involved with the court program, Attorneys are encouraged to testify as Lobbyists in committee hearings on bills before the Youth Legislature.

### ***Cases and Briefs***

- At least two cases will be developed. Cases will be assigned to participants on a random basis. Participants may not request a specific case.
- Teams will be assigned to write and submit briefs representing either the appellant or the respondent position, but not both. Positions will be assigned randomly and participants may not request a certain side. Guidelines and sample briefs are provided in this manual.
- Participants will be provided the case and all research material necessary to prepare their briefs and arguments. They may not cite materials other than those provided.
- Each case will have two basic legal issues that need to be addressed. It is recommended that each team member take one of the issues to research and argue.
- This manual and a copy of the cases (excluding research materials) will also be made available to participants via the program internet site's Court link.

### ***Oral Arguments***

- Teams prepare oral arguments for both the appellant and the respondent positions of their assigned case.
- Teams first argue the side of the case for which they wrote a brief.
- Teams will not have to argue different sides of their case on the same day. However, if due to drops there are an unbalanced number of Appellant and Respondent teams, teams may be asked to volunteer to present their case twice.
- Preparing a summary or outline prior to the session that outlines the main arguments for both sides—and practicing arguments for both sides—is strongly recommended.
- A limited amount of time will be allotted after everyone has presented their assigned side to help teams prepare their oral arguments for the opposite side of the case, but there probably will not be enough time to create an entire argument “from scratch.” Participants will need to already have a basic outline ready that they simply need to refine, based on their experiences during the first round of arguments.
- Both teams in a hearing will either both argue from their written briefs or both argue the sides for which they have not written a brief.
- A hearings schedule will be posted in advance. Oral arguments will take place in the following sequence, with the time limits below strictly observed:
  - Appellant: 15 minutes**
  - Respondent: 15 minutes**
  - Appellant: 5 minute rebuttal of respondent's argument**
- Personal timers may be used by participants, but in the event of a discrepancy, the Marshall's timing is official.

### ***Other Appointed Officers***

- A Marshall and one or two Clerk(s) of the Supreme Court are appointed. These highly responsible positions are allocated to participating schools in the same manner as other appointed offices in the legislative and executive branches.
- The Marshall serves as an enforcement officer of the court. S/He announces the arrival of the Justices, calls order to the court, announces the case to be heard, serves as timer for the Attorneys and enforces Courtroom rules. This individual must be assertive, responsible and well-organized.
- The Clerk(s) of the Supreme Court organizes and distributes briefs, helps schedule hearings, keeps notes on oral arguments, distributes the written decisions of the Court, records all decisions made, and assists the Justices and Marshall as needed. This individual must be responsible, meticulous, and well organized.

## Research Guidelines

In the case packets provided to Model Supreme Court Justices and Attorney teams, all necessary and relevant case material will be provided for research. Facts of the cases are presumed to not be in dispute. Participants may not add to or change the facts of the cases presented.

Guidelines for citation format and use of research materials are covered in detail in the Brief Writing Guide which follows this section.

Due to Montana's distances and many small towns, not all participants have ready access to a law library or other outside resources. For that reason, participants are not to cite any additional material in their briefs or oral arguments other than what is included in the case packet. This is not to say that Attorneys aren't allowed to pursue additional resources such as dictionaries of legal terms, guidebooks on brief writing, or manuals on the preparation of oral arguments. But they cannot cite or refer to any source as authority in their briefs or oral arguments other than the resources provided. Factual statements or arguments of law must be able to be backed up by the resources in the case packet.

Important note: If a case in the packet contains excerpts from yet another case, participants may use those excerpts, but need to be sure that their case citation notes the case in the packet, not the excerpt.

## Brief Writing Guidelines

A brief is a legal document prepared by a party to the Court. It contains information on the facts of the case, the legal issues to be decided, the law the Court ought to apply, and the decision the party desires the Court to reach.

The emphasis that the Montana YMCA Youth and Government Program places on preparing written briefs corresponds with the importance these documents hold in the real world of appellate law. Many appeals in Montana are decided on the basis of written briefs alone.

Each Attorney team is assigned the position (Appellant or Respondent) for which they will write a brief. However, it is very important that Attorneys have a thorough understanding of both sides in order to effectively present and defend their case.

The goal of a brief is to convince the Court that one's position is correct, logical and reasonable. To be compelling, a brief must also be understandable and concise. The Court will read many briefs throughout the session, so it is important to write in a clear and interesting manner.

The brief needs to treat the Court as a potential ally to be won over by effective persuasion. The Court is interested in seeing that justice is done and law correctly applied.

Briefs should never take a tone that implies that the Court is one's opposition. The Attorney team must never lie or distort the facts of the case, but rather is to present the client's case in the best possible light, and suggest that the action requested is not only consistent with past legal precedent, but is also just and consistent with the rule of law.

Attorneys and Justices need to thoroughly understand the research materials provided with the case, but may also consider its broader social, economic, and philosophical implications.

A complete sample brief, such as participants might prepare for the Model Supreme Court, follows this section, illustrating all of the parts required. A detailed explanation of each element of brief writing follows the sample. The Sample Brief can also be used as a study tool; analyzing the strengths and weaknesses of its arguments will help participants prepare their own materials.

*(sample brief)*

The following seven-page sample is that of an appellant's brief, but the same general format is used for a respondent's brief. *Sample Brief case concept adapted from Florida YMCA Youth in Government program.*

IN THE YMCA MODEL SUPREME COURT OF THE STATE OF MONTANA

No. 96-001

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STANLEY R. AND JANICE L. DOE,  
individually and on behalf of their child REBECCA W. DOE,

Plaintiff and Appellant,

v.

BOARD OF TRUSTEES, COPPER COUNTY SCHOOL DISTRICT NUMBER ONE, Darla D. Doctor,  
C.P. Accountant, L.C. Psychologist, "Bud" Average, and Jane Q. Public, Individually and as Members of  
the Copper County School District Board of Trustees,

Defendant and Respondent.

---

BRIEF OF APPELLANT

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On appeal from the District Court of  
the Twenty-Fifth Judicial District of the State of Montana,  
in and for the County of Copper

---

ORAL ARGUMENT REQUESTED

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APPEARANCES:

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Coppertown, MT 59000

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ATTORNEYS FOR PLAINTIFF  
AND APPELLANT

*(sample brief)*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... 1

STATEMENT OF THE ISSUES..... 2

STATEMENT OF THE FACTS ..... 2

ARGUMENT ..... 4

    I. THE DISTRICT COURT ERRED IN HOLDING THAT  
    MONT. CODE ANN. § 39-2-205 APPLIES TO DOE’S REFUSAL  
    TO SUBMIT TO DRUG TESTING..... 4

        A. Students are not employees..... 4

        B. Student Leaders are not necessarily athletes ..... 4

        C. Student Council Members hold an elected office ..... 5

    II. THE DISTRICT COURT ERRED IN HOLDING THAT THE  
    STUDENT LEADERSHIP DRUG TESTING POLICY (SLTP)  
    ADOPTED BY THE COPPER COUNTY SCHOOL DISTRICT DID  
    NOT VIOLATE ART. II, §§ 4, 10 AND 11 OF THE MONTANA  
    CONSTITUTION. .... 5

        A. The SLTP violated the Plaintiff’s Individual Dignity..... 5

        B. The SLTP violated the Plaintiff’s Right of Privacy ..... 6

        C. The SLTP violated the Plaintiff’s protection from searches  
        without probable cause ..... 6

CONCLUSION..... 7

(sample brief)

**TABLE OF AUTHORITIES**

Cases

*New Jersey v. TLO*, 469 U.S. 325, 105 S. Ct. 733, L. Ed. 2d 720 (1985) .....6  
*Veronia School District 47J v. Acton*, 515 US 646, 115 S.Ct. 2386, 132 L. Ed. 2d 564 (1995)....4  
*Chandler v. Miller*, 520 U.S. 305, 117 S.Ct 1295, 137 L. Ed 2d 513 (1997).....5

Constitutional Provisions

Fourth Amendment to the *United States Constitution* .....5  
Article II, Section 4, *Montana Constitution*..... 5  
Art. II, § 10, *Montana Constitution* .....6  
Art. II, § 11, *Montana Constitution* ..... 6

Statutes

*Montana Code Annotated*, § 39-2-205 (1997).....3, 4  
*Montana Code Annotated*, § 20-5-103 (1997).....4

*(sample brief)*

**STATEMENT OF THE ISSUES**

1. Did the District Court err in holding that Doe’s refusal to submit to drug testing was grounds for denying participation in the Student Council under § 39-2-205, MCA?
2. Did the District Court err in holding that the Student Leadership Drug Testing Policy adopted by the Copper County School District did not violate Article II, Sections 4, 10 and 11 of the Montana Constitution?

