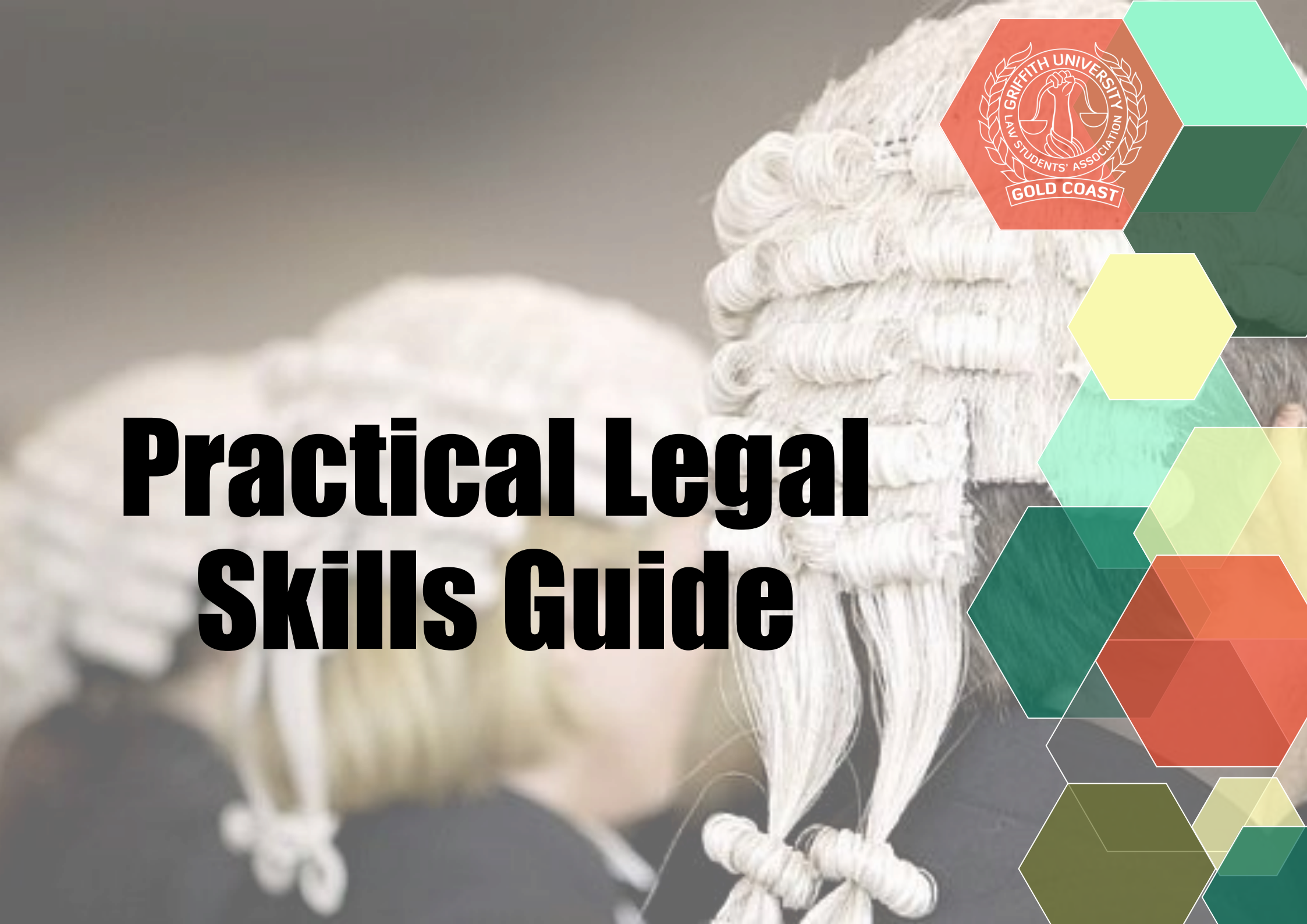

Practical Legal Skills Guide

Contents

Greetings from the Portfolio

The *College of Law Practical Legal Skills Guide is brought to you by the Griffith LSA Competitions Portfolio.*

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As most successful lawyers will tell you, competitions are an integral part of law school.

They are an opportunity to network with other ambitious students and industry professionals, and an opportunity to face your fears and learn to speak, persuasively, in public.

But most importantly, they are an opportunity to learn.

All of our competitions are written and run to reflect real world scenarios, and provide excellent training and preparation for those actual fields of law.

For example, the client interview scenarios are judged by working lawyers, who apply their skills in practice to the competitions, and look for the same qualities in competition winners as they do in interns and future employees. It would be difficult to tell the difference between a client interview competition and a real client interview!

The same can be said for any of the competitions!

It is my belief that no law school education can be truly complete without the practical skills and experiences that can most easily be gained from competitions.

If you are new to competitions, you will make mistakes

We expect you to! In fact, we encourage it.

Our feedback will be comprehensive, and with each competition you will get better and better.

Wishing you luck in your future competitions and legal career,

Jean Fischer
Vice-President Competitions, 2017

INTERNAL COMPETITIONS

The GriffithLSA offers competitions across a number of disciplines. The competitions are designed to assist the development of essential practical skills learnt over the course of one's law degree. The competitions in the first semester of each year form what is known as the Open Championship, which, as suggested by its title, is open to all financial members of the Griffith LSA, regardless of the year they happen to be in. The second semester's competitions form the Junior Championship. The Junior Championship competitions are open only to those students who are, at that time, in either the first or second year of their degree.

Eligible students may enter into any one, or all, of the legal skills competitions on offer in each semester, namely Client Interviewing, Negotiation, Mooting, IHL (Semester 1) and Trial Advocacy (Semester 1). Although involvement across a range of disciplines is always encouraged, it is highly recommended that students consider their respective study loads before committing themselves as competitors.

CLIENT INTERVIEWING

Client Interviewing

What's it all about?

Interviewing, while on the surface may appear relatively simple, is an exceedingly difficult skill to master, calling for the strictest of professionalism and the deftest of tact. It is, nonetheless, paramount in the legal profession, undertaken by solicitors on a daily basis. Competitors are required to glean as much information from their client as is possible within the short space of time afforded them, while also being sympathetic to said client's needs, expectations and concerns.

Requirements

Teams must consist of no more than two students, and can be made up of any combination of eligible year levels. Although interviews are considered less formal than moots, students are expected to don corporate attire when competing.

Prior to the interview

Each team will receive its respective memorandum via email at least two days before the interview is set to take place. This period will vary in length, depending on the difficulty of the question, but will generally contain a very small amount of information designed to provide only a vague preview of what teams will encounter in the interview itself. The most important aspect of preparation is in developing the actual structure of the interview and a general question template, both of which may need to be adapted during the interview itself in order to accommodate the client. Aside from this, preparation, as a general rule, is limited to identifying the essential facts, any red herrings and familiarising oneself with the area of law likely to apply. This may include for example, the elements of any potential offences and remedies which may be available to the client. It is important to note that an extensive knowledge of case law and statute is generally not required, nor recommended.

Timeframe

Teams will be given a strict 30 minute period in which to conduct their interviews, after which time they will then be required to leave the room for 5 minutes while the judge convenes with the client. This will be followed by an informal 10 minute debrief conducted between the judge and the competitors themselves.

Preparation

There is very little that one can do to prepare for the substantive characteristics of an interview. All that competitors will have to go off is a sentence, perhaps two at most, outlining little more than the name of their client/s and the general matter of inquiry. Needless to say, this can make research almost impossible and, what's more, unnecessary, at least for the most part. This does not mean, however, that everything should happen on the day.

Plan what you can

There are certain aspects of the interview that will remain constant across scenarios. These are the aspects that teams should always plan and if possible, rehearse beforehand.

- **Introductions:** Have a couple of ice-breakers in mind. The client must feel at ease. Remember it is an interview with a potential client, not an interrogation.
- **Formalities:** A brief overview of fee structure and confidentiality can be easily scripted. Just ensure that, during the interview, you never appear as though you've memorised a speech; a natural, conversational tone is always best.
- **ADR:** Think about the various avenues of dispute resolution that may prove relevant to your scenario, and ensure that you have a sound knowledge of the advantages and disadvantages of each.
- **Closing Remarks:** Consider how you might go about ending the interview in an effective and positive manner.

Dividing the roles

Teamwork is always an essential criteria, and can often prove the difference between winning and losing. While team chemistry is something that cannot necessarily be practiced, it helps to have a clear definition of roles prior to commencement of the interview. There is, of course, no set formula by which to allocate responsibilities, but a sound knowledge of the structure of a standard interview is imperative (refer to 'The Interview' section of this guide). As a general rule, formalities and housekeeping, note-taking and ADR are lone tasks, whereas information gathering (one person will generally lead questioning) and advice-giving is shared between partners. Regardless, the division of roles will always differ between teams; you need to work on a dynamic that best suits your respective strengths, and always be prepared to deviate from the plan. Flexibility is important in a competition as unpredictable as Client Interviewing.

Client Care

Your Client Care Agreement is perhaps your greatest asset. In practice, a comprehensive Agreement will typically include details of the firm's fee structure, confidentiality clauses, details of the lawyer/client relationship and the terms and conditions upon which the client must engage your services. While, for the purposes of competition, teams are by no means obligated to draft such a thorough document, well-prepared competitors will generally have a standard form template at the ready. If you're a little more time-poor, improvising is perfectly fine, too; the purpose of the physical document is simply to give the client something to take away, consider, and hopefully sign at the end of the day. Just ensure that you verbally explain the purpose and content of the Agreement wherever you make reference to it in the interview (as a general rule, this will occur when discussing formalities and making concluding remarks – refer to 'The Interview' section of this guide).

