2012

Advanced Fundamentals of Appellate Advocacy in a Moot Court

Siyuan CHEN
Singapore Management University, siyuanchen@smu.edu.sg

Published in Singapore Law Review, 2012, vol. 30, pp. 45-62.

ADVANCED FUNDAMENTALS OF ORAL APPELLATE ADVOCACY IN A MOOT COURT

Chen Siyuan*

This article discusses some of the more advanced techniques and "tricks" in mooting and is meant primarily for students who are aiming to compete in moot court competitions for the first time. It builds upon the basic fundamentals that would have been taught in a Legal Writing course, and covers the four key components of a moot: the opening, the arguments, the answering of questions, and the conclusion/rebuttals.

The art of making arguments in a moot court – an activity more popularly known as "mooting" – is probably the biggest intellectual challenge a student faces in law school. It is unsurprising then that many leading practitioners of the law today were prominent mooters in their student days,[1] given that their moot training would have put them through an extremely rigorous and disciplined process of learning how to pitch the right legal argument at the right level before any given tribunal. However, the idea of mooting also has the tendency to strike fear in the hearts of many students, and it is the component in first-year Legal Writing courses that students either love or hate the most. After all, mooting combines and tests a complex array of skill sets fundamental to good lawyering: analysis, research, planning, writing, appellate advocacy, and (in many cases) team-work. Amongst these skill sets, appellate advocacy is probably the most synonymous with mooting (and indeed the most fear-inducing). Yet perhaps more can be written[2] about how students

* LL.B. 1st Class Hons. (National University of Singapore) ("NUS"); LL.M. (Harvard). Assistant Professor of Law, Singapore Management University ("SMU"). The author would like to thank his wife and moot-collaborator, Eunice Chua, for her unending support and encouragement. He would also like to thank his co-coaches and former student mooters for some of the inspiration behind this piece, and his former coaches in NUS for their exemplary instruction.

1 To cite a few local examples that traverse the entire legal profession: Davinder Singh S.C. (Jessup winner, 1982), Judge of Appeal V.K. Rajah (Jessup winner, 1982), Justice Steven Chong (Jessup winner, 1982), Minister for Law and Minister for Home Affairs K. Shanmugam (Jessup, 1984), and Attorney-General Sundaresh Menon (Jessup runner-up, 1986).

2 There is little literature on mooting in Singapore (which incidentally, enjoys an excellent track record in moot court competitions: see http://en.wikipedia.org/wiki/Moot_court#List_of_champions_of_international_moot_competitions). In contrast, there have been recent extensive works (albeit directed at lawyers, as opposed to students) on writing appellate briefs (see for example Paul Tan, "Writing a Persuasive Appellate Brief" (2007) 19 Sing. Ac. L.J. 337) and trial advocacy (see for example Eleanor Wong, Lok Vi Ming S.C. & Vinodh Coomaraswamy S.C., *Modern Advocacy: Perspectives from Singapore* (Singapore: Academy Publishing, 2008)). *Modern Advocacy*, of course, has a chapter on appellate advocacy, but appellate advocacy in a moot setting has important differences. Associate Professor Eleanor Wong also

can overcome the said difficulties and master the craft, especially since the advocacy aspect is a culmination of all the skills associated with mooting – skills that employers will assume to have already been honed to a workable standard even before a law graduate begins work. Drawing on his experience as a mooter and a moot coach,[3] the author has put together in this piece tips on some of the more advanced fundamentals[4] of appellate advocacy in a moot court.[5] Hopefully, this will be a useful starting guide for both moot coaches and aspiring mooters.[6] While this guide is not intended to be exhaustive, the author believes that understanding and applying these advanced fundamentals will make the student an exponentially better mooter, and in time to come, a better lawyer and advocate. This guide will be divided according to the four most important components of a moot: (i) the opening, (ii) the arguments, (iii) answering questions, and (iv) conclusion and rebuttal/surebuttal (there is a part (v), which contains a summary and conclusion). Matters of form and style will be addressed throughout the piece at appropriate points.

I. THE OPENING

Mooters often find themselves hard pressed for time in a moot. Given the number of months spent on analysis, research and writing, they have a lot to say, but they are only given anything between

---

once put together a book from the collection of the experiences of the NUS moot alumni (Eleanor Wong, *Moot Points: A Handbook and Oral Advocacy by NUS Mooters* (Singapore, 2003)), but this piece seeks to provide guidance to students using a different style and structure.

3 The author teaches the International Moots I and International Moots II electives in SMU. As a student, he captained the NUS Jessup team to a third-place finish at the International Rounds of the Philip C. Jessup Moot. His team was seeded first after the preliminary rounds and also won the Alona E. Evans Award for Best Memorial. Not long after graduation, he returned to NUS to co-teach International Legal Process. When he joined SMU, he was part of a team that initiated an official moot programme in 2010. Within two years – and before its first batch of students had graduated – SMU won six international moot competitions. The programme's other achievements are documented at http://en.wikipedia.org/wiki/SMU_School_of_Law.

4 In other words, to benefit optimally from this piece, the reader should have at least completed or is about to complete the moot component of his first-year Legal Writing course (or its equivalent). Without having done so, the reader may have some difficulty understanding some of the mooting concepts mentioned in this piece. The author takes the view that the tips in this piece can be applied in local, regional or international competitions alike; indeed, this piece is targeted at both rookie and seasoned mooters.

5 While these tips and tricks pertain more to "stand-up" moots such as those before a mock International Court of Justice or Court of Appeal, most of the general principles apply equally to "sit-down" moots such as those before arbitration tribunals like the Willem C. Vis and LawAsia moots. Summarily, the main differences between the two types of moot are the proximity to the tribunal (thus affecting projection and style of rapport), and the occasional references to tabbed files (thus creating a different ebb and flow to the presentation).