**STATEMENT OF THE FACTS**

In August 1996, The Board of Trustees of Copper County School District Number One instituted the Student Leadership Drug Testing Policy (SLTP), authorizing random urinalysis drug testing of all student leaders. The policy defined “student leader” as any student who was an elected or appointed officer or captain of any club, sports team, or other activity sponsored by the school. The Board expressed its belief that student leaders should stand as a shining example to all other students as demonstrably drug-free. Testimony in public hearings indicated that Copper County had the lowest number of drug-related offenses in the State of Montana over the last five years for which statistics were available, and the board felt that, because most student leaders were probably drug-free, no one could possibly object to a drug test to prove it.

Rebecca Doe, a Senior at Copper County High School, a student with a 4.0 GPA, active in Speech and Debate, Rainbow Girls, Montana Teen Institute (MTI), Key Club, and 4-H, was elected to the Student Council in September 1996. During the first meeting of the Student Council, the Principal drew names at random and asked the students chosen to submit to drug testing in accordance with the new policy. When Rebecca’s name was drawn, based upon her conviction that random drug testing was an unconstitutional violation of her rights as well as a personal insult given her strong religious convictions, she refused to take the test.

(2)

*(sample brief)*

The Principal, Mr. Fairly Orderly, informed Rebecca that she was in violation of the SLTP and would have to resign from the Student Council if she did not take the test. Rebecca politely asked if she was suspected of drug use. Mr. Orderly replied that she was not, reminding her that it was a random test. Rebecca suggested that the new policy was misguided and that there was no logical reason to make people take a drug test unless there was suspicion of drug use. Mr. Orderly replied that, although he had personally opposed the policy at the School Board meeting, he nonetheless needed to enforce it, and removed Rebecca from the Student Council.

Rebecca and her parents appealed this decision to the school district superintendent and then to the school board, all of whom upheld the policy, claiming that a student's school career was similar to a job in real life, and extracurricular activities were voluntary, just like the choosing of a specific job was voluntary.

The Doe family then appealed to the District Court. Counsel for Rebecca Doe argued that school activities were not a job, and drug testing as a "condition of employment" could not be applied to student extracurricular activities. Also, Rebecca was elected to her office, thus her situation was more like that of a political candidate rather than an employee, thus there was no special need for the school board to institute the policy. Furthermore, in Rebecca's case, there was no prior suspicion of wrongdoing, plus the policy violated Rebecca's right of privacy and her expectation of protection from searches without probable cause under the Montana Constitution.

The District Court held that § 39-2-205, MCA allowed the School Board to extend the Montana Employment Drug and Alcohol Testing Act to include student leaders. The Court further held that Article II, section 15 of the Montana Constitution allowed for statutes to be passed which restricted the rights of minors to a greater degree than those of adults.

This appeal followed.

(3)

*(sample brief)*

**ARGUMENT**

**I. THE DISTRICT COURT ERRED IN HOLDING THAT MONT. CODE ANN. § 39-2-205 APPLIES TO DOE’S REFUSAL TO SUBMIT TO DRUG TESTING.**

**A. Students are not employees**

Under § 20-5-103, MCA, students are required to attend school. Unlike an employment situation, where employees who do not show up are simply fired, students face penalties. Therefore, school is not a voluntary activity that a person may choose. An employee who chooses not to take a random drug test has the option of quitting their job. A student does not have a similar option to quit school. Although extracurricular activities are voluntary, they are an integral part of the school experience and often an important factor considered in college applications.

**B. School Leaders are not necessarily athletes**

In *Veronia School District 47J v. Acton*, 515 US 646, 115 S.Ct. 2386, 132 L. Ed. 2d 564 (1995), the US Supreme Court upheld the constitutionality of suspicionless drug testing of athletes in the public schools. The Court reasoned that the Veronia School district faced an “immediate crisis” and the risk of immediate physical harm to the drug user or to those with whom he competed in athletics was particularly high. *Veronia*, 115 S. Ct. at 2393.

However, not all student leaders are athletes, and the Court’s reasoning is inapplicable to this case. Some of the elements upheld in *Veronia* are unique to athletes and not applicable to other student activities: Most student leadership activities do not carry the risk of physical injury characteristic of athletic events. Student leaders generally do not perceive enhanced performance from using illegal drugs. Furthermore, *Veronia* addressed situations where there was a demonstrated problem of drug use. Creating a school drug testing policy for a student group with little evidence of an existing drug problem is not legally justifiable.

(4)

*(sample brief)*

**C. Student Council Members hold an elected office**

In *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L. Ed 2d 513 (1997), the United States Supreme Court held that a Georgia statute requiring political candidates to certify that they had passed a urinalysis drug test was unconstitutional. The Court held that the Georgia requirement did not fit within the closely guarded category of constitutionally permissible suspicionless searches. It was noted that the statute had not been enacted in response to any fear or suspicion of drug use by state officials. The Court further noted that the Fourth Amendment to the United States Constitution disallows privacy to be diminished by the state merely for symbolic reasons.

Similarly, the students chosen to serve on a Student Council are elected officials within their school. The School Board stated for the record that they believed most student leaders were probably drug-free, thus admitting that they themselves had no reasonable suspicion of drug use among the population in question. Therefore, applying *Chandler*, Rebecca Doe cannot be required to take a drug test as a condition of holding office.

**II. THE DISTRICT COURT ERRED IN HOLDING THAT THE STUDENT LEADERSHIP DRUG TESTING POLICY (SLTP) ADOPTED BY THE COPPER COUNTY SCHOOL DISTRICT WAS NOT IN VIOLATION OF THE MONTANA CONSTITUTION ART. II, § 4, 10 AND 11.**

**A. The Student Leadership Drug Testing Policy violated the Plaintiff's Individual Dignity**

Article II, section 4 of the Montana Constitution reads as follows:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against and person in the exercise of his civil or political rights on account of race, color, sex culture, social origin or condition, or political or religious ideas.

In the case of Rebecca Doe, her individual dignity and status as a leader of drug-free youth

(5)

*(sample brief)*

was violated by being asked in front of the entire student council to submit to a drug test.

Furthermore, by refusing to submit to a suspicionless drug test, she was upholding her political and religious values: that random drug testing was an unconstitutional violation of her rights and unnecessary in light of her strong religious convictions.

The school district violated her right to equal protection of the laws by passing a policy that applied only to student leaders, defined loosely, and which excluded athletes in general as well as the student body as a whole.

**B. The Student Leadership Drug Testing Policy violated the Plaintiff's Right of Privacy**

Article II, section 10 of the Montana Constitution explicitly provides that the right of individual privacy shall not be infringed without the showing of a compelling state interest. In the case of the SLTP, there is no demonstrated compelling state interest. The school board misapplied drug testing laws apparently in order to simply boast that the student leaders at Copper County High School were certifiably drug-free. In Rebecca Doe's case, by being asked in front of the entire student council to submit to a drug test, she also endured public humiliation and an unwarranted intrusion on her privacy.

**C. The SLTP violated the Plaintiff's protection from searches without probable cause**

The SLTP adopted by the Copper County School District is unconstitutional under both the Fourth Amendment of the United States Constitution and under Art. 2 §11 of the Montana Constitution. In *New Jersey v. TLO*, 469 U.S. 325, 105 S. Ct. 733, L. Ed. 2d 720 (1985), the U. S. Supreme Court held that school officials need not have probable cause to conduct a search, but do need to have "...a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce

*(sample brief)*

school policies.” TLO, 469 at 340. In the case of Rebecca Doe, not only was her personal character such that no reasonable suspicion existed, but there also was no evidence of a concrete danger among the community as a whole. The school board itself heard testimony to the effect that Copper County had one of lowest number of drug-related offenses in the State of Montana over the last five years for which statistics were available.

As previously noted, the School Board stated for the record that they believed most student leaders were probably drug-free, thus admitting that they themselves had no reasonable suspicion of drug use among the population in question. Therefore, a drug testing policy for the student leaders of Copper County High School is not justifiable.

### **CONCLUSION**

For the foregoing reasons, the decision of the District Court should be reversed.

Respectfully submitted this 14th day of December, 1997.

*Susanna C. McGillicuddy*

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(7)

## Brief Writing in Detail

The following guidelines explain why a YMCA Model Supreme Court brief is written in the style shown in the sample. Briefs that do not follow these guidelines will be returned for correction.

### *Format*

- Saved and submitted digitally in Microsoft Word or rich text format.
- Created in a 8-1/2 x 11 format.
- 1.5 or double spacing is used, as demonstrated in the sample.
- Typeface must be a legible font such as Courier or Times, in a 10 to 12 point font size with normal character spacing.
- One inch (1”) margins should be used.
- Briefs submitted in an unacceptable format will be returned for correction.
- Briefs shall not exceed ten (10) pages, excluding the title page and table of contents, but including all other elements. (note: It is doubtful that a quality brief can be developed in fewer than 6 pages.)
- All pages except the title page and contents shall be numbered, the page after the Table of Contents being page 1.
- Signatures of both team members must appear at the end of the document in the location indicated in the sample.