Delving Deeper

While, prior to conducting the interview itself, there'll be no way of knowing the full extent of the facts at hand, the initial memorandum will generally give you some clue as to the area of law with which you'll be dealing. It may even imply that you'll be interviewing a minor. Try to anticipate the types of issues that might arise and begin to think about the types of questions that you might have to ask.

If your knowledge of the law is rather scant, it might be wise to brush up on a few key areas. An in-depth understanding of case law and statute is not necessary but you will need to be able to grasp the basics. You'll almost certainly have to deviate from any planned lines of questioning so it's helpful to at least have a rough idea of how you might approach the client's problem and hence ask the right questions.

The Interview

All good interviews can be broken down into three key and very distinct parts: Formalities, Information Gathering, and Information Giving. It is important that competitors know the difference between, and allocate adequate time to each.

Formalities

While no more than five minutes should be allocated to formalities, they are a crucial part of the process nonetheless.

Be Accommodating

From the outset, interviewers should ensure that the client is made to feel comfortable in their environment. Remember, this is probably the first time that the client has ever entered a legal office or had dealings with practitioners, an experience which any lay-person would probably consider daunting. It is always a good idea to begin by introducing yourself and your partner, offering a friendly handshake and/or handing over your business card, and welcoming the client to the firm. As opposed to simply launching into housekeeping matters, try to inject some personality into the situation by employing an ice-breaker. A few of the more common ice-breakers are:

"How did you find parking?"

"Did our secretary, [insert name], offer you a tea/coffee?

Would you care for one?"

"Boy, it's an absolute scorcher out there"

(Or some other weather related commentary)

"So how has your day/week been" (Perhaps not the best option, particularly where you may be dealing with a less-than-emotionally-stable client. Remember, they are the subject of a legal dispute. How do you think they've been?)

It's also polite to ask the client if they'd prefer to be called by their first name, and to confirm that the client's contact details are correct. While these points may seem trivial, the whole purpose of beginning in this manner is to disarm the client, to give them a sense of peace and security and to get things underway on the right footing, so to speak. Once you've dispensed with pleasantries, however, it's time to get down to business.

Ethical Issues

It's always a good idea to ask the client if they've sought other formal legal advice prior to the consultation. In doing so, you'll be able to suss out, and hopefully dispense with, any conflict issues that might arise from the outset.

Cash Monies

Make it clear to the client, from the get-go, that this initial consultation will be absolutely free, and be sure to emphasise the point. Again, this is the perfect way to put their mind at ease. It is important, however, to outline your fee structure in the case that the client should choose to engage your services in future. It is not necessary to go into elaborate detail; simply disclose the standard hourly rate charged for your services, and point them to the relevant page of your Client Care Agreement. This is a great way to bring the Agreement, as a whole, to the client's attention.

Confidentiality

Put even greater emphasis on the fact that everything discussed during the interview will stay within the confines of the room. There are, of course, a few circumstances in which you will be obliged to breach confidentiality, all of which are very comprehensively outlined under Rule 9.2 of the Australian Solicitor's Conduct Rules 2012. It is not necessary to go into the specifics of this rule, but merely to outline the general state of affairs which call for the disclosure of information, ie:

1. Where the client gives you permission to do so;
2. Where the client intends to commit an offence punishable by law; or
3. Where the client intends to harm another individual.

Be sure to highlight the fact that these are very rare and specific occurrences, and that it is ultimately up to the client to determine the general conduct of the interview; at the end of the day, things are entirely in their hands.

Information Gathering

This is perhaps the most essential part of the interview, at least as far as the interviewers themselves are concerned. While there is no general rule as to how long information gathering should take, it's ideal to leave yourself at least 10 minutes in which to give your advice and conclude the interview effectively.

Start with the basics

You've been speaking for a while now. It's time to give the client a chance to tell you a bit about why they've come to you, which is precisely what you should ask them to do. These are just a couple of useful examples which you might use to kick things off:

"So what's brought you here today?"

"What are you hoping to achieve from today's consultation?"

Ensure that you don't interrupt the client while they are telling their version of events; simply nod, or offer a simple, 'yes, I see', at various intervals. Only when the client has finished and you have a more general overview of the issues should you then begin to ask probing questions.

Maintain eye contact

As previously mentioned, both interviewers should be well-aware of their respective roles. While it is important that one takes notes, it is perhaps more important that at least one person maintains eye contact with the client at all times. A client who sees you as attentive and readily-engaged will be more likely to bring you into their confidence.

Do not interrupt!

It is imperative that you never, under any circumstances, interrupt the client mid-sentence, but equally important that you do not interrupt one another. In order to keep yourself from speaking over your partner, implement some sort of seamless system; just ensure that it won't attract attention from the judges. For instance, many teams will nudge one another under the table when they wish to speak.

Pay attention to detail

The difference between an effective and ineffective line of questioning will often be a simple question of instinct; certain teams will pick up on some of the more subtle issues that others won't, and vice versa. Remember that any client, particularly a shady one, will be reluctant to disclose certain facts unless you directly address the issues pertaining to those facts, so you mustn't be afraid to probe. Don't take everything the client says at face value; there will often be times when they may not be telling you the full truth of the matter. Just be careful that, in questioning them, you don't come across as interrogative or condescending; always keep your tone even and polite, and never give way to frustration.

Lather, Rinse, Repeat

You should always conclude your Information Gathering with a recap, in essence telling the client that "this is the situation as we understand it". You don't need to reiterate every minor detail divulged; simply give an overview of the facts that you deem relevant to the legal issues you identify. It is also a good idea to give a very brief, earlier recap immediately after the client has finished telling their version of events. In doing so, you are demonstrating not only that you've been listening, but that you understand the client's needs and concerns. As a general rule, the person responsible for taking notes will undertake this role. Ask the client if they have anything to add or if your recap misses or misunderstands any of their key issues.

Information Giving

Once you have elicited as much information as you deem necessary, you'll need to move swiftly to the Information Giving stage. This is really all about taking the facts that you've been given, analysing the dilemmas posed by them, and giving the client a broad overview of how things might best proceed.

Keep it simple

Begin by outlining the legal issues as you see them, and be mindful also of ethical issues that might arise. Don't bamboozle the client with complex legal terminology, case law or statute; the aim of the exercise is not to demonstrate the vast extent of your legal knowledge, and you certainly won't earn extra points for doing so. Simply give the client a brief and very general explanation of the area of law you are dealing with, the nature of the action/crime that has arisen, and the implications for any of the interested parties involved. Explain yourself as though you are speaking to a legally-ignorant child.

ADR

Once the client has an understanding of the key legal issues, they will naturally want to gauge the potential consequences. Litigation is obviously the most costly and inefficient option, and most clients would rather you pursue other avenues. Ensure, however, that you begin by asking the client precisely what they are hoping to achieve before launching into your advice.

When all is said and done, it is the client who will ultimately decide their fate, something which you should reiterate throughout the interview process; put the power in their hands.

Where it becomes clear that court proceedings are a last resort, as will generally be the case, you will need to step through the logical alternatives:

- Negotiation
- Mediation
- Conciliation
- Etcetera, etcetera

It is important that, as opposed to rifling them off, you discuss the benefits and shortcomings of each. This will ensure that you are awarded full marks in the ADR criteria.

Think outside the box

Legal avenues will not always be the best means by which to achieve a satisfactory outcome. If there is potential to engage the other party in dialogue, a simple apology on the part of the client may be sufficient. Due consideration will also need to be given to the nature of the matter; where implications of criminal activity are present, negotiation and/or mediation may not prove viable options. Consider, perhaps, restorative justice, as an alternative.

A Tentative Recommendation

The avenue that you deem to be strongest will inevitably differ from scenario to scenario. In making an assessment, you will need to take into account all surrounding circumstances, including:

The client's bottom line

The client's needs

The nature of the matter

The parties involved

Remember that you are only making a tentative recommendation, for the purpose of guiding the client in making an informed decision. You are there only to advise, not to decide on their behalf, even if you feel you have the best interests of the client at heart. What is more, your assessment is based only on the facts that the client has given you, and nothing more.

Next Steps

The client's major concern will stem from their lack of surety. The first question on their mind is: "Will this be resolved?" The second: "What role will I need to play?" To be sure, there is no definitive answer to the first of these; you cannot guarantee, after all, that the matter will be concluded any time soon. All you can do is to suggest the best means of achieving a resolution, and to hope that this will prove effective.

The second question can, however, be fielded, and the best way to conclude the interview is by doing so. In other words, outline very clearly what steps are to be taken from this point onward, both by the client, and your good selves.

- **The Interviewers:** The best way to put the client's mind at ease it to reassure them that their matter is in safe hands. Show the client that you will, upon conclusion of the interview, further research the key legal issues, gather any relevant documentation (you may request that the client sends you this), speak to witnesses and, finally, draft a letter of advice, which will be sent to the client within 72 hours. Explain these steps carefully, and advise the client that they are best not to make contact with any interested parties in the meantime.
- **The Client:** As far as the client is concerned, there really isn't a whole lot to be done in the interim. The most pressing concern is having your client retain your services, so that you may pursue the matter further. For this reason, it is important to finish by drawing the client's attention back to the Client Care Agreement, asking them to take it home and consider it carefully, and to sign and return it should they choose to proceed.

