UNIVERSITY OF THE SOUTH PACIFIC

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Skul blong Lo, Univesiti blong Saot Pasifik

MOOTING MANUAL

Contents

Introduction

Congratulations on your participation in the Emalus Campus Moot Competition. Mooting is an excellent skill to learn, and it will assist you to think and analyse the law in the style of an advocate – looking for loose threads, analysing legal logic and presenting your conclusions in a sensible and effective manner. Taking part in the Moot will certainly help you improve your written and oral communication skills.

This guide has been prepared with the simple aim of answering some of the basic questions most people have when they first try their hands at mooting, and attempting to give some guidance as to how mooters can improve. This guide has been prepared with its primary focus upon helping students to develop their advocacy techniques, and is based around the rules and style of the Moot Competition.

This style involves three basic ideas:

- Students compete in teams of two students who present oral arguments in each round of the competition. One student will be known as the Senior Counsel and one as the Junior Counsel, though these titles are meaningless for the moot except that the Senior Counsel speaks first.

- Each team is presented with a problem to prepare based on a hypothetical factual scenario. Before the oral arguments, each side will need to prepare short written outlines of submissions.

- The team present their arguments in front of the fictional Ultimate Court of Justice of Pacifia. This is a court of unlimited jurisdiction and is bound by not decisions except its own. All decisions from other jurisdictions such as South Pacific Nations, England, Canada and Australia are only of persuasive value.

This guide is focused on preparing students for the particular style of mooting required for the Emalus Campus Moot Competition. However, you will find that the broad principles of advocacy and the techniques you learn through mooting will remain constant throughout your legal career.

Acknowledgements

This guide is adapted from a mooting manual published by the Moot Court Bench at the University of Queensland, Australia and the Moots Study Guide

of the Queensland University of Technology. It also references manuals published by the University of Sydney, Australia.

Some of the examples used within this guide have been extracted from the leading text book on the subject: Anthony Cassimatis and Terry Gygar, *Mooting Manual* (1997) Butterworths Skills Series. This is an excellent book and it is highly recommended for students who are looking for a more in depth study of mooting. It is available at the USP Library under call number "Vanu KL146.35 Gyg. 1997". Another useful text is *How to Moot-a Students Guide to Mooting* Snape J and Watt G [2005] Oxford University Press

Approaching a Moot Problem

A moot problem is always based in facts. The aim of a moot is not merely to present a legal dissertation to the judge, but to explain what the result should be when the law is applied to the facts of a particular case. Therefore, it is important to be aware of exactly what the facts of your moot problem are. Rechecking the facts often will be an important part of any preparation, but to begin with, you will almost certainly be reading the facts to identify the applicable law and the likely legal issues.

Given that you'll be working as part of a team of two students, it will also be necessary to divide the material at some stage between yourself and your team mate. As there is only a short amount of time to prepare for each moot, it may be easier if the decision to split the material is made sooner rather than later, so that there is more time to focus on the particular section that you'll be dealing with.

One method that is often helpful is both students to do some general reading first, then to split up the topics and have each student do specific research. Once each student has prepared a draft research paper, outlining the law in their area, the students can swap. Each student will then work on a new area and build on the existing draft research papers.

It is essential that time spent on moot preparation is productive and not wasted. A division of responsibilities between team members to fully utilise the limited time available is recommended.

In developing the case **jurisdictional issues** should be kept in mind -

(a) the power of the Court to hear the case; and
(b) the power of the Court to make some specific order.

Jurisdictional issues are especially important in competition moots, which are often based on problems of international law and heard before courts such as the International Court of Justice (ICJ).

If necessary, students should consult the relevant statute governing the court that is the forum for their moot topic and also (for Queensland) the *Uniform Civil Procedure Rules* 1999. If some doubt arises about the nature or completeness of the issues that the moot topic raises, a pre-hearing conference of representatives from both sides should be arranged with me. Remember that at an appellate level the focus is on the decision that has been made by the lower court supported by reasons, and whether that decision is right or wrong.

Having isolated the issues and thoroughly researched the relevant areas of the law, the argument for presentation to the court must be formulated. This must be logical and must blend to form a coherent whole. Inconsistencies and lack of coherence in the arguments of team members that emerge at a moot hearing are indicative of lack of consultation and lack of thorough preparation. In addition, relevance and reasoning are of the utmost importance. A case that concentrates on establishing and developing one or two sound and relevant lines of argument is invariably more persuasive than one which relies on a number of points, some weak and insubstantial.

Each team member must at all times be able to demonstrate a complete mastery of the facts of the case, not just his or her part of it. This is essential – a team member may be suddenly taken ill and therefore unable to appear or a judge may insist that one team member deal with submissions that the other member is supposed to be making. Complete mastery means that each fact can be instantly recalled. You should concentrate on establishing sound propositions in support of the argument by applying relevant legal rules and principles raised by the issues. It is very easy to become smothered in a morass of case authorities and conflicting dicta.

By way of illustration, consider a personal injury case involving a motor vehicle accident in which a motor vehicle has for no apparent reason, run off the road and injured a passenger. The plaintiff passenger seeks to rely on the doctrine of *res ipsa loquitor* to establish his or her case in negligence. It is not necessary to launch into lengthy submissions on all the law about this doctrine. It would be sufficient to state in general terms the operation of the doctrine and then to establish the basic proposition: that when a vehicle veers out of control onto the side of a road the most likely explanation is that the driver has been negligent in the operation or maintenance of the vehicle, and that the proof of such an occurrence is recognised by the courts as being sufficient to satisfy the evidentiary onus in negligence. Some of the most important appellate cases in support of the proposition would then be cited eg., *Davis v. Bunn* (1936) 56 CLR 246, *The Nominal Defendant v Haslbauer* (1967) 117 CLR 448 and *GIO v. Fredrichberg* (1968) 118 CLR 403. Then one would turn to the facts of one's own case and show that the application of the proposition is valid. Some other cases might be able to be usefully cited to illustrate how the rule has been applied in certain situations analogous to one's own case. Perhaps, for example, a skid is involved or a tyre has burst. If you find a case bearing very closely on the problem before the court it will

be far better to concentrate closely on the salient facts of the case and the problem, than to cite a dozen other cases all having only some vague relevance. **Finally, if any quote you read comes from a dissenting judgment, you must advise the bench that this is the case.** It is unnecessary to cite a case as authority in support of every elementary proposition of law that you put to the court unless you foresee a dispute arising concerning it. (This is more likely in the later stages of the argument, so counsel must use judgment.) There is no particular mileage to be gained by reciting a battery of cases all establishing the same uncontroversial point. On the other hand know the relevant authorities so that they can be cited if the need arises. **Do not cite single judge decisions that illustrate a principle established by an appellate court – cite the appellate court decision. This is very important. You do not have enough time to look at many cases, so be very selective.**

