A PRACTICAL GUIDE TO MOOTING by S.A. Williams & J. Walker (Toronto: Emond Montgomery, 1994)

A Practical Guide to Mooting[1] provides direction on how to prepare for, and participate in compulsory and competitive appellate moots. It is a concise, insightful and well-written book that offers a wealth of useful advice about the mooting process. I strongly recommend it to first-year students participating in compulsory moots, students preparing for their first competitive moot, novice moot-team coaches and instructors of compulsory mooting programs.

The book advises on the four phases of the mooting process: (1) researching the factum; (2) writing the factum; (3) preparing the oral presentation; and (4) delivering the oral presentation. I will examine each of these subjects in turn, summarizing the authors' recommendations and offering some of my own comments.

I. RESEARCHING THE FACTUM

The book suggests a pragmatic approach to research. Students should begin by identifying the things, acts, people and places involved in the facts that form the basis of the appeal; this analysis generates tentative issues. Library research should start with secondary sources, such as texts and looseleaf services, which provide a succinct briefing on the areas of law that may be in issue and serve as a foundation for more detailed research in the cases and academic periodicals. This is good advice, even for students not participating in moots. Many of the competitive and compulsory moots deal with issues students have never before encountered and most students will only waste time by beginning with *Quicklaw* or the *Canadian Abridgement*. The authors emphasize that once the relevant caselaw is located, mooters must update it in order to ensure that they are fluent with subsequent authorities, not just to avoid the embarrassment of learning during the moot that a case has been overruled, but also to enhance their understanding of the issues and their ability to give knowledgeable responses to questions.

Throughout the research phase, team members are advised to discuss the issues with each other in order to save time and to refine their analysis of the problem. This suggestion should be heeded. In my limited experience, many teams in competitive moots fall into the confusion that their most dangerous opponents are from their own school. As a result, they do not benefit from the advantages of teamwork. (The schools could help their moot teams avoid these communication problems by allowing mooters the use of a room in the library while they are researching.)

The book does not address the question of how the responsibilities for research and writing should be divided amongst team members. It is common practice for the appellant and respondent teams to divide their issues in half and this approach works in most cases. However, in one moot in which I participated, the four people on our team each researched and wrote both sides of one of the four issues. A colleague had

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[1] S.A. Williams & J. Walker, *A Practical Guide to Mooting* (Toronto: Emond Montgomery, 1994).

suggested this unusual approach and we found that it allowed us to avoid much duplication of effort and write better factums. Clearly, this method will work best where there are even numbers of issues, but it is an approach which could be fruitfully adapted to deal with any number of issues.

II. WRITING THE FACTUM

The book describes how to complete each of the factum's components, including the summary of facts and legal argument. It reminds the reader of the factum's purpose and its role in the appellate process and in mooting competitions, and emphasizes that the factum is the foundation of oral argument. This chapter is particularly important because most teams do not write good factums. Students invest considerable labour in worrying about the law and their analysis but fail to capitalize on this investment by taking the time to finish the factum so as to make it clear, well-reasoned, factually accurate and error-free. This inattention to detail ensures that even merely competent writing will be treated favourably by judges.

The discussion of the "technical" part of the factum — the title page, the table of contents, the description of the nature of the appeal, the signature page — is useful because these requirements are often overlooked or misunderstood. The book's overview of the discussion of the facts is even more useful, particularly for those who are new to the factum-drafting process. It highlights the importance of relating concise and honest facts and the role they play in framing the issue for judges; the facts should not be a repetition of the trial judge's decision or an incoherent ramble into irrelevance.

The discussion of the legal argument is brief, as is appropriate for a book of this size and scope, and the authors have outlined the essence of what I was taught to believe is good written advocacy. Thematically, the factums should take the reasonable middle ground. Statements of legal issues should be followed by argument which state the law, the relevant facts, and the conclusions which follow from paragraphs of the application of that law to those facts. The factum should have a deductive quality. Respondents should follow the structure established by the appellants and respond to all their opponent's arguments in anticipation of the possibility that the court may adopt crucial portions of the appellants' position. The weakness of this part of the book is its brevity; it is necessarily abstract and this quality may frustrate the beginner with its lack of practical detail. Mooters with more experience are reminded of key principles, but may need to turn to practicing litigators or other published materials for additional guidance.

III. PREPARATION FOR ORAL ARGUMENT

The book shines most brightly in its discussion of oral argument, offering readers easy access to information on the subject that could otherwise only be accumulated by experience in at least one moot tournament. Technique will come only through practice but reading the *Guide* will allow novice mooters a considerable head-start.

