

**COMPETITIVE MOOTING AND ADVERSARIAL ADVOCACY: A DRAFT MODEL
FOR CHANGE**

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I. Introduction

When I came to law school, I wanted to be a litigator. The germ sprouted in the eleventh grade, when my then-history teacher made the class stage a mock trial of Louis XVII, and put me in charge of his defense team. The King still lost his head, but I managed to sway four of twelve jurors to set him free. That was my first attempt at advocacy. My second was equally educational, and equally unsuccessful.

During a four-year break between degrees, I worked and traveled. My longest trip was in Africa; two and a half months traveling from Nairobi to Cape Town. One of my stops was in Iringa, Tanzania, where a teenage boy (perhaps fifteen years old) leapt onto our over-landing truck and stole my sandals. He was caught in the act by nearby townspeople. The end result was that despite my arguments to the contrary, the local police remanded him for an immediate hearing where he was to be tried for theft. They politely informed me that he would be found guilty and the mark of a thief would be carved into his arm with a knife. Then he and his family would be banished from the town.¹

The point is that prior to law school I automatically assumed that being a lawyer meant arguing in what I now understand to be the traditional adversarial sense; that is, the goal was to argue better than the other side and ‘win’. This is what I came here prepared to do when I left, assuming that I would learn the skills I could have used to save the King and thwart the Tanzanian justice system in the process. I no longer have any desire to litigate precisely because I fulfilled my goal. While the King is long past saving and no Tanzanian police officer will ever take me seriously, I learned what I needed to know about advocacy to attempt a career as a

¹ Iringa is a major stop for tourist over-landing trucks. The local economy is almost entirely dependent upon the town being safe for tourists to stop, refuel and buy supplies before moving on. The locals were unwilling to tolerate any threat which could persuade truck drivers to patronize another town, simply because without the trucks, the town would starve. By banishing the boy and his family, they could no longer make a living, and no tourist town would accept the boy with the thief’s mark.

litigator. That I no longer want to is the result of two realizations: first, that I am simply better suited to corporate work. The second is that the advocacy skills I learned in law school have, in my opinion, prepared me to fight to 'win' but nothing else – a state of affairs I now find almost completely unsatisfactory.

My personal 'lawyering' experiences are solely derived from mooting. I do not think that this is uncommon. Barring those comparatively few students who prioritize ADR-type courses or programs early on, those who seek an approximation of realistic advocacy experience, regardless of their individual area of interest, derive it from mooting. The problem is that when students do not have the opportunity, the time or the self-interest to experiment with other, alternative methods of lawyering in their coursework, moots become an attractive, extracurricular way to gain advocacy experience respected by the profession. The risk is that if they began their law school career assuming that the adversarial model is how all real lawyers advocate, mooting in its current form will only reinforce that assumption.

Three years and four moots has given me the ability to use knowledge and oratory to, hopefully, 'win'. However, I cannot 'see' the client behind the legal issues, at least in part because I have never been trained to see the client as anything more than a vehicle through which to express legal principles. The advocacy I know is purely one-dimensional. Perhaps that condition is one which could be remedied, or at least mitigated, once in practice and clients become real people in real situations, instead of fictional characters who make faulty widgets. However, a larger problem looms. It is quite possible that everything I was taught about advocacy is at best limited in its applicability, and at worst incompatible with the reality of modern lawyering.

It is now accepted that the adversarial or traditional model of advocacy is merely one of several equally valid dispute resolution models, usually categorized under the umbrella term ‘ADR’. For example, the advent of Rule 24.1 and mandatory mediation in the Ontario *Rules of Civil Procedure* and its counterparts in other provinces is largely credited with legitimizing mediation as a valid alternative to more confrontational adjudication.² As a result, mediation and other ADR standards and educational bodies have joined the legal landscape.³ For example, the particular complexities and tensions in family law sparked the evolution and growing acceptance of collaborative lawyering as an alternative to both traditional litigation and mediation in that context.⁴ Many Bay Street law firms now offer both traditional litigation and alternative dispute resolution services designed to encourage settlement and mediate disputes,⁵ while other lawyers/firms are dedicated solely to the practice of ADR advocacy, eschewing traditional litigation altogether.⁶ Finally, even the federal Canadian government appears to have come onside, using ADR processes to, among other things, address complex social issues such as the Indian Residential Schools litigation.⁷

The shift away from strict adherence to the adversarial model to more therapeutic or conciliatory approaches to dispute resolution is also clearly reflected the curricula of Canadian common law schools. Every faculty offers at least one course in alternative dispute resolution,

² Michaela Keet and Teresa B. Salamone, “From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation” (2001) 64 Sask. L. Rev. 57 at para. 1 (QL).

