The Guide *to* Mooting

Third Edition

University *of* Aberdeen Mooting Society

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Foreword

I am delighted to have been asked, as Honorary President of the Law Mooting Society of the University of Aberdeen, to provide this foreword to the Society's first handbook.

When I first went to Parliament House as a pupil to a leading junior, now Lord Grieve, I had the opportunity of listening to great masters of the art of advocacy pleading in court. Like most of my contemporaries I spent a lot of my time listening to those distinguished advocates and seeking to assimilate the art of which they were such masters. My colleagues and I learned that there is no one right method of advocacy. Each of them had their own distinctive approach which suited their different personality but all were effective in their different ways. We learned that you had to know the facts and the law of the case you were pleading very thoroughly since the judges probed the case deeply as it was being developed. Generally it was useless to be tied to a speech carefully prepared in advance, since it was highly likely that the judge by careful questioning would throw a new light on the problem by which the argument might be advanced in a different way from that which had been envisaged in the study the night before. We learned that one had to be open to adopt and adapt suggestions that might be helpful while discarding with courtesy, but firmness, suggestions that might be put forward as obstacles.

Nothing that I have seen or heard in subsequent years leads me to believe that those very simple principles observed then are in any way flawed. They are, I think, as relevant today, both in court and moot, as they then were.

I very much hope that everyone who uses this handbook and participates in mooting will find it an enjoyable and educative experience.

I wish you all success.

Foreword to the First Edition of the University of Aberdeen Mooting Society's Guide to Mooting by The Rt. Hon. the Lord Mackay of Clashfern, The Lord Chancellor, London, August 1991.

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1. Introduction

A ‘moot’ is a mock appeal case wherein two teams put forward their legal argument before either a single judge or a panel of judges. There are no juries or witnesses in a moot court as the moot is in the appeal courts. This usually being the Court of Appeal or the Supreme Court for English law cases or the High Court of Justiciary/Court of Session or the Supreme Court for Scots law cases) and so the facts of the case are already established.

Mooting is a combination of public speaking and debating, yet differs from both. The mooter does admittedly sometimes deliver a prepared speech, but only insofar as the judge is prepared to accept this. A speech which has become largely irrelevant due to the course of the moot will not recommend the deliverer's skills to the judge. The mooter must always be ready to be diverted from the line of argument which they envisaged to be delivering. For this reason straight delivery of a prepared text is not recommended and can even be perilous at times.

The mooter is also something of a debater, in that he must be prepared to pick up points by his opponents and the judge, and those who are practised in the art of debating should be able to make the transition reasonably easily. However, the mooter is much more constrained by his subject matter than the debater, and must back up his arguments with legal authority rather than persuasive personal opinion. In addition, the mooter is denied the right to interrupt his opponents to question them directly, and cannot employ some of the more theatrical diversions which the debater can bring into play.

The best mooters are those who do three things well:

1. They are prepared thoroughly, having examined the moot problem closely and from all possible angles;
2. They have produced solid, comprehensive and importantly, comprehensible, arguments as a result of their thorough research; and
3. They have selected from these, their best two or three arguments, which they presented clearly and calmly to the judge.

The ability to do all these things while under pressure (and to remain calm whilst doing so) is one which is not to be under-estimated!

These are skills which can be acquired with a little effort and experience, and once you have them you will find mooting to be a worthwhile and perhaps even rewarding pastime which will stand you in good stead in your future career, whether or not this is as a lawyer. Remember everyone has to start somewhere. Perhaps the best starting point is to watch other students mooting before taking the plunge yourself. Feel free - moots are always open to spectators. The

University of Aberdeen Mooting Society runs a smaller, less formal competition for first years later in the academic year, as do societies at other universities. Here you can, "cut your teeth" against others of similar experience and knowledge of the law.

To find out what real life "mooting" is all about it is a good idea to visit the Court of Session, High Court of Justiciary or your local Sheriff Court, where you will see qualified advocates and solicitors debating legal issues. The UK Supreme Court also has a YouTube channel where they upload recorded sessions.

2. Preparation

> "*Cases are won at chambers.*"
>
> – Lord Bowen to his pupil, H.H. Asquith (Prime Minister of the UK, 1908 - 1916)

> "*Preparation is the foundation of good advocacy, anything that is built upon rocky foundations, as we know, crumbles and falls away*."
>
> – Christopher Kessling (Vice Dean, Inns of Court College of Advocacy)

The most crucial, and time consuming, part of a moot, is the preparation that precedes it. The importance of proper preparation cannot be understated.

Once you have been presented with the moot problem the first thing to do is to read it - very, very carefully. The only facts on which you can rely on in presenting your case are contained in the problem. Never try to introduce facts into the problem which are not down there on paper. This is a surefire way of incurring the judge's wrath.

A couple of readings of the problem should make clear to you the issues to be debated in the moot. Consider the following moot problem, *The Dowager Countess of Muck v Diana Luck*:

> "Lady Muck, the Dowager Countess of Muck, is an 80 year old widow who lives in Castle Muck. One of Lady Muck's grandchildren is her favourite granddaughter, the Hon. Diana Luck, who is a Senior Honours History of Art student at Edinburgh University. One of the honours courses Diana is studying at university is called "Victorian Painters".
>
> Diana has always liked one of the paintings on the walls of Castle Muck; a large, dirty, unsigned oil painting of a stag called The Monarch of the Ben. Lady Muck has neither

interest nor knowledge in fine art, being interested mainly in the country pursuits of hunting, shooting, and fishing. One day, Diana asks her grandmother if she can have "that worthless old painting of a stag for my birthday", and, as a doting grandmother, Lady Muck happily agrees to give the painting to her as a 21st birthday present.

