



Support of the foreign language profile of law tuition
at the Faculty of Law in Olomouc
reg. n.: CZ.1.07/2.2.00/15.0288

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MOOTOLOGY AND MOOTING SKILLS



Olomouc 2012



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Introduction

What you're holding in your hands is a reader which ought to serve primarily the students of Moot Court course at Palacky University in Olomouc, Faculty of Law. Driven by the thoughts of proponents of legal transplantations, we decided to provide you with basic foreign literature readings on mooting as it is the foreign literature where mooting skills are covered masterfully. This reader was compiled within the framework of Operational Programme Education for Competitiveness project Support of the foreign language profile of law tuition at the Faculty of Law in Olomouc (Law in English) and consists of texts which analyze fundamental skills you will have to master as a mootie.

What we wanted to cover in this reader were basic mooting skills – argumentation both in written and oral form, legal research and being a member of a team. Out of the tons of material written on these issues abroad, we chose works which are currently regarded as classics of mootology. One of them even transcends this area. *Making Your Case* by Antonin Scalia and Bryan A. Garner is primarily aimed at real-life practicing attorney, nevertheless, we believe that all the advice they offer is more than useful even in moot courts. Additionally, as we chose only particular sections of several mootology classics, we strongly invite you to read these books (and other books concerned with mooting) in their full extent. The more you study and practice mooting skills, the better mootie you will be.

Having mentioned that, we would like to welcome you in the thrilling world of mootology and mooting. For the first time we heard the term “mootology” from David Seikel who sadly passed away earlier this year. David was a guru of mootology for those who devoted themselves to all kinds of moot courts held within the Czech Republic and we believe he would be happy if he knew that such a reader was being prepared. David always used to say with his Texas accent: “Y’all oughta know that moot changes lives.” He was right and we hope that mooting is going to be a life-changing experience for you, too.

June 2012

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**KEE, Christopher. *The Art of Argument: A Guide to Mooting*.
New York: Cambridge University Press, 2006. pp. 7–12**

YOU’VE MADE THE TEAM – WHAT NEXT?

BEFORE YOU BEGIN

Good preparation is the key to success in mooting competitions. This book aims to give you an insight into issues you are likely to encounter throughout the process. This means that you can begin preparing for all aspects now, rather than have problems descend on you at a time when your efforts are better spent refining your oral presentations.

Timing and commitment

We have already noted that participation in a moot competition involves intensive training. With intensive training comes commitment. A team will set its own level of commitment, but if you want your team to perform at its best, every member needs to be highly committed to ensure the team’s success.

Participating in an international mooting competition involves an extraordinary amount of time. It takes time to prepare. It takes time to travel overseas and participate. All of this needs planning. In particular, you need to think about what impact it will have on other commitments you may have, such as paid employment, other studies, and family relationships. Paid employment is potentially the most difficult to accommodate.

The time of year when the moot actually takes place needs careful consideration when you are deciding whether or not to participate. For example, a moot that takes place in the early part of the year will require most students in the southern hemisphere to work solidly throughout their summer break. There are advantages and disadvantages to this. First, you will not need to divert your attention from other subjects that also demand and deserve your attention.

However, equally, you will not be able to pursue recreational activities and relaxation during your holiday time. Days spent at the beach are likely to be replaced

by days spent in the library. Perhaps more significantly, the full-time work you had hoped to do over summer may not be possible.

A moot held during the year may conflict with important academic events such as exams and due dates for assignments. If this occurs you will need to consult your tutors and lecturers to see if alternative arrangements can be made.

What about money?

For some fortunate students, money will not be an issue, but for many it is a very big concern. Unfortunately, participating in an international moot competition does cost money, whether that is simply the entrance fee, or includes the costs of flights and accommodation while you are overseas.

Think about where the money is going to come from at this early stage. You do not want to find yourself distracted by this issue while you are trying to devote all your attention to preparing and practicing your arguments.

Because the situation for every team is different, it is important that all members sit down together and discuss this issue. There are several options you could consider and you need to work out what will best suit your team.

Everyone pays for themselves

The most obvious option is that everyone pays for themselves. However, this can be riddled with difficulties. Not everyone in your team is likely to have the same capacity to fund their trip. Since you are participating as a team, you should travel together and stay in the same accommodation to really make it a team experience. But some people simply will not be able to afford to stay in some hotels or to travel on particular airlines. This can lead to difficult decisions that need to be made as a team. It also means that financial status becomes a discriminating factor. There will be those who simply cannot compete if they are required to fund their own participation. This is a great shame, as every student could benefit greatly from this experience.

Sponsorship

The alternative (or in addition) to everyone personally contributing is for your team to obtain sponsorship. Sponsorship can come from a range of sources. Your law school is the most obvious potential source. Depending on how your particular educational institution is structured you may be able to get sponsorship from different parts of the university as well. Other potential sources of funding are law firms and private benefactors. The advantage of sponsorship is that it creates a pool of money that every member of the team can benefit from equally.

As a team you may choose to nominate someone or a couple of people who, in return for some lighter research duties, spend some time on raising sponsorship. There are definite advantages in directing your sponsorship efforts in this way. Pri-

marily it ensures that you have a coordinated approach. Potential sponsors will get frustrated if five different people from the same team individually approach them to ask for sponsorship. It is also more efficient for team members to focus on particular areas, rather than every member attempting to spend some time on all the team tasks. Some team members can concentrate on detailed research while others can focus on raising money.

If your team decides to nominate one or two people to seek sponsorship, it is very important that you choose the right people within your group to take on the task. Within any team there will be mix of personalities. It is important that you recognize that each of you has different strengths. In order to learn to operate well as a team, you need to work out how to fully utilize everyone's individual strengths. Fundraising generally requires a very outgoing personality. You will only be successful if you willingly take on the task, bearing in mind that it is a big job. Some of the challenges involved may only become apparent once you begin. For example, you may need to coordinate your fundraising efforts with those of other groups within your law school that are also seeking sponsorship, such as other moot teams and the law students' society.

The task of fundraising carries with it significant responsibility, and therefore can place real pressure on the relationships in the team. As a team you should ensure that you set realistic fundraising targets. It is much better to underestimate what you think you can raise. If for whatever reason your team ultimately fails to reach the intended target, make sure you pause and think of the best interests if the team before you rush to blame your designated fundraiser.

THE MOOT PROBLEM

Read the problem

There is a great deal of excitement when you first receive the moot problem. Everyone is different and approaches the first reading their own way. Some people read every word of every line very carefully; others just glance over it and think the answers are obvious! As you would expect, these people are in for a surprise and will very quickly learn that first impressions rarely reflect final ones.

The best approach is probably somewhere in the middle. Sit down and read the problem carefully. There is no need to be too meticulous the first time you look at it; instead you want to absorb the basic information and facts, so you can begin to plan how you might tackle the problem. Read it over once, maybe twice if you want to, and then put it aside and just think about it for a day or so.

Sleep on it! Many students, when reading their moot problem for the first time, think, "I have absolutely no idea what this is about!" By their very nature, international moot competitions deal with complex international legal questions, and therefore the subject matter tends to be outside the ordinary curriculum. Do not be alarmed by the subject matter. All it means is that you are about to face a very steep learning curve. Over the next few weeks you are going to absorb lots and lots of new information. Far from being a bad thing, this is a wonderful challenge that should excite you.

Read the rules of the competition

A crucial task is to familiarize yourself with the rules of the competition. Each competition will have its own set of rules, and you need to know exactly how the rules affect how you should prepare, before you begin to solve the moot problem. Imagine you had done months and months of research and handed in your written submissions, and were then told that you would have won an award but unfortunately you had used the wrong citation method. Or you attended the oral hearings and got perfect scores for all of them, but because you only argued the applicant's case in each moot, you were not eligible for the best oralist award.

The rules of the competition will influence the way you prepare, so it is very important that you are familiar with them right from the beginning. For example, there may be rules about how you can use the evidence provided in the moot problem. It would be a waste of valuable time to practice using the evidence in a different way.

Be aware that the rules of a particular competition may conflict with some of the recommendations in this book. This book is written as generally as possible and aims to develop themes that are consistent with most if not all advocacy, whether in international or domestic moots, or in professional practice. However, there may be occasions where particular rules prohibit the use of some of the techniques discussed. In particular, you should be aware of the extent to which the rules of the competition allow you to utilise external assistance. If the rules do conflict with a technique outlined here, think about the purpose of the technique suggested and find a way to achieve the same outcome within the rules.

ASKING FOR HELP

You need to find a quick way of gaining a rudimentary understanding of the subject matter. Once you have the basics then you can develop your ideas and start to come to grips with the complexities of the issues. It would be a good idea to do a "crash course" in the area. Usually this is something that your coach will co-

ordinate for you. But you can be proactive and take steps as a team to begin the learning process.

There are many people you can turn to for help. Your coach will be your first port of call, and within your law school there will be lecturers with specialties in all sorts of disciplines, who will be a great resource for you.

If your law school has been participating in a moot competition for some years, you should seek out former participants. Arguably there are no better people to give you an understanding of what will be required. Consulting former moot participants can be a vital part of achieving success.

Other students at your law school may also be able to help. Part of your subject matter might be taught briefly in an optional unit taken late in your degree. If so, find students who have taken that subject and ask them to speak to the team. Ask the lecturers if there are any post-graduate students who have an interest in the subject matter. Post-graduate students can be a great resource as they are usually experienced researchers who can offer many tips.

You might also consider approaching law firms, particularly those you already have a relationship with, such as the ones who may be sponsoring your team. Generally people will be willing to offer their assistance if they know that you appreciate and value their effort. On this note, it is very important to thank everyone who gives up their time to help you.

SETTING DEADLINES

The task of estimating the time required to complete a project is often one of the hardest. In one of the *Star Trek* movies, Captain Kirk asks Scotty how he always manages to get things done ahead of the estimated time. Scotty's reply was that he estimated how long it would take and then tripled it before telling the Captain when to expect the work to be completed. This is a very sensible idea.

Break down the process of preparing for the moot into individual tasks, and estimate how long each will take. This is a difficult job and your coach will help you. Start by asking yourself when the first task is due. Do you have a matter of weeks or months? Only rarely do things go to plan, so make sure you have enough time to accommodate any unexpected obstacles. Be careful though not to fall into the trap of thinking the deadlines you set are always flexible. Once you set a deadline always work to it.

SCALIA, Antonin, GARNER, Bryan A. *Making Your Case: The Art of Persuading Judges*. St. Paul: Thomson/West, 2008. pp. 1–43

GENERAL PRINCIPLES OF ARGUMENTATION

BE SURE THAT THE TRIBUNAL HAS JURISDICTION

Nothing is accomplished by trying to persuade someone who lacks the authority to do what you're asking – whether it's a hotel clerk with no discretion to adjust your bill or a receptionist who cannot bind the company to the contract you propose. Persuasion directed to an inappropriate audience is ineffective.

So it is with judges, whose authority to act has many limitations – jurisdictional limits – relating to geography, citizenship of the parties, monetary amount, and subject matter. From justices of the peace to justices of supreme courts, judges face as a first task to be sure of their authority to decide the matters brought before them and to issue the orders requested. If they don't have that authority in your case, you don't just have a weak case, you have no case at all.

Most weak points in your case will be noted by opposing counsel, giving you a chance to reflect on them and respond. If opposing counsel does not protest a particular point, the defect will often be regarded as waived. But a defect in subject-matter jurisdiction is a different matter altogether. An opposing party often has no interest in challenging jurisdiction, being as eager as you are to have the court resolve the dispute. But in many courts (including all federal courts), absence of subject-matter jurisdiction, unlike most other defects, cannot be waived. And in some of those courts (including all federal courts), even if no party raises the issue, the court itself can and must notice it. Nothing is more disconcerting, or more destructive of your argument, than to hear these words from the bench: "Counsel, before we proceed any further, tell us why this court has jurisdiction over this case." You need a convincing answer to this question – and preferably a quick and short one – or else you're likely, in the picturesque words of the lawyer's cliché, to be poured out of court.

Two caveats about jurisdiction: (1) Jurisdictional rules apply in appellate courts as well as in trial courts. The Supreme Court of the United States, for example, has jurisdiction over a state-court decision (involving a federal question) only when that decision is final, and only when there is no adequate and independent state-law ground for the judgment. (2) Defendants and appellees are much more likely to ignore jurisdictional requirements than are plaintiffs and appellants. But jurisdiction is just as important to them, and they must attend to it.

The rules of the Supreme Court of the United States require briefs to set forth, immediately after the description of the parties, the basis for the Court's jurisdiction. Even if the court before which you are appearing has no similar rule, it's good practice to pretend that it does and to identify the law, and the facts, that render this original action, or this appeal, properly brought before that court. Keep that information handy in case the court asks.

KNOW YOUR AUDIENCE

A good lawyer tries to learn as much as possible about the judge who will decide the case. The most important information, of course, concerns the judge's judicial philosophy – what it is that leads this particular judge to draw conclusions. Primarily text, or primarily policy? Is the judge strict or lax on stare decisis? Does the judge love or abhor references to legislative history? The best place to get answers to such questions is from the horse's mouth: read the judges opinions, particularly those dealing with matters relevant to your case. Also read the judges articles and speeches on relevant subjects.

Besides judicial philosophy, learn all you can about how the judge runs the courtroom. Is the judge unusually impatient? If so, you might want to pare down your arguments to make them especially terse and pointed. Is the judge an old-school stickler for decorum? If so, you might refer to opposing counsel as "my friend." One federal judge had a practice of fining counsel \$20 (no notice in advance) for placing a briefcase on the counsel table. It's good to know of such peculiarities. Some of these courtroom characteristics you can (and should) observe by sitting in on one of the judges hearings. Beyond that, however, talk to colleagues at the bar who are familiar with the judge's idiosyncrasies.

Finally, learn as much as you readily can about the judge's background. Say you're appearing before Judge Florence Kubitzky. With a little computer research and asking around, you discover that fly-fishing is her passion; that her father died when she was only seven; that her paternal grandparents, who were both professors at a local college, took charge of her upbringing; that she once chaired the state Democratic Party; that she enjoys bridge; that she has been estranged from

her brother and sister for many years; that she graduated from Mount Holyoke College and took her law degree from the University of Michigan; that she's an aficionado of good wines; that her favorite restaurant is the Beaujolais Room; that she was counsel for a craft union before coming to the bench; and so on. Going in, all these data seem irrelevant to how the judge might decide your breach-of-contract case, but you might well find some unpredictable uses for this knowledge over the course of a lengthy trial. You might want to stress, for example, that the defective contract performance your client is complaining about violated basic standards of the craft and reflects shoddy workmanship. At the very least, these details will humanize the judge for you, so that you will be arguing to a human being instead of a chair.

Apart from judge's personal characteristics, there are also characteristics of individual courts. Can the appellate court you are appearing before be relied on to read the briefs before hearing argument? If not, you might devote more argument time to the facts than you otherwise would, or deal with some legal points that are so basic that you'd normally pass over them in oral argument. Is it the practice of the appellate court to assign the opinion to a particular judge before the case is even argued? If so, you can probably assume less familiarity with the facts and issues on the part of the other judges, and you might want to lay out your judgment in a more rudimentary fashion for their benefit. Is the court notoriously dismissive of higher-court precedent? Stress the public-policy benefits of your proposed disposition.

Bear in mind that trial judges are fundamentally different from appellate judges. They focus on achieving the proper result in one particular case, not on crafting a rule of law that will do justice in the generality of cases. And they will pursue that objective principally through their treatment of the facts (if the case is tried to the court) and discretionary rulings. In most jurisdictions, trial judges are more disposed than appellate judges to strict observance of governing case-law – perhaps because their work is subject to mandatory review. So at the trial-court level you are well advised to spend more time on the facts and on the discussion of precedent (from the relevant courts) and less time on policy arguments. That's one reason why a good trial brief can rarely be used before an appellate court without major changes.

KNOW YOUR CASE

Have you ever tried buying equipment from a salesperson who didn't know beans about it? You might understandably have fled the store. Although lawyers aren't selling equipment, they are selling their cases.

Judges listen to counsel because, at the time of briefing or argument, counsel can be expected to know more about the legal and factual aspects of the case than anyone else. But if it becomes clear that this is not so, judicial attention will flag. If you're asked about a fact in the record that you're ignorant of, or a clearly relevant case that you're unfamiliar with and have failed to mention in your brief, don't expect the court to give your argument much weight. Your very first assignment, therefore, is to become an expert on the facts and the law of your case. If you're a senior partner who hasn't the time to do this, assign the case to the junior partner or associate who knows it best.

At the appellate stage, knowing your case means, first and foremost, knowing the record. You never know until it is too late what damage a gap in your knowledge of the record can do – not only at oral argument, but even in your brief. Richard Bernstein of Washington, D.C., tells of a case in which the plaintiff-appellees, represented by a prominent firm first retained on the appeal, made the theoretically plausible argument that one reason they should receive an injunction for patent infringement was that damages were difficult to prove. Unfortunately, as the appellant's reply brief carefully (oh-so-carefully) explained, the appellee's own expert had told the jury that in this case damages were easy to prove and calculate. Needless to say, the appellee did not press the point at oral argument.

Don't underestimate the importance of facts. To be sure, you will be arguing to the court about the law, but what law applies – what cases are in point, and what cases can be distinguished – depends ultimately on the facts of your case. If you're arguing an appeal, you must have a firm grasp of what facts have been determined below or must be accepted as true, and what facts are still unresolved.

Knowing a case also means knowing exactly what you're asking for – and how far short of that mark you can go without bringing back to your client a hollow victory. Say a member of an appellate panel asks, "Counsel, if we agree with your petition, would you be content with a remand for the lower court to consider X, an issue not decided below and not briefed or argued here?" You must know whether your opponent ever raised that issue below. If not, you must insist on outright reversal and entry of judgment in your favor. If you fail to do so, the court may cite your failure as a concession that your adversary hasn't forfeited the issue. If, however, your adversary raised the point but the lower court didn't reach it, you should graciously concede that remand is a possibility but go on to explain why the appellate court should reject that disposition – as by showing, for example, that the facts could not possibly support a judgment on that ground. By conceding what must be conceded, you establish your credentials as a reliable and even-handed counselor.

KNOW YOUR ADVERSARY'S CASE

No general engages the enemy without a battle plan based in large part on what the enemy is expected to do. Your case must take into account the points the other side is likely to make. You must have a clear notion of which ones can be swallowed (accepted but shown to be irrelevant) and which must be vigorously countered on the merits. If your brief and argument come first, you must decide which of your adversary's points are so significant that they must be addressed in your opening presentation and which ones can be left to your reply brief or oral rebuttal. Of course, a principal brief or argument that is all rebuttal is anathema.

At the trial stage, you must initially discern your adversary's positions from the pleadings, the conferences, and discovery, and by using common sense. At the appellate stage, you can rely on what was argued and sought to be proved below. Bear in mind, however, that lawyers tend to develop new arguments, and revise their theories, as the case proceeds upward. Constantly ask yourself what you would argue if you were on the other side.

Don't delude yourself. Try to discern the real argument that an intelligent opponent would make, and don't replace it with a straw man that you can easily dispatch.

PAY CAREFUL ATTENTION TO THE APPLICABLE STANDARD OF DECISION

The separate issues involved in your case may be subject to varying presumptions and burdens of proof. In a criminal trial, the prosecution must establish guilt beyond a reasonable doubt. An adversary who seeks to overturn the judgment you obtained below on the basis of an erroneous jury instruction to which there was no objection must establish not just error but plain error. An appellant who attempts to set aside federal-agency action as contrary to statutory authority must often show not merely that the best reading of the statute favors reversal, but that the agency's reading is not even within the bounds of reason. And so forth.

When the standard of decision favors your side of the case, emphasize that point at the outset of your discussion of the issue – and keep it before the court throughout. Don't let the discussion slide into the assumption that you and your adversary are on a level playing field when in fact the standard of review favors you. Say, for example, that you are asked, in a case involving review of federal-agency action favoring your client, whether you don't think an interpretation of the statute different from the agency's makes more sense. You should respond somewhat as follows: "I don't think so, Your Honor, but it really makes no difference. The question

here is whether the agency's interpretation is a reasonable one, not whether it is the very best. And on that point there is little room for doubt." Remind the court of the favorable standard of review in your summation.

Appellees' briefs commonly treat the standard of review in boilerplate fashion. If your opponent is fighting against a clearly-erroneous or arbitrary-an-capricious standard, make a big deal of it. Point out that the appellant is attempting to retry the case, or to have the court of appeals substitute its judgment for that of the district court or the agency. Say this explicitly, not only in your standard-of-review section but in your introduction and summary of argument.

When the standard of decision is against you, acknowledge the difficulty but demonstrate concretely why the standard is met. Go beyond mere repetition of stock phrases. For example, if you're arguing that the judgment below was clearly erroneous, it does little good to say, "Here one does indeed have a definite and firm conviction that a mistake has been made." Cite a case in which an appellant met that standard and compare it to your own.

The standard of decision is particularly important when you're selecting the issues to pursue on appeal. Appealing a minor error that will be reviewed under an abuse-of-discretion standard will probably do nothing but divert time and attention from your stronger points. Sometimes, too, you can escape or neutralize the more lenient standard of review by framing your claim differently – as by arguing not that the lower court abused its discretion, but that it made an error of law in considering certain factors.

NEVER OVERSTATE YOUR CASE. BE SCRUPULOUSLY ACCURATE

Once you have worked long and hard on your case – and have decided not to settle – you'll probably be utterly convinced that your side is right. That is as it should be. But the judges haven't worked on the case as long (or, probably, as hard) and are likely, initially at least, to think it much more of a horse race than you do. That will be true in any case, but especially when discretionary review has been granted to resolve a divergence of views in the lower courts. You'll harm your credibility – you'll be written off as a blowhard – if you characterize the case as a lead-pipe cinch with nothing to be said for the other side. Even if you think that to be true, and even if you're right, keep it to yourself. Proceed methodically to show the merits of your case and the defects of your opponent's – and let the abject weakness of the latter speak for itself.

