

School of Law

**Kirby Cup**

**High School Mooting Competition**

**2016**

**Mooting Guide & Rules**

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# Characteristics of Mooting

1. Moots involve a prescribed legal problem scenario that requires parties who participate in the moot to advance legal arguments in an attempt to resolve the legal issues that arise from the problem. In essence, the process of mooting involves students arguing points of law before a simulated court. Students are required to prepare and submit written submissions and deliver their case to a “fake” bench.
2. A moot generally involves various key features.
3. First, students assume the roles of advocates before a simulated bench. The bench may comprise professionals, academics or students. The type of members on the bench will depend upon the formality of the moot. Where formal assessment of the students who partake in the moot is made, this will usually mean that the bench will consist of professionals and/or academics.
4. Secondly, the nature of a moot involves students arguing points of law before the bench, which arise from the hypothetical problem scenario provided. For example, where a court considers a meaning to be given to particular legal words in a statute (i.e. law passed by the government), this involves the parties in the moot to assist the court in providing a lawful interpretation of the legal words in question.
5. Thirdly, students are expected to be able to answer questions from the bench relating to the arguments presented or any other relevant law that the students may not have considered. In particular, this latter process examines the extent to which students who partake in a moot can “think on their feet”, and apply by extension, knowledge that they have already prepared in relation to the moot problem.
6. Fourthly, the process of mooting to a certain extent can be characterised as a replication of appellant litigation in the legal system in Australia – where parties to a court action formulate a plan of attack or strategy that will assist him or her in “winning” the case to be considered by the court.
7. Finally, mooting involves a “conscious effort” on the parties who participate. In this context, students should predict the arguments of their opponents and so far as possible, prepare considered responses. Students should research the area of law that is concerned in the mooting problem in detail.
8. Without question, extensive preparation for the moot is a fundamental principle which should always be adopted. Great advocates are not only great because of experience, but because of the substantial preparation they undertake in relation to the case.
9. Moots can be traced back to the English Inns of Court of the 14th century, where they were used to train barristers (John Snape and Gary Watt, *The Cavendish Guide to Mooting* (2nd ed, 2000) 7–12). The ‘discussion’ at the centre of a moot evolved into ordered presentations by students of opposing arguments based on legal issues raised by a hypothetical case (Andrew Lynch, ‘Why do we Moot? Exploring the Role of Mootingin Legal Education’ (1996) 7 *Legal Education Review* 67–70).
10. Students are required to undertake the following tasks as if they were the advocates for one or sometimes both of the parties to the hypothetical problem: research and prepare the case; draft and submit a written outline of argument; construct opposing arguments on the legal issues raised; and present (and defend) those arguments before a simulated court (Mary E Keyes and Michael J Whincop, ‘The Moot Reconceived: Some Theory and Evidence on Legal Skills’ (1997) 8 *Legal Education Review* 1).
11. Students are generally assessed on their court etiquette (that is, on their observance of ‘the conventional rules of behaviour’ of members of the legal profession towards each other and the court) (Della Thomson (ed), *The Concise Oxford Dictionary Of Current English* (9th ed, 1995) 463).
12. Students are also assessed on their written and oral presentation skills with emphasis on the latter, the structure and quality of their arguments including a demonstrated understanding of the applicable law, their knowledge and use of authority for the arguments presented, and their ability to answer questions from the bench (Bobette Wolski, "Beyond Mooting: Designing an Advocacy, Ethics and Values Matrix for the Law School Curriculum" (2009) 19(1) *Legal Education Review* 41).
13. Mooting allows students to practise and develop a range of skills by performing them rather than just learning about them (William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (2007) 145).
14. The skills which feature most prominently in mootingand which are interrelated, are those most commonly associated with advocacy: problem-solving; legal analysis and reasoning; legal research; written and oral communication; teamwork; time management; and strategy (Terry Gygar and Anthony Cassimatis, *Butterworths Skills Series — Mooting**Manual* (1997) 3-5).

# Etiquette and procedure

1. It is beyond the scope of this guide to outline a comprehensive list of the etiquette to be adopted during a moot. However, the following points should be observed and practised in the context of a mooting competition for high school students.

