

1. Introduction

*My Lords, Your Honours, pray lend me your ears . . .*¹

OVERVIEW

While the development of plausible and meritorious arguments in response to the issues raised in a moot problem is primarily an intellectual exercise, its presentation in competition involves all of the domains of human mental activity – *cognitive, psychomotor* and *affective*.² The development of these skills, and the ability to engage in effective team work and the required legal writing, is unlikely to occur naturally; and, even when an innate skill exists, this needs to be carefully nurtured. Mooters therefore require considered coaching, and coaches require a deeper understanding of mooting in order to be as effective a coach as possible. It is in their roles as legal academics, current legal practitioners (Mr Thomas – barrister; Dr Craddock – solicitor) and active moot coaches, that the authors see the need for a deeper understanding of the theories behind successful mooting as a pedagogy of law schools, as a vital precursor to legal practice and as an aid for newer practitioners or those wishing to refresh their advocacy skills. They present their *Art* for this purpose.

¹ As inspired by William Shakespeare, *Julius Caesar*, Act 3, Scene 2. Importantly, as the authors will consider, effective engagement with the Bench is a key element of effective mooting.

² While it is noted that other authors consider there is a fourth domain – the *social* domain (eg see Peggy Dettmer, ‘New Blooms in Established Fields: Four Domains of Learning and Doing’ (2005) 28(2) *Roeper Review* 70–78) – in the context of competition mooting the authors suggest the *social* aspect has limited (if any) impact and as such will not be considered by them. If at all, this is more relevant to overcoming the issues that impact upon team dynamics and as such is discussed as relevant in Chapter 5.

CONTEXT

Mooting is a public speaking activity, which is based upon appellate advocacy, referred to by some authors as ‘*appellate simulation*’.³ It is an activity that primarily, although not exclusively, is engaged in by law students or those in other degree programmes undertaking a law unit.⁴ Mooting may also be part of an internal programme conducted by student associations as a learning or professional skills activity, which is organised separately from academic activities, or run as either internal or external competitions supported by student associations, the profession and/or the Bar. It also can be used as a tool within Bar preparation programmes, or those that replicate the reality of legal practice in a law firm as part of the obligatory requirements for admission as a lawyer. When undertaken as part of a major competition, the written phases can take many months, and the oral rounds, usually held over several days or weeks, involve months of preparation.

Mooting is also an established mechanism for assessment within many law schools and a mechanism for the delivery of essential skills training.⁵ More recently, however, there has been a fall-off in the availability of mooting in undergraduate programmes – primarily because of the high resource costs of delivering what is, essentially, one-on-one assessment. When used for assessment purposes, this can be either a compulsory form of assessment in core subjects, or an optional form of assessment in selected subjects.⁶ The role of the moot coach, or even the ability to have one, will vary depending on the competition or assessment context, noting in particular that when mooting is used for class assessment the ability to have a coach is unlikely to be permitted.

Where mooting is used for assessment, the marking tools used would include a matrix of criteria and standards suitable for a criterion-referenced mode of assessment (CRA). The role of the academic in developing the criteria will be crucial, and an assessment methodology

³ William McDevitt, ‘Active Learning Through Appellate Simulation: A Simple Recipe for a Business Law Course’ (2009) 26(2) *Journal of Legal Studies Education* 245, 247.

⁴ For a description of the history of mooting and its relevance to legal training see: Louise Parsons, ‘Competitive Mooting: An Opportunity to Build Resilience Skills for Legal Practice’ (2017) 4 *Australian Journal of Legal Education* 1, 2–6.

⁵ Mary Keyes and Michael Whincop, ‘The Moot Reconceived: Some Theory and Evidence on Legal Skills’ (1997) 8 *Legal Education Review* 1.

⁶ Andrew Lynch, ‘Why Do We Moot? Exploring the Role of Mooting in Legal Education’ (1996) 7 *Legal Education Review* 67.

specific to mooting is considered in detail in Chapter 9. Due to mooting's use as a formal mechanism for assessment, and in many jurisdictions as a core component of the assessable skills for admission to the legal profession, the authors suggest that any academic involved in using mooting activities for assessment purposes, as well as all moot coaches (academic coaches and student coaches alike), will benefit from an understanding of the theories and principles considered crucial by the authors (both in terms of the models of achievement directly referable to skills *and* in understanding the relationships between these and *appropriate* criteria and standards in the CRA environment). Appreciating that theory is often best understood by practical example; the authors will provide such an example by linking the theories to the preparation for a specific competition – that of the International Criminal Court (ICC) Mooting Competition (see Chapter 8).