The section addresses the essential elements of preparation for oral presentation: content, delivery and managing the bench. The authors emphasize that mooters should

never just read out their factum in court or even feel that they are bound by its content or structure. The oral presentation should articulate the factum's strongest points and answer the best of the other side's written and oral arguments. It must respond to the court's needs, detailing points that may be obscure or controversial. In my view, the oral argument should be almost conversational in tone and speakers should rely on their familiarity with the issues, and many rounds of practice, to find the words that compromise a presentation. Most people will need a set of notes that summarize their presentation but should be able to work without any notes on the day of the competition. The authors recommend preparing written opening and closing statements which identify the essence of the issue on appeal and capture the interest of the judges. As part of their opening statement, mooters should also prepare and deliver an outline which describes the structure of their argument. They should refer back to the outline during the course of the presentation, ensuring that judges always know how a submission is related to the argument's structure.

Mooters should speak slowly and clearly, and maintain eye contact with the bench. (Video-taping and review would be a useful, pre-moot method to allow students critically to assess their own performances in this area.) The book emphasizes the importance of appearing confident as manifest in calm delivery, deference to the bench, politeness and the use of the pause — rather than "um" or "ah." In this regard, it is important to use pace of speech, volume, emphasis, choice of language and even gestures to favourably influence the bench's perception of an argument. Mooters should make use of these tools to enhance the drama of their presentation.

As the book points out, the most enjoyable part of the oral argument is interaction with the bench. Judges' questions offer an invaluable opportunity to score points by demonstrating substantive knowledge and the ability to deal with complex issues without rehearsal. Mooters should be responsive to questions and confident in dealing with them, and should use every opportunity to connect their response to their argument. They should not show irritation or fear in answering. Mooters should never interrupt a question and should always stop speaking when a judge begins to speak.

When the court's question refers to arguments made in another part of the presentation, mooters should either answer in depth or provide a summary response and return to the question in the relevant part of their argument. Mooters should not be cowed by novel questions or questions that do not seem to make sense. Pause rather than stumbling into an answer and ask the bench whether you have understood their question by paraphrasing it.

IV. DELIVERY OF THE ORAL ARGUMENT

Much of this chapter deals with the formalities of the moot: what to wear, where to sit, what to do with one's hands, how to address the judges. Clothing should not distract from the presentation. Appellants are usually seated to a court's right and respondents on the left. Hands should be left at the lectern's sides or at some other comfortable location, and should be used sparingly to illustrate an argument. All of this information on the etiquette of mooting is useful, even for experienced mooters.

There is additional discussion of the presentation in this part, some of which repeats earlier chapters. As the oral argument unfolds, it is essential to be aware of the time remaining and to adjust the argument accordingly, without being a slave to the outline which guides the presentation. In my view, the best oralists will redraw their arguments on the fly in order to respond to the bench's questions, whether the enquiries arise in their own or another mooter's speech. The authors make the point that questions reveal the bench's concerns about the case and mooters should tailor their comments to respond to those concerns. Time spent in responding to questions may be more valuable than time spent in the prepared presentation. A moot competition is won on skills, not necessarily the argument, and a speaker's ability to respond to questions is a skill the bench will assess.

Mooters should refer to the factum during their presentation by indicating the paragraph number at which each major component of the argument begins and references to the book of authorities should be even fewer in number. The *Guide* recommends using the book of authorities once or twice over the course of a presentation, but I think that the better advice is never to make use of the book of authorities unless one of the central issues in the moot is the interpretation of a decision. Moot judges are usually more concerned with bigger issues than the interpretation of cases, and use of the book of authorities has enormous time costs. An uncontroversial interpretation of a decision will usually be accepted without question.

V. CONCLUSION

The book's greatest flaw lies in the fact that 25 percent of its pages are given over to reproductions of rules of court governing factum preparation in various jurisdictions. The utility of these excerpts is limited. Many moots adopt their own technical rules and a similar result could have been achieved by including a citation list to the relevant rules. This space would have been better spent on examples of good factums; too often students do not have a model to work from and do not get to see different writing styles. Alternatively, the authors could have added some practical advice about preparation for competition or the tactics of competition, which, incidentally should always include a thorough review of the rules.

I would also hope that the final chapter, which includes a description of the what the book calls "the more prominent [Canadian] mooting competitions"[2] will be revised. It does not include the Clinton J. Ford Trial Moot, a criminal trial moot involving teams from the prairies, nor the Alberta Challenge Cup, an appellate moot involving the law schools in Calgary and Edmonton.

These criticisms, however, do not detract from the book's value. The authors have de-mystified the mooting process with a highly readable compendium of advice that is very useful for students participating in competitive or compulsory moots, particularly if they feel their teaching or coaching is inadequate. The book will be less useful for experienced mooters, but they should consider reviewing it before they begin practicing

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[2] *Ibid.* at 97.

in order to remind themselves of the essential principles and to reflect critically on their own style. Moot instructors and team coaches may want to use it as a reference source. In summary, this is a fine work. I hope that the publishers would consider lending a further service to students by publishing a practical guide to law school or legal writing.

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