## Dress and Attire

1. Dress and Attire **–** Students should wear their school uniform for the purposes of the competition.

Where to sit

1. Where to sit – Counsel for the appellant should sit on the left side of the bar table (i.e., to the judge’s right). Counsel for the respondent should sit on the right side of the bar table (i.e. to the judge’s left).

## Protocol for standing

1. Protocol for standing – When Counsel makes a submission, Counsel should always be standing. Counsel should always stand when he or she is answering a question from the bench or is otherwise raising an issue in relation to the proceedings more generally.

## Addressing the Court

1. Addressing the Court – When addressing the Court, Counsel should address the judge as “Your Honour”. For the purposes of the moot competition, members on the bench should also be addressed as “Your Honours” (if referring to the bench collectively) or “Your Honour” (if addressing one Judge).

## Addressing other counsel

1. Addressing other counsel – Opposing Counsel should be referred to as “My friend” or “My learned friend”. If Counsel is appearing with another Counsel, they should be referred to as “My learned Junior” (if you are the more Senior Counsel for the party) or “My learned Senior” (if you are the Junior Counsel for the party).

## Citing Cases and authority

1. Citing Cases and authority – When citing cases, the full reference to the case should be quoted. For example, the correct way of citing the case of *Odgers v Odgers* (1995) 4 CLR 321 is as follows: “Odgers and Odgers, 1995 volume 4 Commonwealth Law Reports at page 321”. You should check the complete citation of cases to which you intend to refer to before coming to court (note that in civil matters the “v” is pronounced as “and” while in criminal cases, “v” is referred to as “against”).

## Reference to judges when citing cases

1. Reference to judges when citing cases – When referring to a judge from a judgment, they should be referred to by their full titles (i.e. Justice Dixon). Accordingly, abbreviations such as “Dixon J” or “Barwick CJ” should not be used when referring to judges in an oral argument.
2. If a judge has a special title, it is best to use that title (i.e. McClellan CJ at CL should be referred to as “the Chief Judge at Common Law, Justice McClellan”). Further, for example, Beazley P should be referred to as “the President, Justice Beazley”. If the judge’s full name and title are not known, refer to a reference work, such as a legal dictionary, to determine that information.

## How to conduct yourself

1. How to conduct yourself – It is paramount that you retain complete self-control during the course of the proceedings. In this context, if a judge is talking, you should never interrupt. Wait until the judge has finished talking before you make a submission in response.
2. In a similar fashion, when opposing Counsel is making a submission, do not interrupt him or her. Actively take notes, so that you can use these notes when you get an opportunity to make oral submissions. Always remain respectful of both the court and your opposing Counsel (despite the fact that you may not agree with his or her analysis of the law or a point taken more generally).
3. If the judge disagrees with you on a particular point you may wish to argue it again, in a different way, on the basis that you believe that the judge has missed the main point of it. If the judge continues to disagree with you in a moot, it may be appropriate to move on to your next argument. It is important that you observe visually how the court reacts to your submissions. Although not always the case, at times you may be able to get an idea of how the court is receiving your submissions by merely observing their reactions to them.

## Advocacy

1. Advocacy – If a judge is taking active notes whilst you are making submissions, be sure to speak slowly. Speak clearly and loudly enough for the court to hear your submissions. Be concise and succinct in your submissions to the court.
2. A good approach to advocacy is to have a structured approach by numerically and systematically dealing with the respective points. For example, you may commence your submissions by outlining to the court that you have three main submissions in relation to an issue. Subsequently, you can then commence your submissions in the following form: “I will now deal with my first submission….”
3. Good advocacy and preparation go hand in hand. An advocate who is well prepared will be more able to actively assist the court in addressing the legal issues for determination in a case. It is best not to read your submissions word for word; rather, as Counsel, you should have an outline of your submissions with dot points which you can expand upon in oral argument.
4. The difficulty with reading out written submissions is that as opposed to conversing formally with the bench, you are merely reading a prepared script. Advocacy in a sense is a formal conversation with the court. If you read out your submissions in full, you also pose a risk of not being able to visually see how the bench is reacting to your submissions.
5. Moreover, in circumstances where the court poses questions to you whilst you are reading your written submissions, this may put the advocate in a startling position if all he or she is doing is merely reading out a prepared script. Ultimately, as Counsel, you should always be flexible, prepared and respectful.
6. As Counsel who is assisting the court, the court is not concerned with your personal views. In this context, do not use personal phraseology such as “I think” or “it is my opinion”. Rather, focus on using mutual language: “It is submitted”; “it is suggested”; “the applicant submits”; “the respondent submits”.
7. Bear in mind that part of your role is to assist the judge – who is making a decision about the merits of the case you are arguing – come to a decision that they are comfortable with. Your role is to put forward submissions, consistent with your client’s wishes, that assist and persuade the judge to come to a decision in your client’s favour (Michael Brogan & David Spencer, *Becoming a Lawyer*, Oxford University Press, 2014, Chapter 11).