³ See, for example, The British Columbia Arbitration and Mediation Institute (<http://www.amibc.org>), the Alberta Arbitration and Mediation Society (<http://www.aams.ab.ca>) and similar organizations in Saskatchewan (<http://www.adrsaskatchewan.ca>), Manitoba (<http://www.amim.mb.ca>), Ontario (<http://www.adrontario.ca>) and Quebec (<http://www.imaq.org>) among many others.

⁴ Pauline H. Tesler, “Collaborative Law: A New Paradigm for Divorce Lawyers” (December 1999) 5 Psychol. Pol’y & L. 967 at 987.

⁵ For example, Goodmans LLP, Osler, Harcourt and Hoskin LLP, Davies Ward Phillips Vineberg LLP and Blake, Cassels and Graydon LLP have all instituted some version of a specialized Alternative Dispute Resolution Group to provide non-litigious settlement and negotiation services, in addition to their traditional litigation group(s).

⁶ A search of the ADR Institute of Canada’s website listed nineteen Ontario lawyers who practice ADR exclusively. Online: ADR Institute of Canada <<http://www.adrcanada.ca>>.

⁷ Online: Indian Residential Schools Resolution Canada <<http://www.irsr-rqpi.gc.ca/english/index.html>>.

and occasionally three or four. In addition, others offer adjunct degrees or certificates in ADR-type studies.⁸ It is worth noting that of Canada's fifteen common law schools, only the University of Ottawa has made a course in ADR mandatory for its students.⁹ The rest offer ADR courses on a purely voluntary basis.

In contrast, the one experience each Canadian law student shares is a moot. Though some discrepancies arise regarding when one must moot, all common law schools make the completion of at least one moot mandatory, and all schools offer their students the opportunity to participate in a voluntary internal competitive moot and/or a national moot. All mandatory and competitive moots are conducted in the spirit of traditional adversarial advocacy.¹⁰ Therefore, every common law student in the country learns the mechanics of arguing to 'win' whether they want to or not, but in comparison their exposure to alternative lawyering is almost universally voluntary.

The purpose of this paper is to argue that student mooting reinforces and perpetuates an advocacy methodology which is clearly no longer predictably representative of real lawyering, in light of the varied ways in which modern lawyers fulfill their ultimate responsibility – to serve the needs of their clients to the utmost of their ability. The reluctance of most law schools to impose a mandatory ADR-type course or practicum means that mooting may well be the best opportunity to give students some pseudo-realistic exposure to alternative methods of lawyering,

⁸ For a review of the ADR courses and programs at Canadian law schools, see Jonnette Watson Hamilton, "The Significance of Mediation for Legal Education" (1999) 17 Windsor Y.B. Access Just. 280. ["Hamilton"]

⁹ For an in-depth examination of the revised first-year curriculum at the University of Ottawa, see Ellen Zweibel, "Where Does ADR Fit in the Mainstream Law School Curriculum?" (1999) 17 Windsor. Y.B. Access Just. 295. ["Zweibel"]

¹⁰ The exception is the Aboriginal Kawaskimhon ("speaking with knowledge") Moot. Students represent the parties and interested interveners. The problem is based on an Aboriginal rights issue, and the moot emphasizes the resolution of legal issues by consensus-building using a modified Aboriginal talking circle. As the Kawaskimhon is considered unique among moot competitions in Canada and does not in any way emphasize the adversarial system, it is not considered to be a 'competitive moot' for the purposes of this paper. Online: Kawaskimhon 2003, <<http://132.206.96.4/aboriginalmoot>>.

because this is clearly what the profession demands today. My argument is not that the adversarial model is valueless and obsolete, but rather to propose a draft mooting model for preliminary consideration with the goal of better preparing law students for the current reality of advocacy as practicing lawyers.

II. Mooting is an integral aspect of a law school education

The noun ‘moot’ is derived from the Old English word *mot*, meaning ‘meeting’. In medieval times, a *mot* referred to an assembly of people, particularly those who performed some sort of judicial function.¹¹ The modern meaning of ‘moot’ originated in the sixteenth century English Inns of the Court, where law students began the tradition of presenting legal arguments to panels of senior lawyers and judges.¹² Today, a cursory internet search demonstrates that an estimation of over one hundred competitive moots held yearly in the common law world is likely not wide of the mark. Unsurprisingly, then, mooting is considered a venerable rite of passage for Canadian law students, and one which law faculties, the practicing legal community and the judiciary consider to be an important, prestigious and valuable experience.