When using cases be aware of their facts so that any questions can be answered about them. Note the similarities and distinctions between the facts of the cases used as authorities and the facts of the case before the Court. Avoid quoting a dictum in isolation from the facts of the case from which it comes. The members of the bench will ask questions during an address, ranging from queries about the facts of a case cited in argument to principles of law and their application. Be prepared to be flexible and to explore the points that are raised. They may be taken as a guide for the choice and development of themes, and will probably give an indication of the way in which the Bench is thinking. Thus a student will need a mastery of the relevant area of law to deal with these judicial interruptions. .[See Chapter 4 and especially Qs 85-94 in *Snape and Watt* (both books)]

IT CANNOT BE EMPHASIZED TOO STRONGLY THAT IT IS COUNTER-PRODUCTIVE TO ATTEMPT TO WRITE OUT IN FULL AND READ AN ARGUMENT. Concise written propositions are sufficient, otherwise the argument will disintegrate when the Bench distracts you from the set form of words and order of points. You will be required to produce outlines of argument for the bench and you should know your case well enough to rely on these alone in the moot. Be prepared to adapt the order of the argument to the wishes of the Bench. If necessary, clarification should be sought from the judge about what is meant by a question. On the other hand, you should not be afraid to persist respectfully in a line of argument in discussion with the judge if you believe it to be important to the case that is being advanced to develop it. You should not be evasive when answering questions from the bench, and in a proper case, you should concede points. At the same time, it is permissible to try to answer questions in a manner calculated to aid the argument being advanced on behalf of the client where possible. It does sometimes happen that a court at an appellate level will have occasion to remark on unnecessary concessions having been made by counsel at the lower court hearing, and possibly at the expense of the client's case; eg., *Holder v. Holder* [1968] Ch 353. **It is very important that you do not ignore authorities that do not support your cas**e. You have a duty to the

court to inform it of all relevant authorities, even those that are against you. What you must do is seek to distinguish an unhelpful case.

Researching the Problem

Having garnered a basic understanding of the topic, your next task will be to do some preliminary research to hone your knowledge of the relevant law. This can be a difficult process, particularly where it is not clear exactly what the legal issues are, but persistence and analysis are all that are needed to overcome this first hurdle.

1. General reading

Where the legal issues are not immediately obvious, you may have to do some further general reading in the particular area of law. Try textbooks that relate to the broad area of law you are looking at. If you look up issues you have identified as relevant in the topic in the index of a general text, this can be the doorway to many more sources.

Additionally, electronic databases offered by the university library offer a commentary on the law and refer to the most important cases. Even if you've already determined the applicable legal issues, such general sources will be very valuable in giving you a broad overview, and helping you to narrow your field of research.

One of the first things we will do is organize a meeting with the law librarian. He/She will be able to give you an overview of all of the hard-copy and electronic resources that relate to the area of law covered in the moot problem.

Beyond general reading, your next points of departure will be scholarly commentary and of course, case law.

2. Scholarly Commentary on the Area of Law

It is always useful to read some commentary on the law, so that you are aware of the current debates surrounding that area. Commentary can point you in the direction of the latest research and case law. Law Journals are useful for this – ask the librarian to show you what journals we have access to in the library and online.

3. Relevant cases

Finally, your most important port of call will be reading the relevant cases.

Sometimes a list of relevant cases will be provided with the moot problem, other times you may have to look for case law on your own. A way to find cases with similar principles to your question is to enter some of the facts of your scenario into the search engine of one of the available databases or websites. ***PacLII, AustLII, NZLII, and Casebase, Butterworths Online*** are particularly useful and are available through the library's website. You will also find that any general reading or legal commentary will probably have produced a number of important cases for you to follow-up.

In your research, you will be looking for all the cases that will be applicable to your particular area of law, regardless of whether they support or detract from your case. It is very important to keep in mind that even if a case appears to be very detrimental for you, that you will almost certainly need to distinguish it from the facts in your problem, rather than attempting to pretend that the case does not exist. You can be sure that your competitors will want to use any detrimental cases against you, so it is important to be on top of the facts of all cases that relate to the moot.

In particular, you will be looking for cases that have very similar facts to your own, or cases which have been very important in laying down the law in a particular area, which you will attempt to extend to your own case.

4. Summary

By this stage you should have located the relevant principles of law that apply to your factual scenario. It is on the basis of this research that you will construct your arguments and write your submissions.

Written Submissions-

Your Outline of Argument and List of Authorities.

OUTLINES OF ARGUMENT
Each team will need to hand in written submissions/outlines of argument that are not more than two pages in length. Written submissions or you Outline of Argument should be a brief summary of what your party will be submitting to the Court in oral argument. Essentially, they will be a short statement of each argument that you will be making. Cases which counsel will rely on in their submission should be included with each issue and sub issue. It is not necessary to include a complete written version of the oral argument which counsel intends to make.

The written submissions/outline of argument for the appellant and respondent must be given to the opposing side before the moots stats and

three copies must be available to be handed to the members of the bench at the commencement of each moot.

How to write outlines of argument (and lists of authorities) for applications and appeals

A Written Submission or Outline of Argument should consist of no more than two A4 pages - one page is preferable. Two pages is the maximum number in the appeals. It consists of a concise, logical summary of submissions in numbered paragraphs including reference to all statutory provisions and passages in previous decisions or other material relied upon.