Fond Farewells

Before drawing the interview to a complete close, you ought to ask the client if they have any further queries or concerns. If they do not, you can feel safe in the assumption that you've addressed all key areas, and wrapping things up should be a simple matter. Again, it's always good to end on a lighter note:

"Thanks for taking the time to come in today. We hope to see you again soon."

"Have a safe journey home."

"If anything more springs to mind, don't hesitate to call."

"We'll have our secretary escort you out."

…or some such phrase.

The Reflection

At the conclusion of any interview, the judges will generally give teams a few moments in private to deliberate between themselves, before calling upon them to reflect on the positive and negative aspects of the interview. Quality teams should be able to discuss both the strengths and weaknesses of their performance, and to reassess their strategy with a view to future improvement. Remember that this is a conversation between yourselves and, as such, you ought to address one another; do not engage the judges directly. If, however, the judges have questions, they may choose to query you at different stages.

A Little Something More

Here are just a few extra pointers to bear in mind before, during and after your interview.

Be personable, yet professional

Client Interviewing is the one competition in which you will have an opportunity to inject some personality, and it's important to ensure that you do. Despite this being an 'interview', you should see it as more of an informal discussion; the client needs to view you not just as a lawyer, but as a person that they are capable of understanding, and one capable of understanding them. While you should endeavour to maintain a professional tone and to avoid use of colloquialisms (as well as 'ums', 'yeps' and everything in-between), you should be equally conscious of avoiding overly-complex language.

Empathise

As already mentioned, this may be the client's first encounter with the law, at least on such a serious level, and even where it isn't, it is important to bear in mind that they have recently undergone an ordeal. Try to put yourself in their shoes, or at least on their level; it is important, in gaining an understanding of the client's needs, to first understand how the client views their situation. Where they have suffered the loss of a loved one for instance, a simple, "I'm terribly sorry to hear that", can go a long way.

Think outside the box

Certain scenarios will often give rise to ethical dilemmas, some far less obvious than others. Anything you see as being a potential red flag should be addressed immediately, no matter how insignificant it may seem at first. Needless to say, any offers from the client which might be construed as a bribe or even fraternisation should be dismissed, and the focus turned back to the key issues at hand.

Other Resources

Useful Materials

To supplement the information in this guide, we suggest you consult a range of other texts and check out videos of Client Interviews on YouTube. Below are just a few of the additional texts on offer, most of which can be found in the Griffith University Library.

Legal Practice Handbook: Effective Interviewing

Helena Twist (Blackstone Press, 1992)

Gold Coast Law KL90.T94 1992

Legal Interviewing in Practice

Allan Chay & Judith Smith (LBC Information Services, 1996)

Gold Coast Law KL82.2.K1 C52 1996

Legal Interviewing: Theory, Tactics and Techniques

Kay A Lauchland & Marlene J Le Brun (Butterworths, 1996)

Gold Coast Law KL82.2.K1 L38 1996

Negotiation

Negotiation

What's it all about?

This competition provides an opportunity for students to try their hand at what is fast becoming the most popular means of dispute resolution available to lawyers. It is, on the whole, an exercise in diplomacy, rewarding not those who employ autocratic means of achieving the best possible outcome, but those who are most sensitive to the wishes of the party they are representing.

Requirements

Teams are to consist of two students of any year level eligible to compete. In the interests of professionalism, students are expected to don corporate attire when competing.

Prior to the negotiation

Teams will, one week prior to the negotiation taking place, receive two pieces of memoranda. The first of these, given in identical form to both sides, will be a statement of general facts offering a broad insight into the starting position of each party to the dispute. The second will be a set of confidential facts unique to each party; these will take the form of specific instructions from the client, detailing the parameters within which he/she is willing to negotiate and any compromises or concessions he/she is prepared to make.

Timeframe

A maximum of 30 minutes is allowed for each negotiation; there is no restriction as to how much each team or member of a team must contribute to discussions. At the conclusion of the negotiation, both teams will each be permitted 10 minutes in which to debrief with the judge(s).

Negotiation (Cont.)

A basic structure

Much like the client interview, a negotiation does not have a set structure. The course it takes will depend entirely upon the teams involved, the interests they are trying to protect and, above all, the strategy they choose to adopt. The skill of negotiators is in their ability to adapt to a given situation. As a general rule:

1. Competitors will begin by establishing ground rules on matters such as confidentiality and the prioritisation of issues to be discussed. Again, this is subject to change.
2. At any point during the proceedings themselves, parties may agree to separate for a five-minute break; this time may be shortened at the discretion of both teams.
3. When all relevant matters have been addressed, parties will often reiterate, for the sake of certainty, any agreements that have been reached or, if the situation so holds, any contentions which still exist and further meetings which might be warranted.
4. The debrief will take place in private. At the conclusion of the negotiation, one team will be asked to leave the room while the other spends its allocated 10 minutes with the judge(s). There are always two questions which teams will be asked to reflect on:

- Given the same situation again, what would you do the same, and what improvements would you make?
- Taking into account the outcome reached, how effective was your strategy?
- Other questions may also be asked by the judge during this time.

Relevant Criteria

Teams will be evaluated on a broad range of criteria, including their preparedness, strategic flexibility, teamwork, the overall outcome of the session and the reflection, among other things. For further information in this regard, students should refer to the criteria sheet.

Preparation

Much like Client Interviewing, Negotiation is a competition which requires less intensive preparation and only a cursory knowledge of legal doctrine. Having said that, there are certain steps that should almost always be taken prior to the negotiation itself.

Get your facts straight

Your client's legal standing should have little bearing on the process; the aim of any negotiation, as a common form of ADR, is to arrive at an outcome with which both parties can be satisfied, whether they be weaker or stronger. Hence, it is neither necessary nor advisable to engage in in-depth research as part of your preparation. On the other hand, a thorough understanding of the facts is vital. In getting the most out of your facts, you might want to consider the following approach:

1. **Start simple:** Begin by reading through the General Facts a couple of times. Although they are common to both parties, they will at least provide a basic overview of key issues, context, and the parties involved. Only once you have familiarised yourself with these aspects should you move to the far juicier Statement of Secret Facts.

2. **The devil's in the detail:** Pay close attention to the Secret Facts; chances are, this is where you'll find your leverage, provided of course there is any to be found.

3. **Revisit:** Reread your General Facts and Secret Facts in conjunction (well-prepared teams will sometimes re-type both documents as one, leaving out any repetitions). Begin to highlight (colour coding is never a bad idea) every detail which you feel may be relevant to the issues in dispute. All relevant dates, amounts, etc should be noted down, no matter how insignificant they may seem.

4. **Make a list:** Note down each of the key issues to be resolved during the negotiation, at least as far as your client is concerned. Below each of these, list the demands and/or requests that your client is making (it is not uncommon that there are multiple), and the facts that will best support your claim.

5. **Assess your scope:** Generally, your Confidential Facts will contain a statement granting you the power to "act/negotiate on behalf of your client within the spirit of the instructions", or something to this effect. It is essentially giving you discretion to bind your client to negotiated outcomes, without restricting your flexibility in achieving such outcomes; just ensure that you do not, under any circumstances, sacrifice your core objective. Once you know that you have such a power, you can begin to look into creative solutions.

Know the bottom line

While an ideal outcome will ensure that each and every one of your client's wishes is achieved, the fact of the matter is that, unless your opposition is incredibly weak-willed, you will need to compromise. That's okay; there will almost always be wiggle room. Just ensure that you fully comprehend your client's bottom line or, in other words, your client's main objective. In effect, it's all about putting yourself in the client's shoes. Ask yourself: "What is the principal aim of this negotiation?" The answer should be fairly clear on the facts, and if you keep it in mind at all times, you'll never reach an unfavourable outcome. It may be that your client simply wants to restore relations between the parties as quickly as possible.

Prepare for the worst

The Confidential Facts should give you some clue as to the range within which your client is willing to negotiate, as well as any concessions that they are prepared to make or, conversely, not to make. For each of the issues that present themselves, prepare a best and worst-case scenario. A keen awareness of potential sacrifices is essential; you may be able to achieve more favourable outcomes in some areas where you are prepared to make certain other compromises.

Search for value

Though it's important to have your client's best interests at heart, due consideration must be given to the other party's position. It may not be entirely clear on the facts exactly what your opponents will be demanding (remember, they have an entirely separate set of Secret Facts tailored to their own client), but it will usually be possible to anticipate their general concerns. As such, you should always try to think of creative means by which to alleviate such concerns, or simply to give value to the other party without having to make any real concessions. Acts of goodwill are always encouraged, and may incline the other team towards granting you favourable concessions in other areas.

Agenda?

An agenda, put simply, is a list of the issues that you wish to address during the negotiation, in the order that you plan to address them. Teams will often present a typed agenda at the beginning of the negotiation, hoping to set the tone of the proceedings. In this way, it can be an incredibly useful tool, provided of course that the other party is amenable. It is not, however, vital that you turn up with an agenda. Just ensure that you're aware of the issues in need of resolution, and prioritise them according to their importance. As already mentioned, an awareness of your client's bottom line is, above all else, essential.

Divide the roles

Negotiation is, more than any other competition, a teamwork exercise; competitors must be of a single mind with respect to both strategy and outcome. Having said that, negotiators will often have clearly-defined roles. For instance, one may take sole responsibility for introductory matters and/or note-taking, and while negotiating outcomes is a shared responsibility, team members will generally agree to take the lead role on different issues.