Law faculties are perhaps the most zealous proponents of mooting. All fifteen of the common law schools require that each student complete a mandatory moot, usually in their first year of study.¹³ Competitive mooters may argue in an internal competition (i.e. the Windsor Zuber Moot Competition), or represent their faculty in national and international competitions. Every common law school in Canada sends teams to some, if not all, of the national moot competitions each year. In theory, student advocates at national and international competitions

¹¹ Online: World Wide Words <<http://www.worldwidewords.org/qa/qa-moo1.htm>>

¹² Online: The European Law Moot Competition <<http://www.elmc.org/society/history.htm>>

¹³ The exceptions are Dalhousie Law school, which conducts its mandatory moots in second year, and the University of Toronto, which requires that a mandatory internal or external competitive moot be done in any year of study.

are of the best their school has to offer; law schools often chronicle the successes (if any) of their teams on law faculty websites and publish celebratory announcements in periodicals such as *Lawyer's Weekly*.

The faculty resources mobilized behind the mandatory moots and particularly the competitive moot teams can be substantial. Second- and third-year Windsor law students are cajoled and recruited to judge the first-year moots. Competitive moot teams enjoy privileges such as access to long-term loans and reserved research rooms in school law libraries, as well as virtually unlimited access to faculty members with knowledge of an aspect of the problem. Teams may have any number of faculty 'coaches', and funds allocated for professional external advocacy advisors and training is not unheard of.¹⁴

The practicing legal community and local judges can also be heavily involved in competitive mooting. For example, Fraser Milner Casgrain LLP sponsors Canada's oldest national moot competition, the Gale Moot, and Davies Ward Phillips & Vineberg LLP organizes and hosts the Canadian Corporate Securities Moot. The Wilson and Laskin Moots are named in honor of former Supreme Court Justices Bertha Wilson and Bora Laskin. It is common for local lawyers to judge mooters in practice rounds in preparation for competition,¹⁵ and each year hundreds of practitioners and judges volunteer to judge the actual competitive moots themselves.

¹⁴ The 2005 University of Toronto Canadian Corporate Securities Moot team accepted their first-place trophy with four coaches and a fifth 'member', whose alleged sole responsibility was legal research and facta writing. In addition, it has been rumored for years that the University of British Columbia in particular hires advocacy consultants to help prepare its team.

¹⁵ Traditionally, the University of Windsor Canadian Corporate Securities Moot team and others sacrifice their Reading Week to participate in numerous practice rounds at Bay Street law firms. The University of British Columbia Gale Moot team undergoes a month of practicing with local lawyers and judges before a final practice round before judges of the British Columbia Court of Appeal. Online: <http://www.law.ubc.ca/moots/comp/gale_cup.html>

Often the finals are presided over by at least one current Supreme Court of Canada Justice and other pre-eminent members of the Courts of Appeal and government bodies.¹⁶

It should also be noted that competitive mooting is prestigious and participation in the tradition gains entrance to a universally recognized ‘club’. Students routinely include mooting experience on their résumés to attract the attention of potential summer or articling employers. Interestingly, a survey of forty-seven former Supreme Court of Canada clerks found that over half of them had participated in competitive moot.¹⁷ A truly noteworthy personal achievement such as Top Oralist is likely to be résumé material for years. Finally, it is not uncommon for now-practicing lawyers to include their mooting experience in their biographies posted on firm websites, as well as any continued involvement in the competitions.

III. A Review of Adversarial Advocacy

To place the ‘moot’ firmly within the traditional of the adversarial system, a brief review of the principles of adversarial advocacy is necessary, as well as an examination of the traditional role of the lawyer and the role that law schools play in the perpetuating the system itself. It is clear that how law schools educate their students is a central underpinning of adversarial lawyering, despite advancements made in providing access to ADR theory and training.

Generally speaking, the adversarial model of dispute resolution rests upon two premises. The first is party-autonomy, meaning that judges will only enter the fray once a dispute has arisen and one or more of the parties has requested assistance to its resolution. The parameters

¹⁶ For example, the final round of the 2005 Canadian Corporate Securities Moot competition was judged by Supreme Court Justice Ian Binnie (who also presided over the final round of the 2005 Gale Moot), Ontario Court of Appeal Justices John Laskin and Kathryn Feldman, former Quebec Court of Appeal Justice Michel Proulx and Paul Moore, the Vice-Chair of the Ontario Securities Commission.