# Opening procedure in court

1. Opening procedure in court– The following general procedure will be adopted to commence the proceedings:
2. The court clerk will announce that the court is ready (i.e. “Silence! All stand”).
3. The judge will enter and bow. Counsel should also bow when the judge bows.
4. When the judge is seated, the rest of the court may sit down.
5. The court clerk will then announce that the court is sitting and state the case for hearing, eg “Director of Public Prosecutions and Bertrand Egentis”.
6. Senior Counsel for the parties will then announce their appearances – starting with Counsel for the appellant: “May it please the court, my name is Johnson and I appear with my learned junior, Howie. We are instructed by Ms Williams”. Senior Counsel for the respondent then follows in a similar fashion.
7. At the time you make your appearances you may seek to tender your written submissions. Simply say, “I tender written submissions.” There should be a court clerk or Judge’s Associate who will take the document from the bar table to the judge on the bench. In the event that there is no clerk or associate you should seek permission for your junior to approach the bench and hand forward the documents on your behalf.

# Rules

1. The participants must restrict themselves to the law that has been set out in the **“Relevant Materials”** section of the moot problem. That is, in preparing your argument, Counsel must limit themselves to the materials provided under the “Relevant Materials” heading, including the legislation and cases (which may have respective web addresses). Importantly, reference may be made to other cases cited in those materials, but only to the extent that they are cited, quoted or referred to within those relevant materials.
2. Each school is permitted to enter one team only, consisting of no more than four students in the role of Senior Counsel, Junior Counsel, Instructing Solicitor and a Court Clerk/Judge’s Associate (the teams will determine who will be the clerk and who will be the associate).
3. Each speaker (Senior and Junior Counsel) will be limited to an address of 10 minutes and will be informed when there is one minute remaining.
4. There will be no right of reply (i.e. when you have finished your submissions and the opposing party makes their submissions, you cannot make submissions in reply).
5. Marking will be conducted on the basis of:
   1. Speaking Ability and Delivery - 30
   2. Organisation, and development of, argument - 30
   3. Questions from the Bench - 20
   4. Written submissions and assistance to counsel - 20.
6. You should refer to the marking sheet (at the end of this document) that the judge’s will use to assist them come to a determination of the winner.
7. Individual marks will not be provided. Judges will provide feedback upon conclusion of the moots on team performances. Judges may provide feedback on individual performances but will not provide scores.
8. One winning team will be selected.
9. Each party (i.e. both the appellant and respondent) to the moot must file a written summary of argument in the following form:
10. The summary of argument must be no longer than three pages.
11. Students are to use Arial font (size 11).
12. Line spacing must be 1.5.
13. The essential feature of the written summary of argument must set out in logical sequence the line of argument that is to be presented and the authority for each proposition of law that is to be argued.
14. Counsel should anticipate being questioned by the bench about the case and are expected to be able to respond logically to the questions asked and comply with directions given (i.e. “I do not wish to hear you further on that point”; “address me on the issue of uncertainty”).
15. Both Counsel for each team should be prepared to speak for 10 minutes. Where an advocate is interrupted by questions from the bench, he or she will be expected to adjust their oral submissions within the allocated time. Counsel will not be given extra time despite being questioned. Do not seek an extension of time for oral submissions.
16. Appellant’s counsel will proceed first to argue their case. After the appellant completes their oral submissions, respondent Counsel will then open the respondent’s case. After the respondent closes their case, the bench will retire to consider the matter. If so, the court will be adjourned. The Court Clerk should ensure that all stand while the judge(s) leave.
17. In the event of a forfeit the Dean of the School of Law, the Director of Engagement of the School of Law, or their respective delegates have the discretion to determine any revisions to the competition schedule and the allocation of byes.
18. Any competition appeals will be determined by the Dean of the School of Law, the Director of Engagement of the School of Law, or their respective delegates. The determination of the Dean or Director will be final.