An Outline of Argument 'is a brief outline of the case that will be argued showing the essential elements of the argument to be presented and identifying the statutes and precedents to be relied on in that argument' [See *Gygar and Cassimatis* at 58;

The aim of an Outline of Argument is to present a logical line of reasoning in support of your case. It will show the bench exactly how you are going to address the issues and succinctly state the law in support. A properly prepared Outline of Argument will anticipate and answer opposing counsel's argument. It crystalises your arguments for you and for the bench. Each counsel only addresses the issues in the argument he or she will be raising before the court. Each issue must be broken up into –

- relevant facts (if applicable)
- the applicable law –each proposition **must** be supported by authority(either a case or cases, or statute)
- application of the law to the facts. You must refer to any **relevant** decisions that do not help your case and distinguish them.

Every point to be raised **must** be shown in the Outline.

All points must be numbered and written in the order they are to be argued. The following Outline of Argument of two pages was prepared by a QUT moot team in 2005 for an appeal. It is a good example of the appropriate content format. The outline must have a Frontsheet. An example is also taken from the QUT Moots Study Guide below. **It is a guide only and the precise format need not be followed provided the essential elements are included.**

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Frontsheet for Outline of Argument (amend as necessary for application)

IN THE ULTIMATE COURT OF JUSTICE OF PACIFICA

MOOT NO. [ ]
[DATE]

[NAME]
APPLICANT/APPELLANT

v

[NAME]
RESPONDENT

OUTLINE OF ARGUMENT

SUBMITTED BY
[NAME]
COUNSEL/SENIOR COUNSEL/JUNIOR COUNSEL*
FOR APPLICANT/APPELLANT/RESPONDENT*

[NAME
ACADEMIC]

[NAME (other counsel)]
COUNSEL/SENIORCOUNSEL/JUNIOR COUNSEL:

* Delete that which does not apply

OUTLINE OF ARGUMENT for APPELLANT

1. Scope of Duty of Care Owed

1.1 A non-delegable duty of care does not require constant supervision of pupils under the schools control.

- *New South Wales v Lepore* (2003) 212 CLR 511.

1.2 The scope of the duty was to provide a reasonable system of supervision to protect against any reasonably foreseeable accidents. The appellant had such a system in place.

- *Commonwealth v Introvigne* (1982) 150 CLR 258.

1.3 To extend the duty of care to require constant supervision would be manifestly oppressive on school authorities.

- *Australian Capital Territory Schools Authority v El Sheik* [2000] FCA 931 (Unreported, Wilcox, Spender, and Higgins JJ, 11 July 2000).

2. Substitution of finds of facts

2.1 An assessment of breach of duty should not be made by a Court of Appeal based upon its own assessment of what was an adequate system of supervision unless the trial judge's findings were incontrovertibly wrong, glaringly improbable, or contrary to compelling inferences.

- *Devries v Australian National Railways Commission* (1993) 177 CLR 472.
- *Fox v Percy* (2003) 214 CLR 118.
- *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 62 ALR 53.

2.2 In this particular case, the Court of Appeal is not the best forum to assess adequacy of playground supervision. A decision that a breach had occurred was made without the benefit of first hand assessment of the facts and witnesses' competency.

2.3 The Court of Appeal should have accepted the trial judge's assessment of the witnesses' statements about adequacy of supervision in the playground in general, and specifically at the time of the accident.

- *Commonwealth v Introvigne* (1982) 150 CLR 258.

3. Breach of Duty of Care

3.1 The non-delegable duty owed by the appellant to the respondent has not been breached merely by establishing an injury has occurred.

- *New South Wales v Lepore* (2003) 212 CLR 511.

3.2 The correct test for establishing a breach of duty is not the '*more likely then not test.*'

- *Commonwealth v Introvigne* (1982) 150 CLR 258.

3.3 The correct test for establishing a breach of duty is whether a '*reasonable [person] in the defendant's position would have foreseen that [their] conduct involved a risk of injury to the plaintiff,'* considering the *magnitude of risk, degree of probability of risk occurring, expense, difficulty and inconvenience of taking precautions,* and any other responsibilities incumbent on the appellant.

- *Wyong Shire Council v Shirt* (1980) 146 CLR 40.
- *Romeo v Conservation Commission of Northern Territory* (1998) 192 CLR 431.
- *Woods v Multi-sports Pty Ltd* (2002) 208 CLR 460.

3.4 Applying the test for breach of duty to the present situation; a reasonable system of supervision was in place at the time of the accident given the likelihood of the accident occurring in such a time, the structure of the supervision system, the school rules, the student's behaviour, and the limitation of resources and impracticability of providing total and constant supervision in the playground.

3.5 A mere absence of a supervising teacher does not lead to a breach of the duty owed to pupils.

- *Australian Capital Territory Schools Authority v El Sheik* [2000] FCA 931 (Unreported, Wilcox, Spender, and Higgins JJ, 11 July 2000) [32].
- *Barker v South Australia* (1978) 19 SASR 83 applying *Geyer v Downs* (1977) 138 CLR 91.

4. Causation

4.1 The mere presence of a teacher will not completely prevent an accident from occurring.

- *Australian Capital Territory Schools Authority v El Sheik* [2000] FCA 931 (Unreported, Wilcox, Spender, and Higgins JJ, 11 July 2000) [32].
- *Barker v South Australia* (1978) 19 SASR 83 applying *Geyer v Downs* (1977) 138 CLR 91.

4.2 The constant presence of a teacher position located at the flying fox would not prevent all injuries from occurring in the play equipment area.

5. Orders and Cost

5.1 The judgement of the Australian Capital Territory Court of Appeal be set aside on the basis that;

- the scope of the non-delegable duty of care owed to pupils is not to insure the absolute safety of students by providing constant supervision;
- the decision of the trial judge that an adequate system of supervision was in place to reasonably protect the safety the pupils under the school's control should stand;
- presence of a teacher would not have prevented all accidents from occurring.

