RMIT Law Student Society
Mooting Guide 2017

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Introduction

Advocacy work is integral to working as a lawyer and mooting is the greatest opportunity for students to practice these skills whilst still at University. Mooting is not debating; it is not public speaking; it is about advocating for your client. I have found mooting to be one of the most rewarding and enjoyable activities through my time studying law and encourage you to get involved in any capacity. You will meet lots of new people and get a far greater understanding of the substantive law once you see it in action through participation in a moot.

Author of the Guide: Paul Melican

So what is a moot?

A moot is a mock proceeding in a mock court. It is usually an appeal from a lower court where the evidentiary matters have been settled and the focus. There are varying levels of formality and procedural correctness depending on the moot, the internal competitions are less formal then intervarsity competitions.

What's the process?

Initially you will be given a problem or scenario which usually includes the specific area of law which is being contested.

An example may be contract law, where there has been a breach of contract for supply of services by both parties, or a torts issue where both parties appear to be wronged in some way and also to have caused a wrong. Scenarios are written so that each party has clear strengths and clear weaknesses and the winning team will be able to create a clear and simple narrative that minimises the weak aspects of the case and makes a compelling case for their cause of action.

The situations may be a case at first instance or on appeal and could be in a variety of situations such as an arbitration tribunal, Supreme Court, Court of appeal or VCAT.

Each moot competition is different and will require more or less preparation depending on the scope of the problem and number of the teams involved. Larger, more prestigious moots may allow a couple of months for written submissions, requiring submissions be written for both parties of 15-35 pages each. Other smaller moots may require shorter written submissions of 4-5 pages, due a couple of days prior to the moot. In all competitions you will have an opportunity to review your opponent's submissions well in advance of the first round. In many competitions, you will write your

second submission in direct response to a submission from the first team that you will moot with in the competition. Oral arguments are made in person in front of an arbitrator or a judge and will usually go for between 15-20 minutes.

Who will be judging you?

It all depends on the moot. You may appear in front of;

- Student Judges
- PHD or Masters Students
- Lecturers from your university or another university
- Team coaches from other teams
- Members of the profession, both Solicitors or Barristers
- Real judges or members of the forum you are appearing in.

In the finals of a large, competitive state or national moot competition you may appear in front of the Chief Justice of the Supreme Court or a High Court Justice.

Preparation

Preparation is key to your success in a moot. Usually, the team who is best prepared will win. Even if you are new to mooting if you prepare well and understand the scenario, the law, have practiced your arguments in front of others repeatedly and understand your objective, or 'narrative' of how you see the facts, you will have a real chance of knocking out a well-seasoned team who is less well prepared and does not present a convincing story, or cannot respond well to questions from judges on the day.

Understand the Problem

Understanding the problem is more than simply reading it. You need to understand the facts that you have been given, the legal issue at hand, and most importantly you must understand what your client wants and what their expectations are. If the matter is a commercial dispute consider; if you were the party you are representing, what is your objective? Do you want money? Do you want the other party to do or cease doing something? Or are you merely defending yourself? Once you understand your party's objective, you need to construct a logical flow of the law around your narrative. In a case of negligence where 'Party A' has won a judgement from 'Party B' and there are multiple grounds of appeal, you need to assess how many of those grounds you need to win in order to overturn the judgement. It may be that you only need to win on one of those grounds to get the desired result, or you may have a series of arguments that build and you need to win all of them in order to overturn the original judgement. It is often simpler if you are the respondent, especially if you do not have a counteraction, as your objective is usually to counter the appellant's submissions. A respondent must consider how the appellant's case is built, if they have multiple grounds and do you need to defeat each one? Or do you only need to defeat a central pillar?

Brainstorming

- What issues are immediately apparent for each party – ie, breach, negligence, misleading conduct, damages etc
- Are there any possible defences to these issues?
- What appear to be the key issues for each party that they have to assert and defend?
- How can these issues be grouped into 'heads of law' ie: a group of issues may fall into statutory breaches of the consumer law, a group may fall into common law torts and so on
- Prioritise these heads of argument- which are strong arguments and which are fanciful? Are there any claims or defences which are weak and could be easily defeated by the other side? For instance, trying to claim very high damages for a contract breach, where your client has done nothing to mitigate the situation, could be easily defeated by an opposing team who exploits your weak arguments.

Legal Research

One of the great things about a moot is that there is always more than one of you and you are part of a team. Legal research, especially if it is a complex scenario with multiple grounds of

appeal, should be split up between you. However, It is imperative that all of you have a good understanding of the basic law of each argument your team relies on for the written submission and especially for oral arguments. Make sure you review all sources of law, legislation, case law (both foreign and domestic) and journal articles. I often like to start with my text books or a journal article for a cursory overview and then move to cases and legislation as my understanding of the law grows.