### *Content*

#### Title Page:

- The title page shall be in the form shown in the sample brief. It contains:
- The words IN THE YMCA MODEL SUPREME COURT OF THE STATE OF MONTANA
- The Case number (or numbers). case number(s) are noted in the case packet.
- The name of the appellant and the respondent as stated in the case.
- Identification of the brief as that of the Appellant or the Respondent.
- Court from which the case originated
- Notation that an Oral Argument is requested.
- Name and address (either home or school is acceptable) of Attorneys appearing before the court. (In this case, list the only members of the team writing the brief.)

#### Table of Contents:

- The table of contents in a Model Supreme Court brief is a separate, single page that lists each element of the brief (except itself and the title page) and the page on which each element begins. Headings and subheadings used within the argument section should also be listed in the contents with a corresponding page number. This is done in outline form as shown in the sample brief in this guide.

Table of Authorities:

- The table of authorities in the Model Supreme Court is a list, no more than one page long, of all materials used to support the argument. It includes every page in the brief where the particular excerpt is found. It is similar to the bibliography of a term paper, except that the citation format is different, and cases are usually grouped by type: state statute, case law, Constitutional provisions and other materials. (See sample)
- This list not only verifies the sources used by the attorney, but is useful for the Court and for other attorneys to quickly determine what cases, statutes or other materials are being cited, and to easily locate these references in the original research materials used in preparing the case. Correct citation format shall be used as described later in this manual.
- Participants are not to cite any additional material in their cases other than what is included in the case packet. This is not to say that students aren't allowed to pursue additional resources such as dictionaries of legal terms, guidebooks on brief writing, or manuals on the preparation of oral arguments. But they cannot cite or refer to any source as authority for their briefs or oral arguments other than the resources provided. Factual statements or arguments of law must be able to be backed up by the resources in the case packet. This limitation is put in place to see to it all participants have access to the same materials.
- Important Note: If a case in the packet contains excerpts from yet another case, participants may use those excerpts, but need to be sure that their case citation notes the case in the packet, not the excerpt. (See citation format)

For example:

In *Smith v. Jones*, the Court cited *Brown v. Topeka Board of Education* saying, "Separation is inherently unequal." *Smith v. Jones*, 123 F. Supp. 456 (D. Mont. 1995) at 461.

Statement of the Issues:

- This is a short introductory statement of the legal issues or points of law involved in the case. It tells the Justices precisely what legal issues the attorney team wants the Court to decide. These statements should be phrased to help one argue FOR a particular conclusion rather than simply against the other side. In Model Supreme Court cases, there are two primary legal issues to be decided.
- These issues are stated in question form and should be phrased in such a way that a "yes" answer will support one's position. These statements are generally no more than one sentence per issue, and are placed just before the Statement of the Facts.

Example:

The appellant may phrase an issue this way:

"Did the trial court err in holding that...?"

The respondent may phrase the issue in the same case this way:

"Did the trial court correctly conclude that...?"

Statement of the Facts:

- The Statement of the Facts is a retelling of the facts from the client’s point of view. However, the facts provided in Model Supreme Court Cases are not to be added to or disputed. For a Model Supreme Court brief, this section should be about one page long, and not more than two pages.
- Attorneys explain the situation in a way that helps their client. This is a very important part of the brief that sets the stage for the argument, and should be presented both to help the court understand the case and show the client in the best possible light. Again, remember not to assume facts not given, and do not distort, change, or add to the facts!
- For example, here is how parties in a real Supreme Court appeal used the Statement of Facts in different ways to support their positions:

The Appellant/Defendant’s brief began this way:

“[John Doe] was a mentally ill nineteen year old when he participated in a robbery with a juvenile female...”

The Respondent/Plaintiff’s brief began:

“Since [John Doe] pleaded guilty...”

Argument:

- This is the core of the brief. Students may find the argument to be somewhat like writing a persuasive essay with lots of research references. It presents support for the issues presented earlier. Solid research is used to back every part of the argument. Arguments must be well-organized and convincing; attorneys will win or lose their case based on the quality and substance of what is said.
- Each point the team wants the court to consider in deciding the case must be described, reasons explained with references to research materials used, and text citations inserted as frequently as needed. Citation format examples appear later in this manual.
- In the Model Supreme Court, arguments for each of the two issues should be at least one, but no more than three pages each. The total argument section should not exceed six (6) pages. Attorney teams are advised to have each member take one issue to research and prepare that portion of the argument for the brief. Remember: the total brief, except for title page and table of contents, must stay under the ten page limit.
- Structurally, each part of the argument is first directed at supporting the various issues of one’s own case, then also opposing the contentions anticipated to be brought up by the opposing party.
- Stylistically, the argument is written in forceful, active, positive language. (A team wants the court to rule FOR their client, not simply against the opposing counsel.)
- The argument also forms the core of one’s oral presentation and is used by the Justices to make their decision.
- As an example of how an argument could be written, imagine the following scenario where a team wanted to argue the point that Judicial Immunity protected a County Sheriff from liability in a particular case. That portion of the argument might be written like this:

The doctrine of judicial immunity is firmly entrenched in American law as held by the US Supreme Court when it stated “a like immunity extends to other officers of government whose duties are related to the judicial process.” *Barr v. Mateo*, 360 US 564, 569, 79 S. Ct. 1335, 3 L.Ed. 2d 1434, 1440 (1959).

Accordingly, the doctrine of judicial immunity shields Sheriff Innocent from any liability arising from his release of the defendant, because he was acting upon the order of Judge Knowsit.

- As shown above, the team first explains the rule of law, then shows how it applies to the particular case. If needed, a short direct quote is included to help the Court recall the precedent or law in question.
- The team goes on to make additional arguments to demonstrate why the Sheriff was not liable. They continue to cite relevant cases, statutes and constitutional provisions from the case packet that further bolster their overall argument.
- The writing of the argument, as shown in the sample brief, uses headings and subheadings to begin each section of the narrative that help clearly organize the argument. The same structure of headings and subheadings should be summarized in the table of contents.
- The idea is to do everything in terms of both form and substance to help the Court understand the reasonableness and logic of the argument, and thus decide in one’s favor.

The following outline style is one often used when writing arguments in Montana:

- I. **ISSUE (bold and all caps)**
  - A. **Main Point (Bold, Underlined, First Letter Caps)**
    - 1. **Supporting Points (Bold, First Letter Caps)**

- This is also handy way to prepare one’s notes for the oral argument. It is more effective to have an outline to refer to than the written text.
- One reason to outline an oral argument is because Justices are free to interrupt an oral argument and ask questions at any time. Questioning can take an oral argument off track very quickly. Therefore, an outline is better than a prepared speech because it allows the Attorney an effective way to remember what points have been covered and makes it less likely to lose one’s place.

Conclusion:

- This is where the Attorney team summarizes their argument and specifically states the result desired. The conclusion in a Model Supreme Court brief can be as short as one sentence, and should not exceed a single short paragraph. The signatures of the Attorney team follow the conclusion, as shown in the sample.

## Citation Format

Before we begin this section, we ask that participants not be overwhelmed by the standards presented. Legal citation conventions are very specific, but for this program, participants will be citing case law that is already listed in the correct citation format, so the participant will be merely copying that format. The following is for informational purposes only.

### ***Why is Citation Important?***

The strength of a legal argument depends in large part on how law, as established in previous court opinions and precedents, is applied to a given case. Therefore, citation of relevant statutes and case law is a critical part of legal writing. Justices and other interested parties often go to the source and read the full text of legal opinions in order to better understand a party's argument.

Court opinions are widely published in books called reporters. This is where most citations to case law are made. There are

many different reporters. The Montana Reporter, the Pacific Reporter, the Federal Supplement Reporter, and the Supreme Court Reporter are examples.

Citation of legal documents is a bit different from the footnotes and bibliographies of high school and college term papers, but the basic idea is the same: to allow the reader to know what sources were used in creating the written document, and where to locate specific information.

### ***How to Cite Materials***

Cases and related research materials included in Model Supreme Court case packets given to you with a citation format that can be copied exactly as is for brief writing. However, the guidelines below can be used as a reference if needed.

Required Court citation can vary from court to court. The Bluebook: A Uniform System of Citation, Cambridge: Harvard Law

Review Association, most current edition, is the standard for legal citation in the United States. However, the Montana Supreme Court uses a format slightly different from the Bluebook, and participants may notice this when reading Montana Court opinions. For the Model Supreme Court, either Montana's or the Bluebook's citation format is acceptable.

Most cases are cited something like this:

*State v. Black* 570 P.2d 489 (CO, 1983)

- *State v. Black* is the name of the case, and like all titles, must be either underlined or italicized.
- 570 is the volume number of the reporter where case information is found.
- P. 2d is the name of the reporter where the Court opinion is found, in this case, the Pacific Reporter, second series.
- 489 is the page number in the Reporter where the case opinion begins.