UNDERSTANDING ADVOCACY

Advocacy, while in a broad sense 'public speaking', is unique. This is because the entire dynamic of forensic advocacy is different from public speaking as conventionally understood. Experience shows that the habits formed in public speaking are, in fact, possibly counterintuitively, often detrimental to moot performance. Advocacy is perhaps more akin to acting. In the English and (most) Commonwealth courts' context, advocates are physically constrained by the formal requirements of the courtroom. They speak from a fixed stage position (the Bar table), behind set scenery (the lectern), wear a costume (robe and wigs), use props (i.e. evidence) and perform for an audience (Bench or jury). And yet, again, advocacy is distinctive, as it is not acting in the sense properly understood of a stage performance, due to the purpose of the speaker, and also the fact that the audience participates either directly by asking questions (Bench) or indirectly by giving a verdict (jury or Bench). As such, advocacy actually bears but a passing resemblance to other forms of public speaking, including that of the stage. Further for the advocate, even absent the physical constraints of the courtroom, their delivery must be more than merely 'entertaining'. It must be holistic, consistent, knowledgeable, persuasive and, notably for their client, winning.

While the ability to engage and persuade the Bench (and jury) is theatrical in nature as relevant to the skills of the *psychomotor* domain, reliance upon these skills by themselves is not sufficient. The advocate also must draw upon a thorough understanding of their client's case and the relevant law, as well as their interrelation as enabled by the attainment of *cognitive*

skills. Finally, the advocate's argument will be in vain if they cannot persuade the Bench (or jury) of their client's position or if their delivery is flawed because of nerves if they have insufficient command of the skills of the *affective* domain and nerves compromise the effectiveness of their performance.⁷ The skills of each domain are unique.⁸ To be a successful advocate, acquiring a command of all three domains' skills is vital – and the development and manifestation of skills in all these domains must be interrelated.⁹ The core requirement for a mooter or advocate in making a successful legal argument is that of understanding the relevant law/s, for which the acquisition of *cognitive* skills is essential.

As Butler and Gygar note, although lacking the physicality of sport or dance, advocacy is, in fact, 'full body art'.¹⁰ Persuasion of the Bench therefore is not merely achieved by the presentation of an unassailable legal argument (which is the work of written memorials/memoranda), but the harnessing of body and voice to bring the Bench around to your point of view. The mastery of the *psychomotor* domain is facilitated by participation in mooting competitions.¹¹ As with any *psychomotor* skill, more often mastery of these skills can only be realised after considered practice rather than reliance on inherent natural skills.¹²

In the moot context, the resolution of cognitively supportable solutions must utilise facilities which transcend the *cognitive* and *psychomotor* domains, with the mooter also being required to operate in the *affective* domain to fashion a solution that is as readily described as *elegant* as it is *correct*. Indeed, its correctness lies, at least partly, in its elegance. This elegance is perhaps most relevant to the making of oral submissions. However, it is also relevant to the making of written submissions, particularly those that represent the threshold to be crossed before qualifying to participate in the oral rounds.

⁷ James McCroskey, 'Communication Competence and Performance: A Research and Pedagogical Perspective' (1982) 31(1) *Communication Education* 1.

⁸ Lorin Anderson and David Krathwohl (eds), *A Taxonomy for Learning, Teaching and Assessing: A Revision of Bloom's Taxonomy of Educational Objectives* (Longman, 2001).

⁹ Mark Thomas and Lucy Craddock, 'Chill Out! Mooting and the Affective Domain' (2018) 25(3) *International Journal of the Legal Profession* 317.

¹⁰ Joel Butler and Terry Gygar (2012) *Australasian Mooting Manual* (2nd ed, Butterworths, 2012) 59.

¹¹ Lucy Craddock and Mark Thomas, 'From the Waist Up: Developing Psychomotor Skills for the Court Room' (2016) 24(3) *International Journal of the Legal Profession* 319.