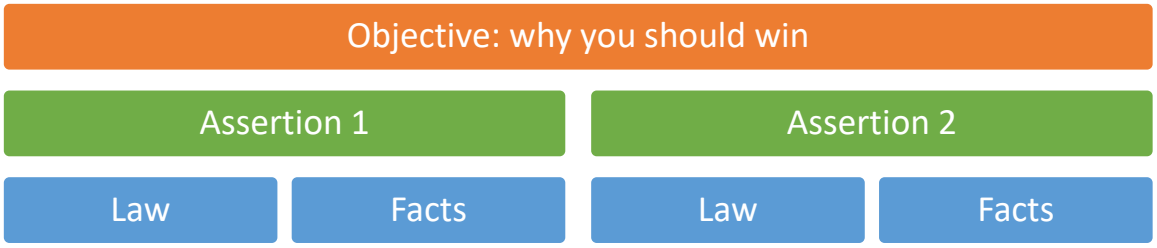
Working with your team

A team captain should be appointed who is an experienced mooter, who can assist to guide the direction of a team and allocate fair workload.

It is important that roles are divvied up early between the team and that mutual times are agreed to meet to plan and structure the written submissions and most importantly, to prepare and present practice arguments in front of each other.

Structuring your Argument

The structuring your argument and understanding the logical connection between your overall contention or position, i.e. why your client should win the case with the assertions you will rely upon to demonstrate this, is important. Further these assertions must be supported by law and fact.



Written Submissions

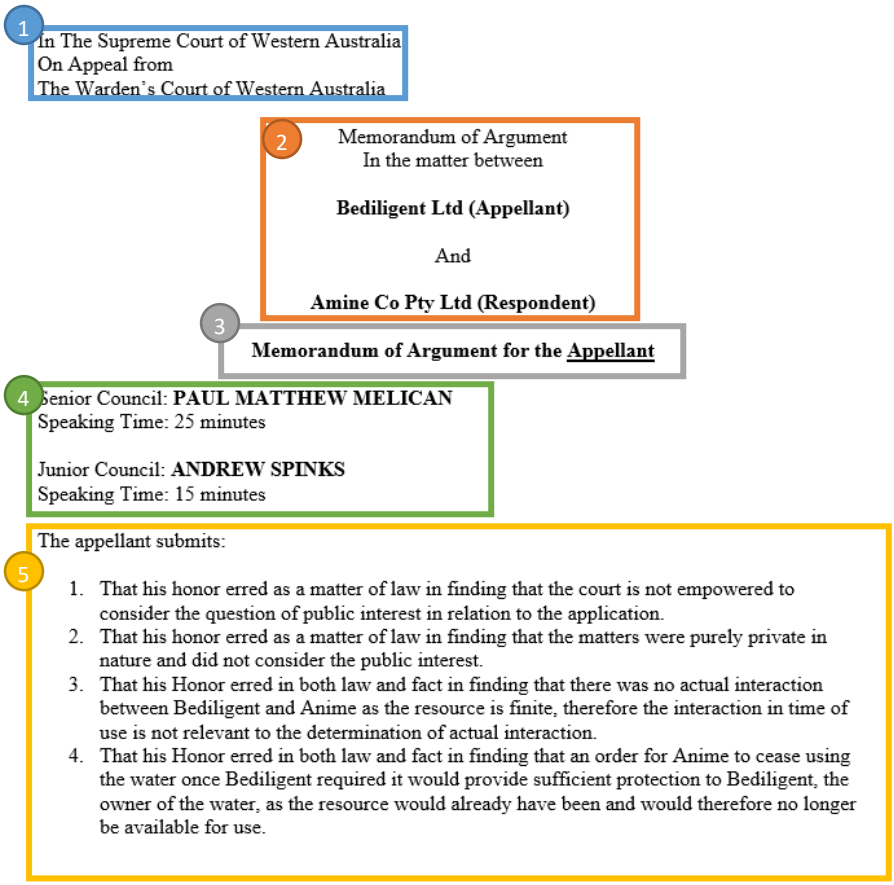
Written submissions form the basis of your oral arguments and serve multiple purposes;

- You must submit them and they will be reviewed by the other side
- The judges will review them, usually prior to the moot
- They can be used to guide your oral arguments, but often your arguments on the day will be further refined and may look quite different from your written arguments.
- Written arguments serve as a basis for structuring your case, however through practicing your arguments in preparation you may find that some arguments are weaker than others and may not be best to present in front of judges on the day

Read the rules of submissions

Each moot will have its own specific rules as to what form your submissions must take, when they are due and how long your opponents will have to review your submissions. If you are required to prepare both sides of the argument it is usually advantageous to prepare the appellant's side first.