Diana takes the Monarch of the Ben to an art dealer to have it reframed, and when the restorers remove the picture from its frame they discover that a second oil painting has been hidden inside the frame. This second painting turns out to be of The Madonna with Holy Grail. Both paintings are sent to the art experts and auctioneers Sotheby's for valuation. The art experts in Sotheby's conclude that the painting The Monarch of the Ben is by Victorian artist Sir Edwin Landseer and is worth £1 million, and that The Madonna with Holy Grail is by the Renaissance master Raphael with a value estimated at £50 million. On hearing of these developments, Lady Muck demands return of both paintings, but Diana refuses to return the paintings. Pending resolution of the dispute between Lady Muck and Diana Luck, Sotheby's retained possession of both paintings with the consent of both parties.

Lady Muck raises an action in the Court of Session for the return of both paintings."

So what are the issues here? Firstly, this is a civil law issue, specifically one of a gift. This can be discerned from which court the action has been raised in. Since this action has been raised in the Court of Session, and not in any of the criminal courts at first instance, it is one of civil law, so do not go into any criminal cases, they shall not be of any use to you here. As for how this matter concerns a gift, well that is clear from the facts, Lady Muck happily agreed to giving the painting to Diana for her 21st birthday as a present. Having identified that this issue concerns a gift, what is the matter in contention? It is the fact that Lady Muck demands the return of the paintings, to which Diana refuses. Counsel representing Lady Muck will be seeking to argue that the paintings can be returned, that the gift can be rescinded or indeed, that it was not a gift to begin with, Counsel representing Diana Luck will be seeking to argue that the paintings do not belong to Lady Muck, do not have to be returned and that a gift was validly formed. The change in the value of the paintings, while it explains the motivations of the parties, does not significantly impact the legal issue at stake here. The matter can be boiled down to whether or not the paintings were a gift/whether or not gifts may be rescinded. These two questions determine what the research will be focused on.

2.1 Research

Once the issues have been identified it is time to start your research. When researching your moot problem, always bear in mind that you are a team. It will save precious time if you research

different points of law, independently. That being said however, it is absolutely essential that you and your partner should work together as a team, and that each should have a complete understanding of the points researched by the other.

At all times during your research take notes. These are useful in allowing you to build up a full picture of the law and undoubtedly save time later on. A process that has worked well for teams in the past is to utilise platforms such as Google Docs which allows multiple people to work together on the same document. Discuss how to divide the workload, and collect the relevant information and research into one shared Google document, this will allow both mooters to not just know what is being researched but allows both team members to see the progress in research.

First stop in your research will normally be your lecture notes. While moots are specifically focused on minute, case-specific topics, your lecture notes should help provide an overview of the relevant area of the law as well as indicate some landmark cases to go to. Your second stop, should your notes not provide an exhaustive answer, is a general source of law on the subject of the moot, such as Walker, *Delict*, McBryde, *Contract*, or Gordon, *Criminal Law*. The main use of these and like books is that they give a general statement of the law with appropriate authority such as case report citations or references to institutional writings, which you must follow up on.

It must be stressed, and stressed strongly, however, that these textbooks can become outdated, cases can and do get overruled, and any authority taken from them should be checked to ensure its continuing validity.

Next base in your research is to read the cases and other authorities you have identified as relevant. You may need to do a simple Google search to find relevant information if the topic of the moot is not covered within textbooks. Some moot problems can be on archaic areas of the law, some simply on less ‘common’ areas of the law, regardless of what kind of moot problem, there will always be something with which you can formulate an argument. If all else fails, and the moot problem is genuinely on an area of the law on which no authority may be found, it may be worthwhile to broaden your jurisdictional scope and see if a similar issue has arisen before the courts of another country, always start closer to home. If it is a Scots law case, check English authorities, if it is an English law case, check that of other Commonwealth jurisdictions, such as Canada, the United States, Ireland, South Africa, India, Singapore, Hong Kong, Australia and New Zealand, to name but a few.

Consider all the cases on the subject and not simply those which suit your argument (if any). It is never too early to start thinking how you might distinguish 'awkward' cases. Distinguishing cases is something that is covered later in this guide, but it is worthwhile to make a list of

counter-arguments to your arguments or position and start considering possible responses to them.

To take the moot problem discussed above, consider the paintings separately for a moment. For the painting that is gifted, The Monarch of the Ben, this is an issue of a unilateral error. Your notes or textbooks will tell you that the general rule is that a contract is still valid and enforceable, notwithstanding that one party has made a mistake about the nature of the obligation she is taking, even if it is that error is essential. The authorities for this general rule will require studying to determine the nature and extent of this rule. For the painting that is discovered within *The Monarch*, the issue is one of whether someone can transfer property via a gift that they did not know they had. One may consider as a starting point, *nemo dat quod non habet* - you cannot give that which you yourself do not own. However, this itself raises issues, firstly whether or not ownership requires knowledge, do you own something even if you do not know it is in your possession? Secondly, even if the painting was not owned by Lady Muck, as she did not know of it, then who would own it? Could it constitute a treasure trove? If it truly is unowned, *bona vacantia*, will it then belong to the crown since *quod nullius est fit domini regis*? All these are questions to be considered.

2.1.1 Choosing Authorities

By this stage you should have a fair idea of the arguments which you intend to employ in the moot and it is now time to select the cases, statutes and other authorities which you will cite to the court. Remember, in court you as Counsel do not give your bare opinion, rather you argue what the law is and how it should be applied. This needs to be buttressed by legal authority, without which an argument has little to no weight.

The number of authorities is usually limited to about 5 or 7 cases; but do not imagine that you must cite as many as are permitted. It pays well to focus only on a few cases - this naturally disciplines your arguments and will enhance the clarity of your submissions. Using many cases can be a double edged sword, you may have more points to support your argument but you reduce the overall time you can spend on each authority and you open yourself up to greater scrutiny on account of the numerous authorities, each with their own particular facts and circumstances which may be distinguished from your present case. As a rule of thumb therefore, use as few cases as possible, use them well, and know them well.