¹² Ken Hansen, 'Teaching Within All Three Domains to Maximise Student Learning' (2008) 21(6) *Strategies* 9.

It is essential therefore to link the acquisition of the skills of the *cognitive* and *psychomotor* domains to those of the *affective* domain. However, many authors, and some academics and moot coaches, fail to appreciate how intertwined the three domain skill sets are, or indeed how vital all three are to effective advocacy. In fact, as the authors will explain, the three domains are so intertwined that a failing of skills in one domain will adversely impact the skills in the other domains. It is in this regard that the authors have witnessed first-hand, in the roles of coach and judge, how the best prepared and most knowledgeable of mooters can stumble, and then crumble, let down by their less developed *affective* domain skills. As Chapter 4 considers, *affective* domain skills are honed only by rigorous practice, including that which is held in front of the most intimidating/demanding Benches available: not intimidating (necessarily) by their demeanour but by the incisive nature of their questioning and/or the esteem with which they are held by the mooter/s.

In real-world advocacy, regrettably for those who appreciate the elegance of a well-presented legal argument, there is ample evidence that a less than articulate or elegant advocate might *win* a case solely because of the legal correctness of their argument. In the world of mooting, however, the legal-logical correctness of a mooter's submissions is to an extent subservient to the advocacy skills with which it is prosecuted. It is this need for *elegance* as well as *correctness* therefore that distinguishes mooting from *mere* advocacy. It also highlights the need for effective coaching as a separate requirement from the acquisition of the necessary legal knowledge to be the author of robust and correct legal arguments.

WHAT IS A MOOTING COMPETITION?

The distinct phases of a mooting competition are divided between the preparation of written memorials, which may or may not also act as a qualifying element for the oral phase; and the oral phase, in which, more commonly, one team represents the appellant (applicant) against another team who represents the respondent (defendant), with teams rotating sides from one round to the other. In the oral rounds each side is represented by a senior and a junior counsel, who may also fulfil the same roles when 'acting' for the other side. In some competitions, however, for example that of the International Criminal Court discussed in Chapter 8, a team consists of three oralists/counsel, acting independently (i.e. not in the same round) as prosecutor, defence counsel, and either victim's counsel or government or third party state counsel. A moot team also will consist of anywhere from one to many researchers, who may or may not also

participate as an oralist. Commonly, teams in external competitions will have an academic coach, although this usually is not permissible in student-run competitions.

The skill set developed by participating in a moot programme – being that which is necessary to persuade someone of your preferred position – is indispensable to anyone practising law. A core difference between the practice of legal advocacy and advocacy in mooting competitions is that in practice usually, irrespective of how poorly presented the legal advocacy may be, the ‘right’ legal position will ‘win’. In a mooting competition, however, it is often the unwinnable argument, which would be abandoned in real practice, and more importantly how it is presented by the mooter that can determine the winner of any moot round and the competition. Effective (by which the authors mean winning) competition mooting therefore relies upon more than accurate knowledge of the law and its application to your client’s circumstances.

The skills associated with successful competition mooting, similar to those of successful legal practice, include intellectual, physical and emotional aptitude. However, for most law students (and some lawyers), these skills are not intuitive and require active development. Within law schools these skills are developed with the assistance of a moot coach (or mentor) and by participation in internal and external law school activities and competitions.

THE NEED FOR COACHING

Coaching plays an indispensable and crucial role in the process of preparing mooting teams for competition at all levels. Enabling effective coaching therefore is (should be) a key strategic component for any law school seeking to develop a culture of excellence in mooting and take its place on the world stage.

Each domain has identifiable skills,¹³ which the authors argue are capable of development through targeted practice for a competition mooting team with the aim of achieving an excellent performance. The authors consider, however, that without first successfully mastering the skills of the *cognitive domain* and formulating a defensible case theory and appropriate doctrinal (or jurisprudential) support, it is unlikely a team would be successful. A principal focus of coaching a moot team therefore necessitates an understanding of the theory of learning that underpins

¹³ Anderson and Krathwohl (n 8).

cognitive development, understood in the context of the timeframes operating in a competition, and what can realistically be addressed within those limits. This principal focus is then supported by the secondary but equally important ability to support mooters in the development of their *psychomotor* and *affective* domain skills.