6 There are several myths surrounding the profile of successful mooters: such students have good grades, have extrovert attributes (are extroverted individuals), were former debaters, and enjoy public speaking. None of these attributes are essential to good mooting, though possessing them may be a bonus in certain situations.

10–25 minutes to do so before a bench (and a usually inquisitive one at that). The result is that mooters tend to find ways to "free up" more time so that they can make as many arguments as possible. The opening is then sometimes heavily compromised[7] – yet this need not be the case. A strong and informative opening immediately captures the attention of the bench, and as will soon be explained, helps distinguish a mooter from the rest of his competitors.

Apart from the formalities,[8] there are four possible ingredients[9] in an opening: recitation of the facts, rhetoric,[10] a roadmap, and relief – for ease of memorisation, we can call these the 4 "R"s. It is uncontroversial to suggest that a strong roadmap is indispensable to any opening and any sensible moot coach will recommend it. In its minimum form, a roadmap orientates the bench by giving an effective overview of all the main issues and corresponding arguments (and if appropriate, sub-arguments and alternative arguments) without going into excessive detail.[11] If representing the applicant, the mooter will usually want to specify the relief or remedy sought at the end of the roadmap.[12] As the roadmap unfolds, the relationship between the issues and arguments must become apparent, and the gist of the case theory[13] should preferably emerge.

To take things to the next level however, the mooter may want to consider either prefacing the roadmap with, or weaving into it, some rhetoric that makes the opening more compelling. Instead of asking if a recitation of the facts is necessary,[14] the mooter can volunteer his own brief narrative of the facts and legal position to attempt to colour the minds of the bench and

---

7 Or worse, bogged down by excessive formalities.

8 Namely the greeting of the court, the introduction of the names and the parties, the division of the issues, and the reservation of time for rebuttal/surebuttal.

9 Other schools of thought may either take the view that there are other ingredients or give these three ingredients different names or labels.

10 Sometimes referred to as "motherhood statements".

11 Rather than come up with something entirely new, you sometimes only need to adopt tweaked versions of the first-level and second-level headings of your memorial for something punchy and effective. Also, be aware that some panels may expect you to briefly touch on your co-counsel's roadmap as well. Be familiar with that too, in case you are asked. On this note, if you are asked a question relating to an issue that your co-counsel is addressing, you can briefly answer the question and gently remind the bench of this if you are the first counsel. If you are the second counsel, you have little choice but to substantiate your answer to such a question if the bench demands that.

12 Alternatively, this may be sought at the conclusion.

13 For those not acquainted with Neumann (see Richard Neumann, *Legal Reasoning and Legal Writing: Structure, Strategy and Style*, 6th ed. (USA: Aspen, 2009)), the case theory essentially explains what happened, why it happened, how your client has been wronged, why the law is on his side, and why he deserves the remedy you seek. It is an overarching encapsulation of your case that applies to most, if not all, of your issues and arguments. It could be narrowly defined (for instance, the respondent is a *sui generis* international organisation and therefore has a certain set of obligations and responsibilities commensurate with its legal status) or broadly construed (for instance, customary international law has not evolved in tandem with human rights developments).

14 Some moot coaches advise against this.

demonstrate doubtlessly which side he represents.[15] To aid in shaping such an opening, the mooter should identify the most powerful points (whether in fact or in law) that are in his favour, and see which of those can be worked into the brief narrative. Suppose a moot problem is about the use of force in international law and the mooter represents the applicant. Is there something heinous about the nature of the weapons used? How many innocents were killed? Did the respondent behave unreasonably in any way, and why? Could the respondent have avoided the bloodshed? Did the applicant provide any form of provocation? These will be some of the instinctive concerns of the bench when faced with such a problem.[16] By tapping onto such instincts in his opening, the mooter executes a double duty: provide the anatomy of his case, and characterise either his client or the opponent (or both) in a way favourable to himself.

The problem is that many mooters are averse to such openings not just because of a question of time, but also the fear of not being able to pull it off or being interrupted by a bench that cares little for the dramatic (or is quick to point out that all facts are assumed to be read and known). Such a fear is understandable; while first impressions last, negative first impressions caused by a bad opening can form a considerable psychological barrier to be overcome for the remainder of the moot. However, there are some things to look out for in order to avoid tripping up right at the start, such that mooting does not necessarily eventuate into a game of high risks and high rewards.

First, ensure that you have the attention of the bench before you begin (this also applies during rebuttals and surrebuttals). Once you have set up the rostrum, (subtly) use eye contact to indicate to the entire bench that you are ready. If a member of the bench is busy with something, wait patiently (unless another member gives the cue to begin) and do not give anything away, not even with your body language.[17] The eye contact used to indicate readiness should exude conviction and confidence in the case, as opposed to tentativeness or fear. In addition, the microphone is there to help establish one's presence – use it well.

Second, although a large part of mooting is a dynamic process of responding to arguments and concerns and cannot (and should not) be scripted, the opening is something that has to be penned down in advance and internalised completely (that is, practiced over and over again). Coming up with a compelling narrative on the spot is plainly unwise even for the highly intelligent, but reading off a script for the opening is even more unwise. Mooting is a form of public speaking that is different from other types of public speaking in that many things have already been thoroughly researched and memorised or internalised in advance, and the mooter cannot appear rehearsed or

15 If representing the respondent, however, the mooter will want to observe if the bench has (in relation to the applicant) any appetite for interesting openings, before deciding on the type of opening to proceed with.

16 With practice, mooters will discover that most of the questions from most of the panels will be guided by instinct, rather than hard law or a close scrutiny of the fact pattern.