Scrupulous accuracy consists not merely in never making a statement you know to be incorrect (that is mere honesty), but also in never making a statement you

are not *certain* is correct. So err, if you must, on the side of understatement, and flee hyperbole. Since absolute negatives are hard to prove, and hence hard to be sure of, you should rarely permit yourself an unqualified “never”. Preface a clause like “Such a suit has never been brought in this jurisdiction” with an introductory phrase like “As far as we have been able to discover...”

Inaccuracies can result from either deliberate misstatement or carelessness. Either way, the advocate suffers a grave loss of credibility from which it’s difficult to recover.

IF POSSIBLE, LEAD WITH YOUR STRONGEST ARGUMENT

When logic permits, put your winning argument up front in your affirmative case. Why? Because first impressions are indelible. Because when the first taste is bad, one is not eager to drink further. Because judicial attention will be highest at the outset. Because in oral argument, judges’ questioning may prevent you from ever getting beyond your first point.

Sometimes, of course, the imperatives of logical exposition demand that you first discuss a point that is not your strongest. For example, serious jurisdictional questions must be discussed first: it makes no sense to open with the merits, and then to consider, at the end, whether the court has any business considering the merits. There is also a logical order of addressing merits issues. C may not be relevant unless B is established, which in turn is not relevant until A has been established. For example, you might have to prove that (A) the agency validly promulgated the regulation, (B) the agency has interpreted the regulation to favor your client, and (C) the agency’s interpretation is entitled to judicial deference. No other order of progression would make sense. Similarly, in defending a medical-malpractice judgment on appeal, your argument portion would not begin by justifying the amount of the award and then proceed to defending the judgment of liability.

If you’re the appellant, even though logic has pushed your strongest argument toward the back of the line in your principal brief, bring it up front in your reply – which will often set the agenda for the oral argument.

And if you’re an appellant at oral argument, begin with your strongest point regardless of what logical progression demands. If the court wants logical progression at oral argument, it won’t be shy about asking you to turn to a logically prior point; and there (unlike in briefing or bridge), if you don’t show your ace of trumps first, you may never get a chance to play it.

IF YOU'RE THE FIRST TO ARGUE, MAKE YOUR POSITIVE CASE AND THEN PREEMPTIVELY REFUTE IN THE MIDDLE – NOT AT THE BEGINNING OR END

It's an age-old rule of advocacy that the first to argue must refute in the middle, not at the beginning or the end. Refuting first puts you in a defensive posture; refuting last leaves the audience focused on your opponent's arguments rather than your own.

So for the first to argue, refutation belongs in the middle. Aristotle observed that "in court one must begin by giving one's own proofs, and then meet those of the opposition by dissolving them and tearing them up before they are made."¹

Anticipatory refutation is essential for five reasons. First, any judge who thinks of these objections even before your opponent raises them will believe that you've overlooked the obvious problems with your argument. Second, at least with respect to the obvious objections, responding only after your opponent raises them makes it seem as though you are reluctant, rather than eager, to confront them. Third, by systematically demolishing counterarguments, you turn the tables and put your opponent on the defensive. Fourth, you seize the chance to introduce the opposing argument in your own terms and thus to establish the context for later discussion. Finally, you seem more even-handed and trustworthy.

But anticipatory refutation has its perils. You don't want to refute (and thereby disclose) an argument that your opponent wouldn't otherwise think of. Avoiding this pitfall requires good lawyerly judgment.

IF YOU'RE ARGUING AFTER YOUR OPPONENT DESIGN THE ORDER OF POSITIVE CASE AND REFUTATION TO BE MOST EFFECTIVE ACCORDING TO THE NATURE OF YOUR OPPONENT'S ARGUMENT

Aristotle advised responding advocates to rebut forcefully in their opening words:

[I]f one speaks second, one must first address the opposite argument, refuting it and anti-syllogizing, and especially if it has gone down well; for just as the mind does

¹ *Rhetoric* ch. 3.17, at 257 (ca. 350 B.C.; H.C. Lawson-Tancred trans., 1991; repr. 2004).

not accept a subject of prejudice in advance, in the same way neither does it accept a speech if the opponent seems to have spoken well. One must therefore make space in the listener for the speech to come; and this will be done by demolishing the opponent's case; thus, having put up a fight against either all or the greatest or most specious or easily refuted points of the opponent, one should move on to one's own persuasive points.²

This point applies to those who oppose motions, to respondents, and to appellees. If an opponent has said something that seems compelling, you must quickly demolish that position to make space for your own argument.

Caution: As a general matter, this advice applies to refutation of separate points that make your affirmative points academic – not to your opponent's contesting of your affirmative points themselves. If, for example, your case rests on the proposition that a particular statute creates a claim, you would not begin by refuting your opponent's argument that no claim was created; you would present your own affirmative case to the contrary first. Suppose, however, that your opponent has argued, quite persuasively, that the court lacks jurisdiction and that the statute of limitations on any claim has expired. Judges don't like to do any more work than necessary. If they have a fair notion that they will never have to reach the question whether a claim was created, they aren't going to pay close attention to your oral argument on that point. And we have known judges to skip entirely over the merits section of the appellee's brief to reach the response to the appellant's jurisdictional or other nonmerits argument. You must clear the underbrush – or, as Aristotle puts it, “make space” – so that the court will be receptive to your principal argument.

Having made that space, however, you must then fill it. Proceed quickly to a discussion of *your* take on the case, *your* major premise, and *your* version of the central facts. As put by a perceptive observer, in the context of an appellee's argument:

*Nothing could be a more serious mistake than merely to answer the arguments made by counsel for the appellant. These arguments may be skillfully designed to lead counsel for the respondent off into the woods or they may lead him there unintentionally. The proper line of attack for counsel for the respondent to adopt is to proceed to demonstrate by his discussion of the law and the facts that the judgment is right and that it should be affirmed. All other considerations are secondary.*³

² *Rhetoric* ch. 3.17, at 257 (ca. 350 B.C.; H.C. Lawson-Tancred trans., 1991; repr. 2004).

³ Harold R. Medina, *The Oral Argument on Appeal*, 20 ABA J. 139, 142–43 (1934).

OCCUPY THE MOST DEFENSIBLE TERRAIN

Select the most easily defensible position that favors your client. Don't assume more of a burden than you must. If, for example, a leading case comes out differently from your desired result, don't argue that it should be overruled if there is a reasonable basis for distinguishing it. If you're arguing for a new rule in a case of first impression, frame a narrow rule that is consistent with judgment for your client. (Why set yourself the task of providing a satisfactory answer to 100 hypothetical questions about the multifarious effects of a broad rule when you can limit the questions to 5 about the limited effects of a narrow one?) If the defendant has intentionally injured your client in some novel fashion, argue for the existence or some hitherto unrecognized intentional tort, not for a rule that includes negligent acts as well.

Taking the high ground does not mean being noncommittal – saying, for example, that you win under any of three different possible rules, without taking a position about which rule is best. The judge writing an opinion, especially an appellate judge, cannot indulge that luxury, but must say what the law is. Be helpful. Sure, point out that you win under various rules, but specify what the rule ought to be. If you fail to do that, you leave the impression that all your proposed rules are problematic.

Don't let your adversary's vehement attacks on your moderate position drive you to less defensible ground. If, for example, your position is that an earlier case is distinguishable, don't get muscled into suggesting that it be overruled. And don't let your adversary get away with re-characterizing your position to make it more extreme (a common ploy). If you are arguing, for example, that lawful resident aliens are entitled to certain government benefits, don't leave unanswered your opponent's suggestion that you would reward illegal aliens. Respond at the first opportunity.

On rare occasions it may be in the institutional interest of your client to argue for a broader rule than is necessary to win the case at hand. When you take this tack, the court is likely to ask why it should go so far when a much narrower holding will dispose of the case. Have an answer.

YIELD INDEFENSIBLE TERRAIN – OSTENTATIOUSLY

Don't try to defend the indefensible. If a legal rule favoring your outcome is exceedingly difficult to square with the facts of your case, forget about it. You will have to consume an inordinate amount of argument time defending it against

judges' attacks, and you will convey an appearance of unreasonableness (not to say desperation) that will damage your whole case.

Rarely will all the points, both of fact and of law, be in your favor. Openly acknowledge the ones that are against you. In fact, if you're the appellant, run forth to meet the obvious ones. In your opening brief, raise them candidly and explain why they aren't dispositive. Don't leave it to the appellee to bring them to the court's attention. Fessing up at the outset carries two advantages. First, it avoids the impression that you have tried to sweep these unfavorable factors under the rug. Second, it demonstrates that, reasonable person that you are, you have carefully considered these matters but don't regard them as significant.

Suppose, however, that you're the appellee and those damaging points have already been noted by your adversary. Don't pass them by in sullen silence. Make a virtue of a necessity. Boldly proclaim your acceptance of them – thereby demonstrating your fairness, your generosity, and your confidence in the strength of your case, and burnishing your image as an eminently reasonable advocate: "We concede, Your Honor, that no notice was given in this case. The facts cannot be read otherwise." (*Huzzah!* thinks the court. *An even-handed fellow!*) You then go on, of course, to explain why the conceded point makes no difference or why other factors outweigh it.

Bear in mind that a weak argument does more than merely dilute your brief. It speaks poorly of your judgment and thus reduces confidence in your other points. As the saying goes, it is like the 13th stroke of a clock: not only wrong in itself, but casting doubt on all that preceded it.

TAKE PAINS TO SELECT YOUR BEST ARGUMENTS. CONCENTRATE YOUR FIRE

The most important – the very most important – step you will take in any presentation, whether before a trial court or an appellate court, is selecting the arguments that you'll advance. A mediocre advocate defending a good position will beat an excellent advocate defending a bad position nine times out of ten. (We made up this statistic, but it's probably correct). Give considerable thought to what your argument should be, and talk it over with your associates. Bear in mind that in an appeal, trial counsel is not necessarily the best person to make the call. Extreme attachment to a rejected point can color one's judgment about which rulings lend themselves to effective challenge. Think of the poker player who can't bear to fold three aces even after it has come to seem very likely that the opponent has a full house.

Scattershot argument is ineffective. It gives the impression of weakness and desperation, and it insults the intelligence of the court. If you're not going to win on your stronger arguments, you surely won't win on your weaker ones. It is the skill of the lawyer to know which is which. Pick your best independent reasons why you should prevail – preferably no more than three – and develop them fully. You might contend, for example, that (1) the breach-of-contract claim is barred by the statute of limitations; (2) the performance complied with the contract; and (3) any deficiency in performance was accepted as adequate and hence waived. Of course, each point may be supported by several lines of argument.

Lawyers notoriously multiply their points, just as they notoriously multiply their verbs (“give, grant, bargain, sell, and convey”). Some of the multifarious points often turn out to be just earlier points stated differently. Sometimes they result from including the pet theory of every lawyer on the case. Don't let that happen. Arm-wrestle, if necessary, to see whose brainchild gets cut. And don't let the client dictate your choice; you are being paid for your judgment.

On the surface, it might seem that a ten-point argument has been overanalyzed. In reality, it has been underanalyzed. Counsel has not taken the trouble to determine which arguments are strongest or endured the pain of eliminating those that are weakest.

COMMUNICATE CLEARLY AND CONCISELY

In an adversary system, it's your job to present clearly the law and the facts favoring your side of the case – it isn't the judges' job to piece the elements together from a wordy and confusing brief or argument. Quite often, judges won't take the trouble to make up for your deficiency, having neither the time nor the patience.

The judges considering your case have many other cases in hand. They are an impatient, unforgiving audience with no desire to spend more time on your case than is necessary to get the right result. Never, never waste the court's time. Having summoned the courage to abandon feeble arguments, do not undo your accomplishment by presenting the points you address in a confused or needlessly expansive manner. They must be presented clearly and briskly and left behind as soon as their content has been conveyed – not lingered over like a fine glass of port. Iteration and embellishment are rarely part of successful legal argument.

In a recent case before the Supreme Court of the United States, an appellant's brief took ten pages before mentioning the critical fact in the case, then took an-

other seven pages to discuss peripheral matters before setting forth the legal rule that governed the case. No judge should have to cut through 17 pages of pulp to glimpse the core of the dispute.

Avoid the temptation to think that your brief is concise enough so long as it comes in under the page or word limit set forth in the court's rules – and more still, the temptation to insert additional material in order to reach the page or word limit. Acquire a reputation as a lawyer who often comes in short of the limits. "It's worth reading carefully what this lawyer has written," the judges think. "There's never any padding."

The power of brevity is not to be underestimated. A recent study confirms what we all know from our own experience: people tend not to start reading what they cannot readily finish.⁴

ALWAYS START WITH A STATEMENT OF THE MAIN ISSUE BEFORE FULLY STATING THE FACTS

Cicero advised that you must not spring at once into the fact-specific part of your presentation, since "it forms no part of the question, and men are at first desirous to learn the very point that is to come under their judgment."⁵

In 1981, the rules of the Supreme Court of the United States were amended so that the first thing a reader sees, upon opening the cover of a brief, is the question presented. Many court rules, however, don't require issues or questions presented to be up front or even to be set forth at all. That's regrettable, because the facts one reads seem random and meaningless until one knows what they pertain to. Whether you're filing a motion in a trial court or an appellate brief – or, for that matter, an in-house memorandum analyzing some point of law – don't ever begin with a statement of facts. State the issue first.

But while your statement of the issue should come before a full statement of the facts, it must contain enough of the facts to make it informative. "Whether the appellant was in total breach of contract" is a little help, but not much. Fill in the facts that narrow the issue to precisely what the court must decide: "The appellant delivered a load of stone two days late under a contract not providing that time was of the essence. Was the appellee entitled to reject the delivery and terminate the contract?"

⁴ See Susan Bell, *Improving Our Writing by Understanding How People Read Personally Addressed Household Mail*, 57 *Clarity* 40 (2007).

⁵ Cicero, *Cicero on Oratory and Orators* 143 (ca. 45 B.C.; Ralph A. Micken trans., 1986).

APPEAL NOT JUST TO RULES BUT TO JUSTICE AND COMMON SENSE

Courts have been known to award judgments that seem to be unjust or to defy common sense. A defective statute, or a defective Supreme Court precedent, can (in the eyes of most judges, at least) require such a result. But don't count on it. Consider the philosophy of Lord Denning, regarded by many as one of the greatest of 20th-century British judges:

My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law [that] impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule – or even to change it – so as to do justice in the instant case before him. He need not wait for the legislature to intervene: because that can never be of any help in the instant case.⁶

To be sure, Denning was a renowned judicial activist – or a notorious one, if that is your view of things. But a similar, if not quite identical, approach was endorsed by the famous Chancellor James Kent of New York:

*I saw where justice lay and the moral sense decided the cause half the time, and then I sat down to search the authorities until I had exhausted my books, and I might once in a while be embarrassed by a technical rule, but **I most always found principles suited to my views of the case...**⁷*

Now you may think that the “principles” contained in the “authorities” ought to lead a judge to his or her conclusion, rather than merely provide later support for a conclusion arrived at by application of the judges “moral sense”. And you'd be entirely right. We're giving advice here, however, not to judges but to the lawyers who appear before them. You can bet your tasseled loafers that some judges, like Lord Denning, will be disposed to change the law to accord with their “moral sense”; and that many more will, like Chancellor Kent, base their initial decision on their “moral sense” and then scour the law for some authority to support that decision. It is therefore important to your case to demonstrate, if possible, not only that your client does prevail under applicable law but also that this result is reasonable. So you must explain why it is that what might seem unjust is in fact fair and equitable – in this very case, if possible – and, if not there, then in the vast majority of cases to which the rule you are urging will apply. You need to give the court a reason you should win that the judge could explain in a sentence or two to a nonlawyer friend.

Rely fully on the procedural and technical points that support your case. If, for example, a particular constitutional objection was not raised below and was not addressed by the lower court, *say so*. Whenever possible, however, accompany the procedural or technical objection with an explanation of why the pretermitted point is in any event wrong (or at least weak) *on the merits*. Judges will indeed dis-

⁶ Lord Denning, *The Family Story* 174 (1981).

⁷ *An Unpublished Letter of Chancellor James Kent*, 9 Green Bag 206, 210 (1897).

pose of cases on procedural or technical grounds – but they will do so much more reluctantly if it appears that the claim thereby excluded is a winner. If you cannot make a plausible case on the merits, then point out how the procedural or technical bar is necessary to ensure the correct result in the long term.

A real-life example: In a recent arbitration in Arkansas, the discovery cutoff came and went on February 15, by which time the parties had taken lengthy depositions and made voluminous production of documents. Counsel had one month left to prepare for the March 15 arbitration, which was slated to last two weeks. On March 8, the defendants issued subpoenas to four witnesses employed by the plaintiffs, requiring them to produce within five days all sorts of documents that the defendants had never before requested. The plaintiffs objected on grounds that the discovery cutoff had passed. But the arbitrators ordered the plaintiffs to produce the documents.

The result? During the week before trial (yes, in terms of the work required an arbitration is essentially a trial), while the defendants' lawyers were readying themselves – preparing their witnesses and assembling the documentary evidence – the plaintiffs' lawyers were scrambling to gather the documents required by the 11th-hour subpoenas.

The argumentative mistake? In objecting to the subpoenas, the plaintiffs' lawyers argued merely the obvious: (1) the discovery deadline had passed, and (2) the defendants could have requested these documents much earlier. The objections seemed hardly to register in the three arbitrators' minds. Here's what the plaintiffs could have – and should have – argued:

Plaintiffs' counsel should not be forced to stop preparing for trial, one week away, and travel to four cities on both coasts to find documents that the defendants never asked for before the expired discovery deadline. There is a reason for discovery deadlines: they level the playing field. If the defendants succeed in this last-minute stratagem, the plaintiffs' team will be severely prejudiced. One week from the trial date, we should not be forced to conduct a frenetic scramble for newly subpoenaed documents. Nor should we be forced, in order to avoid that consequence, to request a deferral of the agreed-upon trial date, further delaying the justice our client is seeking. Although we are sure the defense lawyers mean well, the effect of what they have done is major-league sandbagging. We urge the panel to quash the subpoenas.

That might have worked. Certainly it stood a better chance than merely harping on the deadline. If there is prejudice, never fail to identify and argue it.

WHEN YOU MUST RELY ON FAIRNESS TO MODIFY THE STRICT APPLICATION OF THE LAW, IDENTIFY SOME JURISPRUDENTIAL MAXIM THAT SUPPORTS YOU

A naked appeal to fairness in the face of seemingly contrary authority isn't likely to succeed. Whenever possible, dress up the appeal with citation of some venerable legal maxim that supports your point. Such maxims are numerous, mostly derived from equity practice. For example:

When the reason for a rule ceases, so should the rule itself.

One must not change his purpose to the injury of another.

He who consents to an act is not wronged by it.

Acquiescence in error takes away the right of objecting to it.

No one can take advantage of his own wrong.

He who takes the benefit must bear the burden.

The law respects form less than substance.

The State of California has codified many of these maxims with case summaries exemplifying their application.⁸ Courts in other states are no less familiar with such maxims, and you can almost always find one to support a defensible position.

UNDERSTAND THAT REASON IS PARAMOUNT WITH JUDGES AND THAT OVERT APPEAL TO THEIR EMOTIONS IS RESENTED

It is often said that a “jury argument” will not play well to a judge. Indeed, it almost never will. The reason is rooted in the nature of what we typically think of as “jury argument” – a blatant appeal to sympathy or other emotions, as opposed to a logical application of the law to the facts. Before judges, such an appeal should be avoided.

Some authorities (though not most) defend some degree of appeal to emotions:

Every argument... must be geared so as to appeal both to the emotion and to the intellect. I think the basic difference between a competent advocate and a great one is that a competent advocate can only do one or the other, or thinks only one or the other is important. You get competent advocates who are very good in emotional cases, because they are adept in appealing to the emotion. You get competent advocates

⁸ Cal. Civ. Code §§ 3509–3548.

who are successful in cases that are on the dry side because they have the knack of appealing to the intellect. But a great advocate is one who can appeal to both and knows how to press the two appeals in such a way that one will not get in the way of the other.⁹

We hold strongly to a contrary view:

*It is both folly and discourtesy to deliver a jury speech to [the New York Court of Appeals]. It will surely win no votes. You are fortunate if the judges will attribute such misconduct to your ignorance rather than to the vulnerability of your case.*¹⁰

Appealing to judges emotions is misguided because it fundamentally mistakes their motivation. Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions and bad judges want to be regarded as good judges. So either way, overt appeal to emotion is likely to be regarded as an insult. (“What does this lawyer think I am, an impressionable juror?”)

There is a distinction between appeal to emotion and appeal to the judge’s sense of justice – which, as we have said, is essential. *Of course* you should argue that your proposed rule of law produces a more just result, both in the present case and in the generality of cases. And there is also a distinction between an overt appeal to emotion and the setting forth of facts that may engage the judge’s emotions uninvited. You may safely work into your statement of facts that your client is an elderly widow seeking to retain her lifelong home. But don’t make an overt, passionate attempt to play upon the judicial heartstring. It can have a nasty backlash.

ASSUME A POSTURE OF RESPECTFUL INTELLECTUAL EQUALITY WITH THE BENCH

The Solicitor General of the United States – the most frequent and often the most skilled advocate before the Supreme Court of the United States – is sometimes called the “tenth justice”. Every advocate has the opportunity to deserve this description – to be so helpful to the court as to be a colleague of sorts, albeit a junior one. And that is the sort of relationship with the court, a relationship of respectful intellectual equality that counsel should try to establish. Some appellate judges refer to oral argument as the beginning of the court’s conference – an initial deliberative session in which counsel participate.