- (CO, 1983) is the Court where the case was heard (in this case, Colorado) and the year in which the decision was issued.

Sometimes you need to note the specific page within an opinion. So, if you wrote the citation:

*State v. Black* 570 P.2d 489, 493 (CO, 1983)

- This would indicate that while the case opinion begins on page 489, the specific material you want people to notice begins on page 493.

Although it looks awkward to read, legal citations are usually placed directly into the text of a brief as shown in the example in the sample brief in this guide. In the narrative parts of a brief, complete citations are used the first time they appear, but may be abbreviated afterwards as follows:

If the full citation is: *State v. Black*, 570 P.2d 489, 491 (CO, 1983)

Subsequent citations may be abbreviated as:

*Black*, 570 P.2d at 493 (if page 493 is where the specific information is located.)

Sometimes an opinion may be published in more than one reporter. Model Supreme Court case packets will include all the citation references needed for the Table of Authorities. If specific page numbers are cited in a narrative, just cite and use the page numbers of one reporter, the one used in the case packet.

***General Abbreviations:***

§	Section
USC	United States Code
¶	Paragraph
ARM	Administrative Rules of Montana
Const.	Constitution
art.	Article
amend.	Amendment
Cir.	Circuit (referring to Circuit Courts)
ann.	Annotated
MCA	Montana Code Annotated
cl.	Clause
2d, 3d	Second Series, Third Series (second or third set of volumes for a particular Reporter)

Note: If you need to say "section" at the beginning of a statement, spell it out, but if it's within a sentence, you may use the "§" symbol.

### ***Citing Laws and Statutes***

Montana Law: Montana Code Annotated 00-0-000 (3) (a)  
or § 00-0-000 (3) (a), MCA

Federal Law: 10 USC section 3069 (this means volume 10 of the United States Code, section 3069)  
or 10 USC § 3069

Other state formats vary, and Model Supreme Court participants can generally use the samples provided in the case materials if laws from other states are cited.

### ***Citing Constitutional Materials***

#### **Montana Constitution:**

Article II, Section 1, Montana Constitution -- abbreviated form: Art. II, § 1, Mont. Const.

#### **US Constitution:**

Article II, Section 1, United States Constitution -- abbreviated form: Art. II, § 1, US Const.

#### **Bill of Rights:**

First Amendment to the United States Constitution

### ***Citing Case Law***

As noted earlier, the general form for legal citations is: Case Name, Reporter information (year). Reporters commonly used in researching Montana cases are listed below with abbreviations:

U.S.	U.S. Reporter (covers US Supreme Court decisions)
F. Supp	Federal Supplement Reporter (contains Federal District Court opinions)
L.Ed, L.Ed.2d	Lawyer's Edition Reporter (contains US Supreme Court decisions)
F., F.2d, F.3d	Federal Reporter (covers Federal Circuit Court of Appeals decisions)
S. Ct.	Supreme Court Reporter (covers US Supreme Court decisions)
Mont.	Montana Reporter (covers Montana Supreme Court decisions)
P. or P.2d	Pacific Reporter (covers state court decisions from Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington and Wyoming)

Other regional reporters such as the Southern Reporter, Atlantic Reporter, etc. may sometimes be used as references in a Model Supreme Court case. Case packets will show how to cite them.

## ***Examples***

### **A Montana decision:**

*State v. Jones*, 100 Mont. 271, 275, 485 P. 2d 123, 127 (1995)

Abbreviated form: *Jones*, 100 Mont. at 127 (Use the source in your case packet)

Notice that the Montana case is reported in both the Montana Reporter (Mont.) and the Pacific Reporter (P. 2d). We know it is a Montana Case because it is in the Montana Reporter, so the state abbreviation is left out of the parentheses where the date is listed.

### **Another state's decision:**

*State v. Smith*, 215 P. 2d 214, 225 (CO, 1997)

Abbreviated form: *Smith*, 215 P. 2d at 225

Notice that the out of state case cites the state and the year (CO, 1997). This is because the case citation comes from the Pacific Reporter, and in this situation, you cannot tell which state decided the case.

### **Federal Court decision:**

*Smith v. Jones*, 123 F. Supp. 456, 461 (D. Mont. 1995)

Abbreviated form: *Smith*, 123 F. Supp. at 461

Notice that D. Mont. means the case originated in the Federal District Court for Montana.

### **Federal Circuit Court of Appeals decision:**

*Anderson v. Wilson*, 3 F. 3d 292 (9th Cir., 1996)

Abbreviated form: *Anderson*, 3 F. 3d at 302

9th Cir. means the case was heard by the 9th Circuit Court of Appeals.

### **U.S. Supreme Court Decision:**

*Roe v. Wade*, 410 U.S. 113, 93 S. Ct 705, 35 L. Ed. 2d 147 (1973)

Abbreviated form: *Roe*, 410 U.S. at 116

Notice that Supreme Court decisions can appear in three different reporters.

### **A decision not yet published in any reporter:** (This only applies to a very recent decision!)

*State v. Doe*, No. 98-000 (Mont. March 25, 2006)

98-000 is the case number. The date the Court handed down its decision is in parentheses.

## Oral Argument Guidelines

### *What is an Oral Argument?*

Oral arguments are the reward for the time spent studying a case and perfecting a brief. An oral argument is the place where you can demonstrate the worthiness of the position you are presenting to the Court. You explain the arguments presented in your brief and get an opportunity to talk to the court about the case, listen to the Court's concerns, answer the Justices' questions, and clarify or correct any misunderstandings that the Court may have about the client's position and your argument.

Oral arguments are both similar to and different from events such as team debate. Like a debate, presenters need to know both sides of a case, speak extemporaneously, and be ready to adapt their arguments based on statements by the opposing side. However, in an oral argument, speakers can organize their allotted block of time as they see fit, and opposing parties do not speak directly to one another, nor do they question or cross-examine one another. Both sides only address the Justices, and only Justices may ask questions.

### *Organizing an Oral Argument*

Unlike a prepared speech in a legislative body or at an interscholastic competition, an oral argument is flexible. Justices can interrupt a speaker and ask questions at any time. Attorneys need to have a thorough understanding of their case so a change of pace or subject does not diminish their presentation.

To create an effective oral argument, prepare an outline of the points you plan to cover, but one flexible enough to change as

In a way, attorneys do not "argue" at all, but rather enter into a dialogue with the Justices, explaining their positions in the style of a discussion or conversation, but one based on how the law is applied to the case at hand. The goal of the oral argument is to help the Justices understand the case and to win them over to one's own side. Therefore, think of the Justices as allies to be won over - not enemies to be confronted!

It is important to behave in a professional and ethical manner. The Montana YMCA Model Supreme Court Program challenges participants to accept and demonstrate the positive values of caring, honesty, responsibility and respect.

If possible, try to attend a hearing at the real Montana Supreme Court. They hear roughly 40 oral arguments a year, so there are many opportunities. The Court usually meets in Helena, but they also travel a few times a year to hear arguments in other communities around the state. The Clerk of the Supreme Court will have a schedule of oral arguments available about 30 days ahead of time.

needed. You may not even use all of it, because Justices will focus their attention on the particular issues of most concern to them.

Anticipate questions that may be asked and design your outline so that you already have many answers covered. This way, most questions will not take time from your presentation, they will just rearrange the order in which you present your points!

***Remember the following basics:***

- Know the facts and the issues of the case. Usually teams divvy up the case and each individual argues one issue.
- Know the applicable law and authorities provided in your case packet.
- Understand BOTH sides of the issue so well you could argue either side (because you will!).
- Be honest with the court. Do not assume facts not given, do not make up information, do not evade or maneuver around questions.
- Notes are helpful and necessary, but not a crutch. Memorize your major points!
- Do not plan to give a canned speech, but rather know the case well enough to discuss any part of it in any order.
- Anticipate the other side's arguments and have plans to counter them.

***Time Limits for Oral Arguments***

**Appellant: A total of 20 minutes.** The recommended procedure is to present argument for 15 minutes, splitting time between team members in an effective manner, and reserving 5 minutes at the end for rebuttal of the Respondent's argument. If the Appellant team goes over 15 minutes, that time is taken away from their rebuttal time.

**Respondent: 15 minutes total, no rebuttal.** The reason the Respondent gets less time is because the Respondent is arguing for the decision already made in a lower court, so they do not have the same burden of proof as the Appellant. Respondents need to remember that they have only one shot at making their case, so need to anticipate and forestall possible ways their argument could be rebutted by the Appellant.

Teams may use personal timers, but the Marshall’s timing will be considered official.