17 Such as faking a cough to get their attention, or looking on impatiently. The tricky part is when not all on the bench are ready but one of them signals for you to begin. The best way to deal with this is to indicate politely (preferably with a smile) that the remaining judges are not ready as yet.

rigid but must appear totally on top of his material in presenting them. Why should a bench have any confidence in a counsel who is unsure of his opening?

This leads us to the third point, which is that the opening should not be presented in an over-the-top fashion. Watch recent videos of the finals of the best international moot competitions[18] and you will discover that there really is little room for theatrics or drama at any point in a moot (although this does not mean you should not be assertive or even emphatic). Instead, the presentations as a whole usually embody a fine balance between being clinical and forceful, and the same applies to the opening. Content-wise, avoid hyperboles and mischaracterisations, and depart from saying something completely neutral. Better yet, find something that captures the essence of your case theory.[19]

The fourth point is that for the opening to be impactful, the mooter must keep it succinct and relevant. If the opening is segregated from the roadmap, anything more than 30 seconds for the former is generally considered unnecessary and cumbersome. Precisely because of the brevity afforded to it, the rhetoric must, as mentioned, only be peppered with relevant points of law and/or fact. A mooter should be able to commence on his arguments proper with not more than 1–1.5 minutes accorded to the formalities and the opening (including the roadmap).[20] Note that this presupposes the moot lasts between 15–25 minutes. A final note on the opening is that should you be abruptly interrupted with a question while delivering the opening, remain calm and deferential; after the question has been answered, assess if the opening should be continued or dispensed with, and then proceed to do so accordingly.

II. THE ARGUMENTS

While the opening is chronologically prior to the substantiation of the oral arguments, in their formulations, oral arguments logically come before the roadmap. As a starting point, the mooter must understand the 3 "F"s in making persuasive arguments: Fight, Focus, and Flag. The first 2

18 Youtube.com, a popular online video-sharing platform, as well as local law libraries, should stock some of these. Some of the websites of these competitions also carry short video snippets.

19 Assume, for instance, that the moot problem is about the extent to which a government can pass sweeping laws to regulate speech on social media platforms. Rather than describe sovereign prerogatives or freedom of speech rights in absolute and mutually exclusive terms, the approach is to outline why one right should outweigh the other in the factual matrix at hand: on one side one can say the national security interests are real and pressing as a result of the attributes of social media (instant and widespread dissemination of uncensored information); on the other side, one can say that social media communications have superseded previously orthodox modes of communications such that any curtailment of speech via social media has to be very calibrated and measured.

20 If it is really necessary, 2 minutes may be fine. The suggested time limit does not factor in early interventions from the bench.

"F"s involve preparation before the moot; the third "F" involves execution during the moot.

"Fight" refers to identifying the spectrum of issues of the moot problem that is most likely to be contested by the other side and probed into by the bench with interest. When you first approach the moot problem, many issues will be raised during the brainstorming, some of which will invariably be red herrings or tangential issues. It is impossible to run full arguments on every single issue. Through further research, analysis, and writing (and indeed, even during the actual competition rounds), the mooter will get a better idea of where the battle grounds will lie when the arguments are presented orally. Is there something in the law that will really undermine your case? Is there something in the facts that bothers you and simply will not go away? What are the trends that have emerged during the practice rounds?[21] What real life situations might the moot problem have been inspired by? What are the controversies in the problem that have intuitive appeal? These are usually helpful indicators in determining the fight. Discussions with various people always help, and know that the key does not lie in winning the moot, but in making the best possible argument on your given facts and the given law (this does not mean, however, that one holds the fort longer than one should or holds the fort with little conviction). You may also find it helpful to begin the entire analysis by penning down a very digestible and elegant version of the arguments, in which there is nothing but punchy headings and the most relevant facts and authorities listed in bullet points. From this basic version, you can slowly add or subtract bullet sub-headings and bullet points as the practice rounds progress, without compromising on the simplicity and digestibility of the arguments. Needless to say, mastery of the most basic facts and authorities is the expected minimum of any mooter. The more facts (including corrections and clarifications) and authorities there are in the picture (through revision and research), the more the mooter must stay on top of the material.

This then becomes the hard part: focusing on specific aspects of the fight, and allocating the right amount of time for each argument. For instance, at times there are threshold issues that if lost, will technically have a fatal domino effect on the rest of the arguments (be it yours or the opponent's). Some examples are the jurisdiction of the tribunal and its features, having the right parties before the tribunal and the complete exhaustion of local remedies. If a mooter represents the respondent and defends a claim, he must recognise that the onus is not on him to prove the claim. He can afford to lose on the point of jurisdiction because that only goes to procedure and not the merits – having said, if he can mount a very credible argument on procedure, forsaking it lightly is definitely not a good call either.[22] Conversely, if the applicant is having difficulty coming

---

21 In moot court competitions that involve national rounds, sometimes the bench memorandum is revealed indirectly via the questions posed by the panels. With regard to practice rounds, always maintain a good balance between quantity and quality – one always needs sufficient time to carefully think through the case theory.

22 Because he has passed up on a golden opportunity to trip up the opponent on a threshold issue, the

up with a solid argument on a point of procedure, he must not show that it is his weak spot or be overly concerned that it is a threshold issue. Instead, he has to somehow neutralise the magnitude of the issue, execute the strongest possible argument with finesse, and find a way to turn the attention of the bench to his stronger arguments on (presumably) the merits. If the applicant is unable to pull off this act of finesse, he must recognise that most threshold issues require him to hold the fort for quite a while. A reasonable bench, upon sensing that the best possible argument has been advanced, will usually let the mooter go.[23] It would be a mistake for either side to spend a disproportionate amount of time on issues that will not interest the bench much. Avoiding such mistakes requires both astute observation and good judgment.