⁹ Whitman Knapp, *Why Argue an Appeal? If So, How?*, 14 Record N.Y.C.B.A. 415, 417 (1959).

¹⁰ Simon H. Rifkind, „Appellate Courts Compared“, in *Counsel on Appeal* 163, 178–79 (Arthur A. Charpentier ed., 1968).

Intellectual equality requires you to know your stuff, to stand your ground, and to do so with equanimity. When you write your brief, or stand up to speak, have clearly in mind this relationship that you wish to establish. It is *not* the relationship of teacher to student – and if the judges get the impression that this is your view of things, you will have antagonized them. Nor is it the relationship of supplicant to benefactor. You are not there to cajole a favor out of the judges but to help them understand what justice demands, on the basis of your intimate knowledge of the facts and law. Perhaps the best image of the relationship you should be striving to establish is that of an experienced junior partner in your firm explaining a case to a highly intelligent senior partner.

Respect for the court is more effectively displayed by the nature of your argument (by avoiding repetition, for example, and by refraining from belaboring the obvious) than by such lawyerly obsequiousness as “if Your Honor please” or “with all due respect.” Of course if you’re going to err on the point, it is probably better to be unduly deferential than not deferential enough.

RESTRAIN YOUR EMOTIONS. AND DON’T ACCUSE

Don’t show indignation at the shoddy treatment your client has received or at the feeble and misleading arguments raised by opposing counsel. Describing that treatment and dissecting those arguments calmly and dispassionately will affect the court quite as much. And it won’t introduce into the proceeding the antagonism that judges heartily dislike. Nor will it impair your image as a reliably rational and even-tempered counselor. Ideally, you should evoke rather than display indignation.

Cultivate a tone of civility, showing that you are not blinded by passion. Don’t accuse opposing counsel of chicanery or bad faith, even if there is some evidence of it. Your poker-faced public presumption must always be that an adversary has misspoken or has inadvertently erred – not that the adversary has deliberately tried to mislead the court. It’s imperative. As an astute observer on the trial bench puts it: *An attack on opposing counsel undercuts the persuasive force of any legal argument. The practice is uncalled for, unpleasant, and ineffective.*¹¹ This advice applies especially against casting in pejorative terms something that opposing counsel was fully entitled to do.

Nor should you accuse the lower court of willful distortion, even if that is obvious. A straightforward recital of the facts will arouse whatever animosity the appellate court is capable of entertaining, without detracting from the appear-

¹¹ Morey L. Sear, *Briefing in the United States District Court for the Eastern District of Louisiana*, 70 Tul. L. Rev. 207, 224 (1995).

ance of calm and equanimity that you want to project. If the court concludes that the law is against you, it will not award your client the victory just to embarrass a rogue trial judge.

CONTROL THE SEMANTIC PLAYING FIELD

Labels are important. That's why people use euphemisms and why names are periodically changed. And that's why you should think through the terminology of your case. Use names and words that favor your side of the argument.

Consider American Airlines. Some lawyers who have represented the company call their client "AA" in briefs, perhaps as a space-saver. That passes up an opportunity for subliminal reinforcement. If American Airlines is your client, you have the opportunity to call your client "American" – knowing that every judge sitting on your case (unless you are in some international tribunal) will *be* an American. Of course, if you're opposed to American Airlines, you will call your adversary "the Company," "the Corporation," or perhaps even "the Carrier" – never "American." If you can get your adversaries to use your terminology, so much the better.

Sometimes it's not a proper name at issue but an event. Some years ago, Warren Christopher represented Union Oil in connection with some major spills at offshore oil platforms in the Santa Barbara Channel. From the beginning, Christopher persistently referred to this potential environmental disaster as "the incident" and soon both the judge and even the plaintiffs' lawyers adopted this abstract word uniformly. Anything more concrete, from Union Oils point of view, would have conjured up prejudicial images.

Judge James L. Robertson of Mississippi has recounted a splendid example of his use of disputational semantics when he was in practice. He was challenging some unduly restrictive outside-speaker regulations on Ole Miss's college campuses. During the proceedings, he and his partners kept referring to the lawsuit as the "speaker-ban case." Soon everyone was doing it.¹² That done, the outcome of the case seems to have been foreordained. Would you be inclined to vote for or against a speaker ban?

Of course, semantic astuteness must not degenerate into sharp practice. In a high-profile medical-malpractice action some years ago, a hospital executive named Lyman Sarnoski (the last name is fictional) was accused of falsifying medical records. The plaintiff's lawyers repeatedly referred to him before the jury as "LIE-man," emphasizing the first syllable of his name to suggest, undoubtedly, that lying was part of his nature. It was not long before the judge ordered them to refer

¹² Hon. James L. Robertson, "Reality on Appeal," in *Appellate Practice Manual* 119, 124–25 (Priscilla Anne Schwab ed., 1992).

to the man as “Mr. Sarnoski” – and levied a \$5,000 sanction on the lawyers. Even if the judge had not taken offense, the jurors probably would have.

CLOSE POWERFULLY – AND SAY EXPLICITLY WHAT YOU THINK THE COURT SHOULD DO

Persuasive argument neither comes to an abrupt halt nor trails off in a grab-bag of minor points. The art of rhetoric features what is known as the peroration – the conclusion of argument, which is meant to *move* the listener to act on what the preceding argument has logically described. The concluding paragraph of a legal argument cannot, of course, be as emotional as the peroration of Cicero’s first oration against Cataline. But it should perform the same function appropriately for the differing context. It should briefly call to the readers or listeners mind the principal arguments made earlier and then describe why the rule of law established by those arguments must be vindicated – because, for example, any other disposition would leave the bar and the lower courts in uncertainty and confusion, or would facilitate fraud, or would flood the courts with frivolous litigation, and so on.

The trite phrase “for all the foregoing reasons” is hopelessly feeble. Say something forceful and vivid to sum up your points.

LEGAL REASONING

THINK SYLLOGISTICALLY

Leaving aside emotional appeals, persuasion is possible only because all human beings are born with a capacity for logical thought. It is something we all have in common. The most rigorous form of logic, and hence the most persuasive, is the syllogism. If you have never studied logic, you may be surprised to learn – like the man who was astounded to discover that he had been speaking prose all his life – that you have been using syllogistic reasoning all along. Argument naturally falls into this mode, whether or not you set out to make it do so. But the clearer the syllogistic progression, the better.

Legal arguments can be expressed syllogistically in two ways. Some are positive syllogisms:

Major premise: All S is P.
Minor premise: This case is S.
Conclusion: This case is P.

Others are negative:

Major premise: Only S is P.
Minor premise: This case is not S.
Conclusion: This case is not P.

If the major premise (the controlling rule) and the minor premise (the facts invoking that rule) are true (you must establish that they're true), the conclusion follows inevitably.

Legal argument generally has three sources of major premises: a text (constitution, statute, regulation, ordinance, or contract), precedent (caselaw, etc.), and policy (i.e., consequences of the decision). Often the major premise is self-evident and acknowledged by both sides.

The minor premise, meanwhile, is derived from the facts of the case. There is much to be said for the proposition that "legal reasoning revolves mainly around the establishment of the minor premise"¹³

¹³ O. C. Jensen, *The Nature of Legal Argument* 20 (1957).

So if you're arguing from precedent, your argument might go:

- Major premise: Our cases establish that a prisoner has a claim for harm caused by the states deliberate indifference to serious medical needs.
- Minor premise: Guards at the Andersen Unit ignored the plaintiff's complaints of acute abdominal pain for 48 hours, whereupon his appendix burst.
- Conclusion: The plaintiff prisoner has a claim.

Or if you're arguing text:

- Major premise: Under the Indian Commerce Clause of the U.S. Constitution, states cannot tax Indian tribes for activities on reservations without the express authorization of Congress.
- Minor premise: Without congressional authorization, South Dakota has imposed its motor-fuel tax on tribes that sell fuel on reservations.
- Conclusion: South Dakota's tax is unconstitutional.

Or if you're arguing policy:

- Major premise: Only an interpretation that benefits the handicapped serves the policy objectives of the statute.
- Minor premise: The defendant's interpretation of the statute requires each wheelchair-bound employee to buy additional equipment at a cost of \$1,800.
- Conclusion: The defendant's interpretation does not serve the policy objectives of the statute.

Figuring out the contents of a legal syllogism is a matter of finding a rule that works together with the facts of the case – really, a rule that is invoked by those facts. Typically, adversaries will be angling for different rules by emphasizing different facts. The victor will be the one who convinces decision-makers that his or her syllogism is closer to the case's center of gravity. What is this legal problem *mostly* about? Your task as an advocate is to answer that question convincingly.

**KEE, Christopher. *The Art of Argument: A Guide to Mooting*.
New York: Cambridge University Press, 2006. pp. 23–51**

WRITTEN DOCUMENTS

MEMORANDA AND MEMORIALS

Most competitions require each team to submit a written document, although the form of documentation required can vary significantly. In some competitions, you are asked to provide a lengthy memorandum of submissions, sometimes called a memorial. On other occasions you need only submit a short outline of submissions, or you might be asked to prepare a case file. Although each of these different styles of written document serves a different function, they all have a similar purpose, that is, they force you to identify and deal with the relevant issues. Competitions that require documents of this kind will usually expect you to submit two documents, one for each side. The process of preparing the written documents doubles as an important step in the preparation of your oral presentations, hence it is worth preparing a written submission even where it is not required by the rules of the competition.

In some competitions, the written memorandum or memorial will form part of a document competition. Producing the document is usually the first task. Inevitably putting it together will involve considerable frustration, and immense pride once the task is completed.

Just as your team must decide on your commitment to the moot in terms of time and level of preparation, you must also decide how much effort you wish to put into the written documents. Obviously the more effort you put in, the better the documents you produce will be.

Documents from past years will usually be available on the competition website, and it is a sensible idea to obtain copies so that you can judge the standard. The standard will be very high, but you need not feel disheartened. Remember that this is a team activity and collectively your team will have the necessary skills.

THE TIPS AND TRICKS OF WRITING

The task of producing the written documents for the moot task can be highly rewarding. It can also be difficult and frustrating, but with some thought and preparation your team can sail through this immensely satisfying aspect of the competition. This section examines some of the tips and tricks associated with memorandum writing.

Knowing your purpose and your audience

The first thing you need to do is identify your purpose. Remember that you are not writing a scholarly dissertation. Although there are many similarities between a memorandum and a dissertation, and your research may be equivalent to that done by Masters students, your purpose is very different. Research dissertations seek to contribute or further scholarship, whereas you are simply arguing a case. Rather than analysing the law, you are applying the law. You are not being asked to discover a new legal doctrine, but to explain an existing one. Always reduce your task to its primary purpose. Keeping this in mind will help you produce a much better document.

If your purpose is not clear, and your document is beginning to resemble a dissertation, this will often be indicated by excessive referencing. Referencing is extremely important. However, it is possible to put too many references in a memorandum. Excessive referencing detracts from the document. It will not suggest that the weight of authority is on your side. It is more likely to be interpreted as “showing off” by those assessing the document.

The purpose of your written submission is to argue a fictional case before a panel of judges. These judges will be assessing only how well your document is written; they will not be determining whether your client wins or loses on the strength of your submission. In a moot competition you do not need to win the case to win a prize. This point is particularly important, and we return to it later in the context of oral submissions.

You need to be pragmatic. Arguably, in a real case you are often under a duty to run every possible argument to advance your client’s cause – although this too must be tempered. There is no such duty in a moot competition. The ideal document, which everyone should strive to create, will be one that also wins the case. But in a well written moot problem, it is virtually impossible to create an ideal document. Moot problems are deliberately written to ensure that both sides have an arguable case. Furthermore, the problem will usually confine the issues to be discussed. Work within the parameters of the problem and to the expectations of your audience. This is what the judges will be looking for when they assess your document.

It is sometimes suggested that moot participants should not waste their time on weak arguments. The effective presentation of weak arguments can often be

a key to success. However, the advice is not entirely without merit. Your audience will have particular expectations. The readers of your document will expect to see certain arguments advanced and authorities cited. These are some of the prejudices any advocate faces when presenting a case. The safe path is not to disappoint your audience and to ensure you deal with the expected material. As you are likely to have a word or page limit, this may mean you are unable to cover all the arguments you have been developing in your document.

A good document will present the expected arguments, along with at least one or two unique arguments. These unique arguments are what will set your document apart. They must be developed carefully, and it is often easier to do this in a document rather than in an oral submission. Although ideally they should not need to, readers can flip backwards and forwards through your submission if necessary. This is not a luxury you have in an oral submission.

Setting up your document

There are competition rules governing the length and presentation of the written memorandum. For example, you may be required to have a maximum of 35 pages with minimum right and left margins of 2.5 cm. Make sure you read these rules very carefully. If the page margin is defined in the rules, set the correct margins in your document even before you start writing.

As technology progresses, this otherwise time-consuming task is made easier and easier. Most students will have access to powerful word-processing programs. Learning how to fully utilise these programs will be of great benefit to you in your immediate task – that is, composing the written document – but also when completing research assignments and as you head out into the workforce. This section covers some of the important tools in your word-processing program that you will need to know how to use in order to compose your written document.

Using styles

There are a number of functions in standard word-processing programs that you should learn before writing a single word. For example, you need to know how to “style” a document. This involves applying “style tags” to every paragraph and heading in your document. The style you apply to a paragraph will determine its font type and size, the margins, the line spacing and many other formatting features. This function allows you to have a consistent look to paragraphs and headings, without needing to go through every line and manually change the font or check margins. You can use the basic styles set-up in your word-processing program for a standard document, or you can create your own style names and give them the attributes you wish them to have. Before beginning to compose your document, work out what styles you will need. Typically you will need a standard paragraph style (probably numbered), and a different style for each level of head-

ing in your document. This is very important for compiling a table of contents. You may also need a style for long quotes that are set separately from the running text.

The easiest way to create a new style is by adapting an existing one. If you do this, be very careful not to change the “Normal” style in your program. “Normal” is the name given to the base style in Microsoft Word. Other programs will have a similarly named style that performs the same function. It is the root of all other styles and should not be altered.

Page numbering

A second function you should familiarise yourself with is page numbering. In some programs, it is simply a matter of selecting this option; in others you will need to insert a running foot. Both are straightforward processes. However, do you know how to change the page numbering style in the middle of the document? Or can you start numbering on page 5 of the electronic document? It is likely that you will need to do both.

As mentioned in the introduction to this section, there may be page limits placed on your document. It is also likely that according to the rules certain pages need not be included in that limit, for example, the table of contents or reference list. If this is the case, those pages should be numbered in a different way. You may decide to number pages that are not included in the page limit using Roman numerals. How this is done will vary from program to program, so you will need to investigate the process yourself. Typically it will involve dividing the document into sections.

Cross-references

One of the most important and time-saving word-processing skills a lawyer will ever learn is how to automatically insert cross-references within a document. Lawyers are frequently called upon to draw up a contract and then, as negotiations progress, amend that contract several times. This may involve adding or removing paragraphs, and consequently the clause numbers will change. Each time this happens your document should be set to automatically amend any cross-references in other clauses. It is very poor risk management not to set up your document in this way, as it is easy for human editors to overlook the occasional cross-reference. While the consequences of cross-referencing mistakes in a moot document are certainly not as dire as in professional practice, it will detract from the overall impression of your document.

Table of contents

Most word-processing programs have the capacity to create an automatically generated table of contents. This is another important use of the application of styles

within your document. The automated table of contents function works very simply. It tells the computer to look for every paragraph styled as heading A, B and C, for example, and to list them along with their page number. The table of contents is generally the last thing you should create in your document.

Avoiding common problems

There are some potential pitfalls in word-processing that you need to be aware of. A document that has been set up on one computer may look completely different on another computer. This is usually because a font you have chosen for one or more of the styles in your document may not be loaded on the other computer. As a result, the computer selects a replacement font for any missing fonts. This will affect the appearance of the text and the pagination. This problem is relatively easy to correct. You can load the fonts you need on the other computer, or use the original computer to print your document or check pagination. It is best to select commonly used fonts, such as Times New Roman and Palatino, to avoid this problem.

If the problem is more complex it may be harder to identify and correct. For example, your styles may be based on a particular style, the “Normal” style, for instance. You may have inadvertently and unknowingly set your style to automatically reflect any changes made to the “Normal” style. If the “Normal” style on computer is different to that on computer 1, your document may look very different and may no longer comply with the rules. For example, it may now be 36 pages, rather than 35. This is a situation where team work is important. A good solution is to nominate one person to be the final writer on a designated computer.

A similar effect can occur when you cut and paste text from another document into your document. You may unintentionally import a new style into a document when you cut and paste. You can avoid this by pasting “Text only”, without any formatting. For example, in Microsoft Word all the formatting features of a paragraph are contained in the hard return symbol “¶”. If you highlight the text you wish to copy and paste, but do NOT highlight the paragraph symbol, you will be able to paste the text into your document without the unwanted formatting.

If you do need to print your document from computers other than the one on which it was created, you can avoid printing problems by saving it in PDF format. This should ensure that it will print from any computer.

Referencing

Throughout your education you will have produced research essays, and you will be aware of the importance of proper referencing. It is especially important in the context of an international moot competition. There is a real possibility that one of the commentaries you refer to in your document has been delivered by one of the judges who is assessing your document. If you misquote, or worse plagiarise, the consequences will be dire.

There may be rules particular to your mooting competition about the form of referencing to be used. For example, you may not be allowed to use footnotes. It is vital that you know the referencing requirements before you begin your research. Using a referencing style involves not only knowing the correct form of citation, it also involves knowing how to compose your sentences in such a way that you can follow the referencing style correctly.

Those who commonly use footnotes or endnotes (often referred to as the Oxford style of referencing) may have some difficulty coming to terms with the Harvard system. If the referencing style is incorrectly applied, you could be referencing the application of a legal doctrine, rather than the legal doctrine itself. The consequence is that various authorities appear to be making a statement about the actual problem rather than about the law that applies to the problem.

Being organized

In the course of preparing your arguments you are likely to read and consider more than 200 different articles or texts. It is impossible to remember the details of the relevant material from each of these texts. You need to write down the bibliographic details of any resource you read at the time you actually read the resource, not at the time you write the submission. Trying to pinpoint references for quotes in your document the night before it is due is not the best way to write a submission. Unless you take a proactive approach to referencing, you will need to devote considerable time once you have completed the rest of the document to correcting the referencing alone. No matter how well you prepare, you will always need to check the references in the final draft. This is an important task that should not be overlooked. However, there is a very big difference between checking references and correcting incomplete and inadequately prepared references. Make sure that you take an organised approach from the very beginning.

References are such a significant element in your final document, it may be worthwhile nominating one person in your team to be responsible for collecting references from other team members and maintaining a collective bibliography.

Using bibliographic programs

Those of you who have had some experience with larger research projects may be familiar with bibliographic programs. These are programs specifically designed to help you manage your bibliographic references. They are essentially just databases. If you are unable to get access to one of the commercial products, it would be possible to achieve the same result from any standard database.

Databases operate by classifying information into specific fields. For example, for bibliographic references, the fields will include type of resource (book, journal article, internet, etc.), author's name, the title, and so on. By entering information in this way you are then able to determine how the information should be repro-

duced, and change it if needed. For example, you may need to present your references alphabetically listed by the name of the author, or you may wish to list them in date order. Having this option is important, because different referencing styles call for different methods of listing the information. The professional programs will have hundreds of different referencing options available for you to choose from. Select the one that complies with the rules of your competition and much of the hard work disappears, as your program will automatically set out your references in the required style.

Using a proforma reference sheet

Irrespective of whether you are using a professional bibliographic program, a database you have created yourself, or just a list, it is very important that you give consideration to how you collect bibliographic information. Whoever is responsible for collating the references within the team will find it much easier to manage that information if it is presented in a standardised fashion. The easiest way to achieve this is to develop a proforma reference sheet. This sheet will identify the required information, such as author, title, type of resource and year of publication. Every team member should complete a new sheet for each reference that they read.

Although its primary function is for referencing purposes, with very minor amendments the reference sheet can be a valuable tool in other ways. For example, the person completing the sheet may be asked to rate the resource out of five, provide a summary or identify key words. This information will be very useful to other team members if you decide to rotate research areas. Key words can be used by those writing the document to quickly identify resources that are relevant to the section they are currently working on. If you are keeping any kind of electronic record of these reference sheets, running a key word search will be very easy.

Here is an example of a referencing sheet that you can copy or adapt to your team's needs.

Title: <i>(Article title / chapter title / case name)</i>
Publication name: <i>(Journal title / book title)</i>

Web address:
First author: <i>(First name / SURNAME)</i>
Second author: <i>(First name / SURNAME)</i> <i>Any other authors should be noted in bold in 'General comments' below</i>
Date viewed:
Date (year) published:
Publisher:
ISSN / ISBN:
Citation: Pages: <i>(Official journal citation / Case citations – all available in proper hierarchy)</i>
Rating (1 poor – 5 excellent):
Countries referred to:
Select appropriate key words: <i>(Determine a list of key words relevant to your topic.)</i>
Other: <i>(key words not in list)</i>

General comments:

(This should include a brief summary of main arguments / points raised. Attach more paper if required.)

NAME:

(It is important to know who completed the sheet.)

Writing style

The documents produced by your team need to be written in a clear, consistent, flowing style. This will assist readers of your document to follow the logic of your arguments and understand your case.

Achieving ‘one voice’

We each have our own distinctive writing style. There may be simple phrases that we tend to repeat, and particular ways we construct a paragraph. It is very easy to recognise when different passages in one document have been written by different people. In order to achieve consistency and fluency in your team’s work, it is important that your document has a uniform style or “one voice”. There are several ways this can be achieved while still ensuring that each member of the team contributes.