Strategise

The most important preparation you can do prior to a negotiation is to decide upon your overall strategy. Words such as 'integrative' and 'distributive' are often thrown around. In a nutshell, it is for you to decide whether you'll adopt a more conciliatory approach focussed on establishing rapport and facilitating a mutually-beneficial outcome, a hard-line approach aimed at achieving the maximum possible gain at the cost of the relationship, or a mixture of both. For the purposes of the LSA's internal competitions, hard-balling is rarely advisable; focusing solely on one's own needs and concerns can lead to detrimental breakdowns in dialogue, and signed agreements are seldom reached within a 30 minute timeframe.

The Negotiation

Set the groundwork

Whether you've come prepared with an agenda or simply a mental plan of attack, it is vital that, from the get-go, you establish an order of proceedings. While this will require the mutual consent of both teams, being first to put forward your proposal can get you on the front foot at any early stage and allow you to dictate matters from thereon. It's not about having control, but simply an upper hand.

Remain flexible

Although you'll enter the negotiation with an agreed strategy in mind, it won't always prove effective. Negotiations can be unpredictable, and the general conduct of proceedings is dictated as much by the other team as yours. It is important to recognise when a certain approach is failing you and to take an alternative tact. If, for instance, your opponent seems reluctant to offer information, a more assertive tone may be required. Make certain, however, that dialogue doesn't escalate to the point of heated argument; losing your temper will get you nowhere.

Complement each other

Even where you've agreed to divide responsibilities, no one person should ever dominate proceedings. Equal input is always desirable, and a well-matched pairing will bounce off one another seamlessly. To avoid speaking over your partner, decide upon a means by which you can signal them without drawing attention from the judges. Many negotiators will, for instance, nudge one another under the table when they wish to speak.

Avoid tangents

There will be times during which discussions deviate from the desired path and irrelevant debates ensue. Your opponent may even attempt to intentionally bamboozle you with questions of semantics. Don't fret. Simply bring it to the attention of all involved, and try as far as possible to get things back on track. If at any time you feel there is a chance of things derailing, keep harking back to the principal issues at hand.

Eye on the time

A 30 minute timeframe, though it may at first seem generous, passes quickly, and while judges retain the discretion to allow extensions of time, they are not often granted. In gauging your progress, it is never a bad idea to have a phone or some such timekeeping device in front of you.

If you feel that too much time is being spent on an issue and discussions are moving in circles, don't be afraid to table it for later and to move to the next issue on the agenda. Remember that some scenarios are designed to prevent teams from reaching an agreement in the allotted time. Sort out what is absolutely required for your client and organise with your opponents how the remaining issues will be settled in the future.

Save your break

The 5 minute break is, for all intents and purposes, a strategic tool; if used effectively and in good time, it can prove incredibly beneficial. There are two particular instances in which it is advisable to request a break in proceedings:

Dead ends: There may be times during which teams find themselves bogged down in non-essential issues and progress slows to an unbearable pace. Taking a breather, even for just a few brief moments, will allow both competitors time to collect their thoughts.

Tentative agreements: A number of offers may be on the table, not all of which are ideal, yet appeal on some level to both parties. In such a case, it's best to take a step back, step through each outcome logically, and determine whether any further value can be gained.

Take Note

Ensure that you keep a record of the various offers and counter-offers being put on the table; at least one of you should be jotting down notes at regular intervals. Particularly where dollar amounts are involved and discussions are bouncing between issues, it's easy to lose track, and the last thing you want is to have to reiterate key points; judges tend not to look favourably on what they see as inattentiveness.

Be Clear

Once you have reached a finalised agreement on all relevant issues, you'll need to draw up a contract of sorts. This is the reason that note-taking proves so valuable. But while a written record of each outcome is essential, it is equally important that you verbalise the agreement prior to signing off. The reason for this is two-fold:

- To ensure that both parties are entirely clear about what it is they are signing; and
- To ensure that the judges are aware of what it is that's being signed (they won't be able to read the written document from that distance).

The reflection

At the conclusion of the negotiation, the judges will give teams a few moments in private to deliberate between themselves, before calling on them to self-evaluate their performance. Quality teams should be able to discuss both the strengths and weaknesses of their strategy, and to reflect upon any shortcomings with a view to future improvement. In other words, you need to be able to justify the approach taken, and to assess its effectiveness in achieving the end result. It is appropriate to address the judges face-on, and to treat the reflection more as a conversation; be prepared for interjections and further questioning, and ensure that you respond directly and, above all, courteously.

Other Resources

Useful Materials

To supplement the information in this guide, we suggest you consult a range of other texts and check out videos of Negotiations on YouTube. Below are just a few of the additional texts on offer, most of which can be found in the Griffith University Library.

Legal Practice Handbook: Negotiating Skills

Ann Halpern Blackstone Press, 1992)

Gold Coast Law KL90.H34 1992

Negotiation: Theory and Techniques

Nadja M Spegel, Bernadette Rogers and Ross P Buckley (Butterworths, 1998)

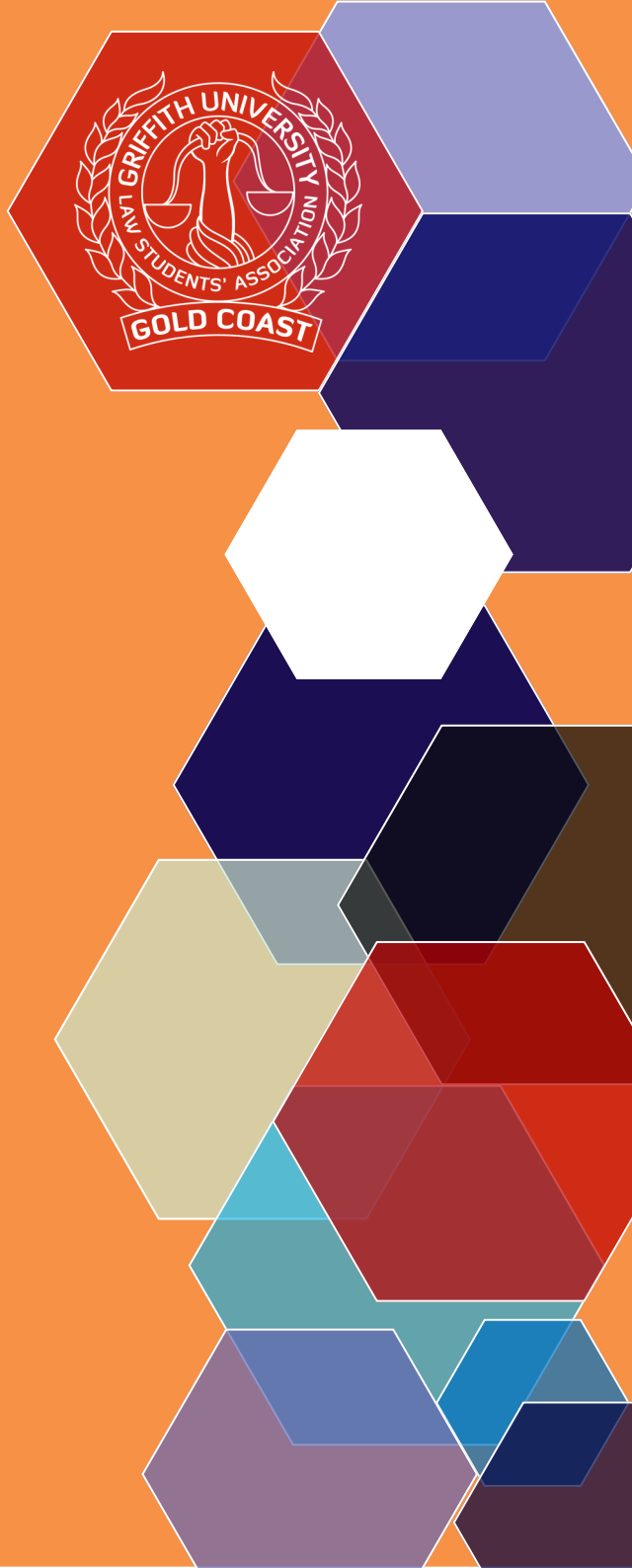
Gold Coast Law KL82.2.K1 C52 1996

Getting to Yes: Negotiating an agreement without giving in

Roger Fisher & William Ury (Arrow Books Limited, 1997)

Nathan Law BF637.N4 F57 1997

Mooting



Mooting

What's it all about?

Mooting, aside from being the most prestigious of the legal skills competitions on offer, is also the most involving. Students have the privilege of imitating their favourite advocate (Atticus Finch? Cleaver Greene? Lionel Hutz?) and living out their ultimate courtroom fantasies, presenting legal arguments, both written and oral, before a distinguished judge or, if they are fortunate, panel of judges.

Requirements

Teams are to be made up of at least two students, a senior and junior counsel, responsible for presenting oral arguments before the bench. A third student may also be enlisted as solicitor in order to assist with research and written submissions. These roles may change for each round at the competitors' discretion; there are no restrictions in this regard. Teams may also consist of any combination of students from any eligible year level. In consideration of the courtroom environment, mooters are expected to observe the same standard of dress as professional counsel. This amounts to a full suit for both male and female competitors.

