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## **Competitive Mooting: An Opportunity to Build Resilience Skills for Legal Practice**

**Louise Parsons<sup>1</sup>**

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## **Abstract**

Competitive mootings are highly suitable for teaching law students to be prepared for legal practice. In particular, competitive mootings as experiential learning in a mock dispute resolution setting provides a unique pedagogical tool that is ideally suited to the development of resilience in law students. Developing resilience in law students is therefore important for their future career practice. Although competitive mootings can spontaneously develop resilience, this article draws on Positive Psychology and proposes some strategies and practices that moot coaches can use to assist competitive moot teams to develop resilience and learn resilience skills with a view to legal practice. It includes a 'nutshell version' of some practical tips for moot coaches such as the focus on a growth mind-set, the importance of focussing on strengths and positivity, effective feedback, the ABCD formula and reflective practice.

*A good half of the art of lawyering is resilience.<sup>2</sup>*  
(with apologies and thanks to Alain de Botton)

## I Introduction

Lawyers have always needed resilience, but legal practitioners of the future will need even more resilience in light of the significant disruptions facing the legal profession in the near future. For legal educators, it is not a 'future problem', but an important question now: how can students best be prepared for a career in law that will require significant resilience?

This article argues that teaching advocacy and dispute resolution through competitive mooting can be an effective pedagogical tool to develop resilience in law students that will equip them well for legal practice. The article demonstrates how the student experience in competitive mooting could be leveraged to develop resilience as a valuable psychological character trait for the challenges of legal practice. It analyses the benefits and limitations of competitive mooting as an opportunity for developing resilience, both spontaneously through the experience of competitive mooting and intentionally through focussed approaches and practices. It concludes with some practical suggestions for moot coaches (a 'nutshell version') as to how to enhance the development of resilience in moot team members.

## II A Brief Introduction to Mooting and Competitive Mooting

A moot is a mock dispute resolution procedure used to teach the law. A fictional legal dispute is used as the basis for students to study the applicable legal principles as well as dispute resolution practices (litigation and alternative dispute resolution). As a pedagogical tool, mooting dates back to the medieval period in 14<sup>th</sup> century England,<sup>3</sup> when the law and the skills of lawyering were exclusively studied experientially through moots — there were no formal classes. Law students were provided with fictional cases that they needed to research. The students then prepared legal arguments for the parties involved in the fictional dispute. Students presented their legal arguments in front of experienced legal practitioners, and learnt experientially through the questioning by and feedback from the experienced legal practitioners. In essence, that is still what mooting is today. Using mock dispute resolution through litigation or alternative dispute resolution as a basis of instruction is powerful because it combines knowledge and application of the law in a practical setting.

From a pedagogical perspective, mooting is a form of experiential learning,<sup>4</sup> namely an academic simulation exercise that includes the presentation of legal arguments for one or both parties in a hypothetical legal dispute, in front of moot judges who intervene while arguments are being presented.<sup>5</sup> As a practical legal exercise, mooting mimics court or arbitration proceedings, enabling students to 'practise and develop a range of skills ... by performing them rather than just

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<sup>2</sup> 'A good half of the art of living is resilience'. Quote attributed to Alain de Botton. See for example The Resilience Institute, *Quote by Alain de Botton* (undated) Resilience Institute <<https://resiliencei.com/2017/03/8-quotes-about-resilience-and-transformation/>>.

<sup>3</sup> In the 14<sup>th</sup> Century in England, the original form of legal education to train barristers was through mooting. Aspiring barristers mooted after dinner in front of senior barristers. A Lynch, *Why do we moot? Exploring the role of mooting in legal education*. *Legal Education Review*, 1996, 7(1), 68-69. In the late 1800's mooting was revived as a training tool. See Anthony E Cassimatis & Peter Billings. *Thomson Reuters guide to mooting* (Lawbook Co, 2016). See also Louise Parsons, 'Competitive mooting as clinical legal education: can real benefits be derived from an unreal experience?' (2017) 1 *Australian Journal for Clinical Education*.

<sup>4</sup> For an analysis of mooting as a form of experiential learning, see Parsons, above n 3.