¹⁷ Mitchell McInnes, Janet Bolton and Natalie Derzko, “Clerking at the Supreme Court of Canada” (1994) 33 *Alta. L. Rev.* 58 at 67.

of the dispute are defined entirely by the parties, and the judge only settles the issues put forward for consideration. The second is party-prosecution, where “the parties have the right and the responsibility to choose the manner in which they will go forward with their case and the proof they will present to support it. The judge’s role is to passively evaluate the merits of the case as an when it is presented to him.”¹⁸

Much has been written regarding the lawyer’s role as an advocate in the adversary system, and in particular on the predominant concept of neutral partisanship. Neutral partisanship has two branches, the ‘principle of partisanship’, which obligates a lawyer to be a “zealous, partisan advocate for the interests of his or her client”, and the ‘principle of non-accountability’, which relieves the lawyer of any resultant moral consequences of zealous advocacy.¹⁹ In Ontario, the basic principle is found in Rule 4.01(1) of the *Rules of Professional*, which states that “[w]hen acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.”²⁰ Commentary to the Rule states that

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, for which the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law....In adversary proceedings the lawyer’s function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (save as required by law or under these rules) to assist an adversary or advance matters derogatory to the client’s case.²¹

At least theoretically, the adversarial model is intended to observe two fundamental judicial goals; the search for truth through a partisan competition to convince an impartial third

¹⁸ Neil Brooks, “The Judge and the Adversary System” in G.D. Watson et al eds., *The Civil Litigation Process: Cases and Materials* (Toronto: Emond Montgomery Publications Limited, 1999) 93-95.

¹⁹ *Ibid.*, 111-112.

²⁰ Online: The Law Society of Upper Canada <<http://www.lsuc.on.ca/services/contents/rule4.jsp>>

²¹ *Ibid.*

party of their version of it, and the protection of individual rights.²² While Rule 4.01 falls short of mandating ‘zealous’ advocacy, the end result is still an emphasis on ‘winning’, leading one commentator to categorize lawyers in this model as ‘managers of war’ as opposed to brokers of peace.²³ This is unsurprising given that, at least superficially, lawyers must view everyone other than their client as potentially adverse to their case in order to fulfill the obligation conferred by Rule 4.01. By focusing almost exclusively on the client, the adversarial model requires lawyers to subjugate values such as “the pursuit of truth, fairness and justice” to the client’s interests if they want to win.²⁴

Law schools perpetuate this concept of advocacy, despite course offerings in ADR disciplines and/or practicums designed to encourage experimentation with more therapeutic forms of lawyering. Students entering law school may consider themselves, based perhaps on the image of advocacy portrayed in popular culture, as prime lawyer material because they are “logical thinkers, debaters, have the ability to argue both sides, and win every argument.”²⁵ They learn the law primarily through appellate case-law, which separates the parties neatly into opposing camps, attributes each a distinct legal position and debates the merits of various legal principles and arguments extracted from a common set of facts to reach a result which then becomes ‘law’.

As a result, students are left with the impression that lawyering is litigious, one side will ‘win’, the other will ‘lose’ and that serving their client means fighting successfully for a legal entitlement using legal principles. In other words, the traditional methods by which the law is

²² Gavin MacKenzie, “Breaking the Dichotomy Habit: The Adversary System and the Ethics of Professionalism” (1996) 9 Can. J.L. & Juris. 33 at paras. 42-43. (QL)

²³ Julie Macfarlane, “What Does the Changing Culture of Legal Practice Mean for Legal Education?” (2001) 20 Windsor Y.B. Access Just. 191 at 191.

²⁴ Donald E. Buckingham, “Rules and Roles: Casting Off Legal Education’s Moral Blinders for an Approach that Encourages Moral Development” (1996) 9 Can. J.L. & Juris. 111 at para. 14. (QL) [“Buckingham”]

²⁵ Zweibel, *supra* note 9 at 301.

taught as well as the obligatory onus to pursue a client's rights in a thoroughly partisan fashion "reinforce in students a bias toward intellectual conceptualism, verbal aggression, and competitive manipulation, at the expense of fostering emotive and moral understanding, collaborative problem-solving and human concern for people."²⁶

IV. Mooting Epitomizes the Adversarial System

Mooting in its current form reinforces the adversarial model for the simple reason that it is designed to do precisely that. The venerable moot tradition has been cited critically as evidence that "the competitive, adversarial paradigm of dispute resolution is still dominant in Canadian law schools"²⁷ and positively as an important contribution to training students to be lawyers.²⁸ Depending upon your perspective, moot either develops crucial advocacy skills, needed because "advocacy is the lifeblood of the common law"²⁹, or it inappropriately validates the adversarial approach as "inevitable to the practice of law, [and] furthermore as a legitimate and honourable mode of inquiry."³⁰ Either way, moot is recognized as an exposition of adversarial advocacy in the purest form possible in law school.

A moot is defined as "preparing written submissions in the form of a factum and making those arguments in an oral presentation before a mock bench of judges."³¹ Students gain intensive experience with the three skills of advocacy – research, writing and oral argument.

²⁶ Buckingham at para. 19.