# Tips for the competition

## Written Summary of Argument

1. You are expected to prepare and hand up to the bench a written summary of your argument.
2. Focus on the key issues in relation to the case. When addressing an issue, you should raise your strongest arguments first. Be selective in the arguments that you make. Weak arguments should be avoided if they add nothing to your submissions.
3. Ensure your written summary of argument is logical and clearly structured. For example:

***The decision of the Tribunal should be set aside because jurisdictional error has been committed***

1. First, the Tribunal failed to have regard to the positive contribution that the applicant has made to the Australian community.
2. Secondly, the applicant was not afforded procedural fairness by the Tribunal as it permitted the respondent to adduce expert evidence at the hearing without prior notice or service of the expert report before the hearing.
3. Thirdly, the Tribunal took into consideration irrelevant material by accepting evidence of the opinion of the Fiji High Commission, when *Direction 55* does not permit “external material” from foreign institutions to be considered.
4. Put the law in context. Both your issues and arguments must be presented within an appropriate factual context and with reference to broader policy considerations. In this context, get to the point quickly in as few words as possible. Use plain language.
5. Aim for accuracy, brevity and clarity.
6. Be sure to check your written summary of argument for spelling and grammatical errors. Do not underestimate the significance of errors of this nature (it may suggest something about the level of preparation and care you have placed in your work).
7. Do not make use of lengthy quotations in your written summary of argument. Rather, outline the effect of the principle from the case in your own words. Ensure that you give correct and complete case citations. Given the limitation of time for the purposes of this competition, cite key cases only.

## Presentation of Argument

1. Focus on critical issues in the case. Do not waste precious time on irrelevant or trivial points. It is best to outline your strongest point early. Address each issue in turn – proceed in a logical and sequential fashion.
2. If the bench want you to address a different issue, then you should follow the direction of the court and address that other issue. If the judge seeks an answer to a question, you should answer that question expressly. If you do not know the answer to the question, you should outline to the court a phrase in the following forms: “I take that question on notice Your Honour. I will investigate the point further and come back to you shortly”, or “Your Honour, I am unable to assist you further on that point”.
3. Speak slowly and confidently.
4. Present your argument before attacking the other side’s position.
5. If you are defending the reasons for the judgment of a lower court that is infected by a clear error, concede the mistake. You can still win a case where concessions are made – perhaps on the basis of putting forward alternative arguments which may not have been considered by the court below (or better still, arguments erroneously rejected by the court below).

## Basic Principles of Effective Advocacy

1. Practise your speaking (allow time for questions).
2. Have your materials organised. For example, it may be a good idea to place all the authorities you rely upon in a separate folder. Moreover, it is a good idea to ensure your authorities are in alphabetical order so they can be easily accessed where necessary.
3. Prepare speaking notes for the moot. In essence, speaking notes involve jotting down important bullet points in relation to each of the issues you seek to address during the proceedings. Upon reviewing the bullet points in your notes, you can look up and accordingly make submissions to the bench whilst keeping eye contact with the judge(s).
4. Punctuate your delivery with “thought pauses”. That is to say, you need time to think – so do the judges. Avoid distractions such as clicking pens, waving your hands and flicking pages. Unless absolutely necessary, your instructing solicitor should avoid interrupting you (as Counsel) whilst you are on your feet making submissions. However, an instructing solicitor is there to assist you in the event that you become ‘stuck’.
5. Have conviction in your arguments (but know when and what to concede).
6. It is important that Counsel adopt an appropriate demeanour. In this context, be courteous, polite and conversational in turn. A moot is analogous to appearing in a “court of law”. Accordingly, do not “over-dramatise” your performance as if you were seeking an Oscar for acting.
7. Do not personalise your submissions. The court is not interested in what ‘you’ think or what you feel, or in your opinion. Instead, submit arguments for your client by using phrases such as “I submit” or “I invite the court to find….” or “It is my submission…”.