<sup>5</sup> See the description in Bobette Wolski, 'Beyond Mooting: Designing an advocacy, ethics and values matrix for the law school curriculum' (2009) 19(12) *Legal Education Review* 43, 46.

learning about them'.<sup>6</sup> The moot problem is typically both factually and legally complex, and will require both in-depth factual and legal research.<sup>7</sup>

The discipline of mooting has not changed much since its medieval origins, and is still used as a pedagogical tool in law schools. Students research a fictional legal case and prepare legal submissions, which are then argued in front of moot judges in a mock courtroom or arbitration setting. Moots are appellate proceedings, or arbitrations, and no witness examination is involved.

Mooting is a form of experiential learning. Experiential learning occurs by 'doing, reflecting, applying and evaluating'.<sup>8</sup> Competitive mooting involves all four stages of experiential learning that have been identified by Kolb in a 'sequential, recurring four-stage cycle'.<sup>9</sup> The four stages are concrete experience, reflective observation, abstract conceptualisation and active experimentation.<sup>10</sup> In experiential learning, the students gain knowledge from the experience itself, not through conventional doctrinal instruction.<sup>11</sup>

In competitive mooting, teams of students compete against other teams to be the team that best argues the set fictional case, and win the competition.<sup>12</sup> Teams of students from different universities compete against each other in an organised competitive setting, based on a complex, factual scenario that forms the 'moot problem'.<sup>13</sup> Although competitive mooting is a voluntary co-curricular activity, students will often be given subject credit for participation in big competitive international moot competitions such as the Philip C. Jessup International Law Moot Court Competition. Most universities provide faculty staff to coach moot teams representing their universities in international moot competitions, and doing well in moot competitions is a matter of pride for universities.<sup>14</sup>

To become a team member and represent their university, students will normally have to go through a formal selection process, which is often a highly competitive process. Depending on the actual competition rules, the competition may have national or regional rounds, and the teams from some universities may find themselves representing their country or region on the international stage.<sup>15</sup> For students this can be both thrilling but also quite stressful. In international and national moot competitions, teams compete not only to win the oral part of the moot competition, but also for other prizes, such as for the best written outlines of arguments and the best individual oralist.<sup>16</sup>

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<sup>6</sup> Ibid, 46, 61. Moots can be forms of assessment and can also be used as an in-class, non-competitive activities.

<sup>7</sup> For example, if the moot problem involves medical negligence, some research into the relevant medical issues may be required. In a recent moot problem for the Willem C. Vis International Commercial Arbitration Moot Competition (2017-2018), students were required to familiarize themselves with the intricacies of cocoa production, the cocoa trade and supply chain issues in light of the UN Global Compact. See generally Joel Butler & Terry Gygar, *Australasian mooting manual* (2012, LexisNexis). See also J Risse (ed), *The Complete but unofficial Guide to the Willem C. Vis International Commercial Arbitration Moot* (2013, C.H. Beck, Hart, Nomos) 90-91.

<sup>8</sup> Wolski, above n 5, 51.

<sup>9</sup> Ibid. See also D.A. Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (1984, Prentice Hall, New Jersey).

<sup>10</sup> Wolski, above n 5. See also C.K. Gunsalus & J.S. Beckett, *Playing doctor, playing lawyer: Interdisciplinary Simulations* 2008 14(2) *Clinical Law Review* 441. See also generally Parsons, above n 3, for an analysis of competitive mooting as experiential learning.

<sup>11</sup> See Parsons, above n 3.

<sup>12</sup> Competition organisers set the rules of the different moot competitions. These introduce many variables in for example the length and style of written submissions and the size of the teams. Some competitions are more advanced and only suited to students at an advanced stage of their law degrees. See Parsons, above n 3, 6.

<sup>13</sup> Moot problems are set by the organisers of the moot competition, or individuals or a group of individuals at the request of the organisers.

<sup>14</sup> See for example announcements of the successes of moot teams on university websites. See University of Queensland, '*UQ mooters crowned Jessup world champion*' (16 April 2014) University of Queensland <<https://www.uq.edu.au/news/article/2014/04/uq-mooters-crowned-jessup-world-champions>>.