Structure of Written Submissions – Part One: Title Page



Graphic 1: Example title page of written submissions

1. The procedural history of the case and the court that you are appearing in
2. The title of the parties
3. The title of the document
4. Your names and speaking times
5. A brief summary your main arguments, these will form headings in the document

Structure of Written Submissions – Part Two: Summary of Facts

Following the title page of your written submissions you should include a short summary of the main facts of the case. This needs to be accurate and fair but it is important to ensure you mention all of the facts that you are later to rely upon. The facts should be summarised objectively and you ought not subjectively characterise these facts you can highlight the importance of facts that are important to your case. This section can be very important in building and presenting your particular 'narrative'. For instance, in highlighting the adverse consequences as a result of the conduct of the other party.

Structure of Written Submissions – Part Three: Your main arguments

Generally, the structure of argument should include your strongest argument first and should end with a damages or remedies section. I usually like to take each of the arguments that I have in my summary and use them as headings for the body of the submission. It is also helpful to have the same numbering in your main arguments as in the summary.

Senior Counsel:

1. That his honor erred as a matter of law in determining that the court is not empowered to consider the question of public interest in relation to the application.

1.1 The Wardens court is not restricted in its review of applications for miscellaneous licenses to excluding the equities of the case

Re Roberts; ex p Western Reefs Ltd v Eastern Goldfields Mining Co Pty Ltd (1990) 1 WAR 546

Tortola Pty Ltd v Saladar Pty Ltd [1985] WAR 195

1.2 The objector to an application is not required to establish a special interest in the subject matter of the application in the Warden's Court

Re Heaney; ex p Serpentine-Jarrahdale Ratepayers and Residents Association (1997) 18 WAR 320

1.2.1 If an the objector can object on the grounds of public interest then the Warden's court must equally be empowered to refuse an application on public grounds

1.3 The minister has the right to refuse applications that are not in the public interest

s75(5) and s111a *Mining Act 1978* (WA)

1.4 The ministers power to refuse applications on the basis of public interest extend to the Warden

s111A *Mining Act 1978* (WA)

Re Warden Calder; Ex p Cable Sands (1998) 20 WAR 343

1.5 The Warden is required to hear public interest objections in relation to prospecting licenses

ss85 (2) 111A *Mining Act 1978* (WA)

Re French; Ex p Serpentine-Jarrahdale Ratepayers and Residents Association (1994) 11 WAR 315

Hardman Resources NL v Conservation Council of Western Australia [1989] 8 *AMPLA Bulletin* 44

1.6 The Warden may exercise his discretion in adjudicating the applications

ss91(1) & 105A *Mining Act 1978* (WA)

s3(1) & 56(1) *Interpretation Act 1984* (WA)

Re Roberts; ex p Western Reefs Ltd v Eastern Goldfields Mining Co Pty Ltd (1990) 1 WAR 546

1.7 There is nothing in the act that restricts the class of person whom may object to an application made under the act

Graphic 2: Example of a main argument in a submission

(Use another are of law or style here, this one already included above)

The title of the argument is the assertion upon which you rely to prove your case. This is usually built upon a series of lesser assertions that prove it to be legal correct. Each of these minor assertions must be supported by both law and fact.

Depending on the amount of space that you have to detail your submissions you may have a short main argument (as in the case of the example) or it may be multiple pages long.

It is important to ensure that you list all the case upon which you seek to rely and any other cases that are relevant or may be relevant and how you will distinguish those cases from your own.

*** In written submissions it is very common to present arguments in the alternative. So, you may assert the Respondent has committed misleading and deceptive conduct per statute. In the alternative, you may assert they have committed negligent misrepresentation. Each will involve different elements which need to be made out and if successful, each will then result in a particular outcome, ie economic damages or equitable remedies such as a voided contract.

Structure of Written Submissions – Part Four: References

A summary of the sources you have included in your submission or which may be relevant to your submission (i.e. the ones that you have reviewed). This is consistent with a bibliography in an essay. Sometimes the rules of the moot will require a specific method of referencing but I find that in text referencing where the specific case or section of legislation is called out directly after the argument upon which it is relied is more easily understood that footnotes. Other than that slight change you should use the *Australian Guide to Legal Citation* (Melbourne University Law Review Association, 3rd ed, 2010).