Prior to the moot

Each team will receive a statement of agreed facts via email precisely one week before the moot is scheduled to take place. Competitors will also be told which party they are to represent. The rather lengthy time afforded teams is reflective of the relatively high degree of research expected of them; an extensive knowledge of case law and any relevant statute will be required in order to make sound legal arguments. Written submissions are to be submitted to competitions@griffithlsa.org.au at least 24 hours prior to the moot. This will allow judges an opportunity to adequately anticipate the oral arguments to be made by each competitor. While there is no strict format which must be adhered to, submissions must contain all of the following content: the names of the parties, the court in which they appear, an outline of key arguments (numbered appropriately), the order sought, a comprehensive list of all authorities (with full citations provided for each), the names of the counsel themselves and, not least, the way in which time will be split between each counsel. Templates endorsed by the Australian Law Students Association will be provided as a guide to assist competitors in structuring their written submissions.

Mooting (Cont.)

Timeframe

Each team will be given a maximum of 20 minutes in which to present its oral submissions. Competitors may choose to split this time between one another as they see fit, though will usually opt to speak for 10 minutes each.

A basic structure

Senior Counsel:

1. The first speaker from each team will be responsible for making appearances on behalf of said team. This will not be counted towards the allocated time.
2. On beginning actual oral submissions, the plaintiff/appellant should inquire as to whether the judge(s) would like a summary of the facts of the case before them.
3. When this has been seen to, it will be necessary to outline each of the chief submissions to be made by the team, and to clarify who will be addressing each.
4. Aside from these basic courtesies, there is no specific structure which must be adhered to; counsels may address their arguments as they see fit. It is important, however, that arguments follow a logical progression, and that the judge has a clear understanding of the central point being made at all times.
5. Making reference to specifically-numbered written submissions will allow the bench to follow the line of reasoning with greater ease. It is important to note that the judge(s) may interrupt at any time in order to ask relevant questions or to seek clarification of certain points.

Mooting (Cont.)

Junior Counsel:

1. It may be useful, before beginning on the remainder of the submissions, to provide a very brief summary of what these will be. It is unnecessary to reiterate the facts of the case.
2. Again, there is no set way of going about one's arguments, provided that they are clear and well-supported.
3. It will, however, be necessary to conclude by summarising the submissions made by both speakers in the team, and to outline the general order sought.

Relevant criteria

Speakers will be assessed in five separate categories: ability to answer questions proposed by the bench, speaking and delivery, organisation of presentation, development of argument and also the written component. Each is accorded a different weighting. A complete criteria sheet will be provided for your benefit.

Preparation

The aspect that most separates mooting from other practical legal skills is the amount of preparation and degree of knowledge it calls for.

Facts are your friends

A mooter's greatest ally is his/her statement of facts. It can, nevertheless, prove to be your undoing if you don't give it the utmost attention. To assist you in getting the most from your facts, a step-by-step guide is provided below. It is by no means mandatory that you follow this process to the letter; everyone works differently, that much is understood. This is merely a suggested approach, albeit a highly proficient one.

1. **Get familiar:** On receiving your statement of agreed facts, read through it a couple of times simply to familiarise yourself with the scenario(s) and parties involved.

2. **Start at the end:** Once you have a feel for the state of affairs, focus your attention on the final couple of paragraphs. It is generally this section of the statement that will outline the central issues needing to be addressed.

3. **Pay attention to detail:** Only when you've thoroughly grasped the applicable legal issues should you revisit the statement as a whole. Begin to highlight (colour coding is never a bad idea) every detail, no matter how insignificant it may seem at the time, which you feel may be relevant to each issue. Read it through at least a few times, being as meticulous as possible.

4. **Make a list:** Write out each of the legal issues to be addressed and, below these, list the facts applicable to each. You should now have a broad idea of your standing, and the arguments you will be required to make.

5. **Separate the superfluous:** It isn't until you begin researching the relevant law that you will know, absolutely, which facts will assist you in your arguments, and which should come under the heading of "red herrings". While doing your research, revert constantly back to your list and separate these into two separate categories or, better yet, simply cross out those which you deem superfluous.

5. **Revisit:** Your statement of facts should never be discarded until the judge has delivered his final decision. It is advisable to return to them while doing your research and writing up your submissions to ensure, if nothing else, that you haven't overlooked anything. It is also a good idea to retain a copy to bring into the moot with you.

Dividing the Roles

It is imperative that, after you have gained a sufficient understanding of the scenario and the legal issues at hand, you convene with your co-counsel in order to discuss a team split. This will mean deciding who is to be senior counsel and who is to be junior counsel, and which submissions each will address. Both you and your partner must be absolutely clear on the roles you are to undertake; it will make further research that much easier.

Research

Research is without doubt the most time-consuming, and probably the most difficult, facet of a moot. The most common question posed by first-time mooters is always, "how much research will I need to do?" This can be answered with another question: "how long is a piece of string?" The truth is that, every moot being different, the degree of research required will depend entirely upon the number and complexity of facts presented. You will never know just how deep you have to delve until you actually begin. So, just where does one begin?

Texts

Text books generally provide the best starting point, offering a broad overview of relevant legal principles and the chief authorities through which they have been established. Even so, one must remember that they are by no means exhaustive, and don't always provide the most up-to-date information. Even the most recent texts, those printed in the past 12 months for instance, can become redundant in that short space of time.

Databases

To complement your preliminary research, Griffith subscribes to an excellent array of online legal databases. To access a comprehensive list of these, follow these steps:

Griffith Library Homepage > Criminology and law > Law

Halsbury's Laws of Australia is an excellent resource to begin with. It provides a complete and regularly updated A-Z list of every area of law imaginable, its various subcategories, a general overview of the elements of each, and the applicable cases and statutes.

Case Citators

There are numerous other resources at your disposal for the purposes of specific case research. AustLII comprises numerous databases of full-text judgements handed down from the High Court, federal courts and a majority of state courts and tribunals, and is freely accessible to anyone with an internet connection. There are, however, two databases which generally prove far more useful for competitors, both of which are accessible via the Griffith library page. These are CaseBase and FirstPoint. Being case citators, they not only provide links to a wide variety of unreported and full-text judgments from a multitude of report series, but reliable case summaries and details of each case's history, including any legislation or cases considered within it and any cases or journal articles which have since considered it in any capacity. Hence, while the legal principle supporting your argument may have been established more than a century ago, you will always be able to trace it to a more recent source. Each case is, furthermore, supplied with a signal indicating how positively or negatively it has since been treated. These are extremely advantageous tools which should be employed to their full potential.

Know the Difference

It is important to recognise that not every case you find, even if it supports your argument, will be as valuable as another. Judgements handed down by inferior courts (those which, according to the Australian hierarchy of courts, sit below the court in which you are currently mooting) will not be considered binding on the judge.

If, for instance, your moot is to take place in the High Court of Australia, and you find a case from the Queensland Court of Appeals, said case will not be binding. The same principle applies where the decision was handed down in a different jurisdiction.

This does not mean, however, that the case should not be submitted, nor that it is of no worth. On the contrary, it still has a great deal of influential value, and should be submitted as 'persuasive' precedent.

Keep it Fresh

Always cite the most recent cases relevant to the legal principle on which your argument is based. It is always appropriate, and sometimes necessary, to pay homage to the principle's original authority, but you need to be able to demonstrate that the principle is still a relevant one. The more recent the case, the easier it will be to convince the judge of this. Keeping this in mind, it is always best to find, if you can, a fresh case in which the principle is not only cited, but applied. If the principle is an obscure one and there have been only a handful of cases to address it, all of which are 30+ years old, don't fret. Provided the principle is still considered good law (it hasn't been overturned since its inception) it is perfectly fine to rely on these older cases in such circumstances. If the judge happens to question you on it, make it known to him/her that this was the most recent case you could find, and that there is nothing to suggest it should be considered redundant.

Don't Overburden Yourself

The second most common question asked by newbies is, "how many cases will I need to refer to?" Again, the answer is never a definite one, and will vary on a case-by-case basis. The important thing is not to cite cases merely for the sake of citing them; you don't need to reference every case to have considered the principle on which you are relying. There will be moots in which you cite ten cases or more, while in others, and this is quite often the case, you will rely merely on a few essential cases.

However many you choose to employ, it is imperative that you have a sound knowledge of the basic facts, holding and ratio for each. If you are very well prepared, you will also ensure that you take into account any dissenting judgments handed down and the judges involved.

Written Submissions

Submissions must contain certain necessary content, but otherwise do not need to conform to any specific conventions. You may use the template provided at http://griffithlsa.org.au/competitions/mooting, a variation of these, or simply design your own.

Some Final Pointers

Expect the unexpected

The difference between a good mooter and a poor one is the ability to anticipate both the arguments of the opposition team and the questions likely to be asked by the presiding judge. This is not an easy feat to accomplish, it must be said, yet no preparation is complete without having attempted it. It is simply a matter of self-analysis and careful reflection; having completed your written submissions, ask yourself two questions:

1. Are there any weaknesses or holes in my arguments?
2. If I were in opposition, how would I counter the arguments I've made here?

These questions are closely linked; answering both will assist you in determining whether there is any room for the judge to challenge you on certain points, and of course, there always will be.

Obviously your weakest arguments will prove to be your opponent's strongest arguments. Pay close attention to your more feeble submissions, because these are the ones the judge will drill you on. If you have at least some idea of what might be asked of you, and feel confident in your ability to respond to these potential questions, half the battle will already have been won.

Conceding is okay, too

There may be occasions on which the law is so completely in the other side's favour with respect to a point of contention that argument is futile.