<sup>15</sup> This is, for example, the practice in the Phillip C Jessup International Law Moot Court Competition, the ICC Moot Court Competition, the World Human Rights Moot Court Competition and the ELSA Moot Court Competition on WTO Law.

<sup>16</sup> See for example the Michael Kirby Moot on Contract Law, and the Willem C. Vis Moot International Commercial Arbitration Moot Competition.

A moot competition has defined stages. The competition kicks off with the release of the moot problem or fact scenario, that forms the basis of the competition.<sup>17</sup> Moot teams have to familiarise themselves with the moot problem (some, like that for the Willem C. Vis International Commercial Arbitration Moot Competition, are more than 50 pages long, and involve complex transactional facts). The legal issues that arise in the moot problem are then usually distributed among the moot team members who start an intensive process of research. The research process is arduous, as the legal issues in moot problems are often cutting edge and unsettled, and therefore research may at times be unproductive if there is little literature available. Often students will not have completed subjects that cover the area of law dealt with in the moot problem, and they may have to familiarise themselves with a whole new area of law.

Teams are required to prepare written submissions for both parties to the dispute, which can be quite lengthy.<sup>18</sup> Writing lengthy documents with a view to a competition as a newly-formed team can be quite stressful as students not only have to integrate their individual contributions, but also assess the work of their team mates. The preparations for the oral part of the competition can also be intense as students work on developing and delivering oral arguments in practice moots. In the research, writing and oral preparation stages, students will be continuously exposed to feedback from the coach, other team members and guest judges, and embark on a continuous process of improvement. Some students will be more successful than others, and team members may compete with each other for a coveted 'speaking role' (oralist position) in the moot competition. Getting competition-ready therefore generally involves some frustrations, and requires diligence and commitment.

The oral rounds of the moot competition will involve some preliminary rounds, in which each team presents oral arguments for both parties in the dispute, and then based on the team's performance, the team may progress to the final or elimination rounds.<sup>19</sup> The final or elimination rounds could include quarterfinals, semi-finals and a grand final round.<sup>20</sup> Typically the final or elimination rounds in a moot competition are knock-out rounds, which will increase the stakes and the stress for the participants, and these rounds can be quite close in time. In some competitions quarterfinals, semi-finals and the finals may all take place on the same day.

The role of moot judges or moot arbitrators is of particular importance. Their role is not to judge a performance by the students passively and simply determine a 'winner' and a 'loser'.<sup>21</sup> Instead, they are required to actively engage in the roleplay with the students during the moots and actively engage in the legal issues in the moot through an intellectual conversation with the participants through questioning.<sup>22</sup> This is an important aspect of competitive mooting and vital to the student learning experience. For students developing the ability to think on their feet is important. Developing the high levels of competence required to respond to what is sometimes a rigorous line of questioning from judges who are not familiar to the participants, is both stressful and satisfying. In fact the competitive mooting experience has been described as 'a powerful mixture of fear and elation'.<sup>23</sup> It requires extensive preparation and mental agility, as well as excellent oral advocacy skills. For some students, this unpredictable interaction with the judges is the essence

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<sup>17</sup> Moot problems are prepared by persons appointed by the competition organisers, not by the academic coach of the team.

<sup>18</sup> In the Willem C. Vis International Commercial Arbitration Moot Competition, for example, written submissions are 34 pages in length, excluding indices and lists of authorities.

<sup>19</sup> Competition rules differ. Some competitions determine the progression of teams based on score; some determine progression based on a win-loss ratio.

<sup>20</sup> The number of final rounds depend on the rules of the competition.

<sup>21</sup> The role of moot judges is not like the role of judges in a public-speaking competition, where the judges judge from the perspective of a passive, observant audience.

<sup>22</sup> See Butler & Gygar, above n 7, 118. Experts act as moot competition judges and students present their arguments to these experts. The moot judges interrupt and ask questions. See also Cassimatis & Billings, above n 3, 33, and Butler & Gygar, above n 7, Chapter 5. Students aim to have a conversation with the bench. The manner in which students interact with the judges and their responses to questions from the judges, will form an important component of the scoring.