***Attorneys need to be aware that they could have their entire argument thrown off track by questions; they will need to adapt.*** Time taken by questioning from the Justices is a part of the total time allotted. Justices have the right to ask a question whenever it occurs to them. Attorneys need to be aware that they could have their entire argument thrown off track by questions, and will need to adapt. A successful argument is not one where every point is addressed, but rather one where the Justices are convinced to rule in your favor.

***Be ready to think on your feet!*** Keep in mind that many questions asked by the Justices cover points that should already be in a well-planned oral argument outline, and so ideally you may only have to rearrange the order you present your main ideas.

Below is one way a team can organize their time; however, teams are free to organize differently if they think it will be more effective. It is best to allot time to answer unanticipated questions from Justices, or to add, clarify or change material as needed. Always give yourself time to summarize and request a favorable decision from the court!

First Lawyer, introductory remarks and issue one:.....7 minutes  
 Second Lawyer, issue two and summary:.....7 minutes  
 Rebuttal (Appellant only): ..... 5 minutes maximum

Either team member can do rebuttal as circumstances warrant. It is a good idea for each team to plan their total argument to run no more than 12-13 minutes, leaving time to spare for unanticipated questions during the hearing.

## Structure and Content of the Oral Argument

### *Introductory Statements*

The following elements are required, be clear but concise.

- Each team begins with the phrase, "May it please the court..."
- The first speaker goes on to introduce him/herself and co-counsel as outlined in the Court Procedures script that is provided later in this manual.
- The first speaker states the issues to be addressed and which team member will address them. Most Appellants give a very brief summary of the type of action involved and the judgment being appealed.
- In the opening argument of Appellant, the first speaker should give a short statement of the facts to remind the Justices of the case. Respondents do not have to do this, but should have a statement of the facts ready in case they disagree with the Appellant's version.
- Don't take too much time rehashing facts the Court already knows, rather focus on what is pertinent to your client's case. (The Court may cut you off if you spend too much time here!)

### *The Argument Itself*

- Each Attorney presents in turn the substantive arguments for each of the issues.
- Remember to lead with your strongest argument!
- Prioritize arguments so those each speaker considers most important are covered first.
- Personal opinions or feelings are irrelevant. Application of logic, public policy and the law is relevant.
- Spell out how the law clearly supports your case.
- Factual statements or arguments of law must be able to be backed up by the resources in the case packet. Remember to (briefly) cite the law or court decisions as needed.
- The Appellant provides positive reasons why the Court should overturn the previous decision as well as showing ways the previous court erred.
- The Respondent shows how the earlier decision was correct, but also has the tricky task of showing why the Appellant's arguments are not legally correct.
- Again, anticipate possible questions from the Justices and prepare suitable answers. Allow enough time in your prepared argument for unanticipated questions. If you prioritize your arguments, you will have time to cover what is most important.
- A reminder: Stick to your brief unless questioned otherwise by the Justices. Attorneys can beg the court's indulgence and state they have discovered something new. That is the exception, however, and not the rule. Justices might question an Attorney as to why he or she didn't include the new material in his or her brief, and it is the Justices' call as to whether or not they want to consider it.

### *Concluding Statements*

- When you summarize your arguments, be focused and active; this part of your presentation is what the Justices will remember best. Be interesting, but to the point.
- Usually the second speaker does the concluding remarks, but not always. The team can divvy up the argument however they wish.
- At the end of the argument, always do this: **tell the court exactly what you want them to do; i.e., to uphold or overturn the lower court's decision.** Even if time is called, you can still ask if you can finish your sentence, (which is generally granted) then state, **"In closing, we ask the Court to (uphold or reverse) the decision of (the lower court)."**

### *The Appellant's Rebuttal*

- The rebuttal may refute arguments raised by the Respondent, correct any misstatements or misconceptions that arose during the original argument, answer a question one could not answer earlier, or present additional information that may be relevant to the case.
- It is best not to rely on the rebuttal simply for extra time. It is not a good idea to talk just to fill time, either. If you only really need one minute, that's fine.
- Although some notes may be drawn up in advance for use as circumstances warrant, the rebuttal should be adapted to the hearing at hand, and not be a canned presentation.

## How to Present an Oral Argument

When addressing the court, Justices are always addressed as "Your Honor," or "Justice (last name)," Answer questions saying "Yes, your Honor," or "No, your Honor," as appropriate. Never address a member of the Court as Mr., Miss, Ms., (etc.), or by first name.

It is a good idea to be able to have your entire outline in front of you. This makes it easy to check off points covered and rearrange your presentation as needed. It can be distracting to have to shuffle or rearrange note cards, risk dropping things, etc.

### **Rehearse.**

- Practice your presentation, and have practices where others ask you questions or make you defend your argument so that you don't get rattled by the real thing.
- It is wise to practice using correct protocol at all times. Get in the habit of saying "May it Please the Court..." and "Your Honor" in practice sessions. Remember that your peers will be on the bench, so get used to using proper forms of address regardless of whom you are actually addressing.
- While preparing in your home community, a team or delegation should locate a local Attorney, (if possible, one with experience in the Appeals process or who was involved in Moot Court competitions while at law school) and ask this individual to act as a "Justice" for a practice round, having them probe arguments and ask questions as real Justices will, then offering suggestions for improvement.

### ***Suggestions on Appearance, Speaking Style and Manner***

1. Be a friendly professional; speak in a calm, dignified way. Stay cool and rational.
2. Don't read a prepared speech or directly from your brief. It's boring and you won't have the flexibility you need (besides, the Justices have already read your brief!).
3. Show politeness and respect for the Court - you are assisting the Court to reach the proper decision. They are your potential allies, not an enemy or opponent. Therefore, do not become defensive, hostile or condescending.
4. You are in a dialogue with the Court, not with your opposition. Do not address the other side directly. There is no Cross-Examination; they can't answer.
5. Think about your voice: Enunciate clearly, speak loud enough to be easily heard, avoid talking too fast or in a monotone. Avoid slang.
6. Think about style: sound assertive and enthusiastic, but not arrogant or “ditzy;” be confident, not timid or condescending.
7. Be convinced of the rightness of your case.
8. Don't get overly dramatic; this is not argument to a jury. Justices are not easily swayed by emotion, and may find it distracting.
9. Think about gestures: Watch nervous hand motions; avoid drumming fingers or pen, cracking knuckles, putting your hand over mouth or into pockets, etc., avoid pointing.
10. Stand with good posture behind the podium. Don't pace.
11. Be quiet and unobtrusive in your manner while sitting at counsel table. Do not react outwardly to the other side's arguments. In particular, do not attempt to detract from opponent's presentation. If the Justices notice you during the other side's argument, it will probably not help your case!
12. Be as professional in your attire as possible. Avoid gaudiness in accessories or hairstyle.

### **Handling Questions from Justices**

Attorneys are often troubled by questions from the bench. Most people are used to giving prepared presentations, but be ready for the unexpected because **Justices are free to ask a question whenever it occurs to them.** This can be unnerving, interrupting your whole train of thought!

Therefore, you need to know your case thoroughly. Understand the strengths and weaknesses of your arguments. Anticipate what the other side is likely to argue. Structure each point of your argument so it can stand alone without depending on happening in the order you originally planned.

The Justices do not have to ask you questions related to your brief. They may ask you to think on your feet and apply the law to an angle you have not considered. For this reason, know ALL the case law you have been given and be prepared for tough questions!

Because questions may refer back to research materials in the case packet, it is a good idea for teams to have their research materials handy for quick reference. Both team members should be familiar enough with all case material so that one person can quickly locate a reference while the other is still speaking.

***Keep the following guidelines in mind:***

- When the Justices interrupt, remember the old kindergarten rule: STOP, LOOK and LISTEN. Do not continue talking, do not interrupt Justices while they are speaking; it is very rude. Remember, you want the Justices to rule for your side. You are there to help them do so. Think of questions as an opportunity to improve your case!
- Cut to the chase and answer the question. Don't say "that's a good question," or similar irrelevant remarks. The clock is running...
- Answer with respect. Be neither hostile nor condescending.
- If you know the answer, answer the question on the spot. Don't tell court that you will cover the matter someplace later in your argument *unless...*
  - a) ...you need to defer to your teammate to answer a question. If your teammate can answer the question better than you can, say something like, "your Honor, this question is one better addressed by my co-counsel. With your permission, may he (or she) answer this question during his (or her) argument?" (Permission is generally granted.) Then your partner needs to be sure to do so!
  - b) ...you have no clue. It's OK to say, "I don't know," and in fact this is preferable to evasive maneuvering, rambling, or going off on a tangent. If possible, say something logical and to the point. If you're completely stumped, politely admit it and then move on. If there is time, it is sometimes possible for whomever is not speaking to look up the answer and then address it later. If you are the Appellant, you can also look for the answer then mention it in your rebuttal.
- You may ask the Justices to clarify their question if you don't understand it. If they cite case law, you may ask them which case in the packet they are referring to if it isn't clear. Just remember: the clock is running...
- Use questions to your advantage. If you have properly prepared the case, you have anticipated most questions, so you can answer the question in such a manner that you have actually benefited from the question and taken care of something you already planned to address.
- Concise answers are usually the best. If the Justice is not satisfied, she or he will ask follow up questions. You don't need to ask a Justice if you have answered a question properly.