N.B. When citing a case you should use the version in the most reputable case reports you can find, for example Session Cases rather than Scots Law Times, and the Law Reports (Appeal Cases, Family Division, Queen's Bench and so on) rather than the All England Reports and the Weekly Law Reports.

It is permissible to use a casebook such as Gane and Stoddart where the case is otherwise unreported. Obviously, citing an Act of the Scottish Parliament in an English law case is of little use; citing an Act of Parliament in a Scots law case must be checked. When citing a statute please bear in mind that it must apply in Scotland before you can usefully use it. Doing otherwise will be highly embarrassing and may cause offence. To discern the extent of any piece of legislation, consult its provisions under the heading 'Extent' which usually is at the end of modern pieces of legislation. See also any issues of commencement or repeals which may impact your case according to the timeline of the facts of the case.

When citing institutional writings you should beware of using an old edition. Always check with the clerk whether he or she has the same edition as you do - many institutional writings have been revised in the last 150 years. It is also not recommended that you turn to institutional writers as the first step. Stair's writings are significantly important, but in some respects outdated, having been superseded by statutes and cases. Cite the most recent, most authoritative cases you can find, failing which - institutional writings can be of assistance. On the other end of the spectrum of legal authority, modern day textbooks should not be cited to the court unless they contain an especially persuasive argument of law and even then, you cite them at your own peril. Do not cite textbooks unless you absolutely have to. The only scenarios in which this may be appropriate, and will have to be justified to the court, is where there are no authorities upon which you may be able to rely upon. If you feel compelled to cite textbooks, it is a good idea to stick to hardback tomes such as McBryde, Gordon, Walker and Clive. Whilst Woolman and Lake, *Contract*, Stewart, *Delict*, Macdonald, *Succession*, and Jones and Christie, *Criminal Law* provide excellent aids in passing exams, they lack sufficient depth and stature to be cited as authority.

Beware of citing items that are way off the beaten track. A good rule of thumb is to stick to Scots and perhaps English sources, failing which in exceptional circumstances, cases from abroad. While an article in the Greenland Law Review may be on your side it is likely to be regarded with disdain by most judges for its use in court. Similarly views and reports in non-legal journals should in the main be avoided. You should ensure that such sources are essential to your case or that better authority cannot be found before relying upon them.

Avoid the temptation to "pack" your list of authorities to cover all eventualities. This will only annoy the judge (who has to attempt to familiarise himself with all the authorities submitted) and will annoy the clerk of the court (who has to make all the authorities available). It is particularly bad form to cite a "red herring" case or article. Such items can generally be picked out by the opposition quickly (because they invariably are hundreds of pages long and totally irrelevant)

and therefore provides you with no advantage. Moreover this is extremely "uncourtly" behaviour and may cost you the moot in the end.

2.2 Drafting

> *"[T]he genius is having a ten-dollar idea in a five-cent sentence, not having a five-cent idea in a ten-dollar sentence"*
>
> – Justice Antonin Scalia (Supreme Court of the United States, 1986 - 2016)

Having gathered your list of authorities, read through them and identified the relevant parties, it is now the stage to draft your arguments. Preparing a speech in the form of bullet points, which function more so as to structure your speech as opposed to being your speech, works well in practice between balancing content and delivery. It may be worthwhile to write certain sections in full prose, such as case citations and quotes of judges' speeches, to enable their proper and complete delivery. It should be noted that a verbatim speech can be useful especially if you are just starting out in mooting, it remains important however to balance this with aspects of advocacy such as eye contact, speed of delivery and tone. Remember: Your speech is a conversation with the judge, you are not speaking to a jury, public gathering or to the room.

It is also important to have an introduction. An introduction ought to leave the judge in no doubt of what is being asked of them. Many mooters approach moot problems as though they were an exam question. This is a fundamental mistake, an essay is written for an examiner, a mooting speech is prepared to convince a judge. Convince them of what? In an appeal case, it is that the appeal be allowed, for the appellant, or that the appeal be refused, for the respondent. The introduction must clearly and concisely explain the issues and state the reasons the court should rule in your favour. A good introduction is a short introduction, it should be what you are asking from the judge, and a brief roadmap of how you intend to get there. For example an introduction for the above moot problem could be:

"My Lady, the respondents request that the averements made by the appellants be rejected. I shall be addressing averments 1 and 2 and my learned Senior shall cover averments 3 and 4. It is submitted that the court should dismiss the case against the respondents and uphold the respondent's title to the painting, The Monarch of the Ben. With regards to The Madonna with Holy Grail, the matter is either to do with a common error, one that does not invalidate the original contract, or treasure or objects lost, abandoned and ownerless or *bona vacantia*."

An example of drafting a portion of a speech for the above moot problem, from the perspective of the Counsel representing Diana Luck, and regarding the painting having been gifted in ignorance of its true value, is as follows:

- This is a succinct submission.
- I would like to draw your Lordship's attention the case of *Scott and Craig's Representatives* as reported in the 4th volume of the Scots Law Times starting at page 462, decided in the Inner House, Second Division of the Court of Session per Lady Kincairney at page 468, does your Lordship have sight? [Pause until confirmation] and I quote:
    - "The mere fact that a contracting party is ill informed about the subject matter of a contract has never, so far as I am aware, been held to be a reason for reducing it."
- Therefore, Lady Muck's lack of knowledge of the subject matter of the gift is not a reasonable ground for the contract to be reduced.

When printing this out it can be helpful to enlarge the text as well as have double spacing. Markers can be inserted so that you also feel comfortable looking up.

Mooting is a combination of public speaking and debating, yet differs from both. The mooter does admittedly sometimes deliver a prepared speech, but only insofar as the judge is prepared to accept this. A speech which has become largely irrelevant due to the course of the moot will not recommend the deliverer's skills to the judge. The mooter must always be ready to be diverted from the line of argument which they envisaged to be delivering. For this reason straight delivery of a prepared text is not recommended and can even be perilous at times. Avoiding writing a verbatim speech may avoid the temptation to simply stare down at a piece of paper and recite a pre-prepared text.