<sup>23</sup> A Lynch, 'Why do we moot? Exploring the role of mooting in legal education' (1996) 7(1) *Legal Education Review* 88.

or highlight of a moot competition. The challenge of the experience is augmented by the fact that in many competitions there are three or more moot judges, including legal practitioners, academics and sometimes even sitting judges, often from different legal jurisdictions.<sup>24</sup>

There are many challenges facing students when participating in international and national moot competitions.<sup>25</sup> The most significant potential stresses for purposes of this paper can be summarised as follows:<sup>26</sup>

- the factual and legal complexity of the moot problem, and researching for a particular factual scenario in a legal area that may be unknown to the student;
- the demands of independent research in areas of law that are new to the students, often without prior instruction or class work in the particular area, which will require students to use discretion based on independent learning and analysis. The stakes are higher because team members depend on the accuracy, and depth and breadth of each other's research;
- dealing with time constraints and conflicting demands on the student's time as well as scheduling conflicts (moot competitions often conflict with set law school times for classes, assessments and exams);
- high volumes of work that may require personal sacrifices, such as foregoing holiday time in favour of working on the moot;
- when delivering oral submissions, the extent of knowledge and understanding required to be able to deal with unpredictable questions from unknown competition judges in a competition environment;
- the challenges of team work, arising from working as a team over a prolonged period of time (ranging from 6 weeks to more than 6 months);
- stresses arising from travelling to competitions and competing in unfamiliar and foreign places;<sup>27</sup>
- funding concerns, if the team wants to compete, but the law school does not provide or arrange funding;
- challenges that arise because of adjustments that have to be made for cultural and language difference in international competitions; and
- pressures to preserve their university's reputation and expectations of coaches.

Overcoming these challenges is an important part of the experiential learning and individual development of the students involved in competitive mooting. These are not just challenges to the current level of resilience law students have when they first starting to moot, but provide opportunities to develop resilience. This article argues that the challenges of moot competitions provide excellent opportunities for the development of resilience that will stand law students in good stead in light of the disruptions faced by legal practice now and in future.

### III Defining the Concept of Resilience

A resilient person can continuously adapt when faced with stress and adversity, and can rise above such circumstances with relative ease.<sup>28</sup> Both scientific and lay definitions of resilience reflect its essence as being the ability to 'bounce back' from 'adversity', presumably to a positive

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<sup>24</sup> Practitioners, as well as sitting and retired judges and arbitrators, as well as academics, act as competition judges in international competitions. See Butler & Gygar, above n 7; Risse, above n 10, and Cassimatis & Billings, above n 3.

<sup>25</sup> See Parsons, above n 3, Butler & Gygar, above n 7, and Cassimatis & Billings, above n 3.

<sup>26</sup> See Parsons, above n 3.

<sup>27</sup> For some students, travelling to a moot competition may be their first opportunity to travel abroad.

<sup>28</sup> For example, Emily Morrow defines resilience as follows: 'Resilience is the ability to adapt continually to stress and adversity by facing difficult experiences and rising above them with relative ease'. Emily Morrow, 'Resilience, Self-management and the Practice of Law' on New Zealand Law Society, *Law Talk* (7 May 2015) <<https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-864/resilience,-self-management-and-the-practice-of-law>>. Sallie Emmett defines resilience in the context of the legal profession as follows: 'Resilience in a psychological sense refers to an individual's tendency to cope with stress and adversity'. Sallie Emmett, 'Why lawyers need resilience' (April 2013) *Bulletin (Law Society of South Australia)* 13.

or neutral position.<sup>29</sup> According to the American Psychological Association, for example, resilience is 'the process of adapting well in the face of adversity, trauma, tragedy, threats or even significant sources of stress'.<sup>30</sup> When speaking about resilience in relation to the legal profession specifically, Hampel J described resilience as 'the ability of an individual to properly adapt to stress and adversity'.<sup>31</sup>

It is beyond the scope of this paper to analyse the various nuances of the idea of resilience in more depth.<sup>32</sup> It remains a complex psychological concept, although the term is used in everyday life in a non-scientific manner without any significant loss of its more academic meaning.<sup>33</sup> The scientific study of resilience has been largely done by positive psychology, a defined sub-discipline of the discipline of psychology.