In the process of figuring out the focus for the substantive issues (or the merits of the case), a helpful test would be to ask if you have a set of facts and/or legal propositions that make an issue a "slam dunk" or "home run" for your side. If the answer is yes, then that cannot be where the real controversy of the moot lies – this means that the bench is neither likely to probe too intensely nor be interested in hearing extensive arguments on that issue. Plenty of experimentation is required before one figures out what to emphasise on, what to omit, what to defend, and what can be conceded (and under what circumstances) – indeed arguments frequently evolve during the competition itself. The oral argument can never be a true replication of the written memorial in either substance or form.[24] Indeed, the mooter must eventually (without undue weight given to someone else's opinion, no matter how authoritative that someone else is) figure out the right level to pitch the (oral) argument. The more incredible the argument, the greater the authority required to support it. The search for the ultra-creative and "smoking gun" argument is elusive for a reason. Keep going back to check the arguments against the case theory and see if everything flows and coheres. Think strategically too: is it better to put out one reasonable argument and hold the fort, or to put up a bold argument and retreat to a reasonable alternative (such as resorting to a defence or an exception to the rule) if the bench does not take the bait?

---

bench will consider this bad judgment.

23 If the bench is insistent, then extrication is required if the clock is running down too much. Acknowledge that while the issue is an important but difficult one, you have made the best possible argument, and propose that in the interests of covering your other main submissions you will move on.

24 Due to space constraints and the complexity of the subject, not much can be said here about the necessary amount of concordance between the oral argument and the written memorial. It will suffice to say, however, that while not everything in the written memorial needs to be argued orally, it is safest not to deviate too significantly from the written memorial when making the oral argument. Slight deviations in content, restructuring of the issues, emphasising and de-emphasising are perfectly acceptable. One cannot also help but notice that the best writers usually do not make for best oralists and vice versa. This phenomenon attests to the very different skill sets involved when presenting arguments in written form and presenting arguments in oral form. Chief amongst the differences are that a memorial is static while a moot is dynamic; a memorial is deliberative while a moot is spontaneous. Finally, it should be noted that good memorials may either address a small number of issues in-depth, or a wide array of issues more superficially. In either scenario, the mooter is still expected to distil the main parts of the memorial when presenting orally.

To be clear in his arguments, the mooter needs to figure out the fight and the focus of the moot problem before he even begins to speak at the round proper. When it comes to making his arguments, he will do well in getting straight to the point at all times – that is, avoid lapsing into "aside" discourses on peripheral matters – and having the discipline to constantly apply the third "F", flag. Flag is a mixture of signposting, conventional application, and transitioning. Signposting and transitioning serve similar purposes. On a general level, they comprise using the right words and phrases (use plain English and sentences of manageable length) to inform the bench that you are beginning a new argument or setting out a test, making a list of points, unpacking a series of arguments and sub-arguments, moving on to a new argument or point, responding to a particular question or argument,[25] or returning to a previous argument or point. Signposting and transitioning can also be used to characterise the nature of your argument,[26] and can even be instrumental in guiding the pace, variation, intonation, enunciation, and pausing in your presentation.

After figuring out the legal parameters of the argument (that is, the issue, the legal proposition, and the legal authority that frame the argument), application is where the meat of the matter is. The accompanying adjective "conventional" is used here because it will help remind the mooter to stick to conventional, paradigmatic structures of legal argument, such as CRUPAC, RUPA, CRUPA, RUPAC, and IRAC (which is why application falls under the rubric of "flag").[27] These structures have achieved conventional status because they have been proven to be closely aligned to the sequence of how a legal mind usually thinks, no matter if it is in a written or an oral argument: what is your legal premise or test? What is your factual premise? What is the conclusion after applying the legal premise to the factual premise? Are there counter-arguments to address? Are your examples relevant? Are there overriding policy considerations? What is the principle underlying your rule? A common mistake is to spend too much time developing the legal argument in fear of the eternal "what is the law/where is your authority" spectre.[28] It then becomes a theoretical discourse disconnected from the moot problem; it sounds like a lecture (which will often be interpreted as condescending) peppered with legal terms and authorities, with no apparent

25 For respondents, the perennial dilemma is whether to run one's own case or to respond to the applicant's case. The answer is a combination of both, with a heavier emphasis on the former. Using (a mixture of direct and subtle) signposting (such as referring to the opponent's memorials, or characterising the opponent's test in summary and pointing out that it is either the wrong test or has been misapplied) that show the respondent is responding to the applicant also helps. If the applicant presents a fundamentally different structure, the respondent need not feel an overwhelming need to mirror that structure – after all, the issues are defined by the moot problem, and the respondent can, if necessary, tell the bench why his structure should be preferred. Needless to say, if one acts for the applicant, he gets to set the parameters of the entire debate.

26 Such as whether it is an alternative argument, an argument in response to the opponent, or an answer in response to a question or series of questions.

27 This is largely American nomenclature: "C" for conclusion, "Ru" for rule, "P" for rule proof, "A" for application, and "C" for conclusion again. The "I" in IRAC stands for issue.

28 What should be done instead is to use a bunch of authorities to quickly establish the pedigree of your legal proposition, after you have stated clearly and succinctly what the operative legal proposition is.

connection to the facts. A significant dimension of oral argument lies in its emotive quality, which is brought about mostly by the facts and the policy repercussions, not so much by the austerity of the law. Although it is true that in a good moot problem, one party will have the facts in his favour and the other party the law in his favour, this does not mean that the conventional structures of legal argument should be abandoned. It is a question of emphasis.