²⁷ Catherine Morris, "The Moulding of Lawyers: ADR and Legal Education" (1999) 17 Windsor Y.B. Access Just. 271 at 279.

²⁸ Kathryn Feldman, "Remarks about the Value of Student-Run Law Journals: Opening Address at the First Annual Banquet of the Windsor Review of Legal and Social Issues" (March 2004) 17 W.R.L.S.I 1 at 2.

²⁹ Sharon A. Williams and Janet Walker, *A Practical Guide to Mooting* (Toronto: Emond Montgomery Publications Limited, 1995) at 2.

³⁰ Julie Macfarlane, "A Feminist Perspective on Experience-Based Learning and Curriculum Change" (1994) 26 Ottawa L. Rev. 357 at 369.

³¹ Allan C. Hutchinson and Pam Marshall, *The Law School Book: Succeeding at Law School* (Concord: Publications for Professionals, 1996) at 119.

However, when combined with the ‘win-lose’ mentality cultivated by a student’s coursework, mooting only serves to reinforce the validity of adversarial advocacy as the most realistic model of ‘real’ lawyering. Coursework gives students certain skills; the purpose of mooting is to use those skills to win. In my experience, most students are thoroughly indoctrinated as adversarial advocates by the end of the moot. I will examine the basic aspects of the mooting process to demonstrate the deliberately adversarial nature of the process, before proposing a new draft model for competitive mooting.

A. The Moot Problem

All competitive moot problems are formulated in essentially the same way. The problem is presented as an appellate court review, usually set out in the form of separate and entirely fictional trial and appeal court judgments. The lower court judgments will set out the applicable facts (never comprehensively and with deliberate vagueness to permit manipulation and inference), the parties, the legal issues being argued and the remedies sought.

It is rare that a moot problem is premised entirely upon a litigated case. Students who search for the ‘smoking gun’ – a case which mirrors the moot problem – are usually doomed to failure. Most problems contemplate novel issues, statutory provisions that are not yet in force, or are based loosely on competing precedents in the lower courts upon which the Supreme Court of Canada has yet to opine. A combination of all three is not unheard of. As a result, both fictional lower court decisions typically reach opposing conclusions on the legal issues to provide a sort of guide to deciphering a research path.

B. Legal Research

Problem in hand, mooters split into two teams of two to research precedent, statutes, books and articles to learn as much as possible about the legal issues and identify arguments that

can be made to advance the interest of their client, whether respondent or appellant.³² The sole purpose of this endeavor is to use the given facts and available law or policy to try to cement the client's entitlement to the legal remedy sought. At every step a mooter asks, "Given the facts I know or can infer, will this principle of law help my client win?" Lines of inquiry are developed if they appear to serve the client's objectives, and ruthlessly discarded otherwise.

From the beginning, therefore, the adversarial nature of competitive mooting is clearly established. The interests of the parties and the remedies sought are polarized, and a client's objectives are expressed purely as legal 'rights', without any consideration of their emotional, professional or other needs. The reason is that competitive mooting only contemplates partisan advocacy in front an impartial, third-party panel; there is no scope for negotiation, conciliation or settlement. The only solutions sought are juristic, and each issue will be determined in the favor of one party or the other without any possibility of compromise.

As a result, mooters spend zero time formulating extra-judicial solutions to the issues, focusing entirely upon researching arguments which support their client's claim. No thought is given to whether the remedies sought are the most appropriate or whether the client's emotional or other needs are being met, because neither the problem nor the forum invite those considerations. The law is used purely as a weapon and moots research feverishly to support their own positions and cripple the imagined arguments of their opponents.

C. Oral Arguments

Mooting is really all about oral advocacy. The culmination of weeks of research and writing is the factum, upon which mooters base their oral submissions. The facta are certainly

³² The Canadian Corporate Securities Moot requires each moot team to prepare two facta, one for the appellant and one for the respondent. While this is not uncommon, the CCSM also requires each mooting team to moot twice, representing each party once. To the best of my knowledge, the other competitive moots only require each mooting team to argue a single time, one team representing the appellant and the other the respondent.

important, but a team with two highly competent oralists and a substandard factum can still win their round handily. The process is deceptively simple; each mooter makes submissions to the court for approximately twenty minutes on the issues they are responsible for while the panel of 'judges' asks them questions.

The mooter's goal is to convey a comprehensive knowledge of the applicable law and a superior grasp of the facts and their relevance to the legal arguments submitted. Successful mooters are those who can do this calmly, clearly and in an organized manner, despite the best efforts of an often deliberately fractious bench. 'Judge-reading' is crucial during oral arguments; mooters constantly adjust their style, language and even their arguments during their interaction with the judges in their efforts to persuade the bench that their client should 'win'.