Having drafted your speech, it is important to review it and practice it. Remember, knowing the law well will aid in answering questions, knowing your own cases inside out is crucial for this. It is only when you fully understand the issues, the relevant authorities which resolve them, and their application to the moot at hand, can a mooter say they are adequately prepared for their moot. It is also key to practice with your mooting partner to see how the speeches fit together as well as to time each other to make sure the speeches not only do not go over time, but leave sufficient time for questions at the end of the moot.

2.2.1 Structure of Submissions

The Senior Counsel for the Appellant must introduce himself or herself and the three other speakers, and should say, "May it please Your Lordship/Ladyship, I am [Caroline Whitmore] and

I appear in this matter on behalf of the [Appellant], together with my learned junior [Miss Sally Webb], and the [Respondent] is represented by my learned friends [Mr William Postgate] and [Miss Mary White].” The second, third and fourth speakers do not then need to introduce themselves, just say, “May it please your Lordship, I am the Senior/Junior Counsel for the Appellant/Respondent and I will be addressing point X of this appeal.”

Generally speaking, submissions must be well structured and easy to follow. The best way to do this is to explain to the judge in very simple terms what the submissions will seek to cover. In simple terms, this should be what you are requesting from the court, and why. In logical form this would be: “My Lord, the appellants/respondents/defendants are requesting X. We will seek to demonstrate why this ought to be the case with X arguments. Firstly, X. etc.” In spoken form this can take the form of: “My Lord, the appellants request that the Confiscation Order made against the defendant be quashed. We will seek to demonstrate 2 reasons as to why the Confiscation Order made to the defendant would not be lawful. Firstly, because causation has not been established and secondly because any such order under the Proceeds of Crime Act 2002 would be disproportionate.” This makes it easy for a judge to note down what you will be arguing. Making the judge’s task of understanding your submissions as easy as possible is your number one priority. If the judge cannot understand your submissions, if it is not well structured, regardless of the merits of the argument - in terms of advocacy it will fail.

It may be helpful to in the preparation stage make a simple numbered summary of your submissions in the following order:

1. Point 1
    a. State simply Point 1;
    b. Case law;
    c. Apply *ratio decidendi* of case law to the present case; and
    d. Conclude as to its impact in the present case.
2. Point 2
    a. etc.

This makes sure that when you are preparing your submissions, you keep it focused on the argument and present your argument in an understandable manner. The body of your submissions should therefore follow the above format. A nice way to remember it is the IRAC method:

I: Issue, identify the legal issue at hand
R: Rule, state the applicable rule
A: Apply, apply the rule you have stated to the case; and
C: Conclude, what does the rule’s application in the present case have for the legal issue

N.B. You can use the IRAC method in your law essays as well to good effect.

A good introduction can set you apart from other mooters and be a factor in determining victory. A well structured, logical body of submission is the bedrock of your case, doing this well is the basis of any victory. The judge is after all taking down notes of what you say, so structure is key in making sure your submission makes sense in the grand scheme of things. It should be noted that you must be slightly fluid with your structure. You won't be rattling off a speech uninterrupted, so a judicial intervention during the moot which confirms, accepts or rejects one of your points, requires amending your speech and structure to take that into account.

2.3 Distinguishing Authority

A few days before the moot you will be required to exchange your authorities. Once you have received your opponents' authorities, read any that you have not come across in your own research. If a case cited by your opponents appears to go against you then you will have to distinguish it in the course of the moot and make a point of doing so. Do not ignore it.

Distinguishing a case can be done in one of three main ways:

1. By arguing that the case has been overruled by one of the cases cited by you;
2. By arguing that the case can be distinguished from the case at issue on the facts or the law decided; or
3. By arguing that the case was wrongly decided in that it conflicted with settled law or legal principle. In this third case, it will be necessary to argue that as a consequence the court ought to over-rule the earlier case (provided your court has that power).

Distinguishing a case need not be a long affair, to take a case that is different on the facts, considering the following example:

“The case of *Gray and Binny* cited by my learned friends ought to be distinguished on the facts as it concerned pressure from both a mother as well as a solicitor who was acting in a professional and advisory capacity to her, contrary to the facts in this case.”

Distinguishing cases is a fine art which you will become more adept at with practice. For further information see Wilson, *Introductory Essays on Scots Law*, "Dealing with Decisions", p78-86.

2.4 Skeleton Argument and Bundle

After having read your case repeatedly, researched, selected authorities, read those authorities repeatedly, drafted your speech, practised your speech repeatedly, the bulk of your work before the moot is done. Two things remain, your skeleton argument and bundle.

2.4.1 Skeleton Argument

A skeleton argument is a summary of your case, and a list of all your authorities and any textbooks, articles or other material you intend to use, and is a required part of a moot. It is prepared for the judge and the other party to the moot in advance and should not be longer than a single side of A4 paper. The purpose of a skeleton argument is just that, to provide a skeleton for your argument to which your advocacy will fashion the body, as well as to avoid the embarrassing situation of a respondent replying to the argument they had expected the appellants to make. It can often be helpful to prepare the skeleton argument after having concluded your research so as to give form to your argument before you start drafting it in more detail. It is to an extent, a personal decision, whether to draft the skeleton argument before, or later. See the annex of this guide for an example skeleton argument.

N.B. Do not leave this to the last minute.

2.4.2 Bundle

You must also prepare a bundle to bring to the moot. If the moot is in person, then the bundle is a folder containing photocopies of the headnote and relevant parts of your authorities and a copy of your skeleton argument. It can be helpful to number the pages for ease of reference, and possibly to have dividers to separate each case. You may use photocopies of law reports, or the scanned pdf copies of law reports on Westlaw, Lexis or Justis, should be used. It is recommended that you highlight or sideline the passages of the authorities that you wish to quote, so that you can guide the judges to the appropriate part quickly. Helpful also are tabs to which you can direct the judges to. You should have an identical copy of the bundle for your use during the moot. Another copy must be prepared for the other side but it need not include tabs, highlighting, dividers, etc.