The simplest method is to delegate writing to particular team members. This may be one or several people. If several people are chosen, then those people should write together. This means that as far as possible they should all be sitting in front of the same keyboard as the document is produced. Other team members will be responsible for bringing the research and arguments to be transformed into the written document. In this way the writers are the scribes whose job is to translate the ideas of the whole group into one document.

Delegating the writing to a group of several people can lead to problems. One of the underlying themes of this book is the need to think about what you are going to do before you actually do it. Give some thought to the difficulties that may arise when several team members are acting as scribes and identify ways to avoid them.

Writing with one voice will not only improve your document but it is also a very important exercise in learning how to work together as a team. Those members of the team who do the research for the writers will sometimes face the difficult task of seeing their arguments written in different ways. If you are in this position, there

may be times when you find your arguments so transformed that they are barely recognisable. How you respond to this situation will have a considerable effect on both the unity and smooth functioning of the whole team. Whatever role you are in, you are handing over some of the responsibility for the outcome to others, which requires you to have faith in your team-mates. The writers must remember that they are being entrusted to prepare a group document, and should not let their own personal ideas overpower ideas from the rest of the team.

Presenting information to the team scribes

The team needs to think about how the researchers should present information to the writers in order to minimise potential difficulties. The information can be presented orally or in writing.

Set rules about how written information should be presented. For example, you might want to list key or fundamental points that must be reflected in the document at the top of the page. Underneath these, you could provide an explanation of these points for the benefit of the writers. Unless they are confident that the explanation fits the voice of the document as a whole, the writers should resist the temptation to simply cut and paste these explanations into the document. Quotes and references should also be clearly identified. Determining a standard approach that everyone understands will avoid pitfalls such as the writers omitting a key point. If the research is presented in a standardised way, with the key points clearly identified, then those points cannot be overlooked.

This technique has a very close parallel in professional legal practice. When you begin legal practice you will almost certainly be asked to do research for a more senior lawyer. Usually, this research will be presented in the form of a memorandum, and most firms will have a guide as to how the memorandum should be structured.

The oral presentation of information is really just a discussion between the researchers and the writers. It allows the researchers to explain in more detail the importance and significance of the research they are providing. It is also a time when researchers can comment on what the writers have actually written. However, researchers should not be allowed to completely rewrite passages in the document. One way to ensure this cannot happen is to have a rule that only writers are allowed to type into the actual document. Researchers should be given a hard copy of any relevant section of the document to comment on, criticise and edit, but they should not directly edit the master document.

Structuring your document

One of the secrets of a good document, and for that matter an argument generally, is to ensure that it flows logically from point to point. It is not possible to simply sit down and write a flawless document – considerable planning is required. Just

as you might follow a map in order to go somewhere new, you need to map out a framework for your document.

One way to do this is to put your ideas on a whiteboard. An advantage of using a whiteboard is that it is very easy to change the structure of your ideas until you find the best approach. Another method is to use a large piece of paper, or put each of your ideas on an ordinary sheet of paper and spread them out over the floor or attach them to a board. It can be very helpful to use a digital camera during this process. Taking a photo of your framework is a simple way of recording your work.

Planning your approach is not unique to moot competitions. It is extremely important in other aspects of your studies, such as in examinations. A good examination tip is to spend a few moments drawing a quick map of your anticipated answer before you begin. Not only does this help you stay focused when you are writing the answer, but also serves to guide the examiner through your answer. If you run out of time in an exam, the concept map you have drawn should demonstrate that you know how to answer the question, and often examiners will take that into account when awarding marks.

Headings and paragraphs

Within your document you will need to guide the reader through your submissions. This is commonly done through the use of headings, where each distinct section of your material is presented with its own heading. Some competitions outline specific headings that must be used, whereas others allow you to determine your own. Ineffective headings will detract from the document as a whole, and obscure the underlying structure of your argument. As a consequence you need to take great care when composing your headings.

A heading must clearly express the theme of the paragraphs that follow. It should be from your client's perspective, and ideally it will be short and concise. Different level headings must be used in a consistent manner. You must not only ensure that headings of the same level are formatted in the same way, but that their relative significance and importance are consistent within your heading hierarchy.

Well-constructed paragraphs also play an important role. Paragraphs delineate issues for a reader. They also break up information into consumable parts. While there is no set length for a paragraph, it should not be particularly long. Each paragraph should contain a topic sentence. This is usually but not necessarily the first sentence. The topic sentence briefly introduces the point of the paragraph. There should only be one main point per paragraph. The middle sentences of a paragraph develop and provide evidence for the point being made. It is important that the final sentence is not simply a repeat of the topic sentence, as this will give your reader the feeling that the paragraph is going round in circles. The final sentence should reiterate the point by drawing on the evidence provided by the middle sentences.

Avoiding contradictory arguments

A well-structured document will take a reader step by step to the conclusion you want them to reach. Frequently you will do this by presenting a series of alternative routes: if the reader does not accept your first argument, then you have another argument to follow that supports your case.

A common trap is to present contradictory arguments rather than alternative ones. Contradictory arguments suggest that there may be a flaw in your case, whereas numerous alternative arguments will lead the reader to conclude that the outcome you are proposing is indeed the correct one. How your document is structured will often affect whether an argument appears to be contradictory or a positive alternative. This typically occurs where you have mutually exclusive arguments.

Mutually exclusive arguments are ones that cannot co-exist that is, they are contradictory. In other words, if your reader accepts proposition A, they must by definition reject proposition B. Often situations like these will be immediately apparent, while in other situations the conflict may be initially obscured by the different levels of argument presented.

This can be demonstrated by reference to a relatively simple example. The example that follows relates to arbitration law, but the principles apply to any area of law and in any dispute forum.

In this example, the parties involved have agreed to have their dispute resolved by arbitration. The arbitration is to take place in Australia. The law governing the contract was not expressly stated and is now in issue. The New Zealand based Respondent wants to argue that English law governs the contract. New Zealand's conflict of law rules point to the application of English law.

As Australia is the place of the arbitration, we must first look at Australian law. Australia has adopted the UNCITRAL Model Law.

Article 28 of the UNCITRAL Model Law is as follows:

Rules applicable to the substance of the dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

The Respondent believes it can make two submissions. It can argue that pursuant to the New Zealand conflict of law rules English law will apply; or it can argue that there was an implied agreement between the parties that English law would

apply. The order in which these two arguments are presented will affect whether they are contradictory or simply put in the alternative.

The Respondent presented the arguments as follows:

The Respondent submits that this Tribunal should apply the conflict of laws rules of New Zealand under Article 28(2) of the UNCITRAL Model Law to find that English law governs this contract. It makes this submission because . . .

Alternatively, this Tribunal should find that the parties have chosen the laws of England to apply under Article 28(1) of the UNCITRAL Model Law.

The arguments may have been placed in this order because the Respondent believed the implied agreement argument was the weaker one. There is a presumption that you should lead with your best argument, but despite the fact that both arguments arrive at the same conclusion, presented in this fashion they are contradictory.

The reason the arguments are contradictory when presented this way is because Article 28 UNCITRAL Model Law requires the Tribunal to first look to the parties' agreement, and then to apply conflict of laws rules only if the parties have not made any agreement. By first arguing that the Tribunal should apply the conflict of laws rules of New Zealand, the Respondent is in essence accepting that the parties have not made a choice of law. The Respondent contradicts itself by then arguing the parties chose the laws of England to apply.

If, however, the order of the submissions were reversed the Respondent would have two logically coherent alternative arguments. The Respondent should first ask the Tribunal to find an implied agreement. It is only in the event that the Tribunal does not accept the submission that it needs to even consider the second. We can call these "cascading alternatives".

Basic rules of writing

There are many good books available that set out the basic rules of writing. You are strongly encouraged to borrow some of these books from your library.

Those students who are native English speakers will have probably already learnt these rules, although it never hurts to revisit them. Indeed, this may be where non-native English speakers have an advantage. Upon returning home from international moot competitions, some native English-speaking participants have remarked with some embarrassment on the fact that the non-native speakers spoke better English than they did.

The same is true of the documents. A quick review of the document awards for the Vis Moot reveals that only twice in the history of the competition has a native English-speaking team won first prize for a document. All other first-prize winners have been non-native speakers. No doubt there are many reasons for this, however complacency is probably one of the biggest factors. People from any country

can become lazy when conversing in their native tongue, and are more likely to lapse into slang and colloquial expressions. Abbreviated forms of expression, such as “g’day” for “good day” have evolved simply because we are too lazy to enunciate the complete words.

Similarly, we tend to become lazy when applying the general rules of writing in our own language. If you want to do well in the document competition, you cannot afford to do this. While it is not within the scope of this book to examine all these rules in detail, there are a number of rules that are particularly pertinent to written advocacy.

Sentence construction

Writing that is intended to be argumentative and assertive should be written in the “active voice”. Sentences should follow the sequence: subject, verb, object. If you place the subject at the beginning of the sentence, you give it emphasis. You should then place the verb directly after the subject without any intervening words if possible. The object should then closely follow the verb. Sentences written in the active voice tend to be short and direct, which is perfect for your task.

The Respondent breached its duty.

There may be occasions where you deliberately want to understate something, for example, when presenting a weak argument. In these situations it might be appropriate for you to use the “passive voice”. The passive voice reverses the position of the subject and object in the sentence: object, verb, subject. These sentences tend to be longer than active voice sentences.

The duty was breached by the Respondent.

Whether you are using the active or passive voice, it is important to construct your sentences so that the order of the words does not create ambiguity. You need to take particular care with the placement of any modifiers in the sentence. A modifier is a word or phrase that gives extra information about another word or phrase. Consider the following example.

The food aid was ruined on the date it was received by the Parthian refugee agency.

In this sentence, the modifier is the phrase “by the Parthian refugee agency”. It is not clear whether the agency is doing the receiving, or the ruining, or both, therefore the sentence should be recast to remove the ambiguity.

In complex sentences where there are multiple subjects and verbs, it is wise to present verbs in the same form to avoid confusion. For example, in the following

sentence, inserting the second 'is' helps the reader to understand the sentence easily.

The Respondent is responsible for the maintenance of the satellite and is liable for the damage it caused.

Using words appropriately

Your ability to select the appropriate words is naturally limited to the extent of your vocabulary, or in the case of your team your collective vocabulary. Native speakers of a language often have a natural advantage in this regard as they tend to have a larger vocabulary than non-native speakers of a language.

However, both native and non-native English speakers can fall into the trap of mismatching words. A common mistake is using an inappropriate verb with a noun. A mismatch of this sort leads to subjects doing things they cannot actually do. For example, a court may "find" or "rule" or "determine", but it cannot "submit".

The following example is incorrect:

In the shipping case The Poseidon, the Court submitted . . .

The correct form would be:

In the shipping case The Poseidon, the Court found . . .

The subject and verb in a sentence must always agree in number. This means that a singular subject needs a singular verb, and similarly a plural subject requires a plural verb. It can be easy to spot cases where subjects and verbs disagree in number, but it becomes more difficult in sentences where a phrase has been inserted between the subject and verb, particularly if the phrase includes a noun that differs in number from the subject of the sentence. The rule is that the verb must agree with the subject, not with any intervening noun.

The Applicant's submission, although purportedly supported by all those authorities, is misconceived.

If your sentence has two nouns joined by the word "and", you should use a plural verb. You would use a singular verb if the sentence contained two singular nouns that are joined by "or". If there are both singular and plural nouns joined by "or", the verb should agree with the nearest noun.

The following constructions are correct.

The Applicant and the Respondent are responsible.

The Applicant or the Respondent is responsible.

The Applicant or the Respondents are responsible.

The Applicants or the Respondent is responsible.

Avoid gender-specific language

As a consequence of now antiquated social norms, the use of masculine pronouns developed as the default form of expression when giving general examples. This has been rightly criticised, and many official legal documents such as statutes must be written in gender-neutral language. Indeed, it is also a rule of most moot competitions.

A common difficulty arises when you need to use a singular pronoun in a general example. For example, “Each member of counsel must present his (or her) documents”. The pronouns “his” and “her” are obviously gender specific and should be avoided unless you are referring to a particular person. In some cases, it is possible to use “its” although this can sometimes seem clumsy. A way of circumventing this problem is by using a plural pronoun such as “their”, which is gender neutral. Technically this is grammatically incorrect if the noun referred to by the pronoun is singular, however it does seem to be used with increasing regularity.

If possible, it is better to rephrase the sentence to avoid the problem altogether. You can either recast the sentence so that a pronoun is not needed, or you make both the original noun and pronoun plural. (The example above would become: “Members of counsel must present their documents.”)

Keep the tense consistent

The tense used in a sentence provides a timeframe for the action that is being described. There are twelve main tenses in the English language. If you write in the active voice, as described above, you are very unlikely to encounter more than a few different tenses. The “simple” tenses, as they are referred to, are the most commonly used and easiest to understand. The simple tenses are past, present and future.

The Applicant submitted . . . (past tense)

The Applicant submits . . . (present tense)

The Applicant will submit . . . (future tense)

Two other common tenses are the “past perfect” and “present perfect”. You use the past perfect tense to refer to something that happened before the action you are now describing.

The Applicant had submitted . . . (past perfect tense)

The present perfect tense is used when an action is continuing, that is, it began in the past but is ongoing, or where the action occurred at an indefinite time in the past.

The Applicant has submitted . . . (present perfect tense)

As the above examples demonstrate, the “past” and “present perfect” tenses can be used to convey a similar meaning. The most important rule about tenses is not

to change tense in the middle of a sentence. The tense you use should remain consistent throughout your document. The need for consistency applies to many different aspects of the preparation and presentation of your document.

Editing

Editing is an invaluable part of the preparation of any document. It is inevitable that you will make errors while writing the first draft of your submission. When you consider the complexity of the writing process, this is not surprising. When you write, you are not simply thinking about the next word that is about to appear, you are thinking about the whole sentence. You are also thinking about the point you are making in the paragraph as a whole, so you are thinking about the sentences that are to come as well as those you have already written. You might have external distractions as well, such as the presence of other team members. With all of this going on, it is little wonder that sometimes the ideas you have in your head are not conveyed perfectly by the words you write on the page.

Editing allows you to compensate for these distractions. Once you have written your first draft, print it out and read it carefully and as objectively as you can. Although some people feel comfortable reading documents on a computer screen, there is a risk associated with editing in this way. Authors of documents have a tendency to read what they intended to write, not necessarily what has actually been written. There is likely to be a greater risk of doing this if you read the document on the screen.

When learning to study, students are often encouraged to have a dedicated space where all they do is study. We train ourselves that if we are sitting in that seat we are there to work. A psychological association is formed. The same can occur when writing submissions, whether as part of a moot competition or for a real case. For this reason, when you begin the editing process it is a good idea to find a place to work in that is different from where the document was written. This can help you clear your mind for the task ahead.

The aim when editing is to be as objective as possible. Try to read the document as if you were reading it for the first time. Apart from correcting spelling and grammatical errors, you should also ensure that each sentence serves a purpose and makes sense. One way of doing this is to read the document aloud. Sometimes hearing your ideas out loud will prompt you to notice something you missed when reading it silently to yourself. Be brutally honest with yourself. Sometimes thoughts do not translate well into sentences and paragraphs. The idea might be good, but the expression of it in your document may not be clear or logically set out. If you identify a passage like this, simply rewrite it so that it better conveys your idea. This is exactly why we go through the editing process.

Regardless of how hard you try to be objective when editing your own work, it will be impossible for you to be totally objective. It is essential to have someone

else also edit the document. You can ask another member of your team, and you can also ask a family member or a friend.

Another member of your team who has not been involved in the writing process will have a greater level of objectivity, as well as an understanding of the substantive content of the document. This person can advise on matters of expression as well as the content.

Having a family member or friend look at your document, one who has no idea about what you are writing, can offer you different benefits. First, this person will be even more objective than your team-mates. Like you, other team members will have a tendency to read words that are not there because they are familiar with the material. Second, and perhaps most importantly, if this person can understand your argument then you know you have expressed it clearly and logically. If your submission appeals to both those who know about the law and those who do not, then it is likely to do well.

THE SECOND DOCUMENT

In most competitions you are expected to submit written submissions for both sides, that is, the party bringing the claim and the party defending the claim. Some competitions, such as the Jessup Moot, require these documents to be submitted on the same date. Other competitions, such as the Vis Moot, call for the second document at a later stage. In the latter situation, you will probably receive another competitor's document to which you must respond. From a participant's perspective, there is relatively little substantive difference between the two approaches. The method for developing and constructing your arguments will work equally well. Time and task allocation will be the most significant practical considerations.

However, it is likely that this will be your first chance to see what other teams have been doing. Ideally, the document they have produced will be along the same lines as yours, but it is possible that it will be quite different. If it is, sit back and critically evaluate your own work in comparison to the document you have received. Be as objective as you can about which document has adopted the better approach. If you decide the other document is better, do not spend time worrying about the document you have already completed. Most competitions expect that the arguments advanced by students in the oral stages of the competition will have developed significantly since the submission of the written documents. Learn from what you have received, and work hard on producing a really good second document.

Preparing a genuine response

It is important to remember that you must provide a response to your opponent's submission. Your preparation may lead you to the false presumption that you can write the responding document without even looking at the submissions of your opponent. This is simply not true and would be tactically very unwise.

Read and consider your opponent's arguments carefully. They may be subtly different to your own. Demonstrate to the reader that you have done this by referring specifically to passages in your opponent's document. Examine the way they have interpreted authorities. Can you challenge these interpretations? Take great care to address all the specific submissions raised.

Is it good or bad to get a 'weak' memorandum to respond to?

There are three sorts of documents you are likely to receive. The first is a weak document. The second is one that you believe is roughly on par with the document you submitted. The third is a document that you believe is even stronger than yours.

You might instinctively think that it is advantageous to receive a weak document. You would be wrong! Do not misunderstand the nature of the competition. A responding document will not win a prize simply because it is better than the first document. Just like the first document, it is being judged principally on content. The second document has the added complexity of needing to respond to the first document, and naturally this plays a very important role in a document's ultimate success or failure. However, it is rarely, if ever, a determining factor.

It follows then that the best type of document to receive is a really strong one. A strong document is more likely to challenge you to produce a strong reply. If the arguments it raises are new to you, you will now be aware of them and will be forced to respond. Responding will be easier, as the points will be presented in a logical way, which in turn will allow you to respond in a similar way.

Documents that are of a similar standard are generally more comforting than helpful. Replying to a document of this kind is probably the least intensive, and requires less work than responding to strong or weak documents.

Responding to a weak document is the most difficult. A weak document is generally one that has very little substance, or the argument is very hard to understand. This can be due to language difficulties or just simply poor construction. Whatever the cause of the weakness in the document, you now face problems. In the first situation, do you respond to issues that are not there but you believe should be? In the second situation, how do you respond tactfully?

Do you respond to issues that your opponent missed?

The competition rules and other information provided by the competition organisers will generally provide guidance on this issue. In the absence of such advice,

it is best to assume that you should respond to issues that your opponent has missed. The challenge is to tactfully yet clearly distinguish where you respond to the actual arguments raised by your opponent from your response to the arguments you believe they should have raised.

It is important that you do not lose your focus. Always act positively in strengthening your case. Attempt to discredit your opponent's case, never your opponent personally. One way to do this is to address concerns that you believe your reader may have. For example, you might say, "This Honourable Court may be concerned that the letter of 12 May 2001 was not a valid notice of avoidance." This approach can be very convincing because it demonstrates that you have thought very carefully about your case. It shows that you have identified areas that might be perceived as weaknesses and have addressed them. However, most importantly, you are making your point with a measured degree of subtlety. There is no attempt to embarrass your opponent; instead you are buttressing your client's position.

How do you respond tactfully?

Do not be distracted by any weakness you might perceive in counsel for the other side. Always treat them with the highest respect. As the saying goes, play the ball and not the person. If you play the person, it will not advance your document in any way and is very likely to be considered a violation of the spirit of the competition, potentially resulting in penalties.

The key is to focus on presenting a positive case on behalf of your client. Adopting this approach also guards against complacency. Although you write your response believing that it is the best effort your opponent could muster, you should immediately adopt the opposite opinion as soon as the document is submitted.

Competitions that have a two-stage document program generally make the documents a precondition of participation. In other words, if you fail to submit the first document you are out of the competition. Some teams will face difficult timing issues, and may have very little time to submit the first document. In these cases rather than drop out of the competition, teams will not concern themselves with the first document competition and simply submit whatever they have at the due date. As a consequence, you should draw no conclusions about a team's ability to perform in the oral stages of the competition from the quality of their document. It is commonplace that you will face the team you are responding to in the oral stages. Do not be lulled into a false sense of security or make assumptions about the quality of your opponents' advocacy.

THE OUTLINE OF SUBMISSIONS

This section is intended to include all documents that summarise the submissions. Depending on the competition it may be referred to as an “outline of submissions”, a “summary of argument” or even just “submissions”. Although there are likely to be subtle differences between them regarding presentation, they are all relatively short documents.

In contrast to memorials and memoranda, referred to above, an outline of submissions is typically only a few pages long. The underlying purpose of the document, to provide a structure and explanation of your case, remains the same, but the level of detail is different.

An outline of submissions needs to identify all the authorities on which you intend to rely. You would usually state the proposition you intend to make and then simply list the cases in support. As a consequence there is generally only a couple of sentences per paragraph.

Many of the strategies for writing a memorandum or memorial apply equally to writing an outline of submissions. In particular, you should implement the strategies discussed in the section entitled “Structuring your document”. As in a memorial or memorandum, you must ensure that your alternative arguments are genuine alternatives. You should write in the active voice. You should edit your outline of submissions. These are all very important steps in the process. Even though you may not be entering a document competition, the moot masters will read your written work. Indeed, they are likely to see your outline of submissions quite some time before they see you, which means that your outline of submissions will create the first impression. Make sure their first impression is a good one.