If faced with such a situation, don't be afraid to concede on that point and to move immediately on to your stronger arguments; there is little sense in wasting time on points of law which will ultimately work against you, provided they are not crucially detrimental to your client's case.

The Moot

Addressing the Bench

The most intimidating aspect of any mode of public speaking is, most will agree, the audience. The beauty of mooting is that a competitor's audience will generally consist of no more than a few people at most. It just happens that those few people are usually vastly experienced and knowledgeable students, lecturers or even legal professionals seated on the other side of the bench.

General Conduct

1. **R-E-S-P-E-C-T:** Judges value respect above all else, both for themselves and the conventions of the court. It is of fundamental importance that general etiquette be observed at all times, meaning a courteous manner and consistent use of formalities. Competitors are prone to adopting a tone which may come across as defiant or condescending, even without meaning to; it can be the simple consequence of nerves, excess adrenaline or simply forgetting oneself in the heat of argument. Nevertheless, it should be avoided at all costs; judges never excuse rudeness or insolence.

2. **Presentability is key:** Ensure, at all times, that you not only adhere to the dress code, but do so with the utmost care, that you maintain a sound posture (don't slouch and keep your hands out of your pockets!) and, most importantly, that you keep good eye contact with your judge. Although it isn't necessary to memorise every syllable of your submissions by heart, you should be familiar with your arguments and the general facts and holdings of the cases you are relying on, as much as is practicable. Relying too much on a speech or your written submissions will lead the judge to believe you have not adequately prepared yourself.

3. **Strike a balance:** While it is imperative that you adopt a formal manner of speech and do your utmost to avoid use of colloquialisms, you shouldn't think of a moot as a one-dimensional speech, but rather a conversation with the judge. It is appropriate that, provided you maintain a suitable degree of professionalism, you come across as relaxed and sociable.

4. **Gesture accordingly:** Everyone has their own style and corresponding mannerisms. Some prefer simply to stand stock-still while others will employ various hand gestures to emphasise certain points. This is by no means mandatory, but is entirely appropriate and, moreover, can prove advantageous when used effectively. For those who prefer a more subdued approach, you may wish simply to stand with your hands resting either side of the lectern; this can be an excellent means of calming the nerves and steadying yourself. If you fidget, furiously wriggle your toes. It can't be seen and it works. Try it.

Answering Questions

1. **Get to the point:** The number one rule when dealing with any judge, no matter who they may be, is that any question they ask MUST be answered immediately. NEVER defer the question or tell the judge that you will deal with it in a later submission, even if this may be the case; there is nothing that judges hate more. If the judge should express interest in a certain issue, and question you on it, then that issue, and having it answered clearly and concisely, will be the only concern of the judge at that precise moment in time.

2. **Breathe:** Before answering any question put to you, pause, take a deep, calming breath and think about your answer. Judges would much prefer you take a little extra time to provide an effective answer than immediately launch into an incoherent or illogical spiel.

3. **Don't be afraid to use your co-counsel:** In the event that you simply cannot find an answer for the judge's query, ask leave to confer with your senior/junior. It may be that they can give you some idea, or that during this time a satisfactory answer may occur to you yourself. Regardless, this option should not be relied on too often; while very few judges will deny you leave, they would much prefer you answer them without needing to seek assistance and it will not do wonders for your credibility.

4. **Clarity is paramount:** If you don't understand the question the judge is putting to you, don't be afraid to ask him/her to repeat or rephrase it. This is also a good fallback to use when faced with a difficult question. It will allow you more time to think up a quality response.

Appearances

The senior counsels for both the plaintiff/appellant/prosecution and defendant/respondent/defence will be required to announce themselves and their junior counsels and the party they are representing. Memorise the appearance below:

> "If it pleases the court (alternatively: for the record) my name is [Surname], Initial [X], and I am appearing with my learned junior [Surname], Initial [Z], on behalf of the plaintiff/defendant in this matter, [insert name of party]."

Citations

Students will rarely be called on to articulate full case citations in a competition moot, yet it is essential that they have an understanding of what each number and abbreviation means, particularly with respect to court reporters. As a general rule you should speak one full citation then ask leave to dispense with full citations in the interests of expediency. The following is an example of how a full citation is to be read:

Citation:	*Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379
Pronounced as:	"Balmain New Ferry Co Ltd and Robertson, reported in 1906 in volume 4 of the Commonwealth Law Reports, starting at page 379."

If you are unsure of the abbreviation of a particular reporter, a list of abbreviations may be found on CaseBase. Simply log into CaseBase via the Griffith library page, click 'Help' in the top right-hand corner of the screen, and then 'Abbreviations' under the Index menu.

All references to law must include a specific page or paragraph reference. Write it down as soon as you find it.

Formalities/Expressions

There are certain terms and phrases unique to the courtroom environment which counsel should employ, not only in keeping with tradition, but also as a mark of respect both for the court and its officers. Among the more common formalities are:

"Your Honour/ Your Excellency":	For the purposes of a conventional moot, the judge should always be addressed as 'Your Honour'. In an IHL Moot, however, 'Your Excellency' is more appropriate, and should you face a panel of three judges, the presiding judge (seated in the middle) ought to be referred to as Mister/Madam President.
"My learned colleague":	Used to refer to co-counsel.
"If it pleases the court":	Often used when making appearances, asking the judge's permission, or simply as an introductory statement in beginning an oral argument.
"If it pleases the court (alternatively: in the interests of expediency) may we seek leave to dispense with full case Citations?":	In competition moots, this request may be made at the very beginning. The judge will almost always grant leave, and will usually indicate that it is to apply to all competitors; if this is the case, it is unnecessary for any of the following speakers to repeat the request. When leave is granted, it will thereafter only be necessary when making reference to a case, to state the names of the parties.. For example: *Leaf v International Galleries* [1950] 2 KB 86 need only be referred to as "Leaf and International Galleries".
"If it pleases the court, may I seek leave to confer with my learned junior (or senior, as the case may be)?":	Used by competitors to ask permission to seek the assistance of co-counsel when answering a particularly difficult question.

Other Resources

Written Outline

Submission One: The learned judge did not err in dismissing Clarion's extension of time with respect to the supplier delay incident.

1.1. The failure of a third party is not sufficient to effect force majeure clause.

Interfert Australia Pty Ltd v Yara Nipro Pty Ltd v Cosmo Ubaldino [2010] QCA 128, 138.
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165, 179.

1.1.1. By interpreting the meaning of the express terms, it is apparent that the parties did not construct the terms to include the failure of a third party as sufficient grounds for claiming an extension under the force majeure clause.

1.2. Impracticability of performance of one or more of the parties does not bring effect to force majeure clause.

AGL Sales (Queensland) Pty Ltd v Dawson Sales Pty Ltd [2009] QCA 262, 269.
Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd (2006) 236 ALR 115.

1.2.1. Due to the fact that Clarion, through their sub-contractor Sentinel, had different options when sourcing cement, they were not prevented from performing their duties, making performance more onerous will not be sufficient grounds for an enforcement of a force majeure clause.

1.3. Notice of force majeure for supplier delay incident was not prompt.

1.3.1. The notice given for force majeure was not provided promptly as specified by clause 37 of the contract. Therefore, the appellant is not entitled to request an extension of fourteen days due to the supplier delay incident

Submission Two: The learned judge did not err is dismissing Clarion's extension of time with respect to the repair works incident.

2.1. The repair works incident is not a specific term of the force majeure clause.

2.1.1. The force majeure clause details a number of events that would allow for its application. The repair works incident does not fall into any category specified under the force majeure clause.

2.2. Notice of force majeure for repair works incident was not prompt.

2.2.1. The letter of notice sent to Dice on 10 April 2013 was not prompt in regard to the incident which occurred on 10 May 2012. Therefore, Clarion cannot claim an extension of time for the delay of fourteen days.

Useful Materials

To supplement the information in this guide, we suggest you consult a range of other texts and check out videos of Moots on YouTube. Be wary of American moots. These may not reflect the experiences in Australia. Below are just a few of the additional texts on offer, most of which can be found in the Griffith University Library.

Mooting Manual

Terry Gygar & Anthony Cassimatis (Butterworths, 1997)

Gold Coast Law KL147.Q3.G93 1997

How to Moot: A Student Guide to Mooting

John Snape & Gary Watt (Butterworths, 2004)

Gold Coast Law KL131.S63 2004

The Cavendish Guide to Mooting (2nd Ed)

John Snape & Gary Watt (Cavendish, 2000)

Gold Coast Law KL131.S62 2000

The Art of Argument: A Guide to Mooting

Christopher Kee (Cambridge University Press, 2006)

Gold Coast Law KL146.35.K43 2006

A Practical Guide to Mooting

Gold Coast Law KL140.W54 1995

Sharon A Williams & Janet Walker (E Montgomery Publications, 1995)

Blackstone's Book of Moots

Tim Kaye & Lynne Townley (Blackstone, 1996)

Gold Coast Law KL131.K39 1996

International Humanitarian Law Moot

What is an IHL Moot?

The International Humanitarian Law (IHL) Moot is a mooting competition addressing the law that applies during times of conflict; essentially it is the law of war. The International Committee of the Red Cross (ICRC) is responsible for all statutes relating to IHL such as: the Geneva Conventions, the Rome Statute and Hague Conventions. Other sources of law include the customary rules of IHL and the principles derived from the cases of the various international courts and tribunals.

The IHL Moot may cover a diverse array of topics. Some of these include, but are not limited to, the killing of civilians, rape, destruction of cultural property and the conscription of child soldiers. Each year new problems are released by the Red Cross for local, national and international competitions. Generally, the questions will cover an area of IHL that is controversial or uncertain.