5.2 Cost for the matter to date be paid by the respondent. Alternatively, individual costs to be borne by the parties.

LIST OF AUTHORITIES

You will also need to submit a list of authorities. The list of authorities should be as concise as possible, with as few a number of cases as is possible. Only list cases you propose to cite when presenting your case. Any additional materials on which you intend to rely, such as statutes or secondary materials, should also be set out in the List of Authorities. **Unauthorised reports should only be cited if there is no authorised report, and electronic judgments should only be cited if they are unreported, or the reported version is not in the Law Library**. **You must use the same reports for the same case. It is very frustrating for the bench to be referred to a passage in an unauthorised report when the authorised report is in front of it**

Cases and materials must be correctly cited and marks will be deducted for inaccurate citations. A Frontsheet must be completed and attached to each list.

An example from the QUT Moots Study Guide is below.

Frontsheet for List of Authorities (amend as necessary for application)

IN THE ULTIMATE COURT OF JUSTICE OF PACIFICA

MOOT NO. [ ]
[DATE]

[NAME]
APPLICANT/APPELLANT

v

[NAME]
RESPONDENT

LIST OF AUTHORITIES

SUBMITTED BY
[YOUR NAME]
COUNSEL/SENIOR COUNSEL/JUNIOR COUNSEL*
FOR APPLICANT/APPELLANT/RESPONDENT*

ACADEMIC
]

[NAME (other counsel)]
APPLICANT/SENIOR COUNSEL/JUNIOR COUNSEL*:

* Delete that which does not apply

List of Authorities

MOOT NO. [ ]

LIST OF AUTHORITIES

COUNSEL/SENIOR COUNSEL/JUNIOR COUNSEL* FOR THE APPLICANT/APPELLANT/RESPONDENT*

1.

2.

3.

4.

5.

6.

STATUTES

1.

2.

3.

4.

NOTE THAT IF YOU WISH TO REFER TO ANY SECONDARY MATERIALS SUCH AS TEXT BOOKS AND ARTICLES BY LEARNED AUTHORS THESE SHOULD ALSO BE INCLUDED IN YOUR LIST OF AUTHORITIES UNDER A SEPARATE HEADING OF :

SECONDARY MATERIALS

1.

2.

3.

* Delete that which dos not apply

The Oral Element of the Moot

The oral part of the moot is what most people associate with the concept of mooting. Therefore, it is important to be well prepared and confident, not only about what you will be arguing, but also about Court etiquette.

The moot is a formal appearance, which is intended to replicate a courtroom experience.

1. Dress

Counsel should dress formally for appearances in a courtroom. For a moot, students generally tend to wear suits though this does not mean that you should buy something special for the moot! It is more important to look neat and tidy than to be wearing an expensive suit.

2. Punctuality

Arriving to your moot at least ten minutes early is important to give you the opportunity to settle any nerves and allow for any last minute alterations before the moot commences. There is really no excuse for being late. It is unprofessional to be late for a moot in the same way that it is for a real trial. You do not want to upset an impatient judge before the moot even begins.

3. Modes of Address

You will refer to the judges in the moot as “Your Honour” or “Your Hounours” or sometimes “This Honourable Court”.

You partner in the moot should be addressed or referred to as “My learned [junior or senior]”. The other side should be addressed or referred to as “My colleague” or “My learned friend”.

4. Citations

Cases should be cited in full, unless the Court invites you to dispense with citations or to use abbreviated citations. If you will be referring to a case a number of times throughout your submissions, it may be helpful to ask the Court if you can refer to that case by an abbreviated name, following its complete citation the first time it is mentioned.

Example:

A quote from page 615 of the judgment in Bryan v Maloney (1995) 182 CLR 609 would be cited as "The case of Bryan and Maloney, reported in 1995, Volume 182 of the Commonwealth Law Reports page 609 at page 615.–

Remember that civil cases are cited as "Bryan and Maloney", not "Bryan vee Maloney"; and criminal cases: "The Crown against Bryan", not "The Crown vee Bryan".

Case citation: When referring to a case decision the name of the report should be recited in full with its year (and year of decision if different). For example, [1948] 2 KB 448 is referred to in full as '1948, volume 2, Kings Bench Division Reports page 448', and if a particular passage is to be referred to, the full citation is used with the addition "at page 452".

The decision itself should generally be identified as, for example, *DPP v. Smit*h; *Smith v. Jone*s; *Queen v. Smit*h; and *King v. Smith* - the "v" should be spoken as "and". If the case is a criminal case the "v" is spoken as "against".

Rather than repeat full citations for cases that will be referred to extensively in argument, counsel may ask the Bench for permission to dispense with full citations. This does not mean that full citations are not to be used. The first time a case is referred to the full citation must be given to the Court.

References to High Court judgments

Paragraph Numbers in High Court of Australia Judgments and the use of Medium-neutral Citations

Since the delivery of the first judgment in 1998, the High Court of Australia has incorporated paragraph numbers into the body of its judgments.

Coupled with this initiative, the Court now allows the citation of High Court decisions in a medium-neutral way where the decision has not been published in the printed law reports. In proceedings before the Court, the Commonwealth Law Reports (CLR) remain the required citation for the Court's published judgments.

The new-medium-neutral citation is based on the following format:
(parties) [year of decision] (Court abbreviation) (sequential judgment number)
For example the sixth decision of 1998 appears as *Gould v Brown [1998] HCA 6*

Where necessary, a specific location within the judgment can be identified with the additional reference to the applicable paragraph number. For example, the seventeenth paragraph in *Gould v Brown* would be cited as *Gould v Brown [1998] HCA 6 at [17]*

References to UK Judgments

1. With effect from 14 January 2002 the practice of neutral citation is being extended to all judgments given by judges in the High Court in London. A unique number will be furnished to every such High Court judgment from a register kept at the High Court. A unique number will also be furnished, on request (se below) to High Court judgments delivered by judges outside London.
2. The judgments will be numbered in the following way:

   - Chancery Division EWHC number (Ch)
   - Patents Court EWHC number (Pat)
   - Queen' s Bench Division EWHC number (QB)
   - Administrative Court EWHC number (Admin)
   - Commercial Court EWHC number (Comm)
   - Admiralty Court EWHC number (Admlty)
   - Technology & Construction Court EWHC number (TCC)
   - Family Division EWHC number (Fam)

   For example, [2002] EWHC 123 (Fam); or [2002] EWHC 124 (QB); or [2002] EWHC 125 (Ch).