THE CASEBOOK

The casebook, sometimes referred to as an “appeal book”, “case file” or “trial notebook”, is a mini reference library. Every authority, whether it be a case or a commentary, that you intend to refer to during your submission should be reproduced in the casebook. In a real case the parties are often directed to jointly agree on and prepare the contents of the casebook. This cooperation is unlikely to occur in a moot competition, purely because of the time constraints involved.

International moot competitions do not commonly require that casebooks be compiled and submitted; however, having one can be a considerable advantage. Frequently you will want to cite a particular passage from a judgment or commentary. If you are in a position to quote that passage for the moot master, it will demonstrate your level of preparedness. It is particularly impressive when you are able

to quote an authority in response to an argument raised by your opponent, especially if you can demonstrate that your opponent is misconstruing the authority.

How the casebook is composed requires thought. It must be functional. If it takes you longer than three seconds to find a particular document in your casebook, it is not functional. There must be a logical and immediately apparent system to the ordering of your authorities. It must be immediately apparent because others may also be using the casebook. If the competition specifically requires a casebook, you should be prepared to provide one to both the moot masters and your opponents. Always have a couple of copies of your casebook to hand in case you are asked to provide them, but unless asked you do not need to volunteer a copy.

There are a number of logical sequences that you might consider. You may collate the authorities alphabetically. Although this is logical it is not ideal. There are too many variables. For example, if you are including a commentary, should it be listed under the title or the author's name? A better approach is to order the references in the sequence you intend to refer to them. Separate each reference with a divider and tab, then number each tab. This is a very straightforward and effective method.

However, it is not enough though to set the order once and then just blindly follow it thereafter. You need to develop an awareness of where all your references are in the casebook. You need to know which decision of the International Court of Justice is under tab number 3, for example. Without this knowledge you may get into difficulty if the moot masters take you away from your intended structure.

KING, Kimi. *The Basics of Oral Argument*. In: Weizer, Paul I. (ed.) *How to Please the Court: A Moot Court Handbook*. New York: Peter Lang Publishing, 2005. pp. 45–68

THE BASICS OF ORAL ARGUMENT

For many students, speaking in front of other persons can be a daunting task, but once you have the basic principles down, it can become quite rewarding. The ability to communicate persuasively is a skill that virtually everyone needs to use throughout their lives. After you have mastered the ability to participate in moot court, most people find that they are less intimidated by public speaking in general. When you have been grilled by judges, attorneys, and law students, everything else is easy by comparison!

This chapter helps you prepare for your oral argument, and it contains two components to develop your speaking skills. The first component provides an introduction to principles of legal argumentation and underscores the importance of developing a “theory” about your case. It includes the fundamentals about structuring your argument so that it is coherent. The second component introduces you to principles of persuasive and effective speaking in the context of moot court. Here we include suggestions about how to improve your verbal skills and tips for successful moot court arguments.

PRINCIPLES OF CONSTRUCTING ARGUMENTS

Arguments are statements that assert a situation, condition, or state of affairs to be true by providing *premises* (underlying statements) to support the *conclusion* (end result you are seeking). The most important aspect of argumentation involves structuring your argument in a logical manner to avoid common weaknesses that can undermine your points. On its face, your reasoning should be apparent, and you should weave a story that combines both law and fact into a persuasive case for your client on the issue you are addressing. Make sure that as you structure your argument you set up your *premises*, provide *law* to support it, and then reach your *conclusion* about what this means for your case. A successful argument presents the claims, the use of logical reasoning and evidence to support

the claims, an acknowledgment and refutation of counterpositions, and a summary of why your claims should be the preferred position.

A common mistake in argumentation is to spend too much time refuting the counterpositions without fully developing your position and establishing its superiority. Another frequent mistake is to imply the conclusion by setting out only the premises. Finally, be aware of the logical reasoning that underlies the structure of your argument so you can be prepared to counteract potential criticism that may be leveled against you. You may use both deductive and inductive reasoning to present arguments, but the arguments must be internally consistent and the premises should be valid.

An *inductive argument* is where you proceed from a specific observation to a generalization based on the premise of the specific observation. Inductive arguments are based on experience or evidence that may or may not be consistent with factual premises. It is concerned with empirical investigation upon which conclusions are reached or hypotheses tested (on the basis of experience, a generalization is made in terms of the probability). As such, inductive arguments depend more on the probability that the conclusion is true rather than pure logic that it can be proven to be true. As such, inductive reasoning can be easier to attack.

Example: All students sitting at the table in a local bar are students on the moot court team. Those students at the table in the bar all party too much. Therefore, all students on the moot court team party too much.

A *deductive argument* is one in which you examine an issue by proceeding from general observations based on premises that are true to the specific statement about an individual observation that can be concluded based on the premises. Deductive arguments are based on knowledge that is already known and rely on declarative statements and establishing logical connections between known facts to generate conclusions.

Example: Students who are on moot court teams study too much. A woman in my class is on the moot court team. Therefore, the woman in my class studies too much.

The biggest mistakes persons make in structuring arguments are using logical fallacies and faulty premises to support their position. A fallacy is a defective argument that is based on a false premise (all arguments are based on some underlying premise that applies in the context of the issue with which you are dealing). Both formal and informal fallacies weaken your argument and cause you to lose credibility – your arguments are easily attacked. For both previous examples, discuss what problems you may or may not see with the statements as presented.

A *formal fallacy* is a flaw that can be identified by examining the structure of the statement presented. Such statements look like valid arguments because the premises seem true enough, but the conclusions are invalid.

Example: Wine is a beverage.
Milk is a beverage.
Wine is milk.

Here the fallacy is in the structure of the syllogistic reasoning. One classification is not necessarily related to the other simply because they both belong to a similar category. In contrast, an *informal fallacy* is an identifiable flaw that can be seen by analyzing the content and structure of the argument. Such statements are invalid because they fail to demonstrate the truth of the conclusion that is reached and derive plausibility from improper usage of language and the structure of arguments.

Example: That man drank milk for twenty years.
That man became addicted to cocaine.
Milk causes cocaine addiction.

Here the fallacy is one of false causation – erroneously attributing two events to be related to one another when in fact they are not.

Before going on, be sure that you understand the different types of fallacies that can be made, the problems they can cause, and potential solutions to correcting such mistakes by referring to “Common Criticisms of Arguments”. We now turn to developing a moot court argument.

DEVELOP A THEORY OF THE CASE

To develop a coherent argument, you must develop your “theory” of the case. After examining the questions presented, begin asking yourself about the propositions that you want to communicate. *What* is it that you think is going on here? *How* do the underlying suppositions form the core of the arguments you want to make? *Why* should the court decide in favor of your client’s position because it is the preferred outcome among a range of alternatives? A theory of the case requires a particular perspective on the legal and policy issues. By having a theory, you can easily revert to the major premises that underlie that theory and avoid making inconsistent arguments. The theory should be focused and framed in a definitive manner so that it is presented in a few short phrases that are easily understood.

Each section of your argument should address the legal issues for that section and conform with the theory. Watch assumptions you make about your argument to be sure you remain consistent with the philosophy of the case. Your theory begins with the general position you want the court to adopt and then proceeds to the legal and policy reasons why it is preferred. You may acknowledge countervailing values in your theoretical statement, or you may reserve that for points in your main argument. From your theory develop the major points, sub-points, and minor points. The entire structure of your argument follows from your theory, so invest some time in carefully articulating it.

Example: The right to bear arms should not be infringed upon by the state because it is a core principle upon which this country was founded. The right to life, liberty, and the pursuit of happiness as embodied by the Second Amendment of the U.S. Constitution should be incorporated through the Fourteenth Amendment to apply to the states. The right to protect your personal integrity from the encroachment of others must be protected even if others misuse the right and carelessly disregard the responsibility of gun ownership.

RESEARCHING AND DEVELOPING AN OUTLINE OF THE LEGAL POINTS

Your outline will be a critical component setting out the structure of your argument, and it presents the broad strokes of your legal points based on your theory of the case. As such, it is more of a reference guide that you refer to throughout your argument. It should be no longer than 1–2 pages. *NEVER use a speech that is written out on multiple pages.* It makes you look unprepared, and judges are more likely to question you more vigorously as a result.

To prepare your outline, begin by going through the lower court cases and records that are available. In most instances, only the lower court opinion(s) will be accessible, so you should read through and brief what the lower court(s) said. After you have briefed the case, set down arguments for and against your issue. One helpful tip is to divide a sheet of paper in half – on the left side place all the strong arguments in favor of your client's position, and on the right, put all the counterarguments that your opponents may use to challenge your position. After you have summarized the key legal points, look over what you have written and give a rank ordering to what arguments you consider to be the strongest – you want to always present the strongest arguments first.

Next you need to begin doing legal research. The best place to begin is by finding the cases that are cited in the problem or case that you have been given for

the moot court problem. In some instances, you have access to textbooks that can help you find key words to search on, so be sure to use those to help brainstorm key words and phrases. In other instances you have what is considered a “closed case”, meaning that you are confined to a limited number of materials and cases that you may use. Read the resources that you are to use to help find the relevant issues. You need to be sure that you use the most up-to-date version of all your materials. The general rule is that material that is more than five years out of date should be double checked. Shepardize or KeyCite all cases that you intend to use.

After collecting the cases that you might use, begin to read through and brief each of the most relevant ones to give you a better picture of the sources you have for developing your client’s case. You cannot possibly use every single case you find if you are operating under an “open case” system. Roughly one to three key cases for each minute of arguing is about all you have time for, so be sure to pick and choose your cases carefully. Do not discard cases that have one or two key points because later on these may serve as additional or subsidiary sources of authority. As you did with your original case, divide your arguments according to those favorable to and those against your case. After you have done this, look back at your original case and begin the process of synthesizing and arranging by topic all of the legal points that seem most relevant to your theory of the case.

Outlining and structuring your oral argument

Your oral argument should be in outline form. Writing the presentation out long-hand wastes space, forces you to depend on your notes, and increases the likelihood you “read” rather than argue. The argument should be typed on a computer because you should change it around as you practice and learn what works best. The argument should be structured by presenting your strongest points first and proceeding to weaker ones – keeping in mind the time frame. Generally speaking, you cannot get through more than four to five major points, and most persons tend to rely on just two to three major points to clarify the crux of their case.

Now you are ready to begin outlining your arguments. Set out the strongest arguments for your side and issue first. If you are working with a partner, go over key points to ensure that you are not duplicating or contradicting one another. Stay focused only on the issue that you are presenting without addressing tangential points. The outline should be a series of syllogisms presented in single sentences that persuade the court to rule for your client. Present each point as a one-sentence affirmative and argumentative statement that clearly spells out the legal issue you are presenting for your client. When the judges hear that statement, they should be able to quickly identify the issue, the law you rely on, your position about which way they should rule. Stay focused on the legal issues and facts – avoid using rhetoric, clichés and colloquialisms. Your outline is a skeleton that you fill in with the substantive law and facts to support the central issue. Do not make peripheral arguments that do not address directly the theory of your case.

Example: The First Amendment Establishment Clause prohibits the national government from funding school voucher programs to religious educational organizations because it creates an impermissible endorsement of religion.

In setting up your case, break the major points down into sub-points that present each of the lesser points relevant to the main premise. The actual structure of your outline varies depending on the topical issue. While all major points do have sub-points, not all sub-points and minor points have lesser points (or divisions). Do not *hyper-structure* your argument. This occurs when you go into too much detail. The central points and conclusions are difficult to follow because they are lost in the structure. Avoid making your outline more cluttered with sub-points and minor points than it needs to be. What you want is a clear concise structure that you can present easily and that has sufficient detail to address your legal argument.

I. MAJOR POINT HEADING ONE

- A. Sub-point one
 - 1. Minor point one
 - 2. Minor point two
- B. Sub-point two
- C. Sub-point three
 - 1. Minor point one
 - 2. Minor point two
 - 3. Minor point three

II. MAJOR POINT HEADING TWO

- A. Sub-point one
- B. Sub-point two
 - 1. Minor point one
 - 2. Minor point two
 - 3. Minor point three, etc.

Rely on laws, policy and precedent

You should use authoritative sources for your outline and for the points you are making. Primary sources such as the statutes and legislative histories, as well as court opinions, are preferred to secondary sources such as law reviews or scholarly articles. Legislative histories are helpful because they reveal the intentions behind a law's enactment, and they can reveal flaws and criticisms about the law that you may use to attack your opponent's argument. Use policy arguments from the debates on the legislative floor to point out the ramifications of a law. Examine whether the purpose of the policy has been met or whether it has been subverted as it has been applied in practice.

Supreme Court and appellate court opinions are more influential than trial court cases, but if you find a "killer" case from a trial court, do not discount it. If it supports your argument, use it. Pay attention to what cases come from which circuit

and state. Opinions from the same circuit or state as yours are important, but they are not the final word. Find cases that are directly on point (similar fact patterns or arguments). If you have a case where a court ruled in a way that supports your opponent, think about ways to distinguish it from your case. Point to key facts that are different or find statements that show a judge was influenced by certain factors that are irrelevant to your client's case. How you use the case law is critical to whether you have a strong argument. Even if you have a case that seems negative because of the party that ultimately won the case, argue that it is the legal reasoning, standard, or principle established by the court that is important and that it militates in favor of your client.

Keep an eye open for "tests", standards, and key phrases that are used in legal sources because these help keep you focused on the issues. These phrases not only assist you in doing legal research, but they also help you structure your arguments and provide you with "punch lines" that can be used for answering questions. Your legal arguments should revolve around an analysis of these key phrases and whether the tests that the courts have used apply to your client's case. Do not use countless paragraphs and quotes of material from earlier cases. This is ineffective and increases the likelihood that you will read from your notes. While two or three key quotes may be effective and the quoting of precise terms or tests is preferable, using numerous quotes makes it look like you are not able to analyze the issues yourself. It is your synthesis that the court is interested in hearing.

Secondary sources can also provide you with authority even though these are not from legislators or judges. These can be particularly useful for finding policy arguments. Use the logical reasoning from these sources to support your argument and know the credentials of the authority that you are using. What is their background? Why are they experts? Why should the court listen to what they have to say about some issue? Remember – persons who write law reviews are often experts in their field and may have prior legal experience.

Preparing your materials for presentation

After you have your basic outline and legal sources, you are ready to begin integrating the two into a comprehensive outline. Even though you have pages and pages of material, resist the urge to use everything. For each point you have on your outline you need to go through and establish one of the paradigms which follow for each of your points. Each one stands for a formula you should use as you go through each of your points. Law schools, attorneys, and judges differ in terms of which ones they prefer, but the following summarizes your choices.

IRAC – Issue, Rules, Analysis, (or Application), Conclusion

CRAC – Conclusion, Rules, Analysis, (or Application), Conclusion

CREAC – Conclusion, Rules, Explanation, Analysis, (or Application), Conclusion

Issue – Refers to the legal subject under consideration by that point or section of your outline. What is it that has to be decided?

Rule – Refers to the law or policy that is to be used for analyzing the issue. This can be either an established principle, or it can be a rule of law from a case that has been delivered. What is the law under consideration?

Explanation – Refers to the synthesis of the rule to the case facts where the rule comes from. How do rules from other cases assist in resolving the issues before the court in the case at bar?

Application/Analysis – Refers to the application of the rule to the facts for the case to clarify how the issue should be resolved. How does the law militate in favor of your client's case and position given the case at bar?

Conclusion – State what the outcome of the issue should be given the rules and how they are explained or applied in the analysis. Be sure to note if this is an extension of pre-existing law or if any new precedent is being created by the position you are representing. What is the appropriate interpretation of the law?

Example: Peter (Texas resident) and Danielle (who rims off to Nevada) break off their engagement, and Peter sues for the return of a ring (total value \$10,000). In federal district court he wins because the court finds that the ring was given with the understanding that Danielle would marry Peter – the items were *not* gifts. Danielle appeals to Fifth Circuit which overturns the decision on a technical error (Peter did not file his federal court case in a timely manner). Peter appeals to the U.S. Supreme Court which denies certiorari. Peter then files in the Texas state trial court.

Issue: If Peter took the case to the highest federal court, is he prevented from suing in a state court?

Rule: The principle of *res judicata* requires that if a final judgment on the merits was delivered, the plaintiff cannot bring the same case against the same defendant in either the same or a different court. The case filed in federal court met all of the necessary elements outlined in federal and state law.

Analysis: When Peter appealed the case to the highest court, that judgment is the final statement on the issue. At that point he had exhausted all of his remedies because he had gone to the highest court of appeal. He cannot try to re-litigate the case in the state court.

Explanation: The federal elements of *res judicata* include: 1) identical parties in both suits; 2) prior judgments from court with proper jurisdiction; 3) a final judgment on the merits; and 4) the same cause of action involved in both cases (*Flippin v. Wilson State Bank*, 780 S.W.2d 457 (Tex. App., 7th Dist. 1989).

Conclusion: Peter cannot bring his suit in state court after having lost in the federal court because the issue is barred by *res judicata*.

You will need to go through your outline, and for each point you make do the same type of analysis. In this manner you are weaving law and facts together to build an argument that reaches a particular conclusion.

When you get to law school or begin practicing law, you will find that the most appropriate format can vary depending on whether you are writing a legal essay, memorandum, or brief, as well as whether you are presenting an oral argument to a trial or appellate court. Some court opinions even follow one of the styles depending on the preferences of the judge responsible for authoring the opinion. The common wisdom is that IRAC is best for written materials, but that oral arguments follow the CRAC or CREAC formula. The virtue of the latter two styles in oral argument is that you are stating up front what your conclusion is about the issue being addressed by your point. When you present it in a conclusive manner you are being more argumentative and are more likely to be an advocate. You also tell the judge(s) where you are going with your argument and signpost what you expect them to support by the time you are finished evaluating and explaining the rule of law as it applies to your case. Use your own judgment to develop your own style and do what works best for you. In time, the structure will be dictated by other authorities, so enjoy the chance now to do what you like!

Develop a style and practice, practice, practice

As you begin to develop your style, use your native talents and natural qualities. Do not try to mimic someone else or be something that you are not – that usually translates into a phony performance. Most students find it helpful to think of their moot court personality as an extension of how they communicate in general. For some, this means keeping the tone, quality, and volume of their voice at the same level at which they usually speak. For others, this means they must be more conscientious about making eye contact and being assertive with the bench. The same also holds true for your physical mannerisms. More effective speakers have a straight posture that is firmly rooted showing command of the podium and the material presented at all times. This may not work for some who need to be more fluid and interactive. For them what works best is to lean forward to emphasize points and then resume a stance. One thing virtually everyone needs to watch is how they deal with their hands. Appellate style is much more formal than trial advocacy, so avoid flailing your hands about in the air. A few key hand gestures to drive certain issues home can be effective, but don't pound the podium or give it a death grip so your knuckles turn white! As you develop your style, get feedback from others who observe you. This helps you know what works and how you are being perceived by others.

Always remember to whom you are speaking as your audience. In moot court, you will be in front of judges, attorneys, and law students (or even undergraduates), who will have different levels of knowledge about the case. Be careful not to insult the panel by assuming they do not understand the argument, but also be

careful not to assume that they know everything about every authority you use. Try to find a middle ground where you are discussing your case in the context of other cases and authorities that are relevant for resolving the issue.

Extensive preparation and practice is the best thing you can do to develop your style and reduce nervousness while speaking. Try to work in as many practice rounds as you possibly can and get feedback from the persons who are watching your presentation. Watch yourself in front of a mirror to help develop your style of argumentation and go over key phrases to hear what is the most effective way to highlight critical points. Try to rely on the active voice rather than the passive voice when you are speaking. The active voice is direct and concise, avoids the use of flowery language, and clearly expresses the point. The passive voice tends to be more rhetorical and uses unnecessary words to express the point being made.

Example:

Active voice – The Supreme Court upheld a state legislature’s practice of having a paid chaplain open sessions with a prayer.

Passive voice – The decision handed down by the Supreme Court found that a state legislature could lawfully use funds in order to pay ministers for beginning legislative sessions with a prayer.

Listen to your voice as you are practicing and pay attention to your vocal mannerisms, including the speed and pace of your delivery. The most common mistakes that interfere with a person’s style are unconscious statements and movements. Successful speakers use their diaphragm to control their voice and to give added authority to their speech pattern. Learn to pause effectively to emphasize key points and to raise the volume of your voice when there are particular arguments that merit distinction. If you are someone who says “ah, uhm, or er” regularly, practice just remaining silent when you come to pauses. Let your voice find a rhythm that is even without becoming “sing-song” or “rat-a-tat-tat”. Also be conscious of how quickly you are speaking. When you get up to give your presentation you will probably be nervous and speed up your delivery. This is why you want to practice – you already know how to keep the pace of your presentation at an even tempo.

Similarly, unconscious body movements are distracting no matter how persuasive you are with your voice. You should be careful not to wave your hands around, play with your hair, or toss your head back and forth. Plant your feet squarely in front of the podium so that you are rooted (like a tree) to withstand the onslaught of the questions. Watch your posture and avoid slouching over the podium. You should videotape your practices so you can see whether you are fidgeting, shifting your feet, or moving at the podium. When you watch the videotape, also watch it in fast forward mode. That will highlight your overall style and what moves the most when you are arguing.

FROM START TO FINISH

Now that you know how to put your argument together, the following section is designed to help you present the argument in the most effective way possible.

Pleasing the court and easing yourself

As difficult as it may seem, try not to be nervous when you are actually arguing and pay attention to your voice and your body while you are arguing. It helps to focus if you close your eyes and take several deep breaths (through your nose if possible) before getting ready to get up to speak. When you begin your presentation, relax your shoulders down to the floor and lift up the top of your head confidently to the ceiling so that your stance is forward looking and direct. Remind yourself that you have the inside scoop on how this is done.