For a virtual moot, please prepare a single pdf document which is to function as a bundle.

If you have any questions regarding creating the bundle, please contact the Committee.

N.B. Do not leave this to the last minute.

3. Moot Court

3.1 Procedure

It is usually best to arrive about fifteen minutes before the start of the moot so that you can get settled into the surroundings, arrange your papers and get comfortable. Like in a real court, punctuality is a must. Please also be dressed appropriately - Smart dress is obligatory for all mooters in internal and external competitions. Men should wear smart trousers, shirt and tie or a dark suit if possible. Women should wear dark trousers or a skirt with a light blouse or a dark suit if possible. Gowns will be provided where possible (we have a limited number of gowns available).

Please note that there is no pre-match entertainment (pipe bands are out!) and no half-time interval.

The Court will be called to order by the Clerk shouting "Court" and Counsel must rise at this point and remain standing until the judge is in place on the bench. A golden rule of mooting is that counsel must always stand when addressing the court. Once the court has been called to order the judge will normally say "Who appears?".

This is the cue for the Senior Counsel to identify him or herself and his or her Junior Counsel, stating: "Appearing for the Appellant My Lord is Mr/Ms X as Junior Counsel, and I, Mr/Ms X as Senior Counsel." The first introduction is made by the Senior Counsel for the Appellant. If they so desire they may introduce all four mooters.

Once counsel has been introduced the judge will invite the Junior Counsel for the Appellant to make their submissions to the court. What follows is a brief and by no means comprehensive outline of what is expected from each speaker (in order).

3.1.1 Junior Counsel for the Appellant

1. Offers to provide a short précis of the facts of the case;
2. Outlines briefly the points of law on which the appellant's case is based, indicating which of these is to be dealt with by him or her, and which falls to be dealt with by his or her senior. (The judge will normally take a careful note of the outline which junior counsel presents, so it is advisable to deliver this part of your speech quite slowly, watching the judge's pen as you go);
3. Deals with the points of law mentioned to the judge; and
4. Concludes.

3.1.2 Junior Counsel for the Respondent

1. Does much the same job in outlining the case in law for the respondent. N.B. There is obviously no need to provide another précis of the facts, but as the appellant's case has already been outlined then some mention should be made of the areas where you differ from your opponents;
2. Responds to points made by his or her opposite number in so far as these have directly contradicted own submissions;
3. Deals with points of law mentioned to the judge (these should be adapted if the appellant has perhaps conceded a point you expected to argue. It is not advisable to plough on as if nothing had happened); and
4. Concludes.

3.1.3 Senior Counsel for the Appellant

1. Starts by discussing and answering points raised by the respondents;
2. Outlines the points to be covered in their speech (there is not usually any point making any more than a passing reference to points dealt with by your own Junior Counsel);
3. Deals with the points mentioned to judge, which in the case of the Senior Counsel ought to be the more difficult, complex and lengthy arguments. This is expected by the judge and is the reason why the Senior Counsel has a greater time allocation; and
4. Concludes with a summary of the entire arguments of the Appellant counsel.

3.1.4 Senior Counsel for the Respondent

1. Responds to points made by the Appellants;
2. Outlines own submissions and presents them (Senior counsel for the respondent has the advantage that the appellant's case has been fully developed before him. The corresponding disadvantage is that the case may have moved further from the area of law which counsel has researched and prepared. If this is the case you must take account of this and adapt to the changed circumstances. This may require a little speaking off the cuff, which is indeed very difficult, but if you can manage it, it will only do you good when the judge comes to consider the mooters' performances); and
3. Concludes with a summary of the entire arguments for Respondent counsel.

3.1.5 Right of Reply

There may then be a Right of Reply lasting 5 minutes for the Senior Counsel for the Appellant, use this time to respond to any pressing or particularly damaging points raised by the respondents but do not rehash your whole argument!

3.2. Court Address

Addressing the court is a valuable skill which it is worthwhile mastering in the moot arena because basically the same styles of address are used in real courts. Some of the points will need practice so that you get the right terminology every time, but the better mooter will look to do this to ensure a polished performance.

Always address the court in the third person. The judge is always "my Lord." When addressing the judge, the word "you" is not used - it is instead "your Lordship." For instance: "My Lord, if I may now deal with the point Your Lordship raised earlier." N.B. If the judge is female, ask before the start of the moot if she wishes to be addressed as "My Lady" and "Your Ladyship."

Always be courteous and show respect for the judge. Speeches should start: "If it pleases your Lordship" or "Thank you, My Lord." N.B. Note however, the difference between obsequiousness and courtesy.

Do not refer to your opponents by name, but as "My Learned Friend, Junior/Senior Counsel for the Appellant/Respondent." Your own partner may be referred to as "My Learned Senior/Junior".

Do not give the court your opinions or beliefs on the law. Give the court your "submission". For example: "I submit that the law is X...." Do not say "I think that that law is X...."

Before finishing your speech it is generally best to invite the judge to ask any questions on the points you have raised. Say: "That, My Lord, concludes the arguments I wish to submit on behalf of the appellant/respondent. Perhaps there are some issues on which I may be of further assistance?" If not, conclude: "I am obliged, My Lord."

Addressing the court is a valuable skill which it is worthwhile mastering in the moot arena because basically the same styles of address are used in real courts. Some of the points will need practice so that you get the right terminology every time, but the better mooter will look to do this to ensure a polished performance.