3. Under these arrangements, it will be unnecessary to include the descriptive word in brackets when citing the paragraph number of a judgment. Thus paragraph 59 in Smith v Jones [2002] EWHC 124 (QB) would be cited: Smith v Jones [2002] EWHC 124 at [59].

4. There is to be no alteration to the arrangements for the neutral citation of judgments given in the two divisions of the Court of Appeal, where the official shorthand writers will continue to provide the number for the neutral citation. As indicated above, neutral citations will not be automatically assigned to judgments delivered by judges in the High Court outside London, because they appear much less frequently in published reports. The Mechanical Recording Department, Royal Courts of Justice, Strand, London WC2A 2LL (tel no 020-7947 7771) will supply

a citation for such a judgment to anyone wishing to include it in a published report.

5. Apart from the changes set out above, the rules set out in section 2 of Practice Direction (Judgments: Form and Citation) [2001 1 WLR 194] are still applicable. Brooke LJ, the judge in charge of modernisation, is still responsible for advising the Judges Council on these matters. Paragraph 4.1 of that practice direction remains unchanged.

6. Although the judges cannot dictate the form in which law publishers reproduce the judgments of the court, this form of citation contains the official number given to each judgment which they hope will be reproduced wherever the judgment is republished, in addition to the reference given in any particular series of reports.

Correct terminology when naming judges

(i) Superior Court judges with some specific title such as the Chief Justice, President, Master of the Rolls, etc.

(a) *Australian*

His Honour followed by title and name; eg., His Honour the Chief Justice Sir
Owen Dixon.
In NSW Mr Justice Young who is CJ in Eq is referred to as Mr Justice Young Chief Judge in Equity, not Chief Justice in Equity

(b) *English*

His Lordship followed by title and name; eg., His Lordship the Master of the
Rolls Lord Denning.

(ii) Superior Court Judges without any special title

(a) Australian - His or Her Honour Justice - (surname only). Use this form even if the Judge concerned has been knighted.

(b) English - Two cases. If the judge is a Lord (His Lordship - surname) eg., His Lordship Lord Reid. If a knight - (all English High Court Judges are knights) His Lordship Justice - surname only, eg., His Lordship Justice James. Again note the use of the form Justice although the Judge has been knighted.

(iii) In the case of a Master, "Master X".

In addressing the Court **do not** use the abbreviated forms used in the reports eg., Sugerman J, Barwick CJ.

Students should use the opportunity to sit in on a court hearing in any one of the several courts open to the public that operate through the year.

5. The Bar Table

The plaintiff/appellant should sit at the bar table on the judge's left. The defendant/respondent will be seated on the judge's right.

Always keep the bar table in front of you neat and tidy. Try to imagine what the judge sees when he or she looks at you. Do they see a well-organized, professional looking pair of lawyers, or do they see a mess of papers, books, folders and pens with a law student desperately scrambling around for the piece of paper he or she needs? Keeping the bar table organized will also help you find what you need easily during your presentation.

6. Correct forms of speech

In a moot situation you are not putting forward your own beliefs or opinions on the case at hand. Rather, you should be ***submitting*** to the court the interpretation of the law and its application to the facts of your case, based on precedent. Counsel should never use phrases such as "I think", "I believe", or "I suggest" when presenting their argument.

Examples of the correct way of presenting arguments are "Counsel for the applicant will submit, "It is our submission" or even just "I submit".

Also, when you refer to a judge, *always* remember to say "Justice Kirby", not Kirby Jay" (for example). The latter will almost certainly elicit a raise eyebrow from the bench.

7. Good manners

Exemplary manners are required at all times. During the moot, when your opponents present their argument, you should sit and listen in respectful silence. You should also pay attention to them while they are speaking, to ensure you can comment to the bench on the points that they raise.

You should not make any loud noise or comments while your opposition is speaking, including ruffling through papers and talking to your partner. You should also refrain from using any suggestive gestures, such as rolling your eyes or screwing up your face, in response to the things being said by your opposition.

Presentation of the Moot

1. Formal introduction

At the beginning of the moot, the Judge will enter the Court, and both teams should rise to their feet. When the judge sits down, counsel and others in the Courtroom may also do so. The name of the case will then be read. Following this the judge will ask for appearances from counsel.

2. Appearances

Senior Counsel for the plaintiff/appellant will rise first, introducing him or herself, and then their Junior Counsel. Counsel for the defendant/respondent will then give their appearances.

Example:

Judge: Can I please have appearances?

Senior Counsel for the Appellant: (stands) "If it pleases the Court, my name is John Smith, and I appear with my learned colleague, Jenny Franks, for the appellant, Pacific Trading Limited in this matter" (resumes seat).

The Judge will respond in some form.

Senior Counsel for the Respondent: (stands) "Your Honour, my name is Paula Green and I appear with my learned colleague Andrew White, for the respondent, Oz Fishing Incorporated" (resumes seat)

Following this the Bench will then indicate to Senior Counsel for the Appellant to begin their oral submissions.

3. Stages of the moot

The plaintiff/appellant will speak first, with Senior Counsel followed by Junior Counsel.

After, the defendant/respondent then presents their argument, again with Senior Counsel followed by Junior Counsel.

After, the plaintiff/Appellant may spend up to 5 minutes for rebuttal. This time is included in the 45 minutes total time allotment.

The senior and junior counsel on each side is given 45 minutes to make oral submissions. They may divide their time between themselves as they wish so long as neither member is allotted more than 25 minutes.

Teams will advise the Judge's Associate before the moot begins of how much time each counsel will be allotted. This will allow the judge's associate to keep time for each competitor.