Very clearly any success in the forensic drama that is a moot competition comes from maximising the skills and effective functioning in the *cognitive*,¹⁴ *psychomotor*¹⁵ and *affective* domains.¹⁶ As will be considered (see Chapter 6), the impact of working in an effective team environment can support a mooter's development of these skills.

BOOK ORGANISATION AND STRUCTURE

The authors examine the theories relevant to the development of the skills necessary for effective participation in competition moots. Drawing upon seminal works which have opened the way to a structured and principled analysis of educational objectives (such as Bloom), the authors advance a unique model to be used by moot coaches in the development of a team's mooting skills by providing frameworks that progressively develop the mooting skills relevant to the *cognitive*, *psychomotor* and *affective* domains, and a model for supporting effective mooting team dynamics. In addition to developing a mooting-specific theoretical framework, the authors will exemplify the art of mooting in competition by incorporating references throughout to relevant practical examples. Documentation that can be used to support moot coaching practice, and criteria which may be utilised by moot coaches in measuring the development of mooters' skills, are included as appendices.

This book commences in Chapter 1 with preliminary materials, placing mooting in the context of current legal practice and emphasising the place of the *cognitive*, *psychomotor* and *affective* domains in mooting participation. The balance of the book is divided into three parts, each with a key role.

Part I – Theories

This part forms the base upon which future discussion of mooting principles and practices is framed. This theoretical discussion underpins

¹⁴ Mark Thomas and Lucy Craddock, 'The Art of Mooting: Mooting and the Cognitive Domain' (2013) 20(2) *International Journal of the Legal Profession* 223.

¹⁵ Craddock and Thomas (n 11).

¹⁶ Thomas and Craddock (n 9).

our understanding of the core skills required for mooting and advocacy practice and draws upon and reconfigures specifically to the context of mooting the seminal teachings in related fields of research.

Chapter 2 develops a model of the cognitive domain in a Bloom-Krathwohl styled matrix. The authors adapt the specific levels identified by Bloom and their interrelation with each other to the specific context of mooting in the light of later modification (by other authors) of Bloom's taxonomy. Their analysis will draw upon existing literature and examples from sport, theatre and music to develop a specific model that can be used for developing mooting-specific cognitive skills. Measuring the development of these skills is considered in Chapter 9.

Chapter 3 explores the *psychomotor* skills associated with governing the physical presentation of oral arguments. It positions the *psychomotor* domain with the *cognitive* domain and explores how the two are inter-related and mutually dependent, and how mastery of both is essential. *Psychomotor* skills have not been the subject of such intense study as *cognitive* skill development, and are generally not as refined or as nuanced as the original hierarchies developed for the cognitive domain. Where taxonomies/hierarchies have been developed,¹⁷ these are not as widely agreed on, and tend to be directed to the acquisition of high-level skills whose ultimate performance lies in the physical domain (for example sport, dance or surgery). The authors fill this gap by developing a taxonomy of *psychomotor* skills specifically directed at mooting. Measuring the development of these skills is considered in Chapter 9.

Chapter 4 identifies the place of *affective* skills and links these to those of the *cognitive* and *psychomotor* domains. It provides a discussion of the issues associated with the highly stressful environment in which competitive mooting operates and how to overcome related stressors. While the focus of a moot presentation is primarily its intellectual and analytical content, it is inescapable that its oral presentation is given by a complex human being, whose psychological make-up is not wholly intellectual, and whose 'performance' of the arguments in an interactive context is subject to the fluctuations of the *affective* (or emotional) state of the mooter/performer before and at the time of their performance, rather than being

¹⁷ Ravindrakumar Dave, 'Psychomotor Levels' in: Robert Armstrong (ed), *Developing and Writing Educational Objectives* (Educational Innovators Press, 1970) 33–34; Elizabeth Simpson (1972) *The Classification of Educational Objectives in the Psychomotor Domain* (Gryphon House, 1972); Anita Harrow, *A Taxonomy of the Psychomotor Domain: A Guide for Developing Behavioural Objectives* (David McKay, 1972).

wholly a function of the objective, and stable, rigour of their analytical robustness.