3.3. How to Cite Authority

As in addressing the court, there is an art to presenting authority to the court. When citing a case to the court you should not use written abbreviations. Instead quote the full form. For example, instead of saying "Donoghue vee Stevenson 1932 S.C. (H.L.) 31..." you should say "Donoghue against Stevenson, reported in the 1932 volume of Session Cases at page 31 of the House of Lords reports". Similarly, always refer to Her (or His!) Majesty's Advocate and not "H.M.A.".

When referring to a passage within a case, you should make it clear to the judge exactly where he will find the passage to which you wish to draw his attention. For example, say "Donoghue against Stevenson, reported in the 1932 volume of Session Cases at page 31 of the House of Lords reports, the speech of Lord Aitken on page 44, ten lines up from the bottom of the page, starting "Who then is my neighbour?"

Do not start to quote until you can see that the judge has found the exact place in the report. Always ensure that you and the court are using the same set of law reports. Do not cite from the Scots Law Times if you cited the Session Cases in your list of authorities! It is often advisable to have a photocopy of the entirety of any case to which you intend to refer. Then, if the judge wants to draw your attention to a different passage in the report you will be able to understand his point and respond. When citing a case, it is often advisable to offer to acquaint the judge with the facts of the case. This offer is often not taken up, but it is still polite to do so.

For instance, consider Donoghue v Stevenson [1932] AC 562. The correct way to cite this in court is as follows:

"I would like to direct your Lordship's attention to the case of Donoghue and Stevenson, reported in the Nineteen Thirty Two volume of the Appeal Cases, starting at page 562. The law report for this case may be found on page X of the bundle. This case was a Scottish appeal to the Appellate Committee of the House of Lords and was decided by a panel of 5 judges. Would your Lordship like the facts of the case? [Facts of the case]. My Lord, I would like to draw your attention specifically to paragraph X of Lord X's judgment, starting at page X of the law report, this would be page X of the bundle. Does your Lordship have sight?"

So here, citing a case to a judge has 6 elements to it. Element 1 is the case citation itself. This is the name of the parties, "Donoghue and Stevenson", followed by where the case was reported. Court cases are reported in law reports that have a hierarchy. You should cite the most authoritative law report available in a moot, so an Appeal Cases report is of more significance than a WLR, Weekly Law Report, report of that very same case. Please consult this University of Oxford explanation of law reports when you are citing authority.

Element 2 is directing the judge to which page of the bundle the case is on. You are required to make a 'bundle' of all the authorities you are citing in a moot. This can be dozens of pages long so it is helpful to direct the judge to the page where the authority you are citing starts. In this you should include the following:

1. Skeleton Argument
2. List of Authorities

3. PDF downloads of the law reports of the cases you are citing.

N.B. In person moot bundles should be in folders, highlighted and tabbed. Virtual moot bundles should be one PDF document and the sections you will be citing highlighted.

Element 3 is the authority of the case. You are explaining which court decided the case, how many judges there were and which jurisdiction the case is from. This is vital in establishing whether or not the authority you are citing is binding or not. By explaining that this is a Scottish appeal case to the House of Lords, the then final court of appeal and that it was decided by a panel of 5 judges, if the moot was held in the Court of Sessions, Outer House, then this judgment would be binding. Citing a Sheriff Appeal Court case to the Court of Sessions for instance would not have this binding impact. It is also important to remember that you should not rely on English cases in Scots law moots and vice versa. At most they are only of persuasive value and you must explain to the judge why this should listen to the case.

Element 4 is the facts of the case. In Donoghue and Stevenson this was about a slug being found in a bottle. Ask the judge if they would like a brief summary of the facts of the case. Using cases that are wildly different on the facts to the current moot problem is of limited help unless there is a compelling reason why. It is best therefore to use cases that have similar facts because you can argue that because the facts of the two cases are similar, the legal result ought to be similar as well. This is the entire point of citing cases in a moot. Sometimes judges will say that they do not need the facts of the case, it is still polite to ask regardless rather than assume that they do or do not want the facts of the case.

Element 5 is directing the judge to the specific part of the judgment you are using. Quote exact sentences that you wish to rely on. Your summary of the judgment has no legal weight. The words used in the judgment part of the law report do, this is why you are citing the case. Referring back to the IRAC method, this is the rule part, the 'R'. You are stating the rule you want to rely on. For very lengthy paragraphs or a number of paragraphs, ask the judge if it is permissible to provide a summary of the paragraphs rather than reading whole paragraphs out. This can be done in the following way: "My Lord, I would like to draw your attention specifically to paragraphs X to X of the judgment, this may be found on page X of the bundle. Since this is a lengthy section of the judgment, is it permissible to provide the court with a summary of each paragraph rather than reading each paragraph out my Lord? If your Lordship could still have sight of the paragraphs it may still be of help to his Lordship."

This way, you will give the judge the option of receiving a summary of the paragraphs while still having the judgment right in front of them for them to refer to if necessary. It is still advisable to use shorter paragraphs or parts of longer paragraphs rather than entire paragraphs.

Element 6 is usually said after giving a short pause after Element 5. This is to give time to the judge to turn to that page. After a handful of seconds, enquire, “Does your Lordship have sight?” Once they confirm they have sight of the paragraphs you are quoting. Proceed by saying, “and I quote, ‘...’”

That concludes how you cite cases in a moot. There are however two auxiliary points. Firstly regarding the citations themselves and the second about the choice of authorities. Firstly, after you have cited your first case fully, it is good practice to ask the court if you can dispense with formal case citations in the following manner: “If it pleases his Lordship, may I dispense with formal case citations here on out?” This way you can hopefully avoid having to read out a paragraph of information and get to the crux of the matter more quickly. Most judges seriously want mooters to ask this because no one enjoys sitting through listening to case citations. The second point is the choice of authorities. Different moots have different limits but typically you can cite between 5-7 authorities as a maximum. It is almost always, in 99% of cases better to use fewer authorities but use them well and use them often. Having 2-3 cases that have positive judicial consideration (i.e. have not been overruled), are similar on the facts of the case, are of the same jurisdiction, ideally from the superior courts and address the legal issue in detail is infinitely better than citing 7 irrelevant or marginally relevant cases.