While the length of time may seem like forever at first when you are speaking, the time passes too quickly. Because you are going to be interrupted to answer questions, you need to allocate your time accordingly. There should be a time-keeper with cards so you can pace yourself, but if not, take a watch with a sweeping second hand so you can keep track of your time or have someone else keep track of time for you. While you have your written notes, do not be alarmed if you are unable to address all of your points. You *MUST at least try* to address each of the major points that you want to make. The judges want to throw you off course, so answer the question and get back to your argument. If a judge asks you a question that deals with a part of your argument that you were going to argue later, just argue that point when it is raised and move back to your argument. Do not be afraid of the judges (they rarely bite)! They want to illuminate issues and see how well you know your argument.

Your job is to crystallize issues before the court. You are helping your colleagues clarify issues and arguing on behalf of your client. Think of it as giving persuasive points about the most relevant issues that should be decided. Rather than see this as a hostile situation, think of it as a chance to engage in a dialogue with the judges about the critical issues. You are, in a sense, having a conversation with them about important points of law. Use phrases that will lead the judges down a particular road that you want to travel. You should not view the oral argument as an intimidating experience or else you may get defensive. No one has ever exploded while answering questions! Use the questions that the judges ask you to answer key points that relate to your argument. Part of the reason you should not read a set speech is that the questions will address the different legal points you have made. After you have responded to a question, move back to the organization of the argument and continue presenting your other points. Try to think of questions that you think the judges may ask you or arguments that your opposing counsel may make. What are the weak points about the argument that you are making?

What points of the opponents do you need to address? What are the key points from the lower court opinion(s) that you feel need to be given consideration?

Winning at moot court is not just a function of performance – students who do the best are the ones who are well prepared and organized before they ever walk into a “courtroom”. You should brief every case that you are relying on and take notes of ones that may be used by other student attorneys. Make notes for yourself of the cases. It is helpful to use note cards that contain key cases and facts. For each case, do a “mini”-brief about the case, including the name, date, citation, holding, relevant tests or standards, and a brief fact summary. You may also want to write why the case is persuasive for your argument. Similarly, for cases that go against your argument, point out key facts that show why they should not apply to the case at bar. These note cards will help refresh your memory when you are actually presenting your argument. One helpful device is to use a manila folder and tape the outline on the left-hand side and the case “mini”-briefs on the right. Organize the cases according to the order in which you argue them so that you can flip a case up when you are finished using it. *YOU SHOULD NOT PLAN ON SIMPLY READING A SPEECH!* This is the most common mistake that is made by students and it is the one thing that is the easiest to change. If you read, it looks like you are unprepared.

Nuts and bolts

The structure for your presentation is as follows, but ask your instructor or coach what the rules are for the simulation or competition. Time is divided between the two co-counselors, and the length of time can vary from 10–30 minutes. As for the rebuttal, only one speaker for the Petitioner/Appellant presents for a short period of time after the main arguments have been presented. It is up to the student attorneys for the Petitioner/Appellant to determine who presents rebuttal. As a general rule, the stronger speaker does the rebuttal, but you should choose the person who thinks the best on his or her feet and who reacts well to arguments made by the opposing team. Some teams prefer to trade off. The Petitioner/Appellant gets a rebuttal because they have a tougher case to make (they lost at the lower level). Be sure that the counsel which is *NOT* giving rebuttal writes notes to co-counsel about which points should be addressed. You want to have coverage during the rebuttal – points should not be dropped or go unanswered. The following should help you with a mental picture of how a typical moot court proceeds.

Example for one hour round:

1st Counsel for the Petitioner/Appellant – 15 minutes

2nd Counsel for the Petitioner/Appellant – 12 minutes + 3 minutes rebuttal

First Counsel for the Respondent/Appellee – 15 minutes

Second Counsel for the Respondent/Appellee – 15 minutes

Rebuttal by One Counsel for the Petitioner/Appellant – 3 minutes

Opening

The format for the opening by the court varies according to the simulation or competition, but after the judges have arrived in the room, the first speaker should take his or her outline and immediately go to the podium to await a signal for when he can begin. At the Supreme Court, the oral argument always begins with the statement by the Chief Justice: "Now we will hear case number _____ titled _____. Counsel, you may begin when ready." At lower court levels, this does not apply, and the judges may only ask if you are ready or inform you that you may begin.

The opening has three components: greeting and announcement to the court; introduction of co-counsel; and summary of issues that are being presented in the case at bar. After the judges have acknowledged you, the first student attorney for the Petitioner/Appellant should respond by saying, "Chief Judge (or Justice), your honors, May it please the court. My name is _____, and I along with co-counsel _____ are arguing this case on behalf of _____ in this case of _____. The issue I address today is whether _____. My co-counsel is addressing the issue of _____." You may vary this, of course, by introducing co-counsel and his issue at the same time, but for the most part, be sure you get the basics down.

Roadmap

Before proceeding with your main argument, you should give a brief overview (a roadmap) of your key points. This lets the court know where you are going with your argument, what to expect, and how your argument unfolds. Typically it is the major point headings from your outline, so remember not to have too many issues because that is a signal to the court that there is no way you can get through everything. Students usually select the two to four key points they are using to provide a quick summary. It also assists in helping you make transitions from one section to another. The roadmap should be no more than 30–45 seconds depending on the total amount of time you have allotted. Students frequently make the mistake of spending too much time on the overview and not moving quickly enough to the substance of the argument.

Fact statement or clarification

If you are the first speaker for the Petitioner/Appellant, you have a unique role because you are the first person to speak. As such, you need to ask the court whether it would like a brief summary of the facts after you have given your roadmap. This helps the judges familiarize themselves with the case at bar. Some judges prefer you ask the court whether they would like a brief recitation of the facts; still others prefer that you give the fact summary without asking. Keep the overview of the facts short and cast it in a light that is most favorable for your client. Most student

attorneys find that they do not have time for more than four to five salient points – you should spend no more than 30–45 seconds on this section. You should not mislead the judges about the facts, but identify those key facts that are most important for your case.

Occasionally, when the first speaker for the Respondent/Appellee gets up to speak, she may want to clarify some facts before proceeding with the main points of the argument. This is especially true if opposing counsel has misrepresented key facts. Do so quickly, and then return to the argument. You do not need to ask the court for permission to do so.

Main argument

The main argument should constitute about 90–95 percent of the time that you have allotted. Always keep in mind the central theory of your case to help guide you through the thicket of questions. The thrust of your main argument should be to take the known rules, laws, and policies and apply each to the facts of the case at bar. The most common mistake students make is that they emphasize one aspect disproportionately – either they focus on the case law and never apply it to the case under consideration, or they focus on the facts of the case and ignore the case law that supports their position. To be an effective advocate you need to entwine both law and facts for your client.

When judges begin to ask questions, stop speaking immediately, even if you are mid-sentence, and look directly at the judges to let them know that you are listening and responding to their concerns. This also helps you to analyze what type of question is being asked. (Is it a hardball or softball?) Engage with your eye contact and give facial reactions that indicate whether you are understanding the question. Pause briefly before giving the answer to the question to signal that you are reflecting on what was asked. Always be as direct as possible, and *frontload* by answering the question with a “Yes” or “No” answer before going on to explain why and the reasoning behind your answer. Answer each question directly and then segue way back into your argument with a transition. You may want to have some sample transition phrases ready to help you move more smoothly between questions and your prepared argument. Do not say “now returning to my argument” because that is a red flag for the judges to stop you right there for a question! If you do not know the answer, be honest and deal with it directly. You can tell the judges “I’m sorry your Honor, I don’t have that answer. We would be happy to submit a supplementary brief on that issue.” Always respect the judges, and do *not* be argumentative when you disagree with a judge’s positions no matter what demeanor they are expressing toward you.

The goal of some judges is to keep you from being able to finish your argument and to identify weaknesses in the case that might militate in favor of your opposing counsel. Here the problem is trying to move through all of your points, and you may need to adjust accordingly by dropping some of the less important

points. If you get a “hot bench,” make sure that you focus on coverage and transition back to your argument as quickly as you can after questions. Still other judges are quiet or unprepared, and you may have just the opposite problem because the judges hardly ask you any questions. With a “cold bench” the problem is having enough material to fill in the time. Always adjust according to your bench and learn which sections you can drop if it heats up, and which points you can add if things cool down.

Summary and prayer for relief

Within the last minute of your presentation finish the last argument you are making and go to your conclusion which is composed of a summary and prayer for relief. You want to be sure you leave enough time for a conclusion (summary) and prayer for relief. Your summary should hit those key points that you outlined in the roadmap, only this time, emphasize the key elements of those major points. Your prayer for relief is what you want the court to do. Be direct about how you want the court to rule and remind them of why they should reverse or affirm the lower court decision. State specifically how they should rule (either for or against what a prior court decision indicted), and reiterate why this is important for not only your client, but for principles of law that need to be protected.

You must adjust accordingly depending on the amount of time you have remaining. When there are about three to four minutes remaining, scan your outline and see which points you absolutely must hit and which points can be eliminated. In most cases, you will have had barely enough time to get through all of your argument when you receive the one-minute warning – watch time closely. You always want to use ALL of your time right up until the last second. Student attorneys who do not prepare enough material may struggle to keep speaking, but try. Some professors, judges, or law students, take off points for not fully using your time, so keep going forward until time is up. It is better to err on the side of not having enough time than to err on the side of not having enough material.

In the event you run out of time, your sum and prayer should be very short, otherwise you may have judges take off points. In the event your time expires just as a judge is in the process of asking a question, ask the judge if you may finish answering the question and then *briefly* sum and pray. In most cases, judges will allow you to do this. There will be some judges who are more curt with you and either ask you to be seated or else allow you to finish the question, but will not give you permission to do a summary and prayer. Do not let it throw you off. Just answer the question and graciously thank the court for its time.

Example: In conclusion, your honors, the execution of a person who is mentally retarded does not violate the prohibition on cruel and unusual punishment for three reasons. First, the death penalty is consistent with the Framers’ view of the Eighth Amendment, and indeed was widely practiced at the time of the Founding.

Second, views by religious institutions, public opinion surveys, or the practices of other states do not establish that there is a national consensus in the U.S. States should each determine whether such a policy is prudent for that state. Finally, regardless of the mental condition of the convicted murderer, that person has been found by a jury of his peers to be a continuing danger to society. Moreover, the jury has determined that the only appropriate punishment is complete incapacitation of the defendant. We ask this court today not to take away one of the most powerful and effective tools in deterring and combating crime – the death penalty. Please affirm the Fourth Circuit Court of Appeal’s decision upholding the imposition of capital punishment. Thank you for your time.

COMMON CRITICISMS OF ORAL ARGUMENTS

Table 3.1

Argument Type	Mistake Made	Problem	Solution
Ad hominem attacks	Attacking the individual, not the argument.	Makes it appear as though you can’t attack the argument on its face.	Address arguments & not the person making it.
Ad populum attacks	Appealing to bias, prejudice, or fears of the population to support your position.	Makes it appear that you do not have facts and evidence to support your position & can backfire if your audience does not have the same bias.	Address arguments with facts and evidence, not the audience’s potential biases.
Circular reasoning (begging the question)	Re-asserting the claim’s truth by repeating the claim in different words.	Wastes time & makes it look like you do not have evidence to support your conclusion.	Prove your major premise by discussing the fundamental question before arguing the conclusion.

Equivocation	Equates two meanings of the same word falsely.	Forces you to lose credibility because of a faulty definition which is easily corrected.	Be sure to use words with their proper meaning & have definitions with authorities to support your position.
False analogy	Assuming is similar to another, the conclusions drawn from one apply to the other.	Once the connection is attacked, undermines other analogies that may be valid.	Choose analogies carefully to ensure that the similarities between the two are not superficial.
False causation	Assuming that because one thing occurred before another, the former caused the latter.	You are making a mistake of construction – also called post hoc, ergo propter hoc (“after this, therefore because of this”).	Establish the connection between events occurring by providing facts & evidence.
False dichotomy	Presenting only two possibilities to a situation & forcing a choice of one.	Makes you appear unreasonable, dogmatic, & lackadaisical in your approach to analyzing a problem.	Present sophisticated analyses that show why your position should be preferred among alternatives.
Hasty generalization	Providing only weak or limited evidence to support a conclusion.	Looks like you are relying on prejudice, superstition, “common knowledge,” rather than known facts.	Avoid sweeping generalizations by providing facts and evidence to support your conclusion. Restate your premise so as not to be so broad.
Non-sequitur	Presenting premises or reasons that are irrelevant to a conclusion.	Makes it appear as though you do not fully understand the logic of your argument.	Offer only evidence in support of your claim that is relevant to the issue you are discussing.

Overreliance on authority	Assuming that something is true because an expert says so & ignoring evidence to the contrary.	Undermines your argument if other authorities with greater credibility are introduced.	Appeal to multiple sources for authority & have concrete evidence to refute attacks on your authority.
Oversimplification	Appealing to emotions by giving easy answers to complicated questions.	Can be easily attacked with facts & evidence that will undermine your conclusions.	Appeal to logical construction of premises rather than emotional statements.
Red herring	Attempting to avoid the central issue by changing the subject or digressing into a tangential point.	Deflects the audience's attention from key points that need to be made.	Emphasize your main points & only those arguments relevant to those points.
Slanting	Selecting or emphasizing only the evidence and arguments that support your claim while suppressing or minimizing other evidence.	Makes it look like you have not considered or evaluated all the facts & evidence.	Recognize counterarguments, propositions, facts, & evidence, but argue why your arguments & evidentiary proofs are preferable.
Slippery slope	Asserting that if a course of action is taken, undesirable consequences will inevitably follow.	May not necessarily be wrong to make if you are trying to assert future harms. Be careful that you support the premise that the undesirable consequence will follow.	Provide concrete evidence that the second event will follow based on other similar experiences or events.
Straw man	Setting up a very weak version of an argument the opponent might make, & then attacking it.	The opponent may never make (or may not actually be making) that argument so you waste time articulating it.	Be sure that the argument you are making is relevant to your own.

CONCLUSION

Beware! While the thought of oral argument scares most people when they first consider the challenge, after they have done so, they often find themselves addicted! There is a certain adrenaline rush that comes with being able to hold your ground under tough questioning and to present your client's position as an advocate. The ability to persuade others to your viewpoints is an influential skill that lasts with you no matter what profession you decide to pursue. With practice, most of you will find that improving your speaking expertise begins to permeate your verbal communication in general. It is not just when you are before judges, but even in your interpersonal discussions or in workplace meetings you will begin to notice that you are more effective and direct in addressing issues that arise.

This chapter has presented some of the basics of oral argument, but the real test is out there waiting for you. It is important to note that as you go forth to conquer that the circumstances of your presentation vary, and you need to be able to modify depending on your situation. To that end, we have compiled a list of tips that have come from over twenty years of comments that our students have received regarding what judges recommend or what they look for in an outstanding presentation. Note that not all judges agree on these. As we have noted elsewhere in the book, depending whether you are doing moot court for a class or for a competition, remember that styles and preferences vary. Undoubtedly anyone who engages in "mooting" finds that judges differ in terms of what they like to see. Modify your techniques and approaches accordingly depending on the type of feedback you receive from others. Do not be discouraged if you receive contradictory advice from different sets of people. That is part of the process of learning to create your own style and doing what works best for you. In the final analysis, doing moot court should be exhilarating, and yes, even fun!

POPE, David, HILL, Dan. *Mooting and Advocacy Skills. 2nd Edition*. London: Sweet & Maxwell, 2011. pp. 16–38

LEGAL RESEARCH

If your experience of courtroom advocacy is limited to watching TV dramas, you could be forgiven for thinking that winning a legal argument is all about grand-standing in court. But as any practising advocate will tell you, it is the “hard yards” spent researching the case and constructing arguments that underpin success at hearings. Precisely the same principle applies in mooting.

This chapter examines the skills required to conduct research for moots.¹⁴ It begins by discussing the ultimate objective of research – persuasive arguments. It then describes the research process, separating it into four phases. After looking at a worked example using the illustrative case of *Cecil v Dickens*, the chapter ends with a short description of the principal sources of research material.

THE ULTIMATE OBJECTIVE: PERSUASIVE ARGUMENTS

A moot is a debate about the law and you will take sides in that debate. The ultimate objective of your research is therefore to furnish you with the arguments that you will present in your oral submissions at the moot and in any skeleton argument that you draft in advance. Those arguments must cover both your positive and negative cases. Your positive case consists of the reasons why you say that the fictitious party you represent should succeed on the law. If you act for the appellant (or the reclaimer in certain Scottish moots¹⁵), your positive case is therefore the arguments that support each ground of appeal. If you represent the respondent, your positive case is the arguments that demonstrate why each ground of appeal should fail. Whichever party you represent, your negative case is the reasons why you say that your opponents’ submissions should fail.

¹⁴ This chapter is not, however, a comprehensive guide to conducting legal research. If you need broader assistance with your research skills, you might consult *Knowles, Effective Legal Research*, 2nd edn (2009), another book in the same series as this text.

¹⁵ In Scotland, a party appealing from the Outer House of the Court of Session to the Inner House is known as “the reclaimer” rather than “the appellant”.

Whether part of your positive or negative case, each of your arguments should help to persuade the judge that your side ought to win the moot. But what makes an argument persuasive? That question is considered next.

Means of persuasion

The ancient Greeks were fascinated by the persuasive impact that particular modes of writing and speaking had on audiences. They even developed a complex field of study known as rhetoric that sought to explain the phenomenon. The leading figure of Greek rhetoric was the philosopher Aristotle. He discovered that persuasive speakers use the following three means of persuasion:

- *Ethos*
A speaker's *ethos* is his or her credibility with the audience. Aristotle realised that audiences believe some people more than others. Speakers with high levels of credibility are significantly more persuasive than those with limited credibility.
- *Pathos*
Pathos refers to the emotions of the audience. As Aristotle put it, things do not seem the same to people in different emotional states; an angry audience and a contented audience react differently to the same speech. The accomplished speaker understands the audience's emotions and is able to influence them.
- *Logos*
The ancient Greek word *logos* literally means "what is said". In a rhetorical context, *logos* refers to the reasoning inherent in an argument. A well-reasoned speech is more persuasive than a speech containing logical flaws. As a man of reason, Aristotle wanted people to be persuaded by *logos* alone. But he recognised that certain weaknesses in mankind's make-up render us susceptible to the baser appeals of *ethos* and *pathos*. He therefore advised speakers to use those appeals, in addition to *logos*, to sway audiences.

Means of persuasion in mooting

Aristotle's advice holds good in mooting. Effective moot-court advocates deploy all three means of persuasion. You might wonder how *ethos* enters a moot. You will certainly not bolster your credentials by explaining how well you did in previous moots or by saying that you passed your last tort law exam with flying colours, and no eminent reputation precedes your performance. Nonetheless, you can enhance your credibility by "looking the part", both in the way you dress and in the way you act. If you wear a suit, you will score points over a team that turns up in scruff order. If you produce a sharply-formatted skeleton argument, free of typos, spelling mistakes and grammatical errors, you will also give the judge an impression of competence and boost your credibility. In a close moot, these "form over substance" points can make a difference.

Pathos also comes into play in mooting. Skilled mooters actively try to establish an “emotional connection” with the judge. Through regular eye contact, appropriate gesturing and professional demeanour, a rapport can be developed that provides an added edge. *Pathos* can work the other way too. While it may seem obvious, you must avoid angering the judge. Be aware that some judges in moot courts and real courts take personally what they regard as disrespect. Examples include advocates who interrupt the judge’s questions or fail to turn off their mobile phones. Raising a negative emotion in the judge will only present you with another obstacle to overcome.

While *ethos* and *pathos* therefore play their parts in persuading moot judges, the most important means of persuasion in mooting is *logos*. Moot judges, in common with professional judges, are persuaded first and foremost by sound legal reasoning.

Forms of legal reasoning

According to Aristotle (and no-one has seriously challenged him in nearly 2,500 years), all reasoning is either deductive or inductive. A persuasive legal argument is therefore founded on valid deductive or inductive reasoning.

Deductive reasoning

Deductive reasoning draws conclusions from the application of valid general rules (major premises) to specific situations (minor premises). Deductive arguments are known as syllogisms. The following argument is a syllogism:

Major premise: All mooters are law students

Minor premise: Sally is a mooter

Conclusion: Sally is a law student

Deductive reasoning underpins all legal arguments in rule-based systems of law (as the English and Scottish legal systems are). It establishes a link between a legal rule of general application and the facts of the case at hand so as to arrive at a particular conclusion. The basic building blocks of deductive legal arguments for moots are therefore as follows:

Major premise: Generally-applicable legal rule

Minor premise: Relevant facts of the moot problem

Conclusion: Decision that the moot court should make

Lawyers and mooters derive legal rules for the major premises of their deductive arguments from recognised “authorities”. Authorities include decided cases, textbooks, articles in legal journals and, in Scotland, certain works of the so-called institutional writers.

You will see when you read reported cases that many judgments closely resemble extended syllogisms. In particular, they often contain a review of the relevant authorities from which an applicable legal rule (the major premise) is drawn and then “apply” the rule to the facts of the case (the minor premise) to reach a conclusion. An especially clear example of this approach is the judgment of Neuberger J in *Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd*,¹⁶ in which the judge explained as follows how he intended to proceed:

“... I shall start by discussing the authorities, and shall then turn to consider the principles to be derived from the cases. I shall then seek to apply those principles to the present case.”¹⁷

Deductive legal arguments will feature in both your positive and negative cases at a moot. In order to build a positive deductive argument, you will search the relevant authorities for a principle of law that will act as your major promise. You will then apply that rule to what you identify as the critical facts of the moot problem to reach the desired conclusion. In order to build a negative deductive argument, you will attack the major and minor premises of your opponents’ arguments. You will, in other words, look for ways to dispute the validity of the legal rules that your opponents have drawn from their authorities (their major premises) and argue that those rules, even if valid, do not apply to the facts of the moot problem (their minor premises). If you succeed, you will break the logical thread of your opponents’ arguments and render their conclusions invalid.