To recapitulate: demonstrate the pedigree of your legal proposition, connect the legal proposition to the facts, and conclude either at the start or end of the submission. Somewhere in between, either out of your own volition or through questions from the bench, neutralise important counter-arguments and address relevant examples. Be very clear as to the structure of your argument: what is your test, what is the exception, what is the alternative, what can be conceded – link everything back to this structure as your presentation unfolds.[29] Finally, ensure that your argument is not divorced from the litmus test of a good argument: whether you have been fair (legal proposition is sound and supported), reasonable (did not ignore unfavourable facts or policy, and consistent with a palatable justificatory principle), and logical (conclusion commensurate with legal and factual premises). Needless to say, in presenting the argument, the mooter must let his mastery of the material shine through and leave no doubt in the judges' minds that he is a trustworthy and credible advocate.[30] The co-counsel and of-counsel have roles to play too: as subtly as they can,[31] they should always appear alive, attentive, and "on the same page" as the person speaking at the rostrum. These have positive sub-conscious effects on the bench.

III. ANSWERING QUESTIONS

For this segment, it is imperative to recognise the three main points at the outset: an oral argument in a moot court is a combination of presenting your own case and satisfying the intellectual curiosity of the bench;[32] the ability to answer questions well will, in an overwhelming majority

29 As an extremely general guide, for each issue, you should have one primary argument and one alternative argument.

30 It may perhaps be helpful to bear in mind this analogy: a good mooter is very much like a good salesperson. You are trying to sell an idea, but you cannot be too pushy. You want to showcase the virtues of your product, but you cannot pretend it does not have limitations. You do not want to force anyone to accept your views, but you want to persuade, and you want to show that you can be trusted and that you believe in what you are saying.

31 Remember again: theatrics and drama have no place in a moot court; whatever attendant benefits there are will likely be outweighed by the disadvantages.

32 To be sure, there is a large element of cultural relativism when it comes to judging moots. Certain judges prefer a passive role, reserving all questions to the very end; certain judges prefer to be as combative and adversarial as possible. Researching the general style of judging for any given international moot court competition is usually necessary.

of cases, determine the outcome of the moot. In most cases, the mooter often possesses more knowledge than the bench, but is afraid to show it, and he risks becoming easily upended even by the most rudimentary and innocuous of questions.

With regard to the first point, mooters are sometimes in a hurry to present their own case[33] and consider questions as a hindrance to their presentation, rather than reinforcing it. They think that the best scenario is if the bench hardly intervenes, because silence means acquiescence and acceptance of their argument; *a fortiori*, the more arguments they can complete without intervention, the better. Notwithstanding the fact that time management may be a factor in scoring, this is a grave fallacy that must be categorically and permanently cast aside from the mooter's mind. One must assume that benches mostly comprise judges who are acting in good faith and have genuine concerns that they hope can be properly addressed by counsel. One must also assume that benches have read the gist of the written submissions beforehand and are not looking to hear mere rehashes of that in oral form (even if they have not read the key material, they will most certainly try to make sense of the oral submissions).[34] Obviously the mooter must still be able to run his own show – the point is that he must do so and welcome questions at the same time. If he is able to give an effective answer, then the judge will not be left with the feeling that there are unaddressed concerns, or that he (the judge) has asked an abjectly disingenuous question (especially if that judge has been particularly quiet and only had 1 or 2 questions).[35] It therefore bears repeating that persuasion must take place on two levels: running the client's case, and addressing the bench's concerns.

We now come to the second point of how to answer questions well, bearing in mind that good answers actually reduce the chances of a protracted line of questioning (and therefore saves precious time). The matter of style can be dealt with quickly, and hence will be dealt with first. At the most basic level, the mooter must never appear irritated and/or disrupted when a question is asked. In the first place, a good mooter will not be looking at any script (there should be a 1–3 page skeletal or outline at most)[36] and will be analysing the bench at all times; if so, he will be able

33 While there may be a penalty for failing to complete submissions on time, there are other ways of getting round a highly interventionist bench, such as proposing to move on, or presenting condensed versions of the remaining arguments if time is short.

34 It is a fact that many judges often do not read all the basic materials beforehand; still, many of them have the ability to pick things up in a short span of time and detect contentious issues as the moot unfolds. They may also have read the essential parts of the bench memorandum, while others may have skimmed the summary of arguments and/or table of contents of the team's memorials.

35 Therefore, one should avoid describing questions as 'irrelevant', 'red herrings', 'unjustified', or anything along those lines. Conversely, enthusiastically praising the question as "brilliant", trying too hard to be humorous and so on does not always gain traction with the bench. It is better and safer to be subtle, and avoid overusing crutch phrases (such as "I take your point" or "I understand your concern").

36 All the other relevant documents can be filed in a tabbed ring binder, but only for emergency reference. Note, however, that certain moot competitions require mooters to slowly take the bench through specific parts of the materials (such as the compromis or memorials).

to anticipate questions and not be caught off-guard.[37] As the question is being asked, the mooter should indicate clearly[38] that he is willing (that is, happy and enthusiastic) to address the concern (even if he is not), and that it is a legitimate one (even if it is not). Never interrupt the judge,[39] never look up when thinking, never fluster even when under siege, and never try to fight the asker. Smile, nod, avoid any hint of aggression or hostility, and maintain meaningful eye contact. The next step is to engage the questioner and the question effectively. Listen to the question extremely carefully: does the question yield a yes/no answer? If so, the first thing is to give the yes/no answer, followed by the corresponding explanation behind the yes/no answer (turn of phrases prefaced with "however" and "but" usually work well). A simple question[40] demands a simple answer; a difficult question demands a more considered answer (more on this will be touched on later). In particular, this can never be stressed enough: listen to the question extremely carefully. One of the downsides of practice rounds is that mooters sometimes hastily misjudge questions during competitions because some parts of those questions sound like questions asked before in practice rounds – even when the questions are really quite different.