3.4. Advocacy

> *“I can’t bear it [legalese]”. “Terrible! Terrible!”*
>
> – Justice Antonin Scalia (Supreme Court of the United States, 1986 - 2016)

One of the most important skills of the mooter is straightforward public speaking. You should remember that no matter how familiar you are with your arguments, the judge is hearing them for the first time. You should always pay special attention to ensuring everything you say is clear and well-structured. Getting someone to read over your submissions before you present them is a good idea.

When speaking in the moot itself all normal rules of public speaking apply. Your delivery should be clear and proceed at a reasonable pace. Learn not to mumble into your chest or to put your hand up to your mouth. These signs of nervousness will impair the clarity of your voice. Don't get carried away with body language either. You are presenting a case in law, not a comedy routine.

This rules out excessive use of humour. Telling the one about the Scotsman, the Englishman and the Irishman does not advance your case in law, (and wastes valuable time). As in all public speaking, good eye contact with the judge is important. This gives an air of confidence, suggesting that you are convinced by what you are saying and that the judge should be convinced too. Don't play to the audience - they are for your purposes totally irrelevant.

While it is obviously important to make yourself heard and to appear calm and confident, do not be too forceful in your delivery. The judge may respond to aggression with aggression, and this is clearly not in your favour. Few, if any judges will respond positively to a bullying or hectoring counsel. Your aim is to persuade the judge, not to intimidate him! A little humility goes a long way. That said of course, if you feel that the judge is wrong in his understanding of your case, then you must gently point this out. When the point the judge disagrees with is the central thread of your entire argument then you should be prepared to stand your ground and argue your case. The judge may force you to do this purely to see your mooting skills. If the argument is less important, perhaps one of a number of submissions, and it is quite clear that it is not acceptable to the judge, do not try the patience of the court and waste time by pursuing a hopeless cause - move on to your next line of argument.

Timing is a very important factor. First and foremost you must speak slowly enough to be understood, so you should tailor the length of your submissions to the point at which you are speaking at a reasonable pace and are still comfortably within your time limit. Many judges take copious notes during a moot - you should keep an eye on the judge's pen and slow down accordingly. Remember that you expect a lecturer to go slowly enough for you to take lecture notes - don't demand more from the judge than you would of yourself in that context.

It is not a wise idea to have your submissions up to the full time limit. Remember that in the moot itself you will have to take account of the time the clerk takes to find the authorities, the judge's questioning and so on. Perhaps you should practise your submissions out loud to your friends. The more familiar you are with standing up in front of an audience and making your submissions, the more fluent, confident and persuasive you will appear. You can also time yourself this way. Finally, remember the advice of the Sheriff who said: "Reserve high drama, histrionics, emotions, tears and blood for a jury. Judges are immune".

3.5. Judicial Intervention

> *"[G]ood counsel welcomes, welcomes questions".*
>
> – Justice Antonin Scalia (Supreme Court of the United States, 1986 - 2016)

Answering questions well can make the difference between winning and losing a moot. The best advice is simply to prepare well. The more you prepare, the better a grasp of the law and the facts you will have, making your answering of questions easier. It is a good idea to try and spot the weaker parts of your argument in advance as this is where most tricky questions arise. Watch out for what seem to be trick questions. Many questions may seem easy to you - they probably are. Many judges do ask easy questions simply to check that you know the basics.

If the judge asks a question to which you do not immediately know the answer do not panic. Don't be afraid to stop for a few seconds to think about it. If necessary, ask permission of the judge to consult with your partner. Take some time to think about a response, but not too long - remember the clock does not stop for judicial interventions.

What you can do when a judge asks you a question is the following:

1. Listen intently, making sure you fully understand the question - If you do not understand the question, ask for a clarification, e.g. “Thank you for your question my Lord but I am not entirely sure I have understood it correctly? [Explain what you think the question asked in]” If you have misunderstood, the judge will correct you. This is better to do than start waffling and warbling on about things.
2. Write down the question - I usually have a notepad to write down things during moots. Write down the question asked so you have another opportunity to understand it better and also give yourself more time to think of a response.
3. Thank the judge for their question - There is a fine line between genuine thanks and sycophancy. You should sincerely want to be wanting to help the court understand the issue and your client’s submissions. “Thank you my Lord, with respect... [reply].”

If the judge directs you to address a particular point, say, “If your Lordship/Ladyship pleases… [Reply]”. Alternatively, you can ask the judge whether you can return to the question at the end of your submissions, only do so when it is not directly related to what you just said. Essentially, if you say X, and the judge asks a question about X - usually best to answer it there. If you say A and the judge asks you a question about B, you can ask to return to the question later. Remember to write it down and do leave enough time to return to the question. Do not just leave the question hoping no one will notice - everyone will notice. If the judge asks a question that you will be addressing in your submissions you can politely ask, “My Lord, the question you ask is one that I shall be addressing in my submissions, if it is permissible may I return to it then or would your Lordship prefer that I provide an answer now?”

3.6. Time Management

You will not have an unlimited period of time to present your arguments, quite the opposite. For internal moots at the Society, Junior Counsel for the Appellant has 15 minutes, followed by the Junior Counsel for the Respondent who also has 15 minutes, followed by the Senior Counsel for the Appellant who has 20 minutes and then the Senior Counsel for the Respondent who also has 20 minutes. Finally, the appellant has a Right of Reply lasting only 5 minutes, though note this is not obligatory. In total, a moot run time is 75 minutes, of which, the respondents have 35 minutes and the appellants 40 minutes. You need to be very efficient with your time usage, 20 minutes may sound like a long time to talk but the time will fly by.

The following division is usually the most appropriate way to manage your time but remember, this is not fixed and circumstances may require you to change this slightly.