Inductive reasoning

Inductive reasoning draws conclusions from particular instances. Inductive legal argument takes two forms. The first form – known as synthesis – derives conclusions from multiple instances. In legal argument, the single instance is typically a decided case. In common law systems subject to the doctrine of precedent, previous court decisions are accorded respect so as to ensure wherever possible that similar cases are treated alike. Using analogical reasoning, a mooter might argue that the judge should “follow” the earlier decision at the moot. Conversely, a mooter might argue that an unhelpful decision should not be followed because it is different in material respects from the moot problem. The mooter would conclude such an argument by asking the judge to “distinguish” the earlier case.

¹⁶ *Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd* [2002] 1 W.L.R. 1150.

¹⁷ [2002] 1 W.L.R. 1150, at p1163C.

OVERVIEW OF THE RESEARCH PROBLEM

There is no single way to conduct research for moots. Different people manage it equally successfully using different methods. Nonetheless, it is possible to sketch out a basic model. The model comprises the following four phases:

- *Phase 1: understand the legal context*
During this phase, which follows a careful reading of the moot problem, you obtain an understanding of the relevant legal backdrop. This phase is a relatively short, but important, step in the research process.
- *Phase 2: conduct detailed research*
Phase 2 is when you carry out your in-depth research into each of the grounds of appeal set out in the moot problem. It is usually the longest phase of the research process.
- *Phase 3: finalise arguments and select authorities*
This phase covers the period before you serve your list of authorities and draft any skeleton argument. During it, you finalise the arguments that make up your positive case and select the authorities that your side will cite at the moot.
- *Phase 4: refute your opponents' case*
The final phase begins when you receive your opponents' list of authorities and any skeleton argument. It lasts until the moot begins. Most of this phase is spent coming up with ways to refute your opponents' arguments.

No claim is made here that each of these phases can or should form a distinct, hermetically-sealed component of the research process. On the contrary, there will inevitably be significant overlaps between them. For the sake of convenience, however, each phase is considered separately below.

PHASE 1: UNDERSTAND THE LEGAL CONTEXT

It is essential that, from the very beginning of the research process, you understand the general principles of law that govern the legal issues with which the moot problem is concerned. If you appreciate the legal context, you will find it far easier to read and make the most of the authorities that you come across during your in-depth research. The benefits of a "helicopter view" go farther than that, however. Moot problems, by definition, raise unresolved legal issues. In order to reach decisions on those issues, moot judges are usually forced to fall back on first principles. The arguments that you develop must be consistent with those principles. You therefore need to know what they are.

Where to find the general principles

The best place to look for an overview of the general principles of any particular area of law is usually the leading practitioner textbook in the field.¹⁸ Practitioner textbooks are ideally suited to this purpose. They focus on “black letter” law, describing the law as it is, not as it should be. They are also accurate, detailed and up to date.

If you are unable to lay your hands on the relevant practitioner text, you have two main options. The first is to read the relevant pages of a good student textbook. Compared to practitioner textbooks, student texts are more discursive and less detail-oriented, and they tend to be updated less frequently. You should therefore ensure that any student textbooks you read were published recently. On the credit side of the ledger, student textbooks are normally more readily available to mooters because law libraries often stock multiple copies and many students possess copies themselves. In addition, the layout and writing styles of student texts are more accessible than those of practitioner textbooks, and mooters may accordingly find them easier to use.

Your second option is to read the relevant paragraphs of *Holsbury's Laws of England* (for an English law moot) or *The Law of Scotland: Stair Memorial Encyclopaedia* (for a Scots law moot). Neither publication descends to the detail of most practitioner, or even student, textbooks, but both should offer accurate and up-to-date summaries of the guiding legal principles.

Practical considerations

Whichever source you plunder for your understanding of the legal context, you will inevitably come across references to potentially important authorities. Start to compile a running list of these authorities for use later in the research process. This list will help to ensure that you do: overlook a critical case or text.

Although obtaining an understanding of the context is a vital part of the research process, you are likely to find that it becomes increasingly abbreviated as your legal experience grows. As a young undergraduate preparing for your first moot, you may be completely unfamiliar with the relevant area of law. This phase of the research process will then take up a significant amount of your time. By contrast, as a seasoned postgraduate student studying for your vocational exams, you should have a decent grasp of most of the topics that habitually crop up in moots. This phase may then involve little more than reading a few pages of a tried and trusted textbook, and jotting down a handful of references to authority.

¹⁸ Tables 3.6 and 3.7 below list some of the leading English law and Scots law practitioner textbooks in several key disciplines.

PHASE 2: CONDUCT DETAILED RESEARCH

Once you have an overview of the general legal principles under your belt, you can start your detailed research. This phase of the research process essentially consists of a hunt for the most relevant and important authorities. It involves three broad elements: identifying potentially relevant authorities; deciding which authorities are sufficiently important to read; and reading those authorities.

How to identify relevant authorities

You will find potentially relevant authorities by scouring the sources available to you. The principal sources of authorities are described at the end of this chapter. They include case reports, textbooks and journal articles. You will probably search through most of these sources online. Relatively few legal textbooks have yet made it into electronic form, however, so you will still have to refer to plenty of printed material. Whenever you come across a reference to an authority of potential interest, add it to the running list that you started to compile during the first phase of your research.

The process of tracking down authorities should resemble an investigation. A footnote in a textbook may lead you to a reported decision that, in turn, refers to another, more helpful, case. If you come to feel a little like a private detective, so much the better.

How to decide which authorities to read

If you are thorough, your running list of potentially relevant authorities will grow quickly. Most of the authorities on your list will be case reports. A few of these cases will immediately stand out as particularly significant and you will probably read them the moment you discover them. Since you are unlikely to have sufficient time to read every one of the remaining cases on your list, you will have to develop a system of triage for identifying the most important.

Your ability to separate the wheat from the chaff will improve with experience. But what if you lack that experience? Set out below are four pointers to assist you in eliminating cases of tangential relevance:

- *Concentrate on the cases that crop up most often*
If you find that a particular case is mentioned time and again, it is probably one of the more important ones and is therefore worth reading.
- *Make full use of headnotes*
Almost every reported case, even those available online, includes a headnote that briefly summarises the facts, the procedural history and the findings of the court. The headnote should provide you with a good indication of whether the

case is relevant for your purposes. If that indication is clearly negative, it makes little sense to read the entire report.

- *Read the most recent decisions first*
If you uncover several cases that address a particular legal issue, read the most recently decided first. It may summarise the earlier cases for you and save you the trouble of reading them. It may also refer to cases that are more “on point” and therefore of potentially greater use to you. You can then make a beeline for them.
- *Do not read first instance decisions of cases that went to appeal*
When the lower court and appeal court decisions of a particular case are both reported, you can generally confine yourself to reading the latter. Some series of law reports helpfully set out next to each other the speeches of both the lower and appeal courts. If the judgments of different courts in a single set of proceedings are reported separately, however, you must ensure that you read the decision of the higher court. It is a sobering experience to wade through a seemingly significant judgment only to find that it was subsequently overturned on appeal.

How to read authorities

Once you have identified the most important authorities, you need to read them. Thoroughly. Case reports, in particular, require careful attention. If you fail to read an important decided case from beginning to end, you may miss some useful material such as a helpful quote or case reference. Worse still, you may pick up the wrong end of the stick: in your haste, you might misunderstand a critical part of the judgment and believe it to support your case when it actually goes against you; or you might read a dissenting or differing judgment and mistakenly take it to represent the views of the majority of the court. These sorts of mistakes can land you in a lot of hot water, particularly if the realisation that you have misread a case only dawns on you at the moot.

As you read authorities, look to extract from them material that will help to bolster the arguments you have already thought of and to identify further, possibly more persuasive, arguments. Those tasks are usually pretty straightforward when you read textbooks and articles because authors tend to articulate their points in an argumentative way. Drawing material from decided cases can be more complicated. When reading them, you should have your eyes peeled, in particular, for the following:

- *Helpful statements of legal principle*
Top of your wish List are clear statements of the law that support your case. What you are looking for is that core sentence or two in which the judge explains what the law is. You will quickly develop a facility for spotting these pas-

sages. You must ensure, however, that the helpful excerpt is of general application and is not expressly limited to the facts of the particular case.

- *The judge's reasoning*

Judgments, like arguments, are based on reasoning. You must work out how the judge reached his or her conclusion. Judges usually explain their thought processes before setting out their conclusions. You may be able to use the same chain of reasoning in one of your arguments.

- *Arguments of counsel*

Judges often refer in their judgments to the arguments that counsel advanced before them. Some series of law reports even summarise counsel's principal submissions just after the headnote. These summaries can be fertile ground because you can often adapt counsel's arguments for your own purposes. But be careful, when reading judgments, not to confuse the judges' summaries of counsel's arguments with the judges' findings. Judges sometimes refer to counsel's arguments only to reject them.

PHASE 3: FINALISE ARGUMENTS AND SELECT AUTHORITIES

Throughout the research process, you must think about possible arguments. During the early phases of your research, concentrate on your positive case. You should, of course, give *some* thought to identifying the thrust of the case that your opponents are likely to make and to considering how you will meet it. If you do so, you will be better placed to refute your opponents' case in detail when you exchange lists of authorities and any skeleton arguments. Generally speaking, however, it is unwise to focus too heavily on your negative case until you exchange with the other side because your efforts will be wasted if your opponents take a different tack from the one you were expecting.

As the moot draws nearer, you must decide on the arguments that will make up your positive case and fine-tune them. If you have to serve a skeleton argument in advance of the moot, you will need to settle on the points that appear in it. Even if no skeleton is required, you will have to work out which authorities to cite at the moot. Since those authorities will support your arguments, you need to know which arguments you will run.

Most mooting competitions limit the number of authorities that each side can cite, sometimes to as few as three. Even if you are free from such a restriction, there is bound to be a time limit on your oral submissions. It will act as an effective constraint on the number of authorities that your team cites because you will simply have insufficient time in which to take the judge through more than a handful.

The next few pages provide a few pointers that you should bear in mind when deciding which authorities to cite.

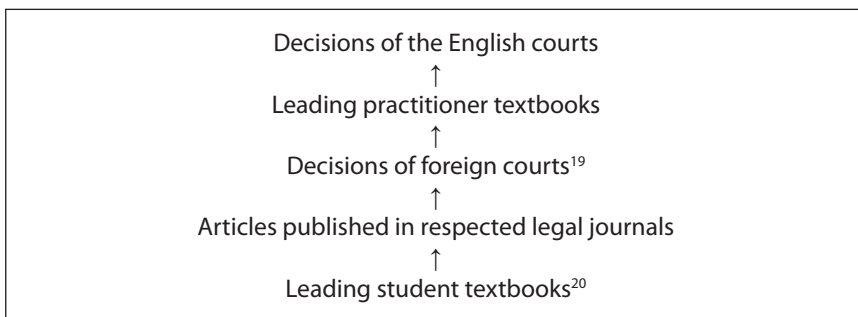
Select the most weighty authorities

As a general rule, choose the authorities that carry the greatest legal weight. The two factors described below largely determine “weight” in this sense.

Type of authority

Different types of authority have different weights. Figure 3.1 shows, in very broad terms, the “pecking order” of English authorities.

Figure 3.1: Hierarchy of English authorities



In Scotland, the “pecking order” is much the same, except that the institutional writings provide an additional form of authority broadly on a par with decisions of the higher Scottish courts.²¹

Most, if not all, of the authorities you cite should come from the top of the hierarchy in figure 3.1. Your list of authorities should usually therefore consist of the names of several decided cases from your own jurisdiction. There may be exceptions, however. For example, when the principles of a particular area of law are not set out in a single case, but are scattered across many, you may be better off citing a respected practitioner textbook that summarises the relevant law rather than citing one reported decision that can only provide a partial picture. The moot judge may ask you to justify your choice of authority, but will probably view favourably your explanation that you were constrained by the number of authorities you could cite.

¹⁹ The most authoritative jurisdictions for English law purposes are Australia, Canada, New Zealand, the United States and (for contract and tort law in particular) Scotland.

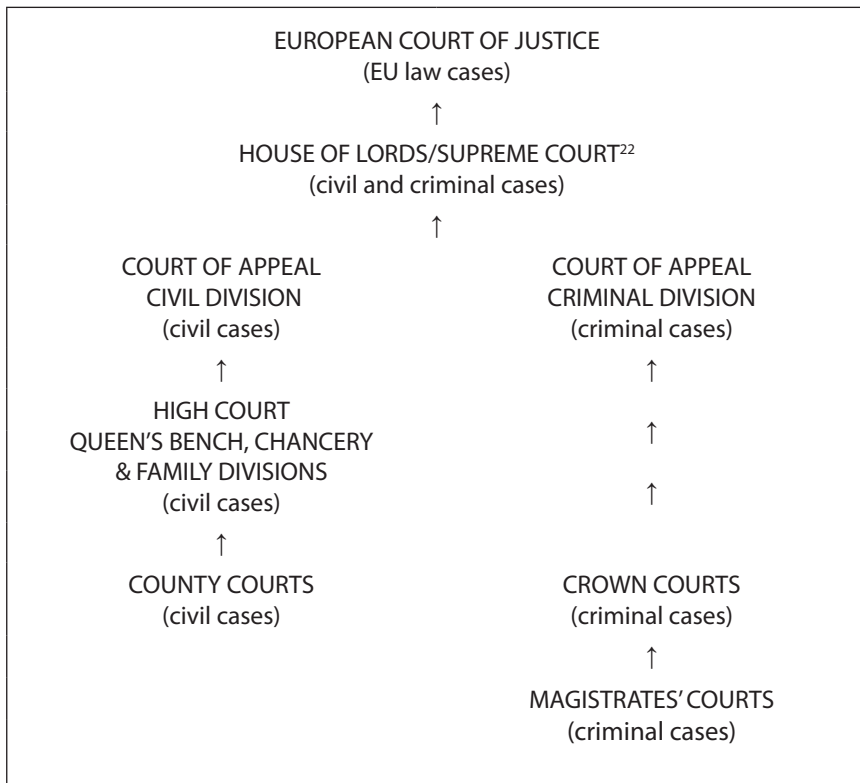
²⁰ One student textbook that makes relatively frequent appearances in the law reports is Atiyah’s *Introduction to the Law of Contract*, currently in its sixth edition (2006).

²¹ The most authoritative foreign jurisdictions also differ. The Scottish mooter may, for example, gain assistance from decisions of the South African courts.

Level of court

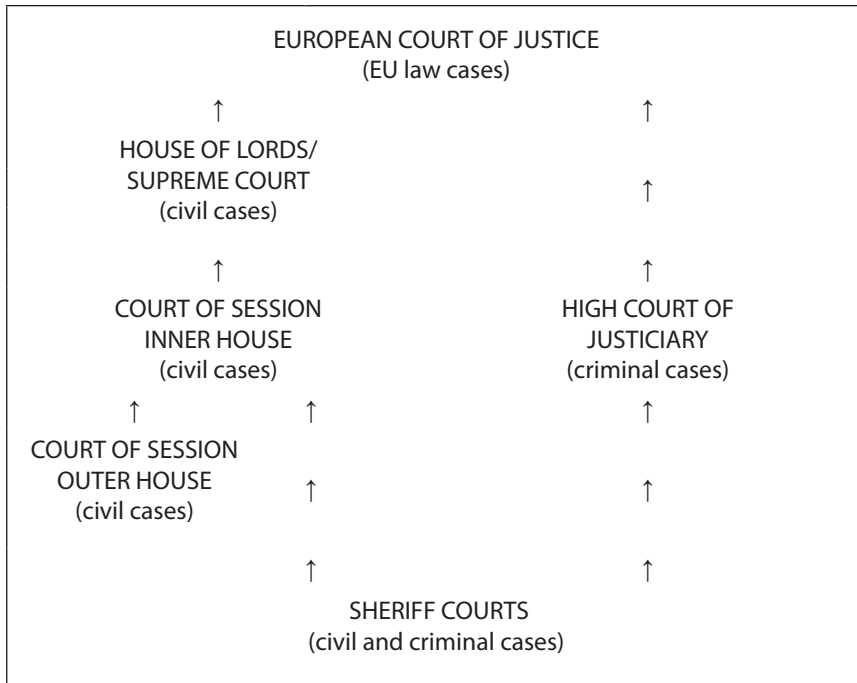
The top band of the hierarchy of authorities in figure 3.1 (decisions of the English courts) is itself subject to a further “pecking order”. The weight of a decision depends on the position in the court hierarchy of the court that made it. The court hierarchy in England and Wales is shown in simplistic terms in figure 3.2. The court structure in Scotland is rather different. It is illustrated in figure 3.3.

Figure 3.2: Hierarchy of courts in England and Wales



²² The Supreme Court assumed the jurisdiction of the Appellate Committee of the House of Lords in October 2009.

Figure 3.3: Hierarchy of courts in Scotland



The decisions of any given court bind the courts below it in these hierarchies. A decision of the Civil Division of the English Court of Appeal therefore binds the English High Court, County Courts, Crown Courts and Magistrates' Courts.

Most courts are not bound by their own decisions although those decisions are highly persuasive. This principle applies to the Supreme Court, albeit that it will presumably follow the practice of the House of Lords and only very rarely depart from its earlier decisions. The exception to this rule is the English Court of Appeal, which is bound by its own decisions save in the exceptional circumstances enumerated in *Young v Bristol Aeroplane Co Ltd*.²³

Select the most recently decided cases

When you find yourself with two or more reported cases of roughly equivalent legal weight, you should generally cite the most modern decision. You might even cite a recent case in preference to an earlier decision made by a court higher up the court hierarchy if the recent case contains a comprehensive summary of the

²³ [1944] K.B. 718.

present state of the law or of the way in which the law has developed. The modern tendency of judges to produce lengthy judgments means that you are quite often presented in a single speech not only with a helpful recitation of the relevant legal principles, but with a smorgasbord of excerpts from the leading cases. By citing an authority such as this, you can show the moot judge the most important passages in a number of other cases. But there are limits to how far you can take this approach without infringing the rules of most moot competitions. In particular, you cannot normally cite a case that refers to other authorities and then seek to introduce material about those other authorities that does not appear in the case you cited.

Be wary of dissenting or differing judgments

As a general rule, only cite a case in order to rely on the views expressed by the majority of the court. That is not to say that you should never rely on a minority judgment. A dissenting judge may, for example, disagree only on the facts, his or her reasoning on the law being consistent with the remainder of the court. You may then safely use that reasoning to bolster your case. You might also cite a minority judgment of a particularly distinguished member of the judiciary whose dissenting view is now taken to represent the law. But you need to be careful, particularly if the speeches of the majority of the court are unhelpful to your case and can consequently be relied on by your opponents.

For similar reasons, be wary of relying on the words of judges who, although in the majority in upholding or rejecting an appeal, reached their decisions for different reasons. The reasoning of the differing judges may not assist you even if the result of the case does.

Do not cite unhelpful authorities

Mooters acting on behalf of appellants are particularly prone to the affliction of citing cases that were decided against them. Their rationale is usually that, because they will address the moot court first, they will be able to “rubbish” the authority before their opponents get to their feet.

Citing authorities in this way is almost always a mistake. If the authority is genuinely helpful to your opponents, they will probably cite it themselves, in which case you can address it when you refute their arguments during your oral submissions. If your opponents do not cite the authority and you do, you will needlessly present them with additional ammunition.

Less is more

Citing more authorities does not guarantee a better argument. On the contrary, most mooters cite far too many authorities and, as a result, do not do full justice to

any of them. In most moots, it should be perfectly possible to rely on one or two authorities per ground of appeal.

If you are satisfied that you have enough authorities of sufficient weight to make good the arguments that you intend to advance at the moot, there is nothing to be gained from citing further, makeweight authorities simply because you can. Nor should you indulge in the tiresome sport of deliberately citing off-beam (and usually lengthy) cases in the hope of sending your opponents on a wild-goose chase. Even if your opponents take the bait, the judge or the moot organiser will probably spot the attempted deception. They will not be impressed.

PHASE 4: REFUTE YOUR OPPONENTS' CASE

The final phase of the research process begins when you receive your opponents' list of authorities and any skeleton argument that they have drafted, and lasts until the start of the moot. During this period, the primary focus of your research is usually your negative case, that is to say the refutation of your opponents' arguments.²⁴ If they have served a skeleton, it should tell you explicitly what those arguments are. Even if you only see a list of authorities, you should be able to work out quite accurately what your opponents will say. In any event, you must read carefully each of the authorities on which your opponents rely.

Analyse your opponents' case with the same logical rigour that you brought to bear in constructing your positive arguments. Concentrate in particular on the major and minor premises of their arguments. Have your opponents correctly identified the relevant legal rules (major premises)? If so, have they correctly applied those rules to the relevant facts of the moot problem (minor premises)? More specifically, look to refute your opponents' arguments on the lines described below.

Your opponents' authorities do not represent the law

You may be able to argue that an authority cited by your opponents does not reflect the current state of the law. For example, a reported case may be inconsistent with another decision made by a court higher up the court hierarchy. You may even be lucky enough to find that one of your opponents' authorities has been expressly doubted, criticised or not followed in a subsequent case.

More rarely, you might notice that your opponents are relying on a case that was decided without reference to an inconsistent *earlier* authority that the court ought to have taken into account. Decisions of this sort are said to have been made *per incuriam* (literally, "through lack of care"). They arise most often in relatively lowly courts where counsel and judges are more prone to overlook existing case law.

²⁴ At the same time, of course, you will be drafting the notes that you take with you to the moot and practising your oral submissions. You may also be preparing copies of your authorities for the judge.