A judge's goal is to test a mooter's knowledge of the law, the facts and the interplay between the two, while thinking on their feet, answering questions thoughtfully and observing court etiquette. As no actual party rights are at stake, judges are free to play the devil's advocate, and do. While moot court judges do not actually adjudicate, victory is theoretically determined by the persuasiveness of a mooters arguments, demeanor and knowledge.

In reality, however, the process is far less straightforward. The point is to win the round, and the most effective method to accomplish that is to discredit your opponent's arguments while discreetly distracting the bench away from the flaws in yours. Mooters are not rewarded for answering questions fairly or thoughtfully, they are rewarded according to the adroitness with which they avoid answering questions potentially damaging to their position. Far more knowledgeable about the issues than the judges, mooters can manipulate and obfuscate at will behind a wall of civility and a deference to the bench.

Regarding one's opponents, the adversarial mindset is formed long before the actual moot. As noted above, mooters spend weeks researching their positions and come to identify strongly with the legal position of their client. Receipt of the opposing teams factum can elevate that bias to outright hostility as mooters deride the choice of precedents, the use of 'weak' arguments, reliance upon misunderstood facts and even poor grammar and spelling errors. By the time of the actual moot, each team, without exception, regards its opponents as incompetent morons, and oral submissions have been prepared precisely to illuminate the other side's weaknesses and destroy their credibility. Worse, the mooters are supremely confident of their ability to do it – because clearly, they are 'right' and their opponent is 'wrong'.

The client is utterly lost in the process. Of course, moot clients are fictional, but even if I had had a real live client sitting next to me during my competition, I doubt I would have noticed they were there, or cared. As an adversary, the focus of my attention shifted to my opposing counsel the moment I understood the legal parameters of the conflict. While my role was to advance the rights of my client, anticipating and trying to thwart my opponent was how I fulfilled that role. The client's fight became my fight, and from that point the client's importance to me was defined entirely by their legal rights. If my clients had been real, I probably would have avoided their telephone calls unless I needed more information from them.

While I do not contend that every competitive mooter evolves to become the adversarial animal that I became, the point is that the entire process of mooting from start to finish fuels the drive to win to the exclusion of everything else. Conceptions of 'justice' are meaningless – unless they are likely to be found compelling to a judge. Opponents are idiots, therefore losing a round is a crushing blow to the ego (though clearly the judges were idiots too). I am right. They are wrong. But most importantly, the client's needs are purely legal, and to this day the thought

of having to service a client's emotional needs horrifies me. I don't know how, and I don't want to learn. I just want to win.

That is a significant part of the reason why I don't want a career in litigation, and why the goal of this paper is to introduce a new draft moot model. If mooting is such valuable advocacy experience, then it should reflect more than the adversarial obsession with winning. I do not deny the role of the adversarial model in teaching students valuable advocacy skills. Traditional litigation can be a significant part of any big firms dispute resolution practice, and many smaller firms practice adversarial advocacy exclusively. However, it is not the only way lawyers advocate, particularly today. As an educational tool mooting has its limits, but at a minimum, in my opinion, it could be reformed to provide students with practical exposure to alternative lawyering while still providing adversarial training.

VI. A Draft Moot Model

The model is presented using the three categories as above: the moot problem, legal research and oral advocacy.

A. The Moot Problem

The problem would be set in two parts, with common parties (either individuals, corporations or both), a common set of agree-upon facts and the same two issues or areas of dispute underlying each part. Part I would be released in mid-September and due for completion by the end of October. It would be provided in the form of two transcripts or other form of client interviews, sufficient in detail to provide mooters with a broad sense of the two issues and the likely positions/needs of the parties, without being comprehensive. The problem would strictly avoid defining the issues 'legally' but merely present them as events or developments where one

or both the parties have suffered in some way. The purpose of Part I is to prepare mooters to take part in a voluntary mediation session as counselors conducted during the actual moot itself, likely held in mid-March. Therefore, the Part I problem would emphasize any number of a party's concerns, such as economic loss, maintenance of personal or professional relationships, the preservation of reputations, the need for an apology, etc.

Part II would be released in early December and due in late January. It would consist of two lower court judgments addressing the same two issues as in Part I, but defining them as legal issues for litigation. Where the focus in Part I is on the non-legal needs of the parties, the emphasis in Part II is on their legal rights and interests. The familiar competitive moot structure would apply; a novel issue or statutory provision would be raised, the lower court judgments would conflict, the interests of the parties would be polarized and the mooters would be expected to act as partisan advocates in the traditional sense.