Structuring the Case

One of the most important parts of your oral argument is actually the structure, including the internal structure of your arguments and the external structure of your speech. A standard speech can be neatly divided into three parts:

- Introduction (tell them what you're going to tell them)
- Arguments (tell them)
- Conclusion (tell them what you told them)

1. Introduction

The introduction is perhaps the most important part of your presentation. In the first three minutes you are on your feet, the judges will form a view on the quality of the presentation they are about to hear. First impressions are important.

The purpose of your opening is to set the agenda for your speech. You need to answer two questions:

- What is this case all about?
- What is my team going to tell the judges about?

If you are the Senior Counsel for either side, you will also need to use your opening to highlight briefly what your Junior Counsel will be addressing. Let the Court know what the essential questions and controversies are in the moot, and then tell them how you will address and argue those issues. The introduction for the Senior Counsel is more important that that of the Junior Counsel as it needs to summarise the entire case.

The introduction, although short, should be very well structured. The structure for the Senior Counsel's introduction is as follows:

- The overview
- The conclusions the court will be asked to reach

- A summary of the facts
- An outline of the important legal principles
- An outline of the framework of your argument

(a) The Overview

The first sentence that comes out of your mouth should be an overview of the entire case. This is also known as your "case theory". This sentence should give a spin on the facts that capture the judge's attention and stick in their minds.

Example

The overview of the Appellant in a defamation case:

> *"Your Honour, this case concerns freedom of speech and the public's right to information in an open society – whether the actions of those who guide our destiny be subject to the judgment of informed public opinion"*

The overview of the Defendant in the same case:

> *"Your Honour, the case before you today deals with the right to reasonable privacy – whether a person who accepts any public office must automatically surrender the details of every intimate moment of their lives to a predatory media".*

(b) The conclusions the court will be asked to reach

Too often in moots, the judges are given a torrent of facts and legal argument, but are left to their own devices to work out exactly what the counsel want done about it. If the judges don't know what you want, they will find it difficult to understand the relevance of your argument.

Effectively, what you must say to the Court is "This is what you should do and this is why it's the right thing to do".

Example

Senior Counsel for the Appellant in a defamation case:

> *"This is an appeal from the decision of the Honourable Justice Lane in the Court of Appeal in Vanuatu. It is our submission that His Honour was wrong in law to decide that there is any public interest*

in publishing our client's personal life. We submit that this decision should be overturned".

Senior Counsel for the Defendant in the same case:

"We will show that the Honourable Justice Lane was correct in his decision that, by standing for public office, the appellant put the question of his integrity in the public arena. We submit that the appeal should be dismissed."

(c) Summarise the Facts

Some Senior Counsel for the Applicant/Claimant ask the Bench if they would like a summary of the facts. This is a matter of personal choice. If you do not offer a summary of the facts and the Bench would like to hear one, they will normally ask.

However, as a matter of standard practice, the alternative, simply including a summary of the facts in your speech without making it dependent upon what the Bench wants is probably unwise, for the very simple reason that even brief summaries will consume valuable amounts of your time that could otherwise be directed at furthering your arguments.

(d) Outline the Important Legal Principles

You should give a brief overview of the legal context in which the decision will be made. This is a very general description of the general body of law that applies to the facts.

Example

Senior Counsel for the Appellant in a defamation case:

"The law of Defamation is set out in the Vanuatu Defamation Act of 1993. We submit that this case falls within section 4(a) of that Act, which clearly states the limits of public interest".

Senior Counsel for the Defendant in the same case:

"My learned friend for the Appellant has brought the bench's attention to section 4(a) of the Vanuatu Defamation Act. However, it is also important to focus on section 16 of that Act, which clearly provides for a situation like the one before the Court. We submit that

the judge at first instance was correct in relying upon section 16."

(e) Outline the Framework of Your Argument

This is where you tell them what you are going to tell them. You will have decided the two of three main points that each speaker will cover. It is important to be extremely clear in telling the court what these are so that they have an overview of your case.

Example

Senior Counsel for the Appellant in a defamation case:

"I will be making two main submissions. Firstly, that the details published about the appellant's life by the defendant were outside the scope of public interest pursuant to section 4(a) of the Vanuatu Defamation Act. Secondly, I will submit that the exception to the public interest doctrine in section 16 of the Act applies to the first and third publications by the defendant. My learned junior will made three submissions. Firstly, he will submit that the damage caused by the publication to the appellant was over one million vatu. Secondly, he will submit that the appellant has a right to compensation under the common law of Vanuatu. Thirdly, he will submit that in the alternative, the appellant has a right to restitution under the Proceeds of Crimes Act 1997.

I will now turn to my first submission, that the details published about the appellant's life by the defendant were outside the scope of public interest pursuant to section 4(a) of the Vanuatu Defamation Act. "

(f) Junior Counsel's opening

The opening of the Junior Counsel is less structured that that of the Senior Counsel. In fact, if the Senior Counsel has concluded well, it may not be necessary for the junior counsel to open their case at all, as it should flow seamlessly from the Senior Counsel's presentation.

However, it is common for Junior Counsels to reiterate what points they will be making in their opening.

Example

Junior Counsel for the Appellant in a defamation case:

> *"Your Honour, I will be making three main submissions. Firstly, I will submit that the damage caused by the publication to the appellant was over one million vatu. Secondly, I will submit that the appellant has a right to compensation under the common law of Vanuatu. Thirdly, I will submit that in the alternative, the appellant has a right to restitution under the Proceeds of Crimes Act 1997.*
>
> *I will now turn to my first submission …"*

2. Arguments

You must present your argument in a logical way, following the summary that you have already given the Court.

Your arguments should focus upon the contentious issues in the area that you are addressing. You are trying to address to the judge's satisfaction the questions that they are most interested in – which will almost always be the difficult areas of the law – and to structure this in such a way so that it is clear to the Bench.

There are many ways to approach the basic structure of your arguments, but the most obvious one is to:

- Determine the particular arguments that you will be trying to make under your area of law.
- Breakdown each of these arguments into the constituent steps that you need to achieve in order to prove this argument.

This basic two-step process is simply a case of saying this is the law, these are facts to which the law applies. In practice though, the construction of your arguments will be more complex than this, but as a general guide this will be effective.