For example, in a prior year, a question involved addressing private security companies and whether or not they constituted combatants or civilians. The law in this area is not black or white, which is what makes the moot interesting.

What information will I receive?

- A problem involving a fictional nation state, which is dealing with some form of conflict, alongside a fictional map of the nation state. The usefulness of this map will vary depending on the question provided.
- A statute for the fictional nation state, bearing in mind that all of the crimes are for breaches of the relevant statute. During your moot, just like you would in the Championship Moot, ensure you refer to the relevant breaches of statute. The statute provided will be modeled off the ICC statute, ICTY statute or the ICTR statute (which are all quite similar).
- The question will outline the charge/s the Defendant is being charged with. These will form the basis of your submissions.

Making submissions

You will be required to present submissions about the crimes the defendant has been charged with. You must undertake research on each of the elements (which are relatively easy to find) and make an argument proving or disproving their guilt. The process is largely analogous to what is taken in the Championship Moot.

You may also be required to make submissions about the criminal responsibility of the defendant. There are two main types of responsibility:

- individual criminal responsibility; and
- superior responsibility.

The former is where you have actually carried out the elements of the crime yourself or assisted in some manner. The latter is where your subordinate has carried them out. Superior responsibility is a common issue within IHL Moot problems.

Preparation

Writing your submissions

The GriffithLSA website contains a template for you to use when writing your submissions (http://griffithlsa.org.au/wp-content/uploads/2015/03/IHL-Moot-Template.docx).

This template provides a basic example of submissions for you to refer to, bearing in mind that the more detail, evidence of research and conciseness of submissions will attract greater marks.

It is best to give the submissions your best attempt and then alter them after receiving feedback from the judges.

Research

We encourage each competitor to not be put off by the fact that you will have to commence your submissions from scratch. The way to make it easier for yourself is to be familiar with what you need to be looking for and where to find it.

Each problem will have a list of recommended sources (usually cases and commentary) – start with these. These resources plus the Geneva Conventions are all you will need to make a legally valid argument.

Know which side you are on and prepare accordingly:

- If you represent the Prosecution your job is to prove every element of each crime beyond a reasonable doubt. If there are issues of jurisdiction, these must be satisfied as well.
- If you represent the Defence, you only need to disprove one element of any given crime, or prove that the court does not have jurisdiction to deal with the crime. Although you only need to disprove one element in each crime to render the Prosecution's argument invalid, bear in mind that your argument may not be a winning one; so try to disprove as many of the elements as you can to have a strong and persuasive argument. This tactic is know as *alternative arguments*.

Databases to consider

- ICTY and ICTR databases (Tribunal websites)
- Geneva Conventions (ICRC website or Google)
- Customary IHL rules are on the ICRC website as well

Control + F

On average, IHL cases are 600+ pages long. However, you will only ever need approximately 50 of those pages unless that covers every single issue in the problem (which is very rare). Use the contents page to navigate your way through the issues and make use of Control + F to search for key words.

Keep your emotions at the door

Do not try and make emotional argument in an attempt to be persuasive. Make your arguments based on what the law says and how it applies to the facts you are given. For instance, we can make the assumption that the defendant is of questionable military background with a cold heart, however this does not mean he is guilty for all (or any) of the crimes alleged.

Know your facts!

IHL relies heavily on the circumstances of the case so your facts are your best friend. The law itself will be fairly straightforward. Where a gap arises, it is your job to fill them using your facts in a persuasive manner.

What will I be questioned on?

The Law

You may be asked about a particular case or commentary you rely on. If you are using any source as an authority, make sure you know why it is relevant and authoritative.

The Facts

If you have characterised the facts in a particular fashion and the judge disagrees, they may question you on this. DO NOT MAKE UP FACTS. The judges will notice.

Policy

You are unlikely to receive these kinds of questions in the internal competition but you may get them at the grand final or at ALSA. These arguments ask you about how current events may relate to the problem at hand. Previous judgements or resolutions may indicate the current policy on situations analogous to your question.

Trial Advocacy

Trial Advocacy

What's it all about?

The ability to articulate and think on your feet can only be acquired through practice. Trial Advocacy is all about examining witnesses and their statements. As an advocate you will either act as counsel for the defence or counsel for the prosecution. Your task is to either prove an illegal act or to defend the person accused with committing that act. Witnesses are expressly instructed to be non-competitive.

Requirements

Advocates compete individually . Each advocate however, must supply a witness (a second person). Students from all year levels are encouraged to compete. A basic understanding of evidence will be beneficial but is not essential. Advocates are appearing before the court and are therefore required to wear a full suit. Witnesses should dress appropriately for appearing in court.

Prior to the interview

Counsel will receive their brief one day before the commencement of the trial. This brief contains both witness' statement of events and an outline of the facts. Consider and absorb the facts. The witness will receive only their statement at the same time.

The most important aspect of preparation is identifying the elements of the potential offences and remedies which may be available to the client. It is important to note that an extensive knowledge of case law and statute is generally not required, nor recommended. The outline of the facts will generally contain the charge the defendant is facing and any relevant statutes/common laws.

Counsel must brief their witness on how to handle the courtroom scenario. Counsel will usually outline any issues arising from their statement, explain how the evidence will be adduced and, discuss their intentions regarding the putting and emphasis of evidence.

Preparation

Case Preparation

The following suggestions are drawn from ex-competitors with assistance from Ian Morley Q.C.'s '*The Devil's Advocate*'.

1. **Start at the Indictment:** For criminal cases, everything starts and ends with the charge. The same applies to civil claims. Don't mess about with the witness statements yet. The indictment will tell you what must be proved, who by and to what standard. If the standard is not provided you must check the relevant statute or law.

2. **Make a list of the elements to be proved:** Clearly identify the elements that must be proved/rebutted or the defence that must be proved/disproved. Write out these elements. Consider what each element requires to be proved to the relevant standard.

3. **Get familiar:** Now it's time to read the witness statements. Not before. Take notice of any consistencies between the statements. What issues do the witness' prove? Do they prove the counts. Which issues are unclear? This will hone you to the real issues.

4. **Write your closing statement first:** The closing speech is what you want to say to the jury. A mixture of comment and reference to facts. The precise words will change but the purpose of doing this now is it lights up precisely what you want from each witness. Once you know what you want to say to the jury, you know what evidence to seek from the witnesses. Write the whole speech out. Reflect on it, delete a few points as hopeless then add a few more. Try writing it out

5. **Bounce your closing speech off a friend:** Above all, your closing speech needs to be succinct and clear. Judges in competitions and juries in the real world are normal people. Bounce your speech off a friend. Does it sound credible? Does a particular saying work? Your closing speech is the time for persuasion. It must be understood.

6. **Consider the comments in your closing speech and the facts you need to say those comments:** A witness gives a fact. Counsel makes a comment. A fact is detail. A comment is argument. Identify the facts required to make your comments. These are the answers counsel needs and hence counsel must gear their questions to get these answers.

7. **Write your opening paragraph and rehearse it:** The opening speech should capture neatly and succinctly the overall point you need to make and why. Counsel for prosecutions opening speech should review the facts, the law and the burden and standard of proof. Start with a summary of what the case is about. Then explain the burden and standard of proof followed by the details of the facts as it is anticipated they will unfold. Last, explain the law. Speak slowly, to the judge (not reading) and watch the judges pen. Just like in mooting you do not want the judge to lose you. Stay colourless. An opening is comment free. The defence opening may contain some comment and will focus on the elements or defences that are relevant. Do not simply restate the prosecutions summary!

See the link below for example opening and closing speech's: (Hold Ctrl)

The Trial

Structure of the Trial

This is the structure for most competitions and which Griffith LSA uses. Other competitions may require the full case of the prosecution to be put before the opening of the case for the defence.

	Order of Events	Counsel Involved	Duration
1.	Appearances and reading of charge	Both Counsel	1 minute
2.	Opening by Prosecution Counsel	Prosecution	2 minutes
3.	Opening by Defence Counsel	Defence	2 minutes
4.	Examination in Chief of Prosecution Witness	Prosecution	10 minutes
5.	Cross Examination of Prosecution Witness	Defence	15 minutes
6.	Examination in Chief of Defence Witness	Defence	10 minutes
7.	Cross Examination of Defence Witness	Prosecution	15 minutes
8.	Summation by Prosecution Counsel	Prosecution	3 minutes
9.	Summation by Defence Counsel	Defence	3 minutes
Judge deliberation and feedback		N/A	N/A

Swearing in of the witnesses will be dispensed with.

Counsel may object and must state the grounds for objection. The clock will be stopped during any objections.

No re-examination is allowed.

Appearances and Reading

The trial begins when the judge asks for appearances:

'I will now take appearances'

Counsel for the Prosecution will rise, introduce themselves in the normal fashion and then sit down:

'If Your Honour pleases, my name is Bloe, initial J, and I appear for the Director of Public Prosecution/plaintiff.

Counsel for the Defence will rise, introduce themselves in the normal fashion and then sit down:

' If Your Honour pleases, my name is Blow, initial J, and I appear for the Defence'

The judge/association will then read the charge of the Accused.

Opening by the Prosecution/Defence

This is counsel's opportunity to present their construction of the case to the judge. Be clear, confident, concise and structure your speech logically. Remember you only have 2 minutes. You must outline your proposed series of facts and identify all of the major issues that you wish to cover.