#### **IV Resilience as an Important Characteristic for Lawyers: Lawyer Well-Being, Stress and Resilience**

Law has always been a demanding profession, and the 'new practice of law' in future may be even more challenging than today, requiring an even more resilient lawyer. This section sets out the importance of resilience as a trait for lawyers.

The concerns about mental health in the legal profession are well documented and researched.<sup>34</sup> For example, the University of Sydney's Brain & Mind Research Institute found that depression and anxiety affects 'almost one in three solicitors and one in five barristers'.<sup>35</sup> Law students also reported significantly higher levels of psychological distress than the general population and according to one study over 40 per cent of law students suffer from stress 'severe enough to warrant clinical assessment'.<sup>36</sup> The findings of quantitative studies of psychological distress among Australian law students and lawyers have delivered consistently 'disheartening results'.<sup>37</sup>

There are many explanations for the high incidence of mental health issues in lawyers, a phenomenon described as 'frightening but not surprising'.<sup>38</sup> Some of the mental health issues

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<sup>29</sup> For non-scientific definitions, compare, for example, the Oxford dictionary's definition. It defines resilience as follows: 'The capacity to recover quickly from difficulties; toughness'; and 'The ability of a substance or object to spring back into shape; elasticity'. Oxford Dictionary <<https://en.oxforddictionaries.com/definition/resilience>>. The Merriam Webster Dictionary defines resilience as 'the capability of a strained body to recover its size and shape after deformation caused especially by compressive stress'; or 'an ability to recover from or adjust easily to misfortune or change'. Merriam Webster Dictionary <<https://www.merriam-webster.com/dictionary/resilience>>.

<sup>30</sup> American Psychology Association, 'The road to resilience' (2014) <<https://www.apa.org/helpcenter/road-resilience.aspx>> as cited in Steven M. Southwick, George A. Bonanno, Ann S. Masten, Catherine Panter-Brick & Rachel Yehuda, 'Resilience definitions, theory, and challenges: interdisciplinary perspectives', (2014) 5(1) *European Journal of Psychotraumatology*.

<sup>31</sup> Felicity Hampel, 'From Stress to Resilience' (September 2015) 33 *Law Institute Journal* <[http://www.judicialcollege.vic.edu.au/sites/default/files/Judge%20Felicity%20Hampel%20\(2015\)%20LIJ%20-%20From%20Stress%20to%20Resilience.pdf](http://www.judicialcollege.vic.edu.au/sites/default/files/Judge%20Felicity%20Hampel%20(2015)%20LIJ%20-%20From%20Stress%20to%20Resilience.pdf)>.

<sup>32</sup> It's a complex and evolving concept, and may be influenced by the person's position. Some view it as a character trait, some see it as a development, some see it as an outcome. See for example Southwick, Bonanno, Masten, Panter-Brick & Yehuda, above n 30.

<sup>33</sup> See the comment by Dr Steven Southwick on the evolving definition of resilience. Southwick, Bonanno, Masten, Panter-Brick & Yehuda, above n 30.

<sup>34</sup> Parker's article provides a list of the literature in this field. The article includes extensive lists of literature and initiatives on the managing of mental health risks. Christine Parker, 'The "Moral Panic" Over Psychological Wellbeing in the Legal Profession: A Personal or Political Ethical Response?' (2014) 37(3) *University of New South Wales Law Journal* 1103 <<http://www.austlii.edu.au/au/journals/UNSWLawJl/2014/40.html>>.

<sup>35</sup> The College of Law, *How resilience is helping lawyers beat the blues*, (2018) <<https://www.collaw.edu.au/news/2016/11/14/how-resilience-is-helping-lawyers-beat-the-blues>>

<sup>36</sup> Ibid. For other studies on stress in law students, see Gregory Vijayendran, 'President's Message The Resilient Lawyer' (June 2017) *The Law Society of Singapore Lawgazette* <<http://v1.Lawgazette.com.sg/2017-06/1875.htm>>. See also Stephen Tang and Aneka Ferguson, 'The Possibility of Wellbeing: Preliminary Results from Surveys of Australian Professional Legal Education Students' (2014) 14(1) *QUT Law Journal*.