The use of the same two issues as the basis for both Parts I and II is potentially problematic, since it confers the assumption that mediation fails to avoid litigation (given that even if the mediation is successful, the issues nonetheless proceed to the moot court). However, the point is for students to approach the same problems in different ways. Instead of automatically defining the legal parameters of the issues and assuming an immediately litigious persona, mooters are forced to think first in terms of conciliation and compromise; to consider what their client really needs as a solution to their current situation. Regardless of success or failure, the mooters will have had to genuinely attempt a non-litigious resolution and thereby increased their understanding of the needs of their clients and the mediation process in general.

Mediation is the ADR model of my choice for Part I of the moot, and for my purposes it may be defined as “third party assistance in the voluntary resolution of difference.”³³ The reason is straightforward: moots need judges, and a mediator would perform that role. Mediation professionals would have to choose the particular sub-type of mediation model to be used, if any. I prefer to envision a simple forum whereby the parties are encouraged to air their views and concerns with counsel present to ask questions of the other side and flesh out the disputes, while the third party mediator keeps the proceedings on track toward, hopefully, resolution. The role of the students during the mediation is explained more fully below.

B. Legal Research

To complete Part I, students must prepare two mediation briefs to be submitted to the mediator, mirroring real-life mediation briefs in style and content (i.e. BATNA) as much as possible. The reason for two briefs is that, as in the Canadian Corporate Securities Moot, the mooters will be required to act as mediation counsel once for one client, and once for the other. This is invaluable experience in my opinion, because it forces students to consider the entire problem and both sides when formulating strategies and arguments. The benefit will be much the same in Part I, because the needs of the parties will be deliberately quite different, as will they would ideally like to effect. Therefore, mooters will have to grasp both sides of the issues by considering and understanding the needs, goals and objectives of both parties to formulate creative, conciliatory solutions.

The mediation brief submitted to the mediator or each party will consist of two documents. The first is a *Statement of Issues*, setting out the clients understanding of the cause and nature of the dispute. It is presented more or less as a version of that party’s interpretation of the facts, with an emphasis on as truthful a recollection and recitation as possible. It will also

³³ Hamilton, *supra* note 8 at 280.

include an account of any losses, embarrassment, inconvenience or other consequence of the dispute suffered by the party. The purpose is to help the parties define the parameters of the dispute prior to mediation and identify their true concerns, thereby providing the mediator with a guide to the areas of importance to them needing to be addressed.

The second document will be a *Statement of Resolution*, which will first set out the clients' dedication to the principles and rules of the mediation session, then propose a resolution to the disputes. It could be a particular course of action, an apology, a public retraction, the reinstatement of a non-binding agreement – anything non-legal which that client feels would effectively resolve the issues in a way acceptable to them. Reasons would have to be given regarding the appropriateness and fairness of the 'remedies' proposed. Emphasis will be placed on compromise and fair result for both parties. The purpose here is for mooters to propose creative solutions which suit each clients particular needs, while accommodating the necessity of proposing a palatable solution to the other party.

The research process for Part II would proceed in precisely the same way as in current competitive moots. However, once again the mooters would be required to act for both parties, researching and writing two thoroughly partisan facta. The obligation to represent both sides of the dispute is onerous but invaluable; I speak from experience. Additionally, the research process for Part I should be considerably less than that required for Part II, and I have extended the length of the entire moot process for six weeks to approximately four months with a months break between the two parts to compensate.

C. Oral Advocacy

Currently, competitive mooting teams split into two teams of two mooters and compete separately. I do not propose to modify this. To complete Part I, each team would engage in two

mediation sessions with each mooter assuming a specific role, acting once as counsel and once as the client. The reason for this is that a 'client' must be present in mediation and logistically, drawing 'clients' from the pool of mooters is easier than drafting volunteers. There is also the added bonus that the mooters know the 'client' and the issues better than an outsider would, and therefore the mediation could be conducted more realistically and, hopefully, successfully.

Lawyers with mediation expertise, other mediation professionals and ADR law professors would perform the role of mediator. Their role would be to help move the parties to a resolution to the conflict as well as assess the mooters' ability to guide their clients through the process. Acting as counsel, the mooters would ask questions of the other party and their counsel, encouraging sincere and honest responses from their own client, offering relevant information when needed, maintaining a calm, respectful and professional demeanor and overall, helping their client toward a solution. The 'client' would be free to play the role however they liked; the onus would be on the counsel-mooter to maintain control and focus, thereby generating the team's mark for Part I. necessarily, then, the counsel-mooter would likely assume a greater role than they normally would in a mediation, depending on the mediator's style in actual practice. However, the purpose of the exercise is to teach students how to be mediation advocates, and therefore the mediator may have to play a less active role in the proceeding than they might otherwise assume.