Written Submissions Tips & Tricks

- Submissions must be concise and to the point
- Ideally all law upon which you are to rely needs to be included
- If you are the applicant think about how the respondent is likely to counter your arguments
- Try to distinguish cases that do not support your argument
- If you are the respondent tailor your submission to your opponents
- Unless required to by the rules, you do not need to be too detailed in case you wish to hold something in reserve for your oral submissions
- If you have time, it can be very useful to run your written arguments through a 'sense check' in practice sessions. If the arguments do not 'flow' or are easily defeated, I would suggest abandoning them in written submissions and focusing on strengthening your best arguments.

Oral presentations

You've done all your preparation, prepared your written submissions read up and the law. Now let's get to the fun bit!

Preparing of Oral presentations

If you have never mooted before go to the RMIT LSS Website and check out the videos to get a feel for it.

Once you have submitted your written submissions you should receive your opponents submissions. First steps is to ensure that the two of you, first and second speaker have a roughly equal amount of content to cover each. Whilst in an actual hearing the individual scores would be entirely irrelevant, moots are usually judged based on the efforts of each individual speaker so it is important to ensure that both of you have roughly equal time and content to maximise your team score.

Here is where the different roles in the moot diverge, depending on your position you should prepare slightly differently.

The Appellant

When you are the appellant you have the advantage of being able to prepare your position in full prior to the oral presentations. Especially if you are the first speaker you should be able to be practice your oral submission almost to the point where it is verbatim.

Be careful to ensure you maintain flexibility however and be ready to anticipate questions. If you are across your points well, you can flow back to your points. Rigid scripts or verbatim arguments can appear stilted and may result in you not answering questions well, wanting to return to your 'script'.

As discussed below you should always be aware of tailoring your submission to the individual judge and respond to questions as they are asked of you.

The first speaker for the appellant needs to

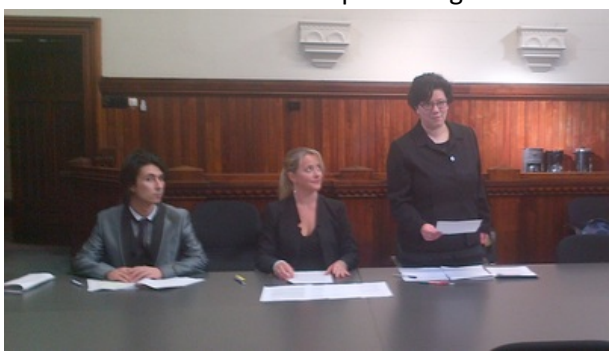
- prepare appearances (see below) it is best to write these down and read them the first couple of times you present;
- prepare a summary of the facts, this should go for no more than 5% of your total team's time

The first and second speakers, once they have prepared their individual arguments, should discuss the strategy for the handover. That is when the first speaker has finished and the second speaker is going to start. It looks very organised and like the pair of you are working well together if the first speaker speaks almost exactly to time and passes over to the second speaker seamlessly. The first speaker should therefore be across the first few

arguments of the second speaker and the second speaker read to come in at any point passed about half way for the first speaker.

The Respondent

You are responding, you are responding, remember that you are responding. There is no need to rebut was has not been raised, even if it is a great argument that you have identified from their written submissions. You are responding to what the appellant has submitted, **do not respond to arguments that the appellant has not raised!** With the one exception that if the appellant is especially poor have you have a limited amount to respond to then you can restate the reasons why the original decision was correct. Your response needs be tailored to the specific arguments that this appellant has submitted. Usually the first speaker for the respondent will address the first speaker for the appellant, and the second speaker will address the second speaker for the appellant, but don't feel overly bound by this.



If you are going to dispute the summary of facts, do so using no more than 5% of your total team's time and make sure it is the very first thing that the first speaker does.

Appearances

This is the most formal part of the proceedings. If the proceedings are in a court then you;

Stand, bow, and go to the place where you will present your submissions

'Your honour, [your full name] *appearing on behalf of* [your client, the appellant/respondent]*, I appear with my learned co-counsel* [their name] *I shall speak for 15 minutes and my co-council shall speak for 13 minutes save 2 minutes rebuttal, if it please the court'*

Bow, and sit back down in your chair.

If you are appearing in a different forum, i.e. a tribunal then you may or may not stand, check the rules of the moot and if they are silent then check the rules of the forum.