Your opponents have misread their authorities

You may accept that a reported case cited by your opponents was correctly decided, but still argue that they have drawn the wrong principle from it. You might notice, for example, that your opponents are hanging their hats on a passage in a judgment that does not reflect the decision the court made; other parts of the same judgment may be inconsistent with it or the judge may have been in the minority of a multi-member tribunal. Similarly, you may find that your opponents are relying on statements that are mere obiter dicta and form no part of the ratio of the decision. These passages are of limited weight and may readily be “trumped” by other authorities.

Your opponents’ authorities are distinguishable

Even if you accept that an authority cited by your opponents correctly sets out a relevant legal rule, you may be able to contend that it does not apply to the moot problem. Judges sometimes state that their findings of law should be limited to the particular facts of the cases before them. Statements of this type are manna from heaven if you are attempting to distinguish an unhelpful decision. Even if your opponents’ authority is not expressly limited in this way, you will find that its facts differ in one or more material respects from the facts of the moot problem. A difference in fact is material in this sense if it would have altered the court’s reasoning in some way.

Your opponents’ arguments are contrary to policy

Your opponents may be running an argument that, if accepted by the court, could have unpalatable consequences in future cases. If so, you can submit that the argument should be rejected as a matter of policy.

Arguments based on supposed policy considerations are often the last resort of the desperate mooter. They are not without their uses, however, particularly if the policy alluded to has been expounded frequently by the courts. An example is the oft-expressed policy of the English courts that novel categories of negligence should only develop incrementally and by analogy with established categories.²⁵ In a moot concerned with the law of negligence, you might be able to contend that your opponents’ argument falls foul of this policy because it would result in a significant extension of the categories of negligence.

Another common policy argument, which is of more general application, goes something like this: if the court allows your opponents to succeed in this particular case, it will open the floodgates to a deluge of similar claims by other litigants. This point can be powerful. But if you use it as part of your refutation, be ready to

²⁵ This policy is referred to, for example, by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 2 A.C. 605, 618.

explain *precisely* why the “floodgates” would open if the court were to accept your opponents’ argument.

TAKING EFFECTIVE NOTES

Throughout the four phases of the research process described above, you should take comprehensive and comprehensible notes. Much of the effort expended in conducting your research will be wasted if your notes are so poor that you cannot rely on (or even understand) them when you come to prepare your oral submissions and any skeleton argument.

It is particularly important that you make effective notes about the leading cases that you uncover. Unless you are blessed with an elephantine memory, you will find that the details of even the most factually gripping cases slip from your mind very soon after you read them.

To be of most use to you, your notes on key reported cases should include at least the following information:

- *The citation*
Head your notes for each case with the full case name and law report citation (or citations if the case appears in more than one series of law reports). A complete and accurate citation will enable you to find the authority quickly in future.
- *The court in which the case was decided*
This information will help you to work out the relative importance of the cases that you find and, in particular, to know whether the moot court is bound by them.
- *A summary of the principal facts*
You can usually keep this section short. Make a note of the central facts and any unusual or amusing features of the case that may help to jog your memory. Descend to greater detail if you believe that you are likely to cite the case at the moot.
- *A synopsis of the court's reasoning*
Identify briefly the point or points of law that the court considered, the decision that it reached and its main reasons for doing so.
- *Important references*
Note the page or paragraph references of the most important passages of each judgment. You may have to find these passages again before the moot and you will not want to re-read the entire report to do so.

FIVE COMMON MISTAKES

There are plenty of mistakes to be made when conducting research for moots. The purpose of this section is to identify five of the most common errors that mooters make and to suggest how you can avoid them.

Underestimating the time that research takes

Mooters routinely fail to appreciate just how long it takes to research a moot problem properly. The issues that moot problems raise have often been pondered long and hard by legions of senior lawyers and judges. It is consequently no mean feat for a student to get to grips with them. Do not be surprised, therefore, if your researches take far longer to complete than you anticipated when you first read the moot problem. You should certainly shy away from setting arbitrary limits on the amount of time that you will spend on your research.

Believing that there is a solution to the moot problem

Some mooters think that, if they search diligently enough, they will find a reported case that comprehensively determines the law in their favour. Do not fall into this trap. The notion that there is a “solution” to the problem is inconsistent with the nature and purpose of mooting. Moot problems are designed to have no clear answer. Indeed, the availability of arguable points for both sides is essential if the moot problem is to bring out the best in all of the participants.

This feature of moot problems means that you should not treat your research as a quest for a single decided case. During the course of your labours, you may, of course, find a case on which the moot problem appears to have been modelled. But there will always be some way of distinguishing that case, whether on the basis that there are important differences in the central facts or that there are other reported cases that cast doubt on its correctness.

Failing to see the wood for the trees

One of the most enjoyable aspects of researching the law for moots is tracking down authorities – the investigative element referred to earlier in this chapter. But mooters must make the most of the limited research time at their disposal. Little will be gained, for example, from detailed research into the historical origins of legal principles. Nor will there be any material benefit in protracted research into the case law of distant jurisdictions with no track record of influencing the courts of this country.

Whilst it is perfectly sensible to follow leads, even if initially unpromising, you should take stock from time to time. Ask yourself where your research is going, what it is uncovering, whether you will be able to use any of this material at the

moot and whether your research is preventing you from investigating more promising avenues. If your efforts are proving largely unproductive, you will probably make better use of your time by following a different line of inquiry.

Failing to see the wood for the paper

As your research progresses, supplement your notes with hard copies of the leading authorities. You will then have a permanent record of your research and be protected from the risk that your source material is not available the next time you head to the law library.

Keep your copying under control, however. You should not usually reproduce whole chapters of textbooks nor do you need to obtain copies of every case report you read. If you take that course, you will quickly find yourself suffocated by a mass of paper, relatively little of which will provide any real assistance.

Failing to work as a team

If you have a mooting partner, do not work in isolation. Instead, meet as often as you reasonably can to discuss the progress that you are making with your research. Regular get-togethers will provide an opportunity to work through any difficulties that you encounter. Very often, the best way of finding solutions to legal problems is to explain them to someone else. Sometimes, the “problem” then reveals itself not to be an issue at all. On other occasions, the act of describing the problem brings forth a means of dealing with it. You may even find that your partner comes up with an elegant solution. And if all else fails, and the problem remains intractable, at least you have a shoulder to cry on.

A WORKED EXAMPLE

The research skills described in this chapter may be illuminated by a short example. Set out below, therefore, is a description of how you might go about researching the first ground of appeal in the illustrative moot problem of *Cecil v Dickens* if you were acting on behalf of the appellant, Mr Dickens. Needless to say, the process described here is a much-abridged version of what you would actually do in practice.

The first ground of appeal states that, “No duty of care arose in negligence”. As counsel for the appellant, your objective would be to build a case in support of that statement.

PHASE 1: UNDERSTAND THE LEGAL CONTEXT

As you would realise on your first read through the moot problem, the broad issue brought into play by the first ground of appeal in *Cecil v Dickens* is the existence of a duty of care in negligence. The first phase of your research would accordingly focus on understanding what a duty of care is and the principles that determine when a duty of care arises.

Following the advice given earlier in this chapter, you might look for this understanding in the leading English law practitioner textbook on tort, which is *Clerk & Lindsell on Torts*.²⁶ Negligence is discussed in Ch. 8, with duty of care examined at paras 8.05-8.118. Many of these paragraphs are irrelevant for your purpose, however, and could accordingly be skipped. In fact, the only sections of real interest are the discussions about the nature of the duty of care concept (paras 8.05-8.11), the test for duty of care (paras 8.12-8.26) and financial loss resulting from reliance or dependence (paras 8.83-8.107). You would also have to consult the corresponding paragraphs of the latest supplement to the 19th edition.

This reading amounts to just over 40 pages. It would provide an excellent grounding in the principles that govern the existence of duties of care in negligence including the various tests that the courts apply. You would also see that para. 8.107 of *Clerk & Lindsell* contains a discussion about the specific issue raised by the first ground of appeal in *Cecil v Dickens*, namely whether a duty of care to avoid economic loss can arise when the relationship between the parties is social. That paragraph identifies two reported cases in which this issue was specifically considered: *Spring v Guardian Assurance plc (Spring)*²⁷ and *Chaudhry v Prabhakar (Chaudhry)*.²⁸ These cases could form the beginnings of your running list of potentially relevant authorities.

PHASE 2: CONDUCT DETAILED RESEARCH

The second phase of the research process might begin with a search for cases other than *Spring* and *Chaudhry* in which the English courts have considered whether a duty of care to avoid pure economic loss can arise in social situations. You would find very little, however, so you might next research in detail the general principles that govern the existence of duties of care when a person's negligence causes pure economic loss. There is an enormous amount of material on this topic. You would find, in particular, that the House of Lords recently reviewed the relevant

²⁶ Table 3.6 lists the leading English law practitioner texts in seven subject areas including tort.

²⁷ [1995] 2 A.C. 296.

²⁸ [1989] 1 W.L.R. 29.

principles in *Customs and Excise Commissioners v Barclays Bank plc (Barclays)*.²⁹ You would therefore add this case to your running list.

At some point during your detailed research, you would read the *Spring, Chaudhry* and *Barclays* decisions. You would discover as follows:

- In *Spring*, the House of Lords held that an employer who gives a reference to a former employee owes a duty of care in its preparation. However, two members of the House of Lords (Lords Slynn and Woolf) doubted whether the giver of a reference to a social acquaintance would owe a duty of care. This case is therefore broadly helpful to your side of the argument.
- In *Chaudhry*, the Court of Appeal held that the defendant, who advised a family friend about buying a second-hand car, *did* owe a duty of care. This case is therefore broadly unhelpful to your side of the argument, but highly relevant because your opponents might well cite it as one of their authorities.
- In *Barclays*, the House of Lords used the following three tests to determine whether a duty of care arose to avoid pure economic loss: (1) whether the defendant had “assumed responsibility” for the claimant; (2) whether the so-called “three-fold” test applied in *Caparo Industries plc v Dickman (Caparo)*³⁰ had been satisfied (i.e., the loss was foreseeable, there was a relationship of proximity between the parties and it was fair, just and reasonable to impose a duty); and (3) whether the imposition of a duty of care would be “incremental” to previous cases. This decision is important because it illustrates the approach that the courts now take when deciding whether to impose a duty of care in financial loss cases.

You would find that these decisions refer to several reported cases that would be worth adding to your running list and, in due course, reading. They include *Caparo*, *Hedley Byrne & Co Ltd v Heller & Partners Ltd (Hedley Byrne)*³¹ and *White v Jones*.³² Your detailed research might range in other directions too. The judgments in *Barclays* refer, for example, to three separate articles in the *Law Quarterly Review*. You might find some interesting material in them. You might also spend some time looking for relevant case law from overseas. Australia and New Zealand are particularly fertile sources of jurisprudence about negligence.

²⁹ [2006] UKHL 28; [2007] 1 A.C. 181.

³⁰ [1990] 2 A.C. 605.

³¹ [1964] A.C. 465.

³² [1995] A.C. 207.

PHASE 3: FINALISE ARGUMENTS AND SELECT AUTHORITIES

Whilst reading the material that you unearthed during your detailed research, you would start to formulate arguments. There are numerous arguments available to both sides in *Cecil v Dickens*. By way of illustration, figure 3.4 summarises one possible line of argument for the appellant's positive case. This line of argument uses deductive reasoning. It applies the rules set out in *Barclays* (the major premise) to particular facts of the moot problem (the minor premise).

Having settled on a line of argument, you would need to draw up your list of authorities. Were you to employ the argument summarised in figure 3.4, your most important authority would be *Barclays*. As a decision of the House of Lords, it binds the moot court. It is also of relatively recent vintage. If you were only able to select one authority, this case might well be it. With more authorities to play with, you might also consider citing *Spring* and paragraph 8.107 of *Clerk & Lindsell*.

PHASE 4: REFUTE YOUR OPPONENTS' CASE

The arguments you came up with to refute your opponents' case would depend on the authorities that they cited. If their research had been as careful as yours, however, it is safe to assume that their list of authorities would include *Chaudhry*. In the last phase of the research process, you would therefore look for ways to undermine that decision. Figure 3.5 lists two of the arguments open to you.

These arguments use inductive – specifically analogical – reasoning. They compare *Chaudhry* with the moot problem and identify material differences between the two cases. The conclusion of these arguments would be that the moot judge should distinguish *Chaudhry*.

Figure 3.4: Possible line of argument

- The leading case is *Barclays*.
- None of the tests applied by the House of Lords in *Barclays* is satisfied in this case for the following reasons:
 - The fact that Mr Dickens told Mr Cecil that he should consult litigation solicitors if he decided to pursue a claim against the accountants shows that Mr Dickens did not “assume responsibility” for Mr Cecil.
 - It was not reasonably foreseeable that Mr Cecil would wait for more than three years after speaking to Mr Dickens before he contacted litigation solicitors.
 - It would not be fair, just and reasonable to impose a duty of care on Mr Dickens given the social context in which he advised Mr Cecil. The context includes the friendship between the parties and the fact that the advice was given in a pub.
- The imposition of a duty of care would not be “incremental” because *Cecil v Dickens* is quite different from other cases in which the courts have imposed duties of care to avoid pure economic loss, e.g., where an employer gave a reference to an employee (*Spring*) and where a solicitor failed to draft a will (*White v Jones*).

Figure 3.5: Possible basis for refutation

- The two judges in *Chaudhry* who held that a duty of care existed (Lord Justices Stocker and Stuart-Smith) were heavily influenced by the fact that there was a relationship of agent and principal between the parties. No such relationship exists in *Cecil v Dickens*.
- The facts of *Chaudhry* were very different from *Cecil v Dickens*. For example, whereas in *Chaudhry*, the defendant told the claimant not to seek advice from anyone else, Mr Dickens specifically told Mr Cecil to consult litigation solicitors if he wanted to proceed with a claim against the accountants.

PRIMARY SOURCES FOR RESEARCH

This final section of the chapter describes the primary sources of information that you are likely to use when conducting research for moots. If you are to make the most of those resources, you will need to hone your online and paper-based research skills.

Case reports

Case reports contain the full text of judgments in significant decided cases as well as a headnote for each decision. In the more authoritative series of law reports, including the *Law Reports* and the *Weekly Law Reports* in England, and *Session Cases* in Scotland, the authorities referred to in the judgments of the court are listed at the beginning of each report. The *Law Reports* and the *Weekly Law Reports* even go so far as to list the cases that counsel cited in argument, but that are not referred to in the judgments.

In addition to being high-level authorities themselves, decided cases are a vital source of information about other authorities. Many higher court judgments, in particular, contain scholarly examinations of the law that refer not only to previously decided cases, both at home and abroad, but also to academic commentary in textbooks and journal articles.

Practitioner textbooks

Practitioner textbooks are primarily aimed at the legal profession and are usually written by prominent practising lawyers or academics. They refer, sometimes at considerable length, to the leading decided cases and are often laden with lengthy footnotes containing references to reported cases and seminal journal articles.

Tables 3.6 and 3.7 list by subject area some of the most well-known English law and Scots law practitioner textbooks. These lists are not definitive. In many areas of the law, other excellent practitioner textbooks exist that you may find just as useful.

Table 3.6: English law practitioner textbooks

Subject area	Textbook	Current edition
Company law	<i>Gore-Browne on Companies</i>	Looseleaf
Contract law	<i>Chitty on Contracts</i>	30th (2008)
Criminal law	<i>Archbold</i>	New edition annually
Equity and trusts	<i>Snell's Equity 3</i>	1 st (2005)
Land law	<i>Emmet and Farrand on Title</i>	Looseleaf
Private international law	<i>Dicey, Morris & Collins on the Conflict of Laws</i>	14th (2006)
Tort law	<i>Clerk & Lindsell on Torts</i>	19th (2006)

Table 3.7: Scots law practitioner textbooks

Subject area	Textbook	Current edition
Company law	<i>Gore-Browne on Companies</i>	Looseleaf
Contract law	<i>McBryde, The Law of Contract in Scotland</i>	3rd (2007)
Criminal law	<i>Gordon, The Criminal Law of Scotland</i>	3rd (2000)
Delict	<i>Walker, Delict</i>	2nd (1981)
Land law	<i>Gordon and Wortley, Scottish Land Law</i>	3rd (2009)
Private international law	<i>Anton & Beaumont, Private International Law</i>	2nd (1990)
Trusts and succession	<i>Meston, Scottish Trusts and Succession Service</i>	Looseleaf

Halsbury's Laws/The Stair Memorial Encyclopaedia

Halsbury's Laws of England and *The Law of Scotland: Stair Memorial Encyclopaedia* are encyclopaedias of English and Scots law respectively. At the last count, *Halsbury's Laws* ran to 101 volumes, not including indices and supplements,³³ and *The Stair Memorial Encyclopaedia* filled 25 volumes.

Since the range of *Halsbury's Laws* and *The Stair Memorial Encyclopaedia* is far wider than any individual textbook, you must search them effectively for information. It is beyond the scope of this work to explain how to conduct such a search, but there are several guides on the subject if you require assistance.³⁴

Journal articles

There is a bewildering array of legal journals and periodicals available to law students. They range from overtly academic publications like the *Law Quarterly Review* and the *Modern Law Review* to specialist practitioner periodicals such as *Computers & Law* and *The Journal of International Banking Law and Regulation*.

The focus of most journal articles is very narrow, often a single decided case or a highly technical legal issue. As a result, reading journals should not form a major component of your legal research for moots. If you have the time, however, a quick, targeted search for potentially relevant articles can bear fruit. In particular, well-researched articles can provide useful ideas for arguments and point you in the direction of decided cases that other sources miss, especially decisions of foreign courts.

Student textbooks

The best textbooks aimed at undergraduates contain accurate, accessible and reasonably full descriptions of the law. They also refer to all of the important reported cases. Although it is not easy to identify the pre-eminent student texts, it is probably safe to rely on any textbook that your tutors recommend for a particular subject.

Lecture notes and handouts

Do not underestimate your lecture notes and handouts as sources of relevant authorities. Any law tutors worth their salt will ensure that the materials they produce refer to the latest legal developments.

³³ The reference here is to the fifth edition.

³⁴ For guidance on searching *Halsbury's Laws*, for example, see *Knowles, Effective Legal Research*, 2nd edn (2009), pp. 110–115.

Legal dictionaries

Some moot problems are concerned with the meanings of particular words or phrases. If you are faced with a moot problem of this sort, look up one or more of the leading legal dictionaries, in addition to a conventional dictionary. The best-known English legal dictionaries are probably *Stroud's Judicial Dictionary of Words and Phrases*³⁵ and *Words and Phrases Legally Defined*.³⁶ Both include references to reported cases in which the meanings of the defined words and phrases were considered.

Online sources

Many of the sources described above are available online. Although some databases can be accessed free of charge, the most comprehensive, and therefore the most useful for research purposes, are available only to subscribers. Your access will consequently depend on whether the law library at which you conduct your research has subscribed to them.

Web-based sources of legal information were virtually non-existent 15 years ago and the materials available online are increasing year-on-year. At present, however, the three most commonly available British commercial databases are probably Westlaw UK, LexisNexis Butterworths and Lawtel. The key features of each are described briefly below. For a more detailed explanation both of what these databases contain and how to use them effectively, consult a specialist text.³⁷

- *Westlaw UK*
Westlaw UK provides access to UK case law and legislation as well as journals published by Sweet & Maxwell. Its case coverage extends to over 30 series of law reports including the *Law Reports* and the *Weekly Law Reports*. Westlaw UK also contains a comprehensive collection of EU case law, including judgments handed down by the European Court of Justice and the European Court of First Instance.
- *LexisNexis Butterworths*
LexisNexis Butterworths provides access to a range of databases covering, among other things, UK and EU case reports, UK legislation and legal journals published by Butterworths. It also includes a number of practitioner textbooks and *Halsbury's Laws*.
- *Lawtel*
Lawtel is used principally by practitioners. Its great virtue is that it is updated daily with the most recent, often as yet unreported, court decisions. It therefore

³⁵ 7th edn (2006).

³⁶ 4th edn (2007).

³⁷ See, for example, Knowles, *Effective Legal Research*, 2nd edn (2009), at pp. 8–22.

provides the very latest intelligence about the law. However, unlike Westlaw UK and LexisNexis Butterworths, Lawtel does not contain links to any series of law reports.

In addition to the subscription services described above, several free databases provide access to case law and legislation. Two prime examples are the website of the British and Irish Legal Information Institute (www.bailii.org), which draws together publicly available transcripts of recent decisions of certain English and Scottish courts (among others), and www.legislation.gov.uk, which contains the full texts of all primary and delegated legislation enacted by the UK Parliament since 1988 and most pre-1988 primary legislation.

CHAPTER CHECKLIST

- Make sure you understand the general legal principles pertaining to the area of law with which the moot problem is concerned.
- Read the relevant passages of a leading practitioner textbook to gain that understanding.
- Keep a running list of all potentially useful authorities.
- Identify the most important authorities, read them thoroughly and make effective notes about them.
- Constantly review your progress and abandon any unproductive lines of inquiry.
- Do not look for the “solution” to the moot problem.
- Look instead for arguments that use valid deductive and inductive reasoning.
- Only cite authorities with significant legal weight.
- Never underestimate how long your research will take.

List of literature

- 1) KEE, Christopher. *The Art of Argument: A Guide to Mooting*. New York: Cambridge University Press, 2006. 152 pp. ISBN 978-0-52168-513-9
- 2) POPE, David, HILL, Dan. *Mooting and Advocacy Skills. 2nd Edition*. London: Sweet & Maxwell, 2011. 188 pp. ISBN 978-0-41404-486-9
- 3) SCALIA, Antonin, GARNER, Bryan A. *Making Your Case: The Art of Persuading Judges*. St. Paul: Thomson/West, 2008. 245 pp. ISBN 978-0-314-18471-9
- 4) WEIZER, Paul I. (ed.) *How to Please the Court: A Moot Court Handbook*. New York: Peter Lang Publishing, 2005. 192 pp. ISBN 0-8204-6949-1