## Montana YMCA Model Supreme Court Courtroom Protocol and Procedures

### Overview

Workshops will be held Sunday evening following registration to help orient participants to rules and procedures. In addition to the presentation of oral arguments, guest speakers, practice or demonstration rounds and workshops may be scheduled during the session.

Just as all Legislators at Youth and Government receive a Bill Book of proposed legislation, a "Brief Book" will be made available to all Attorneys at the session, which will contain a master schedule of events, list of all participants, and copies of all other participant's briefs.

The hearings schedule will not be a part of this book, but rather will be posted by the Courtroom at least one hour prior to a team's hearing. **Teams must be in the courtroom and ready to proceed 5 minutes prior to the opening of their hearing. 10 minutes is recommended.**

Teams will present oral arguments for both the appellant and the respondent positions of their assigned case over the course of the session. Preparing a summary or outline prior to the session that outlines the main arguments for both sides - and practicing arguments for both sides is strongly recommended.

A limited amount of time will be available after teams have presented the assigned side of their case to prepare their oral arguments for the opposite side, but participants will need to already have a basic outline ready that they simply need to refine, based on their experiences during the first round of arguments.

As a rule, Attorneys will first argue the side of the case for which they wrote a brief, and teams in a hearing will either both argue from their written briefs or both argue the sides for which they have not written a brief.

**However**, if due to drops, there are an unbalanced number of Appellant and Respondent teams, teams may be asked to volunteer to present their case twice or volunteer to present the opposite side first.

In addition to presenting oral arguments, all participants will be assigned a time to serve as a Visiting Justice. Visiting Justices hear a case other than the one they were assigned to argue, and need to reserve time to read the other case and review the confidential Bench Memoranda so that they can be informed participants.

When not involved with the court program, Attorneys are encouraged to testify as lobbyists in the committee hearings on bills before the Youth Legislature.

If case hearings are badly unbalanced due to participant drops, Attorneys who are completely finished arguing both sides or their case may be assigned as Visiting Justices to any case on the last day.

Attorneys serving as Visiting Justices should report to the Justices' Chambers about 45 minutes prior to the time they are scheduled to serve on the bench. The Appointed Justices will use this time to orient them. At least 30 minutes after the case hearing also needs to be reserved for deliberation when it concludes.

## Rules of Courtroom Procedure

### *Authority*

The Chief or Presiding Justice of the Supreme Court is the overall authority on all procedural matters before the court and in the courtroom. Any instructions from the bench are to be promptly followed by all present. The Marshall of the Court is the enforcement agent of the Court, acting under the authority of the Chief or Presiding Justice to automatically enforce existing rules and protocol without need for specific direction, and to carry out any instructions from the Justices. An adult advisor to the Court will be available to assist the Chief Justice and the Marshall as needed.

### *Admittance to the Courtroom*

Any member of the public may observe the arguments of the Model Supreme Court from either designated audience seats on the floor or from the gallery (if Old Supreme Court Chambers are used). Observers must remain quiet at all times. The Marshall of the Court has the authority to maintain order in the courtroom and may ask disruptive individuals to be quiet or to leave if necessary.

## Presentation of Oral Arguments

As noted earlier, a hearings schedule will be posted in advance. Teams must be in the courtroom and ready to proceed 5 minutes prior to the opening of their hearing.

Teams need to remember to bring the following to the courtroom:

- Their notes
- A copy of the case
- Their brief
- Research materials from the case packet
- They may also choose to bring in their brief book or a copy of their opponent's brief as well

From the perspective of someone facing the Bench, the Appellant team will always be seated at the counsel table to the left of the Court (on the same side as the Marshall) and Respondent team will sit at the counsel table to the right (on the same side as the Clerk).

There will be a lectern in the center of the Court from which each team will present their arguments. If the lectern is not located within easy reach of the counsel tables, a table will be set up next to it for the co-counsel to sit at (with any necessary materials) during the presentation. The Marshall will time arguments. The team is timed as a unit, so the members may divide up their time any way they want. (The clock is not stopped while team members trade places.)

Similar to the procedure in a competitive speech meet, the Marshall will have cards indicating that the team has 10, 5, 3, 1 and zero minutes remaining. The Clock may be only stopped at the request of the Chief or Presiding Justice, and it will not be stopped simply to allow research on a question or to allow additional time to organize a presentation.

When time is called, the Attorneys must stop speaking immediately. They may ask permission to finish their sentence, which is usually granted. They should finish their sentence, and may briefly ask the court to support their position, but cannot make any more arguments. If they are answering a question from a Justice, they may ask permission to finish their answer.

A reminder: Stick to your brief unless questioned otherwise by the Justices. Attorneys can beg the court's indulgence and state they have discovered something new. That is the exception, however, and not the rule. Justices might question an Attorney as to why he or she did not include the new material in his or her brief, and it is the Justices' call as to whether or not they want to consider it.

### **Courtroom Protocol and Procedure**

1. At the appointed time for the hearing to begin, the Marshall stands and raps gavel. As members of the Court enter, he or she asks those present to stand, saying:  
"All rise and give your attention. The honorable Justices of the Montana Model Supreme Court."
2. After the Court is in their places, ready to be seated, the Marshall says: "This Court is now in session." After Court is seated, everyone else may be seated.
3. The Chief Justice, or in the absence of a Chief Justice, the Presiding Justice of the Court will introduce the members of the bench.
4. The Chief or Presiding Justice of the Court will then announce the case; ask if counsel for appellant is ready, then ask if counsel for respondent is ready. Only one person on each side will stand up when asked, and reply, "Yes, Your Honor," and be seated again.
5. When instructed to proceed, the first speaker for the Appellant's team will stand, move to the lectern provided (bringing relevant materials and notes), and begin their portion of the oral argument as follows:
6. "May it please the court. My name is \_\_\_\_\_. Seated to my left (or right) is my co-counsel, \_\_\_\_\_; we are counsel for (Appellant name), the Appellant before this court today."

Next they say:

"There the following issues are before this court today: (state issues 1 and 2.) I will argue (issue 1) and my co-counsel will argue (issue 2). With the Court's permission, we wish to reserve five minutes for rebuttal."

7. The first Appellant speaker may then, at their option, make a brief statement of the facts and of the judgment of the previous court that is on appeal.

The first speaker will then proceed with their introductory remarks and argument.

Remember: The team is timed as a unit, so the members may divide up their time any way they want.

8. When the second appellant speaker begins his or her presentation, he or she may also say: "May it please the court," may choose to repeat their name, and then proceed with their portion of the argument and summary remarks.
9. The Respondents use similar protocol, beginning by saying, "May it please the court. My name is \_\_\_\_\_. Seated to my left (or right) is my co-counsel, \_\_\_\_\_; we are counsel for (Respondent name), the Respondent before this court today."
10. The Respondents may re-state the facts and issues before the court if they disagree with the Appellant's statements; otherwise, the Respondents may skip to their arguments and summary using basically the same procedures as the Appellant.
11. After the Respondents have presented their case, the Appellants make their rebuttal, provided that they have time remaining.

A maximum of five minutes is allowed for the rebuttal, and only one Attorney may speak.

**Remember,** Justices are likely to interrupt oral arguments with questions at any time. When a Justice says, "Excuse me, Counsel...," stop speaking *immediately* and listen to the question.

12. Watch the Marshall for time. When time is called, conclude immediately, as described earlier.
13. At the conclusion of the hearing, the Chief or Presiding Justice will say , "Thank you Counsel. We will take the matter under advisement," and adjourn the hearing by saying, "This hearing is adjourned."
14. The Marshall will again say. "All Rise," and everyone in the room will stand as the Court exits the courtroom.
15. Judges make no decision on the case at the time of the hearing. They adjourn to their conference room to discuss the case, making a decision that will be announced later.

## Supreme Court Justices

At the most fundamental level, the role of the Justices is to rule on the cases before them.

In order to do this properly and fairly, they must do an extensive amount of pre-hearing research; they must read the briefs carefully; they must listen closely to the Attorneys during oral arguments; they must ask questions so the Attorneys can clarify and explain their point; and Justices must carefully debate each point of law before ruling.

Seeing the judicial system from both sides of the bench helps participants develop a deeper understanding of the law and the courts.

Therefore, in addition to those individuals elected or appointed to serve as full time Model Supreme Court Justices, all Attorneys participating in the Montana YMCA Model Supreme Court will serve as visiting Justices for at least one case hearing.