If there are multiple parts to the question, wait for the question to be completed, and then answer them in turn – better yet, try to anticipate where the line of inquiry is heading towards and tailor your answer accordingly.[41] If there are multiple judges asking questions, remember to answer all the judges in due course, even if one of them was interrupted by another judge at some point and even if the interrupter has brought you to another issue altogether.[42] If it seems helpful to recycle phrases found in the question in your answer, you should do so. If you have a tendency to lose your eloquence when questions come, start curbing that during practice rounds. Mooters also tend to dance around what they perceive as difficult questions, hoping (futilely and without exception) to overwhelm the questioner with ambiguity. Sometimes the questions actually only require simple and straightforward answers – or worse, are actually designed to help extricate the mooters from a difficult position![43] Indeed, when mooters are running out of time,[44] they either give meaningless and repetitive answers out of frustration, or fail to grasp the basic thrust

37 The mooter can anticipate by simply studying the body language and facial expressions of the judges.

38 The mooter can smile, nod, or even take down the question with his pen.

39 Except in certain situations where a rabid judge goes into anecdote mode – but cutting him short really requires finesse and a good excuse.

40 Be careful, however, if you think the "simple" question is the beginning of a train of inquiry or series of cross-examination questions.

41 This is a double-edged sword: mooters sometimes pre-empt the questions wrongly and end up wasting precious time, to the annoyance of the questioner.

42 That is, you can always clarify if that judge had a question that was not asked.

43 Thus, not every question should be treated with suspicion. The key lies in listening to each question very carefully.

44 On the issue of time, when the time is up, the mooter must always inform the bench that this is so (unless a judge is in the middle of asking a question, in which case the mooter can inform the bench when the judge is done asking, and then the mooter can ask for permission to answer the question).

of the question (for instance, for a question seeking a rationale for the legal rule, it is answered with a case or illustration rather than with an explanatory principle of the legal rule).[45] Both are guaranteed recipes for disaster. Instead of thinking that the judge is attempting to trap you, think of it as him testing the structure, logic, and/or limits of your argument. Think about how you can identify and address the concern underlying the question. In this light, the appropriate response is a convincing and confident answer. It cannot be overstated that in virtually all moots, the contest is won and lost within the most intense question-and-answer segment – if you fail to impress in that 2–3 minutes of heavy-fire questioning, how well you started or ended may not matter at all.[46]

How do you give a convincing and confident answer? First of all, take a second or two to digest the question, even if this is a question that has recurred in practice sessions. Ask yourself how you would answer the question in the most direct way possible. A point worth noting is that mooters often answer questions of fact or logical fairness with answers of law. As such, one thing you can do is to consider if the question is seeking an answer of law (run the authorities), application (run the facts), or logical fairness (run the principle). Once you have resolved this, imagine your best possible answer, based on all the research that you have done, as being stored in an onion. On the surface, there is just one layer (your first and most direct response to the question). If you sense that the question demands more layers to the answer, then start rolling out (or peeling) the layers of the onion – the process is akin to a game of poker where you do not want to give away everything at one shot, because the strength of your submissions depends entirely on how expectant the judge is.[47] If the question goes to rule and rule proof, show off intimate knowledge of the authorities – either via the intimate details of a single authority to show depth, or via a wider spectrum of authorities to show breadth and analogy/distinction – and provide a few concrete illustrations. As it is often said, the legal mind is a cynical mind that is usually only assuaged by good and relevant authority – this includes modern examples and developments in the real world. If the question goes to application, then run (on) the facts: weave a narrative, present patterns, distinguish hypotheticals, situate your argument in a wider spectrum to create an appearance of reasonableness, suggest what is missing for a proposition to be fulfilled, invoke real life examples

45 There are two further scenarios that must be avoided at all costs. The first is to offer no answer to the question at all (if you really have no authority or answer to a difficult question, say so but offer something else in return, based on what you think the concern that motivates the question is) or say something to the effect that the question will only be dealt with later. The second is to give a hurried answer and appear to run away from the question after that.

46 This does not mean that one can neglect the other aspects of the presentation. While a moot is won and lost based on that narrow segment of question-and-answer, points will be lost for any given lapses at any given point in the presentation. Damage control is still necessary even if one has not performed excellently during the pivotal moments.

47 This means that the mooter must exercise good judgment and read the bench carefully at all times. Laying out the entire argument complete with facts and authorities is much less impactful if volunteered at the wrong time.

and draw inferences – most judges react intuitively (and therefore factually) to a moot problem and will craft their concerns based on their interpretation of the facts.

Do all of the above calmly and assuredly. If both facts and law are exhausted and the judge still seems unconvinced, run something more abstract and general such as the principle behind the rule, policy (maybe even with some rhetoric thrown in), theory, historical underpinnings, first principles, or the portending of a doctrine or watershed moment in the development of the law – whichever is appropriate. While doing all of this, you should show how your multi-dimensional answer to the question reinforces your own case and neutralises the opponent's case.[48] In other words, connect all the dots back to your case theory; you should never be led down a garden path of irrelevant questions. If the judge is still unconvinced by all of this, then think about give-and-take: in your answer, appear to provide some concession (and thus legitimacy) to the judge's concern,[49] before persuading him or her as to why the tribunal should nevertheless find in your favour – if necessary, run exceptions or alternatives (positing upper and lower limits of the spectrum of possibilities along the way). The job is complete when you successfully bridge back to where you last left off (instead of waiting in awkward silence to see if the question has been answered).[50] To be sure, one must know when to move on after giving an answer. Pausing for an unnecessarily long period of time is an invitation for doubt or (potentially irrelevant) follow-up questions. The key is to read the bench carefully and reacting accordingly.[51]

This entire process is the first half of marshalling arguments. This first half is not as difficult to execute as it sounds: if one thinks hard about it, any given argument only lends itself to the same few 2–3 authorities to be discussed and distinguished, and the same few spins on the same few facts in the moot problem.[52] Amazingly, many mooters are unable to appreciate this even though the research is at their fingertips and become led by the bench, when they should be leading the bench. A frequent consequence of this is that in their despair, they keep repeating

48 Better yet, show that you appreciate the relevance of the question in a good way.

49 For example, "Your Excellency is correct, but…"; "Your Excellency has raised the strongest possible counter-argument to my submission…"; "That is one set of considerations on the one hand, but on the other hand, there is a different set of considerations to be balanced…".