# Ethical responsibilities of counsel

1. Be aware of your ethical responsibilities as Counsel. Importantly, Counsel has an obligation first and foremost always to the court. To the extent that your duties to your client conflict with your obligations to the court, you must always put your obligations to the court first.
2. Counsel has a paramount duty to never mislead the court. In circumstances where you may have mistakenly misled the court, you must as soon as reasonably practicable, outline to the court the error that has been made and why it was made (this will usually be the end of the matter).
3. Listen carefully to questions. Pause to consider your answers. If you do not understand a question, ask for the question to be repeated or rephrased. Significantly, a good advocate will always attempt to anticipate and prepare for predictable questions – that way, when the question, or a similar question, is posed by the bench you will already have a good idea of how to address the court in relation to the issue.
4. Answer questions immediately and succinctly. If you do not know the answer to a question, say so.
5. Good advocacy comes with experience. Obviously, the best kind of experience is actually participating in the court process itself. However, given that everyone has to start somewhere, it is a good idea to attend a court sitting in your local area (i.e. such as the Local Court of New South Wales) to gain a first-hand experience of how advocacy operates in the formal court system in New South Wales.

# Marking rubric

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Criteria & Standards | Adequate | Encouraging | Proficient | Professional | School 1 | | School 2 | |
| SC | JC | SC | JC |
| Speaking Ability and Delivery (30 for team) | * Lacks proper courtesies. * Lacks clarity of language and expression. * Fails to observe correct etiquette and terminology. * Over-reliance on notes.   8 | * Courteous and clear. * Lacks variation of tone, pace and expression. * Poor eye contact. * Good knowledge of court etiquette and terminology.   9-10 | * Courteous and clear. * Good use of language, gesture and expression. * Comfortable with interventions. * Conveys confidence.   11-12 | * Conveys ideas and deals with interventions with ease, skill and confidence. * Engages well with court. * Conveys impression of conviction and sincerity.   13-15 |  |  |  |  |
| Organisation, & development of, argument – (30 for team) | * Insufficient overview of submissions or conclusion. * Organisation poor; lacks structure or direction. * Understanding of legal issues inadequate. * Fails to address key legal or factual issues.   8 | * Adequate overview of submissions and conclusion. * Argument may have been better structured; too lengthy or brief in parts. * Good approach but lacks larity or direction. * Addresses all key issues; though some arguments given inappropriate weight. * Poor application of law to the facts.   9-10 | * Clear focus, concise overview and conclusion. * Arguments clearly and logically structured.   11-12 | * Effective overview & conclusion, noting relative significance of arguments. * Flexible and engaging. * Excellent understanding of legal issues and their interrelationship, policy argument and authorities. * Addresses and rebut opposing arguments. * Logical & peruasive.   13-15 |  |  |  |  |
| Questions from the Bench  (20 for team) | * Unprepared for questions reasonably to be expected. * Evades answering. * Poor composure. * Inflexible or concedes too readily.   5 | * Fails to perceive the object of questioning. * Responses sometimes too lengthy or too brief. * Responses lack clarity or directness.   6 | * Accurately perceives the object of questioning. * Responds to questions directly and concisely. * Handles irrelevant questions well.   7-8 | Accurately perceives the object of questioning.  Clear responses; engages with the court’s views.  Effectively integrates responses and argument.  9-10 |  |  |  |  |
| Written submissions  (20 for team) | * Poorly presented. * Does not outline key issues. * Does not support case effectively. * Does not apply law to facts. * Fails to properly consider the opponents’ arguments.   10 | * Well presented. * Outlines most issues effectively. * Used authorities but with errors or omissions. * Made adequate submissions to support case. * Applied law to facts. * Made some attempt to consider & respond to opponents’ argument.   11-13 | * Effectively outlines the issue(s). * Used authorities effectively, distinguishing where necessary. * Made effective submissions to support case. * Accurately applied law to facts. * Considered & responded to opponents’ arguments.   14-16 | * Excellent overview of the issue(s). * Used authorities effectively, distinguishing where necessary. * Made excellent submissions to support case. * Accurately applied law to facts. * Comprehensively considered & responded to opponents’ arguments.   17-20 |  | |  | |
| Total |  |  |  |  |  | |  | |