Another important thing to remember is that you must be clear in telling the judge when you are moving on to a new submission. This is called signposting. When you finish up with one submission, you should not just quickly move on to the next. Instead, you must tell the judge what you are doing – this is as simple as saying "And now I will move on to my second submission, that the exception to the public interest doctrine in section 16 of the Act applies to the first and third publications by the defendant".

Have you been stuck with a weak argument? This happens regularly in moots. However, it is important to remember that the winner of a moot is decided on advocacy and persuasion, not on the law. So having a weak case may end up being a blessing in disguise. If you can take a weak point and present some part of it as strong, this is very impressive to the judges.

(c) Closing

During your conclusion you should sum up what you have said, reinforcing the major points that you have submitted to the court. You should be aiming to highlight the essential issues that are raised by the case and the way that you think they should be resolved. The closing statement should be strong and concise; it should not attempt to restate any argument in detail. If you are submitting alternative arguments to the Court then remind the Court that they could side with any one of these alternatives.

Essentially, your task is to sum up the reasons why the Court should accept your submissions and find in favour of your client.

The Senior and the Junior Counsel will do different types of conclusions. Generally, the Senior Counsel will finish by indicating that their Junior Counsel will now continue their side's case. However, the Junior Counsel's conclusion needs to be more detailed. The Junior Counsel will need to summarise briefly the arguments that have been made by both speakers and give a final sum up of their whole case. The last words from the Junior Counsel should be similar to the first words spoken by the Senior Counsel – a pithy statement that embodies your case theory and will stick in the judge's mind.

(d) Rebuttal

The Moot Competition allows the appellant/plaintiff an opportunity to rebut for a maximum of five minutes. This occurs at the very end of the moot, after both sides have presented their cases.

Whilst the rebuttal is allowed to be as long as five minutes, do not be tempted to try to fill that whole time if there are not enough good points to make. This is not an opportunity for you to reiterate your entire case.

Instead, while the respondents are speaking, choose two or three points that you wish to rebut. It is not advisable to attempt to cover more than three points.

Rebuttal should be introduced and structured logically. It should be concise and catchy. The judge can still ask you questions in the rebuttal time, so it

is good to keep five minutes up your sleeve in case you get bogged down on a particular issue with the judge. However, when preparing rebuttal, it is better to keep it short and simple, to around two or three minutes.

Example:

Your Honour I have three points of rebuttal to raise.

Firstly, the Senior Counsel for the Respondent focused the court's attention on section 4 of the Defamation Act, which allows for the public interest to be calculated in a particular way. However, my learned friend omitted one very important point. Section 4 is to be interpreted in accordance with section 16 of the Defamation Act. And when we look at section 16 we see that my learned friend's interpretation of public interest does not hold up. Instead, section 16 supports my submission that the public interest is narrowly defined.

Secondly, the Senior Counsel raised the 1988 case of Smith v Brown, a decision of the Vanuatu Supreme Court, in support of her argument that the public interest is a wide consideration. However, Smith v Brown was subsequently overturned in 1991 by the decision of X v Y, a case of the Vanuatu Court of Appeal. Therefore, I submit that the Respondent's submission on this point cannot be accepted.

Finally, the Junior Counsel for the Respondent stated that the appellant was known as a liar and a cheat within business circles of Port Vila. There have been no facts put before the court to support this allegation and it is merely a ploy to sway Your Honour's mind with an emotive and baseless statement. Instead, the evidence supports the fact that my client was a well-respected man, slandered by the publications of the respondent.

Principles of Advocacy

This last section will endeavour to describe some of the basic principles of advocacy and to highlight the important points to concentrate on when mooting. These principles apply to most types of public speaking, and by the end of this moot, they will become second nature.

1. The Basics

The three most basic elements of your presentation will be your voice, your eye contact and your body language.

It is important to understand and be able to use the power of non-verbal

communication to be a successful advocate. Research shows that non-verbal languages account for more than 50% of the impact of the message. In fact 'when verbal messages contradict non-verbal ones, adults usually believe the non-verbal message' (Burgoon, Buller & Woodall, p.9).

You have a number of non-verbal channels that you can learn to use effectively. You need to be effective in using the power of eye-contact, facial expression, body posture and gesture. The other powerful non-verbal channel at your disposal is the voice. The voice has a number of attributes that you can learn to control and through which you can bring added meaning and persuasiveness to your message.

(a) Eye Contact

In every moot, you should be endeavouring to make as much eye contact with the members of the Bench as is possible. For this reason, it is a good idea to be familiar with your speech and arguments, so that you don't need to rely upon your notes too much. Eye contact is one of the things that almost every judge will take note of.

It is ***essential*** that you do not try to write out your whole speech word for word and simply read it to the judges. It is tempting to do so, because it can be scary to stand up and speak without one, but it will only harm your presentation. If you have a script word for word in front of you, the following may occur:

- you will not be able to give adequate eye-contact to the judges;
- you will look down while reading, so your voice may be muffled;
- your speech may be written in technical, legal language, not in a speaking language; and
- you may get flustered and lose your place when you are asked a question.

Instead, you should have dot points summarising your arguments, the names of legislation and case law which you can refer to if you need to. By the time we get to the competition, you will know your material inside out and you shouldn't need to refer down to your notes very often.

Some people find it very difficult when they start mooting to maintain eye contact, even though they know their material well. If you find that this is a problem, you might like to try speaking without a script so as to convince yourself that you–re able to do this. Other speakers do not need to rely upon their written notes, but have a tendency to stare at the wall or above the judge's head. If you find this is a problem for you it will simply be a matter of concentrating on keeping your eyes on the judges themselves.

One method of practice that can be very helpful is to practice your presentation in front of a mirror. Try to keep eye contact with your reflection for as long as possible without looking down at your notes.

It is also a good idea to know both your introduction and your conclusion from memory. This way, you are able to start strong and maintain constant eye contact for a minute or more, and conclude strongly without having to refer to your notes.