50 If, however, the bench seems to prefer hearing the next argument (or you are forced to concede an argument), there is probably not much point in returning to where you left off. The process is dynamic and you must be able to analyse the situation.

51 Put another way, if the question challenges the pedigree of your rule or test, bring out the authorities (rule proof). If the question challenges the application of your rule or test, bring out the facts of the compromis. If the question challenges the fairness of your rule or test, argue on principle or policy. If all else fails, it may be time to acknowledge the difficulty faced and move on to either the exception to your rule or test, or to your alternative argument. But certainly the primary argument should not be conceded too easily, for strategic and logical reasons.

52 Memorising and referring to paragraph numbers of the moot problem (or even the authorities) is usually a good idea. Also keep in mind not to distort the facts or make (reasonable) inferences without stating so.

unhelpful answers, as though repetition makes the argument sound better. Assuming the mooter now understands how basic layering works (that is, display mastery of the positive and negative authorities and facts), it all boils down to how much compelling policy can be weaved in and how much confidence is displayed when he performs the subtle extrication. Indeed, one of the hardest skills to acquire – and the second half of marshalling arguments – is knowing how to "control" the bench without them knowing it.

To that issue, it is only logical that the bench can only ask questions in connection with the submissions made. If you make either a far-fetched argument or a pointless argument, you will either be greeted with incredulity or silence (though a bench may be silent for very different reasons). Over-stating the case usually means presenting an unpalatable position, even if you are arguably correct on the law. The whole idea is to try to word your submissions in such a manner as to prompt the bench to ask questions in the controversial areas – areas in which you have already prepared the layered answers in advance. You must then unpack the answers as though the act of unpacking is not rehearsed.[53] While you should go with the flow as a starting point, do not get carried away by the tide. It is inexorable that you cannot anticipate all the possible questions (such as out-of-this-world "hypothetical" scenarios)[54] so some improvisation is needed here and there. However, once you have answered the question sufficiently well (do not forget to analogise and distinguish where appropriate), leverage on building rapport and goodwill[55] and try to redirect the bench (be firm and unequivocal) to the remainder of your arguments.[56] To be clear, the wresting of control from the bench requires great finesse, timing, and practice.[57] It may help to pretend you are having a formal conversation among friends. It will additionally help if you do not rely on any form of a script.[58] Sometimes, even simple phrases such as "and I will now go on to explain" or "that is one way of looking at it, but we take a different position for the following reasons" go some way in creating some "buffer" space for the mooter to develop his arguments on his own terms. These are ways in which you can keep the process dynamic and the information flow a

53 The identification of the real controversies will only come about with adequate practice.

54 There are standard and customised ways to deal with hypotheticals. The best way is to distinguish the hypothetical on the facts, and show how a difference in the facts actually makes a difference to the legal and/or policy position.

55 Always remember to maintain eye contact with the whole bench, and not just the most active judge. A passive judge appreciates the occasional nod and may even bail the mooter out of a tight situation. The mooter must then be able to identify bailout questions and not resist them! Conversely, once one loses the passive judge with a bad answer, that may become a point of no return.

56 If time is running short, one may consider pointing that out to the bench. If goodwill has been established, the bench is more likely to grant the redirection.

57 At the minimum, never ask for permission to move on – just do so promptly, unless the bench interrupts you. It puts yourself in an unnecessarily difficult position.

58 Mooters need to overcome the psychological barrier of relying on a script. When relying on a script, one appears unprepared, insincere, and unimpressive. It really is not difficult to wean off the reliance after several rounds of practice. There is much more internalisation by then than you imagine.

genuine dialogue augmented by sound knowledge. At the very least, you will win over a cold or unresponsive bench. Therefore, do not be afraid to engage, so long as you do not lose any sense of propriety or become too informal. At no risk of over-emphasising the most important point of them all: always listen carefully to the question, and answer it directly and convincingly. The moment a judge senses in the mooter unnecessary resistance to questions, it becomes completely impossible to score very well.[59]

As a final note, remember the adage "do not moot the last moot", most so when you are well into the advanced stages of preparation. The tough panel in the last round is not going to be the same as the next panel, both in terms of style and questions – seasoned mooters can definitely appreciate the dichotomy between preliminary round judges and advanced round judges.[60] The whole idea of practice rounds and preliminary competitive rounds is to use the most frequently expressed concerns to test and fortify your existing case theory and arguments, not radically change, or worse still, demolish them just because you somehow had a bad round (unless of course your case theory and/or arguments were fundamentally flawed to begin with, but this is nearly impossible when you have had a team of four members or so poring over a moot problem for months on end). Too many mooters get overly influenced by what judges tell them and lose sight of the fact that they are the true masters of the material, and any lack of persuasion in one round was probably due to a failure to put the authorities out there rather than there being a lack of merit to the argument. Others get overly disheartened by harsh judges who forget that when they themselves mooted when they were students, they were not perfect either. Mooters will thus do well to remember the adage: "do not moot the last moot."