<sup>37</sup> See Tang and Ferguson, above n 36. This study notes: 'High levels of distress, particularly in the form of symptoms associated with depression, have been found in a troublingly large proportion of law students'.

<sup>38</sup> See The College of Law, above n 35.



derive from the practice of law itself, which requires a level of professional pessimism. Good lawyers typically excel at 'identifying problems and issues that need fixing', and therefore are often cynical, sceptical, critical, pessimistic and negative.<sup>39</sup> Lawyers also often are both pessimists and perfectionists.<sup>40</sup> Some of the issues may arise from the fact that lawyers are constantly involved in critique, and 'are required to be argumentative, competitive and often pessimistic' in order to do their job well.<sup>41</sup> Pessimistic thinking is also prevalent in the legal world and '[p]essimistic thinking has been linked with depression, stress and anxiety'.<sup>42</sup> The nature of law practice requires 'negative thinking', and rapid change just makes it worse.<sup>43</sup> Further, for some legal practitioners, especially those who work with traumatized populations, 'secondary traumatic stress is a high occupational risk'<sup>44</sup> as they 'unconsciously absorb some of the trauma'.<sup>45</sup>

These are not problems that the profession or educational bodies can ignore.<sup>46</sup> More than ever law schools need to equip students with sufficient skills, including resilience, to make sure that 'they are able to survive and thrive'.<sup>47</sup> James suggests that 'by combining self-care and resilience techniques with entrepreneurial skills, graduates can learn how to adapt their approach to landing a job in law or another profession'.<sup>48</sup> Equipping law students with resilience techniques however extends beyond the requirements of securing employment. 'Teaching these skills in law schools and law firms is a vital risk management issue because resilient lawyers are more likely to be able to manage and protect themselves'.<sup>49</sup> It is also a workplace health issue and it is good for business because resilient lawyers can provide 'a positive client service and deal effectively with people'.<sup>50</sup>

The challenges of the legal profession are even set to increase as the practice of law is changing. Susskind, for example, foresees 'discontinuity over time and the emergence of a legal industry that will be quite alien to the current establishment'.<sup>51</sup> Law students will enter a profession that is predicted to undergo 'a widespread and fundamental transformation'<sup>52</sup> and may therefore even have to learn to write computer programs and code,<sup>53</sup> or at least develop some understanding of algorithms and programming. Lawyers will in future also have to contend with the legal challenges posed by technology,<sup>54</sup> including staying up to date and resolving novel legal

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<sup>39</sup> Vijayendran, above n 36. Vijayendran cites Dr Larry Richard, an expert on lawyer psychology. See also Susan Swaim Daicoff, & American Psychological Association *Lawyer, know thyself: A psychological analysis of personality strengths and weaknesses* (Law and public policy; Lawyer, know thyself) (2004, American Psychological Association).

<sup>40</sup> See The College of Law, above n 35. This sentiment is echoed by the Australian Law Students Association, *Australian Law Students' Association, Depression in Australian Law Schools: A handbook for law students and law student societies*, (undated), 7 <<https://law.uq.edu.au/files/32504/ALSA-Depression-Handbook.pdf>>. It notes: 'In general, lawyers share two personality traits that may predispose them to depression and other stress-related illnesses: perfectionism and pessimism'.

<sup>41</sup> Ibid, 7. See also generally The College of Law, above n 35.

<sup>42</sup> Hallie N Love, 'Resilience is Key to Thriving in Law Practice' (6 September 2017) 56(36) *Bar Bulletin* 9.

<sup>43</sup> Larry Richard, Lawyer Resilience and Grit: How to Thrive as a Lawyer, Lecture given on 13 May 2016, Career Advice Series.

<sup>44</sup> Love, above n 42, 9.

<sup>45</sup> Ibid. In relation to the trauma affecting the legal profession, see Grace Magquire and Mitchell K Byrne, 'The Law is Not as Blind as It seems: Relative Rates of Vicarious Trauma among Lawyers and Mental Health Professionals' (2017) 24(2) *Psychiatry, Psychology and Law*.