(b) Voice

Voice can often be one of the most difficult parts of advocacy to get right. You are aiming for two things: first, to maintain a confident voice and not disclose your nervousness or discomfort; second, to modulate your voice so as to emphasise important points and provide some variety in your speech. This will get better with practice.

Most importantly – SLOW DOWN! One thing to keep in mind is that most people speed up when they are nervous. Make a conscious effort to speak slowly. In fact, it is very difficult to speak too slowly. So you may feel like you are… speaking… too… slowly… but really, you will probably be at a good speed for presentations.

(c) Body Language

Body language can also be difficult to perfect, particularly since it tends to involve subconscious actions. This is often simply a matter of hearing from judges as to whether or not there is anything you do that is particularly distracting, such as pointing with one finger, or pulling your tie, or tapping the lectern. Your team mates should be able to provide feedback on this as well.

Questioning from Judges - Advanced Advocacy

Where two teams are equally well-prepared and have speakers of generally the same quality, the moot will most often come down to which team is best able to answer questions. In fact, even a team with weak preparation but capable of answering questions effectively and confidently will often perform well against a team with strong preparation. Almost certainly, answering questions is the crux of mooting.

When the judge opens his or her mouth to speak, you must immediately close yours, even if you are in the middle of a sentence. Never interrupt a judge. Never! Even if the judge is going on and on, or if they are giving you

a barrage of questions. When the judge is speaking, look him or her directly in the eye. Do not:

- Look away ("I am about to lie")
- Fidget ("Whatever")
- Shuffle your papers ("Get on with it")
- Roll your eyes ("Please take ten points off me")

There are three basic ideas to keep in mind: flexibility, simplicity and answering directly.

It is very important for mooters to know the arguments they are presenting to the bench very well, so that they can address issues raised by the bench or answer questions put to them adequately. The following pointers for answering questions come from *Gygar and Cassimatis* at 6.23-6.27

- Be prepared to change the order and the way you argue the issues in making your submission, following a direction or a question from the bench. The bench may request you to move on and not hear you fully on an issue, or may ask a question that raises different issues from those you are arguing.
- Although you must not be evasive in giving an answer, you are allowed to answer in a way that puts the best possible gloss on your argument. "It is not the responsibility of counsel to argue their opponents' case for them – your task is to present your client's case in the most favourable terms possible." (at p 98)
- **Never** fob off a question from the bench, even if it is not on point, or your team member has prepared for it. The bench does not want to hear "I will come to that point in a minute, your Honour" or "My learned junior will address that issue, your Honour"- the judge will want you to answer now. If the question is not on point, gently re-direct it to the issue you are discussing by linking it with your argument. While it takes skill to be able to do this effectively, a mooter who is on top of her or his case will be able achieve this with greater ease than one who is not.
- Answers must always provide a reference point such as an authority, unless the bench is inviting counsel to extend the application of principles of law for particular circumstances, or the issue is one of public policy and not of law, or the court is being invited to overturn a non-binding authority.
- Finally, treat each question you are asked as an invitation to show your knowledge of your case. Listen carefully to what the judge asks and take your time to answer. If you do not understand the question, do not be afraid to ask the judge to explain it. If you did not hear the question ask the

judge to repeat it.

1. Flexibility

When a judge asks you a question they almost certainly be moving you away from the precise structure by which you planned to deliver your speech. It is vitally important to be flexible about your speech and go to where the judge wishes to go. Even if you plan to deal with the issue the judge is raising at a later point in your speech, you should still answer the question rather than indicating that you will do so later.

The ability to be flexible is one of the most obvious points that a judge will look for. At the same time, remember that you have determined the particular points that you need to deliver, and so, while acceding to the judge's wishes, also endeavour to keep the moot on track and deliver the submissions you planned to make.

2. Simplicity

One of the easiest ways to keep a moot moving smoothly is to make everything simple for the judge to understand. Remember that while an argument or a submission may make perfect sense to you, this will not always be the case from the judge's point of view. Therefore, be mindful of the judge's concerns and attempt to address them so as to make clear what the issues are and why the judge should find in your favour. In and of itself, simplicity is a good idea because judges tend to respond favourably to this.

However on top of this, keeping explanations simple helps a mooter to keep control of his or her speech, because they will not get caught up in the same questions or line of thought over and over again.

3. Answering Directly

This is one of the most difficult skills to master. All mooters have at one stage or another given in to the temptation to give a rambling answer that does not clearly explain the issues or analysis. When a judge asks you a question, you should take a very brief pause to straighten out your thoughts, as opposed to leaping straight into an answer that may or may not make sense.

In particular, when a judge asks you a "yes" or "no" question such as "does the parole evidence rule apply in this case" you must always give a "yes" or "no" answer immediately and then explain further. At least this makes clear

to the judge the direction in which you are heading, and helps to convey simplicity.

In the unfortunate event that you simply do not know the answer to the judge's question, it is perfectly acceptable to say, "I'm afraid I cannot assist the bench with that issue". Judges will often look favourably on this, because you are not going to waste their time getting bogged down on an issue they do not know anything about. This statement is also a good way to move forward if the judge keeps asking you the same questions over and over again.

Marking of Moots

INDIVIDUAL MOOT MARKING SHEET 2008

Senior/Junior counsel – applicant/appellant/respondent∗

Name:

Content (40 marks) Elements - • written and oral organisation and clarity; • analysis and thoroughness in argument • knowledge of facts and law; • accurate citation of materials	
Presentation of argument (30 marks) Elements - • Courtroom style and manner of delivery • professionalism; • overall persuasiveness	
Ability to answer questions (30 marks) Did the speaker- • answer questions correctly, concisely and without evasion? • explain relevance of cases used? • remain composed under stress? • integrate answers and argument effectively? • remain on track in main argument?	
Total:100 marks	

Comments:

∗ strike out whichever is not applicable

Conclusion

A moot is not won on the merits of the law, but rather on the persuasiveness of Counsel. You are attempting to demonstrate a better understanding of the law and facts, and to show strong advocacy. You will find that with practice it will be easy to stand behind a lectern and deliver your submissions confidently with poise and skill.