The presentation of argument before a moot Bench is undeniably performative, with deep resonances to, but also significant differences from, theatrical performance. Krathwohl's taxonomy of the *affective* domain described five stages of development. Similar to the development of a model of *cognitive* skills in Chapter 2, this chapter will develop a moot-specific model of *affective* skills and describe their interaction with *cognitive* and *psychomotor* skills and how these in combination may be used to maximise moot performance. Measuring the development of these skills is considered in Chapter 9.

Part II – Principles

This part begins the authors' consideration of the impact of the three domains to moot teams as they progress through a competition. It begins by examining the role and impact of the moot coach upon the individual team members, and the team's performance.

Chapter 5 engages in a detailed examination of the skills necessary for successful moot coaching, and how these may be acquired. In order to provide context, the authors engage with examples from other fields, primarily those of team sports and athletics. This examination highlights the need for an effective and supportive moot coach to have an adequate understanding of the underlying theories and taxonomies developed in Part I. The role of the moot coach in developing the associated domain skills in mooters is also considered.

Chapter 6 engages with theories relevant to the development of group and team dynamics and considers their relevance to mooting. Due to the smallness of size of a moot team permitted by most competitions, existing literature that engages with larger groups or sporting teams is of limited use for understanding moot team dynamics. However, these same studies serve to reinforce the need to engage with each team member as an individual and emphasise the need to select team members with skill sets that complement, complete and enhance those of the other team members. Also reinforced is the core role of the moot coach as a 'team member', which results in the creation by the authors of a unique taxonomy of team dynamics as relevant to mooting. Measuring the development of effective team dynamics is considered in Chapter 9.

Part III – Practice

In this part the impact of the application of the domain skills, influenced by the coaching received and the dynamics within the team, is considered by means of engaging with examples relevant to the preparation of the written submissions/memorials and the oral advocacy within the competition itself.

Chapter 7 considers the importance of written submissions to moot-ing advocacy. It presents an analysis of the requirements of specific writing styles, drawing in particular upon the example of an appellant moot competition. The relevance and importance of the process of the development of written submissions to a moot team will be considered, based on underlying theoretical principles relevant to the skills of writing, with a focus on the context of forensic writing in the moot competition environment. It also considers the differences, and relevance, of written submissions used to qualify for a competition, as against non-qualifying submissions; and those used in *real* jurisdictions as against those used in *fictional* jurisdictions.

This chapter will develop a moot-ing-specific model of writing and will describe its interaction with the *cognitive*, *psychomotor* and *affective* domains, as well as the impact on the development of written submissions of team dynamics. This chapter is the linchpin between moot-ing theory and moot-ing in action. Together with Chapter 8, it grounds the theory by means of interaction with practical (internationally relevant and transferable) examples of the process and the structuring of moot-ing practices. Measuring the contribution of an individual to the development of the team's written submissions, as reflected in their contribution to the research of the problem and the solutions, the construction of the written work and their support of their team, is considered in Chapter 9.

Chapter 8 draws upon an example from the International Criminal Court Moot Competition 2017.¹⁸ Directly linked to the preparations undertaken by Mr Thomas with his team for the Oral Rounds of that competition, the chapter focuses on the development of questions for mooters 'in rehearsal' which correlate specifically to the authors' model of cognitive functioning as it relates to the development of moot-ing skills.

Chapter 9 concludes the authors' *Art* by grounding the theories engaged with, and the taxonomies developed by the authors, in practice. It also presents a case for the development of moot-ing as a core element of law

¹⁸ Reproduced by kind permission of the ICC Moot problem writer and organiser, as noted.

school academic programmes, and in preparing future practitioners for the formal entry requirements for professional practice, including highlighting its significance for activities other than 'pure' forensic advocacy. Finally, it aids moot coaches, by providing examples of tools that may be used for measuring the development of mooters' skills, which also may be used for formal assessment purposes.

Chapter 10 provides the authors' observations as to the future of mooting.

CONCLUSION (AND THANKS)

Irrespective of the nature of the moot competition, representative competition mooting *per se* is a collegiate activity. It is one that relies heavily on law school academics and former mooters as moot coaches, practice judges and/or mentors. It also can engage the professional advocates in these roles as they support the next generation of legal practitioners. The authors are fortunate in that the teams they have coached have benefitted from the support of members of the state and federal judiciaries, members of the profession and the Bar, law school colleagues and their former mooters as practice judges. It is in this environment of collegiality that the authors now present their *Arti* for all to share.