IV. CONCLUSION AND REBUTTAL/SUREBUTTAL

There was perhaps a time when mooters could complete most of what they needed to say and had sufficient time (or were given extensions) for a proper conclusion. Those days appear to be over (mainly because of increasingly interventionist benches), and contribute to mooters making the mistake of according little or no importance to their conclusion. Mooters these days tend to make rushed conclusions, or run out of endurance due to the pounding they take by questions from the judges (the worst way to end a moot is to answer the last question poorly). This is unfortunate. In the same way that having a powerful opening is going to be refreshing for the bench, a powerful

59 The mooter must know when to move on, when to concede, and when to acknowledge a weak point. For the lack of a better analogy, think of the process as a dance – a tango. No dance partner would want to feel alone and unengaged – the same applies to moot judges. As such, always make the judge feel good!

60 Usually, the latter will have had more time to read or listen to the arguments and will be more selective on the issues to debate on.

conclusion can really set a mooter apart from the rest.[61] Try to avoid merely summarising your arguments in a neutral way, but provide the bench with an added impetus to be on your side. An appeal to rhetoric or even emotion may be necessary.

Yet even if a mooter has penned down and memorised a powerful conclusion, how can he execute it when his time is almost up? Not all benches are at liberty to grant extensions of time even if such extensions are politely sought.[62] The key, as with every other aspect of mooting, lies in the planning. The mooter must be very conscious of how much time he has left at any given point in time, and dish out various condensed versions of arguments accordingly. He must memorise the various permutations of when to move to a different segment of his presentation. Chances are, he will be able to find 15–30 seconds for his conclusion. If he cannot, it may be better to dispense with a pointless (that is, neutral and/or uninformative) summary. Always think of ways to end on a high note. How can a bench award high marks to a mooter who appears rattled at the end? The worst case scenario arises when a mooter trots painfully towards the finish line, only to mumble something when the time is up and scurry off back to his seat. What if the bench still has a question? There should have been no hurry at all. In fact, if the bench still has plenty of questions, use that to your maximum advantage to either bolster or rescue your case.

We now move on to rebuttals (surrebuttals are bound by rules to mirror rebuttals). When back at the table contemplating which points of the opponent to attack, the mooter should make things as clear as possible for himself.[63] He does not want to return to the rostrum in a state of panic because he cannot decipher the gibberish which he has scribbled on his paper. He must stay alert to what the opponent is saying and where the concerns of the bench seem to lie, and make the call to distil the main points to be rebutted. Once it is his turn to return to the rostrum, he must realise that this is his final opportunity to address the court.[64] He must retain the same discipline, focus, and confidence that he exuded when he made his main submissions – while a competent rebuttal may not save the day, a bad rebuttal may cost the performance.

There are different schools of thought as to how much time should be reserved for rebuttals, and concomitantly, how many points should be made. Some think that it is all about performing a mixture of damage control, case-bolstering, addressing the concerns of the bench, and direct offence (going for the jugular). Others think it is about going on a systematic, point-by-point demolition of the other side. However, everyone agrees that rebuttals are not an occasion for summarising your case (or your opponent's), rehashing an argument already made, raising a new

61 If, however, the mooter has run out of time and the bench has clearly indicated that they do not wish to hear anymore, the mooter should smile and sit down respectfully.

62 This depends on the rules of the competition in question.

63 If there is an of-counsel, the same considerations will apply.

64 In the case of the respondent, he will have the last word of the round.

argument, attacking/defending something trivial,[65] demeaning your opponent, or making a half-baked attack/defence of an important point (it is better to deal with what you can, rather than what you should). Everyone would also agree that the mooter should state at the start how many points he is making (giving a brief summary of each point may also help), go through each point with some deliberation and force, always get to the point directly, go for the jugular when on the offensive, and repair the most badly damaged fort when on the defensive.

In short, each point of rebuttal and surebuttal must be nothing short of super, akin to scoring a goal in a football match (of course, if the strategy is a point-by-point demolition then the conclusion of the rebuttal has to be demolition and not self-implosion). As a matter of orthodoxy, for a 20–25 minute moot, mooters usually reserve 2–4 minutes for rebuttals/surebuttals, and aim to make 2–4 points.[66] It is probably a good thing that a bench intervenes during rebuttals/surebuttals, because this usually means the mooter will actually be given more than the 2–4 minutes he had originally asked for. As with the conclusion, end strong, and never walk back to your seat as though you have been defeated.

V. IN SUM

Appellate advocacy in a moot court, rightly or wrongly, is predominantly about appearances.[67] Properly prepared (which means being extremely well prepared), the mooter will always know the material better than the bench (even if the bench comprises eminent individuals). It is then up to the mooter to convince the bench that despite all manner of questions thrown in his way, he truly knows the material (without appearing inflexible and insensitive to the concerns raised by the bench), and that he can showcase the depth and breadth of his arguments (including making concessions where necessary and moving on to alternatives). Coupled with the right structure, the right amount of confidence, and the right choice of words, the material will appear patently in his favour as he engages the bench in a dynamic conversation on the issues and concerns. On the other hand, a mooter paralysed by fear and crippled by a script will fumble at the easiest of questions, refuse to back off from an untenable position, panic at the strength of the opponent, fail to establish any rapport with the judges, and lose endurance and focus at some point (usually towards the end) during the presentation. The battle is in the mind more than anything else. Both

65 Such as pointing out that the opponent made a minor mistake with the citation of his authority.

66 It is usually a gamble to stand up and inform the bench that the applicant has nothing to say in rebuttal – the respondent must have done a really horrible job, but even so, refusing to rebut may be viewed as arrogant behaviour.

67 It has often been said that mooters who can either make the bench laugh with them – or possess a winning and confident smile – usually score very high. This is extremely true with hardly any exceptions.

moot coaches and aspiring mooters will do well to understand this first and foremost. Finally, remember that the first words uttered at the start of a moot should be meant with all sincerity: “May it please the court.” You have done your work, the court has a dispute to solve, and you are there to render assistance – assure and persuade as would please the court!