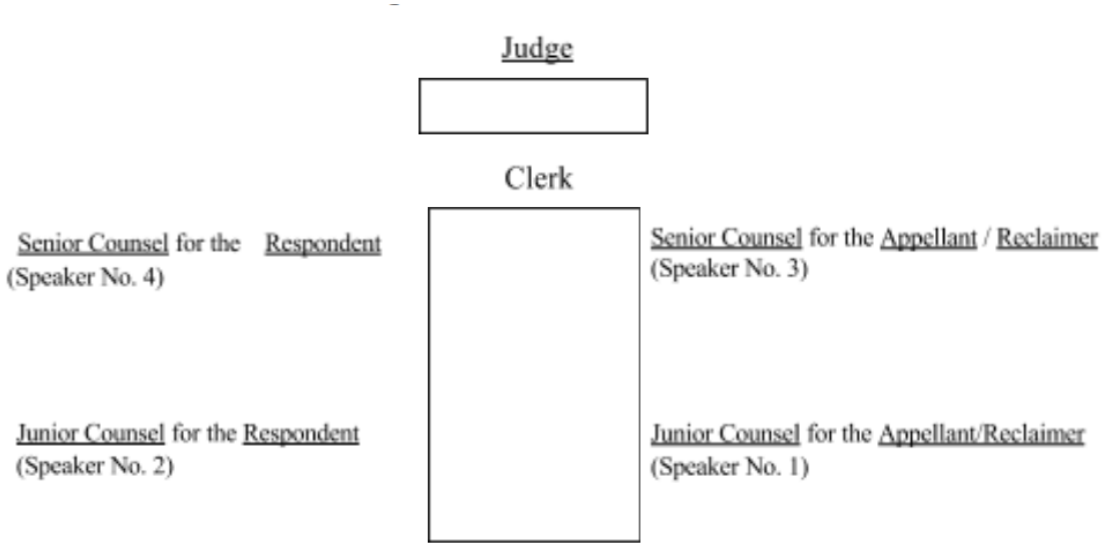
4. Conclusion

Congratulations on reaching the end of this Guide to Mooting! We hope that mooting seems less daunting at this stage, if you do still have any questions or require advice or help, please feel free to reach out to either of the four Moot Coordinators or the Master of Moots for assistance - They are all more than happy to be of help! Additionally, have a look out for our semesterly How to Moot Seminars, if you missed it or would like a refresher, we usually make the Powerpoints available for download on our Facebook page for the event. Otherwise, best of luck on your moot!

As a final mention, here are some other resources:

- Westlaw guide to mooting
- UCL Law Society Mooting Procedure
- Oxford University Price Moot Oral Rounds Guide
- University of Edinburgh Mooting Handbook
- Lincoln's Inn Internal Mooting Document
- General Outline of a Mooting Problem
- Bodleian Library Mooting Guide
- Routledge Textbooks Mooting Guide
- Advanced Fundamentals of Appellate Advocacy in a Moot Court

Annex A: Structure of a Moot Court



Annex B: Sample List of Authorities and Skeleton Argument

Name: MT Cicero **Court 72**

College: Xavier

IN THE COURT OF APPEAL
ON APPEAL FROM THE COUNTY COURT

Between:

ST MATILDA'S COLLEGE **Appellant (Claimant)**

– and –

TOAST **Respondent (Defendant)**

LEADING COUNSEL FOR THE RESPONDENT'S LIST OF AUTHORITIES

Legislation:

1. *Human Rights Act 1998*, ss 6, 12

Cases:

1. *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 (CA)
2. *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534 (HL)
3. *Die Spoorbond v South African Railways* [1946] AD 999
4. *Hector v A-G (Antigua and Barbuda)* [1990] 2 AC 312 (PC)
5. *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234
6. *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL)

Submitted on behalf of counsel for the respondent:

MT Cicero
15 March 2011

IN THE COURT OF APPEAL
ON APPEAL FROM THE COUNTY COURT

Between:

ST MATILDA'S COLLEGE **Appellant (Claimant)**

– and –

TOAST **Respondent (Defendant)**

LEADING COUNSEL FOR THE RESPONDENT'S OUTLINE OF ARGUMENT

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1. The question on the appeal

The question is whether the restriction of the right to freedom of expression entailed by permitting governmental bodies to sue for libel meets a pressing social need and is proportionate to a legitimate aim, taking into account the margin of appreciation in balancing the rights to freedom of expression and reputation: *Human Rights Act 1998*, ss 6, 12; Sch 1, Pt I, art 10.

2. Protection of the reputation of a governmental body such as the appellant does not meet a pressing social need

There is no reported case in England or Wales in which an educational institution has sued in libel, suggesting that there is no pressing social need to protect their reputations: *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534 (HL) ("*Derbyshire* HL") at 551 (Lord Keith of Kinkel). Further, the availability of libel claims by individual members of governmental bodies and of claims in malicious falsehood by the bodies themselves shows the absence of a pressing social need.

3. Protection of the reputation of a governmental body is not a legitimate aim

3.1. The respondent accepts that the appellant has a reputation. However, the nature of a governmental body is such that its reputation is not protected by defamation law.

3.1.1. A governmental body has only a public, not a private, reputation. Its reputation is robust and invulnerable to the kinds of attacks against which defamation law protects: *Die Spoorbond v South African Railways* [1946] AD 999 ("*Die Spoorbond*") at 1009 (Watermeyer CJ). The reputation of an educational institution, is both public and enduring.

3.1.2. The reputation of a governmental body is earned or lost in political debate: *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 (CA) ("*Ballina*") at 711 (Kirby P). The reputation of an educational institution is earned or lost in academic debate and defended through meetings, published assertions, inquiries and the regulation of its conduct through statutes, regulations and rules.

On the basis of these submissions, counsel respectfully submits that the appeal be dismissed.

MT Cicero, 15 March 2011