A PRACTICAL GUIDE TO MOOTING

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The Challenge

What Is Mooting?

There is perhaps nothing more universal in the Canadian law school experience than appearing before a moot court. As students, you have embarked on your legal education from many different backgrounds, you will pursue diverse courses of study, and you will go on to practise in a variety of fields, but you will all face, at least once during your law school experience, the challenge of mooting.

Mooting consists of the preparation and presentation of submissions before a model, or "moot" court. The moot generally takes the form of an appellate proceeding and the decision appealed from is designed to address a novel question or topical legal issue that gives strong and weaker arguments to both sides. You will be required to research the area of law, to draft memoranda of law and facta, and to appear at the hearing to present your submissions orally to the court. This process will give you "hands-on" experience with the full panoply of advocacy skills: legal research, factum writing, and oral argument. Mooting is likely to be the only instance of a compulsory oral presentation in your law school's curriculum.

Some of you will be natural oralists while others will be reticent to speak in public. Some of you will revel in your experience and regale your friends and families with tales of your triumphs, while others will prefer to put the whole business behind them as one of the less enjoyable professional rites of passage. Some of you will go on to make a career of litigation, while others will choose to confine their practices to non-litigious matters or to pursue careers beyond private practice. Nevertheless, all of you entering into the compulsory moot process stand to do well if you are reasonably diligent in your preparation for written and oral submissions; and each of you, no matter how gifted, can benefit from the opportunity to hone your advocacy skills. If you come to enjoy mooting, you will find further opportunities to moot, especially in upper years, in the competitive voluntary moots.

Why Moot?

Even if you have accepted the inevitability of the compulsory moot, you may have more basic questions about the tradition of mooting and its place in your legal education. In short, even if everyone has to go through it, you may well ask, "What purpose does mooting serve in the law school curriculum?" — especially in view of the fact that the fostering of other practice-related skills is pursued with less consistency and fanfare.

As for the tradition of mooting, one answer lies in the central role that advocacy plays in the development of the common law. The enormous body of decisions that comprise "the law" can create the impression that virtually every legal question has been considered at one time or another and that diligent research will supply the answers necessary to advise clients and enter into negotiations to resolve disputes. It comes as quite a revelation, then, when students have their first opportunity to work in practice, either during the summer or in their articles, to find the degree to which the law is in a state of flux and is subject to change through litigation.

As interesting as the study of substantive law can be, then, counsel work is the equivalent in the legal profession of treating live patients — not only does it seek to resolve real disputes between real parties and to serve the public in that fashion, it also advances the law, ameliorating its excesses, and refining old doctrines to address new situations. If pursued with skill and integrity, advocacy can have a profound effect on the evolution of the law. Indeed, advocacy is the lifeblood of the common law tradition. Furthermore, a key aspect of any good legal education is developing a critical appreciation of the existing state of the law; but it would be wrong to encourage you as young lawyers to become familiar with the law in all its weaknesses and imperfections without being given the means to change it for the better. In many ways, advocacy is one of the key ways to do this and through mooting, you will learn the skills required for good advocacy.

From the standpoint of legal education, mooting plays a special role. For many of you, it will be your only exposure in law school to a clinical experience, albeit a simulated one. It is equally important for all of you and not only those among you who hope to specialize in civil or criminal litigation for a number of reasons. It gives you the opportunity to research, write, and put forward oral submissions using the appeal process. This results in your gaining an understanding of a discrete area of

law in greater depth than is obtained in a regular substantive course. In addition, from both the written and oral advocacy sides, mooting engenders the careful and persuasive use of language. Cooperating with a partner in the compulsory moots and with three other team members in the competitive moots is a plus for brainstorming the issues, making sure that the research is complete, and generally contributing to the learning experience. In the competitive moots there is the added benefit in most schools of mooting for course credit and having the guidance, within the rules, of a faculty adviser. As well, mooting highlights the critical importance of complying with the rules of court that concern format and binding of facta and deadlines by which they must be submitted. It teaches that in the moot court, as in the real world, tomorrow will be too late!

Do I Really Stand a Chance of Doing Well?

In the book *Advocacy: Views from the Bench*, Mr. Justice Reid offered his thoughts on "the three great myths" concerning the degree to which advocacy can be learned:

> We hear the slogans, "advocacy is an art," "advocates are born, not made" and "advocacy cannot be taught" on every side. They were current when I was in law school and they are current today. Everyone seems to believe them. No bar association dinner is complete without another candle being lit on the altar of advocacy as art. ...
>
> If these myths were simply harmless we could all afford to ignore them, but they are not harmless. They dissuade beginners who, unable to descry any God-given gift for advocacy among their skills, give up before they start. They discourage those who have had the courage to try their hand from trying to improve. The result is that we are left with a shortage of really first-rate advocates. ...
>
> For the good of the Bar, and of all of us, I hope that these insidious myths may be swept away. They must be replaced with a general conviction that successful advocacy can be learned by almost anybody who wants badly enough to learn it.[1]

Advocacy is a technique rather than an art.[2]

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1 R.F. Reid and R.E. Holland, *Advocacy: Views from the Bench* (Aurora, Ont.: Canada Law Book, 1984), at 14, 17.

2 Sir David Napley, *The Technique of Persuasion*, 3d ed. (London: Sweet and Maxwell, 1988), at 1.

This book is based on the dual premises that advocacy can be learned and that no matter how strong (or weak) your natural abilities, you can always improve by learning and practising the basic skills.

The following chapters take a step-by-step approach to the process beginning with receiving the assignment and ending with the appellant's reply in the court. Chapter 2, "The Case," discusses methods for analyzing the "problem" or the decision to be appealed from and various strategies for researching the law in question. Chapter 3, "The Factum," deals with written advocacy and provides instruction on producing each of the elements that comprise the standard factum. Chapter 4, "Preparing for Oral Argument," reviews techniques for transforming the written submissions into a compelling argument to be presented orally to the court. Chapter 5, "The Hearing," is a guide to the moot itself, explaining the whys and wherefores of the conventions governing oral advocacy at the appellate level. Chapter 6, "The Courts," lists the rules for factum preparation in the various courts on which the moot courts are based. Finally, Chapter 7, "The Competitions," provides a brief description of the competitive moots in which teams from many Canadian law schools participate.

It is our hope that by following the instructions provided in this book, you will not only survive mooting but will excel at it. Good luck!

Further Reading

- J. Olah, *The Art and Science of Advocacy* (Toronto: Carswell, 1993).
- S. Lubet, *Modern Trial Advocacy: Analysis and Practice* (Notre Dame, Indiana: National Institute for Trial Advocacy, 1993).
- S.M. Waddams, *An Introduction to the Study of Law*, 4th ed. (Toronto: Carswell, 1992).