Forms of address in the Court Room

Your teammate	-	"my learned senior/junior" or "my learned colleague"
Your opponent	-	"my learned friend" or "counsel for the appellant/respondent"
The moot judge	-	"Your honour", "members of the tribunal/panel" if in an alternate jurisdiction
Supreme Court Judge or High Court Judge	-	"Justice Kirby" (never Kirby Jay); "His Honour, Justice Kirby"; "Chief Justice French"
If you want to disagree	-	"With respect"; "With the utmost respect" if they are exceptionally wrong

Verbal citations

The first time that you mention a case, you should give the full citation, then politely ask: "Your Honour, may I dispense with full citation?" and be guided by the judge's response. Aside from the

copy of your submission, ensure that you have a list of your case authorities handy, and the correct titles of any legislation to which you refer. The judge may ask you about which court, which judges, procedural history, dissenting judgments, facts of the case or where else the case may have been reported.

Carlil v Carbolic Smoke Ball Co [1893] 1 QB 256 is said as 'Carlil and Carbolic Smoke Ball Company eighteen ninty-three, volume one Queens' bench division page two-hundred and fifty-six'.

R v Macleod (2001) 52 NSWLR 389 is said as 'The Crown and Macleod two-thousand and one volume, volume fifty-two New South Wales Law Reports page three-hundred and eighty-nine'.

Social Security (Administration) Act 1999 (Cth) s 123TE is said as 'The Commonwealth Social Security Administration Act nineteen ninety-nine, section one-hundred and twenty-three "T" "E"'.

Make sure you understand that difference between sections, parts, sub-sections, chapters, clauses and paragraphs. Personally I find the formers eminently unclear but ask one of your lecturer if you are experiencing difficulties and refer to the *Australian Guide to Legal Citation* for a list of abbreviations.

How to handle questions for judges

Some judges ask lots of questions, some ask none at all, sometimes lots of questions are good and sometimes lots of questions are bad. Each judge will have their own style and unless you have the opportunity to appear in front of the same judge on a few occasions you are really not going to know what their style is until you get there.

When a judge asks you a questions you;

- stop talking until the judge has finished asking or saying what he/she wants to
- answer the question then and there
- answer the question concisely
- always answer the question by citing a clear fact or law
- once you have answered the questions, check with the judge if you may move on

Questions can be difficult especially where you do not know the answer. If you are in trouble you can ask to confer with your colleague, which is a good tactic to get 15 seconds to collect your thoughts. Be wary of asking to 'return to that point later' as a judge may decline your request and push the point, or may allow you to continue but not listen to your subsequent arguments, as the question they wanted you to answer remains on their mind.

Oral Presentation Tips & Tricks

The night before it is so important to have a good nights rest. Rehearsing and changing arguments into the early hours does not tend to be a winning strategy.

Read your arguments aloud to yourself. Do you make sense, do your arguments flow and are you being as concise as possible?

Record yourself and listen back. How could you improve your structure, tone and delivery? It is daunting and awkward to listen to yourself, but this is what the judges are doing.

Your style

- try to ascertain the judges style as early as possible – are they more direct, formal or informal
- always be polite and respectful

The Law

- only use Latin if you know what it means after all *qui non videt quid dicit stultus.* Many people say this is antiquated, makes you look stuffy and is out of step with common practice. Otherwise, use plain and clear English
- never verbalise the 'v' as 'versus' but rather 'and' unless you are quoting an American court
- make sure to know the gender of judge you are quoting, Kiefel, Bell and Gordon JJ are the current obvious ones but always check

Structure

- Sign post where you are and where you are going in your oral submissions so that the moot judge knows where you are going

Engaging the judges

- Relying heavily on notes means that you are not maintaining eye contact with judges and this will result in loss of marks and perhaps a loss of engagement with the judges

Managing nerves

- Be careful that some people can speak very quickly when they are nervous. Slow down.
- Try and minimise distracting habits. Experienced mooters have been criticised for the following quirks: swinging on a chair in seated arbitration; keeping a pen in your hand as you advocate, which can unintentionally 'point' at people; apportioning uneven eye contact to a male judge over a female judge and vice versa; flicking a shoe off a foot mid argument; tapping the table; gesticulating widely….

Online Resources

RMIT LSS Mooting Home page, including videos http://www.rmitlss.com/competitions.html

Australian Law Students Association Mooting Home Page http://alsa.net.au/mooting/

What is mooting video (Bond University) https://www.youtube.com/watch?v=NQapfCZ1Q_o

RMIT Mootcourt Blackboard Page
https://lms.rmit.edu.au/webapps/blackboard/execute/announcement?method=search&context=course_entry&course_id=_82873_1&handle=announcements_entry&mode=view