<sup>46</sup> The College of Law notes: 'With disturbing statistics like these, the profession is waking up to the fact that we need to take ownership of the problem'. See The College of Law, above n 35.

<sup>47</sup> Melissa Coade, 'Tech to push tomorrow's lawyers into the 'background' Lawyers Weekly, 20 October 2016 <<https://www.lawyersweekly.com.au/news/19796-tech-to-push-tomorrow-s-lawyers-into-the-background>>.

<sup>48</sup> Ibid.

<sup>49</sup> See Emmett, above n 28.

<sup>50</sup> Ibid

<sup>51</sup> See R Susskind, *Tomorrow's Lawyers: An Introduction to your Future* (2013) Oxford; Oxford University Press.

<sup>52</sup> Nickolas J James, 'More than Work Ready: Vocationalism versus professionalism in legal education' (2017) 40(1) *UNSW Law Journal*, 208, citing Susan Daicoff, above n 39. See also Paula Davis-Laack, Larry Richard, and David N Shearon, 'Four Things Resilient Lawyers do Differently' (14 June 2016) *Law Practice Today, American Bar Association* <<http://www.lawpracticetoday.org/article/four-things-resilient/>>. They note that the legal profession has already seen significant changes in recent years, and these changes are making legal practice 'even tougher'.

<sup>53</sup> Ibid.

<sup>54</sup> There are ongoing hard law challenges that arise in some of fundamental areas of law, for example the law of contracts is challenged by blockchain applications like smart contracts.

issues, requiring high levels of resilience. Resilience will also be needed to navigate the fundamental changes in the practice of law, including through artificial intelligence.<sup>55</sup> Lawyers will have to adjust to meet these challenges, while still functioning at a high professional standard.<sup>56</sup> The challenges will require the learning of new skills at an accelerated pace, and will create increased stress among legal practitioners. It is suggested that resilience will play an important role in navigating legal practice of the future.

## V The Role of Resilience

Developing resilience is one way in which the challenges of legal practice can be withstood. Seligman, a highly-regarded expert on resilience has noted: 'Given the degree of negative emotion and awful events that lawyers deal with daily, I can think of no other profession that would benefit more from resilience training'.<sup>57</sup> Resilience skills can significantly contribute to successfully navigating the challenges of mental illness in the legal profession.<sup>58</sup>

There is a modest but growing body of literature about the need for resilience as part of a lawyer's psychological and personal toolkit; the need for resilience has also been acknowledged by legal professional bodies.<sup>59</sup> Resilience however deserves special focus amidst the mental health initiatives for lawyers,<sup>60</sup> as '[m]any psychologists now recognise that the alternative to depression is not happiness but resilience'.<sup>61</sup> As lawyers cannot totally eliminate work-related stress, the best alternative option available to them is to respond differently — i.e. to have or use resilience.<sup>62</sup>

Lawyers need to be resilient for many reasons. The health impact of legal practice on lawyers (mentally and physically) can be high.<sup>63</sup> Resilience plays an important role in mental well-being, particularly in situations that require change, growth and perhaps painful adaptation. 'Resilience skills provide the tools lawyers and law firm personnel need to successfully cope with the stressors outlined above'.<sup>64</sup> Resilience has 'a strong protective function'<sup>65</sup> and assists lawyers in tackling challenging everyday hassles, including managing workload, dealing with opposing counsel, the loss of a significant client, and/or a personal setback or stress.<sup>66</sup> The new challenges in the legal profession will also require resilience as an important factor in adapting to change and

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<sup>55</sup> Although there is no consensus on the extent to which the use of artificial intelligence may reduce job opportunities, it will as a minimum affect the nature of jobs. See for example Gary E Marchant, 'Artificial Intelligence and the Future of Legal Practice' Summer 2017 21 *The SciTech Lawyer* <<https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2017-2018/2018-sac/written-materials/artificial-intelligence-and-the-future.authcheckdam.pdf>>. See also Erin Winick, 'Lawyer-Bots are Shaking Up Jobs' 12 December 2017 *MIT Technology Review* <<https://www.technologyreview.com/s/609556/lawyer-bots-are-shaking-up-jobs/>>.