The judge will then request that counsel for the prosecution call their first witness.

Examination in Chief

Counsel for the prosecution will say, 'I call …'

The witness will remain outside the courtroom until they have been called. The witness is then examined in chief by counsel for the prosecution and will remain seated for cross-examination by counsel for the defence.

The aim is to have a conversation with your witness. Through this conversation facts are stated logically, chronologically and coherently. The witness should answer questions in a natural manner (own words). Encourage the witness to speak up.

Counsel's first question should be to restate the witness's full name, address and occupation and ask them if that is correct. Generally leading questions are objectable unless the evidence is not contested.

Leading questions are questions designed to lead the witness to the evidence before the witness has mentioned it to the court.

Leading: 'Then you hit him?'

Non-leading: 'How did you react to being hit?'

Open-ended questions that are vague or very wide should be avoided.

'What happened next?'

Use short, clear questions and interact with and respond with the witness.

All facts to be relied on in closing must be drawn out. Counsel cannot argue a factual point in closing unless it has been previously put to the witness or is otherwise in evidence before the court.

Cross-Examination

The goal of cross-examination is to highlight the inconsistences in a witness' evidence. It is not a fishing trip. Opposing witness' are not there to help you and while they are instructed to be non-competitive they certainly do not have to be helpful.

In cross-examination, leading questions are permitted.

If possible, only ask leading questions that you know the answer to. These are questions that are answerable with a simple 'yes' or 'no'.

These questions should be geared towards your closing argument and limited to matters which must be put to the witness or to questions which Counsel considers may be to the advantage of his or her case (i.e. inconsistencies or credibility).

Counsel must remember that the purpose of cross-examination is to reveal the truth to the court, not to hound or badger a witness. Counsel will always seem more credible and persuasive if they are respectable to the opposing witness.

Counsel should consider and attempt to show that the witness may:

- Be lying;
- Be mistaken;
- Be biased;
- Have a bad memory;
- Be a careless observer;
- Have made previous inconsistent statements.

All suggestions must be capable of justification and demonstration to the court.

Counsel may seek to have a witness declared hostile if the witness demonstrates an intention not to tell the truth.

Closing Address

The aim of the closing address is to summarise the case, to highlight the strong points and make any relevant submissions on the law.

Counsel should state their argument succinctly and with clarity, summarising the evidence and drawing out a logical conclusion.

In conclusion counsel should say: 'Your Honour, that is the case for the …'

End the closing address on a high note or a critical point in your favour.

Where necessary, argue the law and the application or interpretation of the applicable section or Act. Generally the interpretation of law will not be in dispute.

The art of persuasion

Persuasion depends on good communication and presentation. First impressions are critical. Start confidently, making sure your voice is well modulated and clear. Speak slowly, precisely and with clarity.

Endeavour to maintain eye contact with the witness and with the Judge when addressing him or her or when being addressed by the Judge.

Argue succinctly, keeping closely to what you are attempting to prove or disprove. Don't indulge in repetition and be aware of and eliminate irritating habits or personal mannerisms.

Demonstrate courtesy to the Judge, to the witnesses and to the opposing Counsel. The use of "with respect" should be adopted when you address the Judge.

Objections

Objections are permitted and are used to achieve two purposes:

1. Highlight opposing counsel's breach of the rules of evidence;
2. Interrupt the opposing counsel's flow of thought.

Objections should not be used simply to achieve the second purpose. Too many objections or pointless objections will annoy the judge.

You must be prepared to defend any objection.

To make an objection, counsel should stand up and say:

'Your Honour, I object. Counsel is (….)'

The judge will hear the objection, and either choose to question counsel on it, or give the opposition an opportunity to respond. Whoever is not being spoken to should be sitting down. When counsel makes an objection, the interviewing counsel at the time must sit down and then rise if the judge address' them.

Objections are most effective if made before the witness answers the question.

Effective grounds for objection can include: 'Counsel is'...

- Leading the witness
- Asking for hearsay
- Breaching the rule in Browne v Dunn*
- Asking for expert evidence
- Making unnecessary comments
- Asking for irrelevant information
- Asking for an opinion (non-expert)
- Asking the same question repeatedly
- Asking several questions at once

*See Basic Rules of Evidence below

Basic Rules of Evidence

Evidence and Objecting 101

This section should provide competitors with the majority of evidence knowledge that they need. Counsel is urged to check the applicability and correctness of these rules before use. The rules listed here focus on how and when to object to questions put to the witness or the conduct of opposing counsel.

Relevance

Relevance denotes a sufficient rational connection, direct or indirect, between information and a fact in issue (Forbes, Evidence Law in Queensland). A fact-in-issue is a fact which proves or disproves one of the identified elements. If the evidence sought by counsel or given by the witness is not relevant, then it is not admissible. An example may be a question asking about the witness' income in a rape trial as opposed to a fraud trial. If challenged, counsel must argue the facts and rationale behind the evidence in question in order to show why the evidence should be admitted.

Opinion

A witness may not give an opinion unless the witness is qualified to give that opinion (i.e. is an expert witness). However, an opinion may be given by a witness on a subject that does not require specialised knowledge.

'Jane was drunk' is inadmissible unless the witness is qualified to give that opinion.

'I saw Jane drink five beers, stagger out of the pub and slur her words' leaves the inference to the jury and is therefore admissible.

Hearsay

The hearsay rule is defined as an assertion other than one made by a witness while testifying in the proceedings is inadmissible as evidence of the truth of that which was asserted (Heydon, Cross on Evidence). In other words, a witness may not give evidence of what a third party has said, for the purpose of proving the truth of an assertion.

'My husband saw the Ford speeding' is hearsay and inadmissible. Note however that 'My husband said to me the Ford was driving fast' is not proving the Ford was speeding and is therefore admissible to prove that the husband said those words.

Prejudice

Related to relevance, a piece of evidence is inadmissible if it's probative value is less than its prejudicial effect.

'John was having many affairs before he allegedly killed his wife'.

The court must consider whether the affairs are relevant and, if so, whether the evidence is too prejudicial to be admitted. A hypothetical jury may dislike John because he cheated on his wife and conclude, substantially because of this weak evidence, that he murdered his wife.

Objections to material such as this are usually combined with the relevance objection.

'Your Honour, I object. This evidence is irrelevant and highly prejudicial!'

Evidence and Objecting 101 cont...

Leading Questions

A leading question is one which suggests the answer desired or assumes the existence of disputed facts. The rationale for prohibiting leading questions is to prevent witnesses from having their evidence stated for them by counsel.

Other examples are provided under the Examination in chief and Cross examination sections of this guide.

'Did you see the defendant's car approaching the pedestrian crossing at a very high speed?' suggests the evidence that should be provided and is inadmissible.

'How fast was the brown Falcon travelling?'

If the presence of the brown Falcon has not been already been revealed then this question is leading and therefore prohibited.

Leading questions are permitted in cross-examination. This is largely due to the following rule.

Objections to Questions

Objections should be limited to contentious material if possible. Questions that are objectionable include those that are general or vague, confusing, duplicitous, argumentative, assuming evidence not yet in existence, calling for a conclusion by a lay witness or speculative.

The rule in Browne v Dunn

Note that this is not an objection but a rule of evidence.

If evidence is put by a witness that is to be disputed by opposing counsel, opposing counsel must challenge the witness in cross-examination (Forbes, Evidence Law in Queensland) This is a fundamental rule of cross-examination.

Credible evidence that is not challenged is normally taken to be accepted. Counsel cannot tacitly accept the gist of what the witness has said and then dispute it in their closing speech.

For example, imagine a witness for the prosecution has stated that they slipped on grapes lying on the defendant's shop floor. If any part of this statement should not be accepted by the jury for the defence case, then defence must, during cross-examination put their case to the witness for the prosecution. Defence cannot just ignore this statement and contend that there were no grapes on the floor (*Payless Superbarn (NSW) v O'Gara* (1990) 19 NSWLR 1).

There are numerous ways of putting your case to the defendant.

'I put it to you that there were no grapes on the floor' is one direct way.

This method is not always recommended. It gives the witness a chance to argue and restate their best points. You may get a lengthy and heated answer.

Always put as little as is necessary and frame your challenge so that it invites agreement:

'I suggest that you are mistaken about there being grapes on the floor, but you would disagree with me, wouldn't you.' The answer will simply be 'Yes' and your duty will be satisfied.

Extra Resources

Useful Materials

To supplement the information in this guide, we suggest you consult a range of other texts and check out videos of Trial Advocacy and Witness Examination on YouTube. Be wary of foreign representations. These often do not reflect the reality in Australia. Below are just a few of the additional texts on offer, most of which can be found in the Griffith University Library.

ADVOCACY: Preparation and performance

Hugh Selby (The Federation Press, 2009)

Gold Coast Law K93.K1 S453 2009

Advocacy: an introduction

Curthoys et al. (Butterworths, 2006)

Gold Coast Law KL93.35.K1 C87 2006

Advocacy manual: the complete guide to persuasive advocacy

Hampel et al. (Australian Advocacy Institute, 2012)

Nathan Law KN350.K1 H35 2012

Advocacy

David Ross QC (Cambridge University Press, 2005)

Gold Coast Law KL93.K1 R67 2005

The Devil's Advocate

Ian Morley QC (Sweet & Maxwell, 2009)

Queensland Evidence Law

David Field (Butterworths, 2014)

Gold Coast Reserve KN390.K2 Q3 F53 2014