### *Becoming a Justice*

- A minimum of four full time Appointed Justices will be selected, more if overall preregistration numbers warrant.
- Only Juniors and Seniors may apply to be full time Appointed Supreme Court Justices.
- A Chief Justice will be elected at each session to serve the following year.
- An elected Chief Justice has the same expectations as appointed Justice, in addition to leadership duties.
- Appointed and elected Justices will be required to prepare a Bench Memorandum on the cases they will hear, based on the guidelines and samples in this manual.
- In each case hearing, three to four individuals on the bench are full time Justices, with the remaining “Visiting Justices” rotated among Attorney participants.
- Individuals wishing to be appointed as Supreme Court Justices must complete an application form and return it to the state office but the publicized deadline.
- The application includes essay questions that constitute a major portion of the applicant’s overall ranking.
- Criteria for selecting Justices includes quality of essay answers and past relevant experience that demonstrates open-mindedness, objectivity, an ability to think logically, to consider all sides of a question in a fair and impartial manner, confidence to think independently and to resist peer pressure.
- Past participation in Model Supreme Court is an advantage to the applicants, but not required.
- Phone or face-to-face interviews may be conducted with leading applicants.
- An alternate may be selected and trained to serve in the event any other Justice is unable to attend the conference.
- A day-long, Friday training session will be held in Helena approximately three weeks prior to the conference. All participants selected as Justices must attend. Failure to attend the training will disqualify the applicant from serving in the capacity of Justice.

### ***Preparation by Appointed and Elected Justices***

Full time appointed and elected Justices need to fulfill the requirements outlined below:

- Justices will read all cases and relevant research materials, then use these materials to write confidential Bench Memoranda according to the guidelines in this manual.
- Justices and alternates are required to attend the full day training workshop in Helena approximately three weeks prior to the spring conference. The workshop will include case review, an overview of the responsibilities of a Justice, instruction on what to look for in written and oral arguments, and what to consider in deciding a case.
- Justices will each be given a brief book in advance and will be asked to read all submitted briefs, taking notes on each as to potential questions to ask the Attorneys during oral argument, strengths and weaknesses of each argument, and other notes or guiding remarks useful to them. There will be virtually no time for Justices to prepare between cases during the session, so this advance study is crucial.
- Each Justice will contribute their bench memoranda to a “master” bench memo that will be used by Visiting Justices.

### ***Guidelines for Visiting Justices***

Times that Attorneys will serve as Visiting Justices will be posted with the case schedules. Participation is mandatory! Several Attorneys will serve as visiting Justices for any given case hearing. Attorneys may serve as Visiting Justices more than once, depending on the number of participants and scheduling of cases. Serving as a Visiting Justice will include the following:

#### ***Preparation:***

- As soon as assigned a hearing and case, Attorneys need to read the briefs of both the appellant and the respondent for that case. ***This must be done prior to case review!***
- Attorneys need to set aside at least an hour for a thorough reading of the briefs and taking notes on points of law or questions about the case.

#### ***Case Review:***

- Attorneys will report to the Justices' Chambers for case review at the time stated on the schedule, which will be approximately 45 minutes to an hour before the actual case hearing. Remember: Case Briefs must have been read and studied prior to this time!
- Attorneys will then be given a confidential bench memo to read that will instruct them on the facts and law involved in the case. This document is to be read only in the chambers and is not allowed to be copied or removed from the chambers. Visiting Justices are not to discuss the contents of the Bench Memo with anyone outside of the chambers until the session is concluded.
- After they have been given an opportunity to read and study the bench memo, they will then meet with at least one of the full time Justices who will orient them to Court procedures and answer any questions they may have on law or procedure.

***Oath of Office:***

- Shortly before the hearing begins, Attorneys will be officially robed and asked to give an oath or affirmation that they will keep all deliberations and case information confidential and serve honorably as a Justice of the Model Supreme Court.
- The Oath is given to Visiting Justices as follows:  
**I (state your name), do solemnly swear (or affirm) that I will support, protect, and defend the Constitution of the United States, the Constitution of the State of Montana, and that I will faithfully discharge the duties of Model Supreme Court Justice with fidelity. (So help me God.)”**

***The Case Hearing***

- The names of appointed, elected and visiting Justices who will hear a given case will be posted ahead of time on the court schedule. The Presiding Justice for the case will be noted.
- The Presiding Justice of the Supreme Court for the case at hand is the overall authority on all procedural matters before the court and in the courtroom. Instructions from this person are to be promptly followed by all present, including other Justices.
- Only the Presiding Justice has the authority to have the Marshall start or stop the clock.
- At the appointed time for the hearing to begin, all seven Justices scheduled for that round will enter the chambers. (Seating will be determined in advance by the Presiding Justice.)
- During the case hearing, visiting justices are equals to the full time Justices, under the authority of the Chief or Presiding Justice.
- It is important to listen carefully to the arguments of the Attorneys. Justices may wish to take notes to refer to later while deliberating.
- All Justices may ask questions of the Attorneys. The proper way to interrupt an Attorney to ask a question is to say, "Excuse me, Counsel..." then ask the question.
- Do not be afraid to question the attorneys! The fear of asking a "stupid" question may keep the Court from hearing an answer that could be very relevant to deciding the case.

***Avoiding Conflicts of Interest***

- Visiting Justices will not be eligible to serve on the bench during a hearing in which members of their own delegation are participating, unless scheduling limitations render this impossible.
- Full Time Justices will also avoid sitting on the bench during arguments by members of their own delegation whenever possible, although this may not always be achievable.
- Visiting Justices may not participate on the bench for a hearing of the same case that they are arguing as Attorneys, unless they are completely finished arguing cases.

### ***Deliberation and Vote***

- At the conclusion of the case, all Justices retire to their Chambers to deliberate on the case, make a decision, and dictate opinions. Approximately 35-40 minutes will be available for deliberation and vote.
- Deliberation is a friendly process where all Justices should be involved, with opinions openly aired so that all aspects of the argument are examined.
- A vote will be taken after a maximum of 45 minutes deliberation, sooner if appropriate.
- Visiting Justices have one vote, the same as the full time Justices.
- The law is the basis for reaching a decision in each case. The Justices' personal biases and/or the age, gender, ethnicity, and presentation style of the Attorneys are to be disregarded as much as is humanly possible in reaching a decision.
- Briefs will weigh heavily in the first round of arguments. If both sides are arguing from their brief, the brief will weigh more heavily than the argument at a ratio of about 60% to the brief and 40% to the argument. When teams are not arguing from a written brief (usually after switching sides) the argument alone will decide the case.
- Teams bringing up new material not included in their written brief may be challenged by the bench for arguing a case or a line of thought that they failed to include in their brief. Attorneys can bed the court's indulgence and state that they have discovered something new. That is the exception, however, and not the rule; Justices might question an Attorney as to why she or he did not include the new material in the brief, and it is the Justices' call whether or not their want to consider it.
- Majority vote determines the winner of the case, and the court will issue a written opinion. Unless there is a unanimous vote, those on the minority side of the vote write a dissenting opinion. (In most Model Court cases, a dissenting opinion is likely.)
- Only one affirming and one dissenting opinion will be written (i.e. due to time constraints, concurring opinions will simply be noted as part of the court's overall reasoning).
- The Presiding Justice will appoint the individual who will draft the written opinions (affirming and dissenting) of the court.
- Visiting Justice may volunteer for these jobs if they wish, and are encouraged to participate.
- The Clerk of the Court will assist Justices in writing their opinions.

### ***Writing Opinions***

Model Supreme Court opinions will be only one page long, but will explain the core reasons why the court ruled on a given case the way it did so that Attorneys and the public understand the basis on which the Court decided the case.

Opinions are written for each *issue* in the case by both the Majority and Dissenting sides.

It is theoretically possible for the Court to split its decision on the issues; for example, the Court

might rule in favor of the Appellant for one issue and for the Respondent on the other.

The state office will have Sample Opinion forms with the case and issues pre-typed for use during the session. The Sample Opinion Outline is on the following page.

Opinions will be posted at a time and place noted in the program schedule.

*(Sample Opinion)*

Montana YMCA Model Supreme Court Decision

case no. \_\_\_\_\_

Case title: \_\_\_\_\_

Appellant's Counsel: *(name of Attorneys)*

Respondent's Counsel: *(name of Attorneys)*

***The Court in this case rules in favor of:***

\_\_\_\_\_Appellant

\_\_\_\_\_Respondent

\_\_\_\_\_ Split decision

*(Name of Justice writing opinion)* , writing for the court's *(Majority/Dissenting)* opinion, *(Affirming/Reversing)* the decision of the District Court.

**ISSUES**

(1) *(example)* Did the District Court err by ruling, in CK's case, that HB 63 does not violate the right of privacy guaranteed under the Montana Constitution?