Again, mooters in Part II would perform in the traditional role as advocates. As much I would like to reform their role in this arena, the fact is that the adversarial process remains, to a certain extent, central in those real-life litigations which actually proceed to trial and beyond. While I do not agree with many of the tactics used by mooters in competition, I have no proof that exactly the same techniques are not used in actual courtrooms. Proceeding from my belief

that adversarial advocacy is still worth learning, I believe that the moots as they have been traditionally conducted is still the best way for a student to gain such experience in law school. However, the hope is that after exposure to the mediation process mooters will have an enhanced understanding of their client's needs and proceed from that basis, rather than automatically framing the dispute in legal terms and losing sight of the client entirely.

VII. Conclusion

The first and most obvious suggestion is that a standalone ADR moot should be founded in Canada by one of our professional organizations, law firms or law schools, perhaps taking as inspiration the Negotiation Competition organized each year by the American Bar Association.³⁴ However, given that such an independent ADR moot does not appear to be on the horizon, the next step is encouraging law schools to intensify their efforts to provide practical alternative lawyering training to their students. As previously noted, law schools have expanded their curricula in recent years to offer ADR courses, adjunct certificates and, in some cases (such as the University of Windsor Faculty of Law) intensive clinical practicums designed to train students to be counselors, rather than litigators. However, there is still room for improvement; I would support an effort made by any of the common law schools to emulate the University of Ottawa and include a mandatory ADR course in its curriculum.

Since my goal is to expose students to practical alternative lawyering skills, I would incorporate writing mediation briefs, conducting 'client' interviews and a final mediation conference as the components of such a course in lieu of a research paper. This structure would likely try the sanity of already overloaded first-year students, but would be perfectly workable in upper years. Professors, local mediation professionals and students participating in clinical or

³⁴ Online: American Bar Association < <http://www.abanet.org/lsc/competitions/negotiation/>>.

advanced ADR courses could act as mediators, while the students act as mediation counsel in their own graded conference while role-play as the client in another.

Either the creation of a standalone ADR moot and/or mandatory ADR courses in law schools would perhaps be preferable, and certainly easier, than instituting the draft model which I have proposed here. It has its flaws, mostly logistical in nature. First, while a competitive moots is always a significant endeavor in terms of time and effort, my model ostensibly doubles the commitment required. Second, it places an even greater demand on the practicing legal community to act, not only as judges, but also as mediators. However, there are many ADR professionals practicing in Ontario who would likely welcome the opportunity to become involved in helping students learn their discipline and contribute to the growth of ADR processes generally.

Third, my model would probably only work for moots such as the Canadian Corporate Securities Moot, namely those which center upon civil disputes. To the best of my knowledge, despite the advent of Rule 2.02(3) of the Ontario *Rules of Professional Conduct*,³⁵ constitutional litigations, administrative proceedings, criminal prosecutions and *Charter* issues have remained largely beyond the scope of ADR models such as mediation. However, a substantial portion of legal professionals practice business law and litigate civil disputes, where mediation and other ADR principles can and are used with growing frequency. Therefore, students interested in gaining advocacy experience in those areas might find the revised model more in line with the reality of their firm's litigation practice and expectations of young lawyers.

³⁵ Rule 2.02(3) confers a mandatory obligation upon lawyers to consider ADR solutions to their clients' problems. The Rule provides that "[t]he lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options." Online: Law Society of Upper Canada <www.lsuc.on.ca/services/contents/rule2.jsp>.

Finally, this model would be impractical to use for the mandatory moots, which are usually the culmination of a faculty's Legal Research and Writing course. The course reviews case law and legislative research, citation practices, and memo- and factum-writing before the moot completes the oral advocacy requirement. The course is extremely time-consuming, and adding to the students' burden by implementing a version of my model seems unjustifiable, particularly since the oral advocacy component of the course is relatively minor.

However, as a preliminary idea the draft moot model is intended to provide interested students with simulated lawyering experience in both mediation and adversarial practices, simply because lawyers as conflict resolvers today are likely to travel both roads in many litigation practices. I do not regret my mooting experiences, but had I participated in a moot of this scope perhaps my decision to abandon my imagined future as a litigator would have been different. I might have sought ADR experience in my articles to complement my traditional training. Or, I might have learned just enough to approach adversarial advocacy less as a 'manager of war' and more as a broker of peace, and avoided my ultimate and complete distaste for the whole process. Hopefully, a moot along these lines or an independent ADR moot will be instituted in the future, and I believe that law students would be better off for it.

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European Law Moot Competition <<http://www.elmc.org/society/history.htm>>.

Indian Residential Schools Resolution Canada <<http://www.irsr-rqpi.gc.ca/english/index.html>>.

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