HOLDING: *(yes or no)*

RULING

Affirm—*(number of votes)*

Reverse—*(number of votes)*

(2) *(State issue two)*

HOLDING: *(yes or no)*

RULING

Affirm— *(number of votes)*

Reverse—*(number of votes)*

**REASONING**

(1) *(Example)* The court decided that while the state of Montana affords citizens broader constitutional protection of their right to privacy than does the federal constitution, the issue of privacy did not apply to wearing protective helmets. Further, because the cost of treating head injuries ultimately is paid by taxpayers in the forms of higher insurance premiums and public funds used to treat inadequately insured individuals, the standard of protecting others from an individual's actions can be applied.

(2) *(State reasons for holding on issue two.)*

Sample opinion format adapted from Kacvinsky, Greg and Justin Ware. Wisconsin Youth in Government Supreme Court Manual, 1992 edition.

## Bench Memoranda

A bench memorandum (sometimes called a bench memo or bench brief) is somewhat like a legal brief, and is used as a tool to help a Model Supreme Court Justice become familiar with the facts of the case, the issues and the applicable law. It also includes written questions that the Attorneys arguing the case should be able to answer.

A bench memo has a neutral statement of the facts and a summary of the issues to be decided. It then goes into a legal analysis of both sides of each issue, with appropriate citations, looking at the case without a bias toward one side or the other. When finely crafted, it gives a judge or justice an overview of the law and provides some well-thought out questions that can be asked during the case hearing.

In the real world, some courts have their law clerks prepare bench briefs as a preparation tool for the judges or justices. Bench memos are also written by students in law schools as an educational assignment.

In the Model Supreme Court, all elected and appointed Justices are required to write a 3-5 page bench memo for each of the two cases they will hear.

Justices are provided copies of both cases with the same research materials as are provided to Attorneys. They may utilize additional outside materials that will help them better understand the law and the issues of the case, ***but must keep in mind that the Attorneys are only allowed to use and cite materials from the case packet and cannot be asked to refer to any other information.***

In the Model Supreme Court, the Justices will hear the same case several times. Therefore, in writing a bench memo for this program, it is ***very*** important to view the case objectively and try to avoid making a conclusion on the case prior to hearing arguments by the Attorneys.

In the real world, the Court generally hears a case only once, and a Justice may have a tentative conclusion in his or her mind prior to hearing the oral arguments. However, Justices also remain open to the possibility that an attorney will make a persuasive argument in a way which the Justice did not think of prior to the hearing. Attorneys might also answer a question which was still undecided by a Justice prior to hearing the argument. In other words, the Justice's tentative position on the issue is open to change.

The outline on the next page demonstrates what needs to go into a Bench memo.

Montana YMCA Model Supreme Court

Bench Memorandum Outline  
(*outline sample*)

Case no. \_\_\_\_\_ Justice: \_\_\_\_\_

**FACTUAL AND PROCEDURAL BACKGROUND:**

(Here, set forth in your own words the important facts of the case and the procedural background from the trial court—i.e. who won and the basis upon which the decision was made.)

**ISSUE ONE:** (Set forth a statement of the issue, which should be in your own words.)

**APPELLANT’S CONTENTIONS:** (What you think the Appellant **should** argue)

**RESPONDENT’S CONTENTIONS:** (What you think the Respondent **should** argue)

**ANALYSIS:** (Here, set forth several **QUESTIONS** you could ask each side at oral argument, problems you see with each party’s argument; thoughts you have on what is critical and what is not; and, if possible, conditions that would lead you to rule in favor of the appellant on issue one, or conditions that would lead you to rule in favor of the respondent on issue one.)

**ISSUE TWO:** (Set forth a statement of the issue, which should be in your own words.)

**APPELLANT’S CONTENTIONS:** (What you think the Appellant **should** argue)

**RESPONDENT’S CONTENTIONS:** (What you think the Respondent **should** argue)

**ANALYSIS:** (Here, set forth several **QUESTIONS** you could ask each side at oral argument, problems you see with each party’s argument; thoughts you have on what is critical and what is not; and, if possible, conditions that would lead you to rule in favor of the appellant on issue two, or conditions that would lead you to rule in favor of the respondent on issue two.)

**CONCLUSION:** (summary of the anticipated arguments and most critical points of the case to consider when making a decision.)

## Sample Bench Memoranda #1

Below is a portion of a bench memo that is adapted by those written by past Model Supreme Court Justices for the “snowmobile helmet” case used earlier in the opinion sample.

*Composite adapted from the bench memoranda of Brooke Gordon, Darby Harris, Charles Harvey, Denice Kelley and Mark Lightner, 1998 Montana YMCA Model Supreme Court Justices.*

### APPELLANT’S CONTENTIONS:

Appellant is apt to argue as follows:

1. Not wearing a helmet does not endanger the public safety, public health, or public moral, therefore, there was no need for the law.  
According to *State v. Betts*, a public need must exist for police action. CK was not harming anyone but himself, and could not have harmed anyone else.  
The decision as to whether or not a helmet is necessary is up to him because it will effect no one but him. The public safety or welfare will not be saved or increased because of helmet-wearing individuals, especially CK. Therefore there was no cause to charge him.
2. By not wearing a helmet, CK presents no harm to the existing public. A compelling state interest is not shown with this case, so there are no grounds for infringing upon his right to individual privacy.
3. Despite the public nature of the trail, the trail was on private land and therefore not in the arresting officer’s jurisdiction.

### RESPONDANT’S CONTENTIONS:

Respondent is apt to argue as follows:

1. The right to wear a helmet should not be decided by the passenger or driver because it is a compelling public matter that affects taxpayers.  
According to *Robotham v. State*, the costs of a head injury could rest on the shoulders of the public. If HB 63 is not obeyed, accidents could result that involve head injuries. These head injuries can be fatal or a life-long detainment, resulting in extremely high hospital bills that the tax payers would have to pay.  
By wearing helmets, it limits the number of head injuries and takes the weight of the rest of our taxpaying society.

2. HB 63 clearly states that it is mandatory to wear a helmet, and does not give exceptions.

CK knew the helmet law and blatantly disobeyed it. People cannot be allowed to disobey rules whenever they want, just because they don’t want to. Our society may have been founded on dissension from another’s rules, but we also have a social contract balancing the needs of the individual against the needs of society.

CK had legal opportunities opened to him to voice his opinion against the law.

3. The helmet law is vital to the safety of the public. A snowmobile can be operated at high speeds, especially by an expert such as CK. If something were to hit him in the head, causing loss of concentration, he could lose control and possibly run into others.

### ANALYSIS:

The issue of right of privacy will be argued by both sides as to exact rights individuals have. Can the appellant prove that having to wear a helmet invades one’s privacy? Can the respondent show that wearing a helmet is not a privacy issue or else demonstrate a compelling state interest?

The issue of the cost to society of head injuries and their treatment will be raised. What is the extra burden to society created by riders not wearing helmets?

In addition, the issue of whether the law applies to private land and if the officer was within her jurisdiction in issuing the citation on private land are important considerations.

Question: Where would you draw the line as to what a compelling state interest would be? Would saving the taxpayers 7 to 11 million dollars be a compelling state interest?

Question: In what other ways, besides accidents and tax money for injuries does lack of helmets infringe upon another’s rights?

Question: Does it have to be specifically stated in the legislation whether the law applies to public or private land or both?

## Sample Bench Memoranda #2

Below is a portion of analysis and questions used in a bench memo on a case regarding whether a Native American child should be placed with a white or an Indian Adoptive family. This excerpt deals with the question of whether a set of guidelines allowing exceptions to the law in question should be applied in this particular case. This sample is taken from a law school model case (Adapted from Alaspa, Karen L. Blossom and Sokol v. Navajo Nation and Turning Leaf. Law school bench memorandum. Northwestern School of Law, Lewis and Clark College, 1997 (problem authored by Professor Toni Berres-Paul). As Sample Bench Memoranda #1 and Sample Bench Memoranda #2 show, there is more than one way to develop a bench memo.

ANALYSIS: The Tribe will argue that the Indian Child Welfare Act (ICWA) recognizes and protects tribal interests in reference to child custody proceedings. Holyfield 490 US at 49. Similar to the reasoning in Holyfield, the application of good cause in this case would allow parents to circumvent ICWA by abandoning children to other off the reservation for a couple of years. The court should be careful applying guidelines in this case; a guideline that is merely instructive and not binding should not be used to defeat tribal interests and open the door to future abuses.

The Family will argue that the child's situation is exactly what was intended for the good cause exception. The guidelines speak of "culture shock" and resulting harm from transfers when a child over five years has grown attached to a non-Indian culture and family. In addition, the Family will argue that this case does not open the door to abuses as noted in Holyfield because the child lived with the Family off the reservation for four years, with the knowledge and permission from all interested parties.

Question: How does the Tribe address the guidelines reasoning behind the good cause exception – that it protects the child from "culture shock" and possible psychological harm? Shouldn't that matter?

Question: Where do tribal interests come in when the court attempts to determine if there is a good cause exception and examines possible harm to the child? Is a balancing test involved?