<sup>56</sup> See Davis-Laack, Richard & Shearon, above n 52.

<sup>57</sup> As quoted by Dan Bowling, 'You're in the Army Now', on Vivia Chen, *The Careerist* (18 April 2011) <<http://thecareerist.typepad.com/thecareerist/2011/04/stop-whining-youre-in-the-army-now.html>>.

<sup>58</sup> 'Accepting that lawyers need to develop resilience and finding ways to enable those involved in the legal profession to learn the skills to develop resilience is likely to make a significant contribution towards meeting the challenges of mental illness within the profession': Sallie Emmett, above n 28, 31.

<sup>59</sup> List here some of the literature about lawyers and resilience, including the works cited in this article.

<sup>60</sup> Mental health initiatives include programs by various law societies as well as private initiatives such as that of Clarissa Rayward of 'Happy Lawyer Happy Life'. See for example her blog, *Happy Lawyer Happy Life*, <<https://happylawyerhappylife.com>>.

<sup>61</sup> Emmett, above n 28.

<sup>62</sup> Richard, above n 33. It has been noted that whether a person one develops symptoms of STS or not, 'may depend on the level of resilience': Love, above n 42. Without a resilient brain, lawyers may not be able to act in the best manner, and chronic negative emotions can further have negative health impacts on the brain. Love describes some physical aspects of the brain and dealing with stress. Love, above n 42.

<sup>63</sup> Love opines: 'Without a resilient brain and nervous system as home base, many lawyers soldier through the daily high stress, negative emotions and adversities that have them operating from the ancient survival part of the brain in charge of the fight/flight/freeze response with its ... cocktail of stress hormones, and the ruminating, and self-critical default mode network of the brain': Love, above n 42 8-9.

<sup>64</sup> See Davis-Laack, Richard & Shearon, above n 52.

<sup>65</sup> *Ibid.*

<sup>66</sup> See Davis-Laack, Richard & Shearon, above n 52.

in learning. Learning anything new and adapting to new circumstances are inherently stressful and demands resilience.

Although there are significant (health and other personal) benefits to legal practitioners in developing resilience, the benefit of resilience extends beyond the personal to the professional,<sup>67</sup> because resilient lawyers can be more productive and could produce better legal outcomes.

Despite the importance of resilience for lawyers, the results of an empirical study has indicated that there may be low levels of resilience in lawyers.<sup>68</sup> Developing resilience need not be limited to practising lawyers, and law schools could adopt some of the principles of positive psychology to develop resilience in law students.<sup>69</sup>

## VI Positive Psychology – The Science Behind Resilience

Positive Psychology is ‘the scientific study of the strengths that enable individuals and communities to thrive’. The goal of Positive Psychology is to ‘provide the conditions and processes that contribute to flourishing or optimal functioning of people, groups and institutions’.<sup>70</sup> The field is founded on the belief that people want to lead meaningful and fulfilling lives, to cultivate their best and enhance life experiences. Positive Psychology as a discipline moves ‘away from a purely deficit-based model of mental health, toward the inclusion of strength and competence-based models that focus on prevention and building strengths’.<sup>71</sup> It aims to ‘move from a disease model, where the focus is solely on fixing what is wrong with people, to a health model, where the focus is on building positive traits and skills that foster optimal functioning’.<sup>72</sup>

Positive Psychology has enjoyed significant popular appeal and its principles have been adopted outside of the strict academic and professional disciplines of psychology, as evidenced for example by the publications of Professor Martin Seligman, that include academic texts as well as books in the accessible mass-media self-help genre.<sup>73</sup> The state of South Australia for example hosted Prof Seligman as the Thinker in Residence from 2012-2013, with a view to developing a strategy for increasing wellbeing in South Australia.<sup>74</sup> This paper draws on the work of Prof Seligman and others in the discipline of positive psychology on resilience.

Positive Psychology focusses on the study of human flourishing, and resilience is an important component thereof. Resilience is one of the seven components of the ‘PROSPER’ model, with the other components being Positivity, Relationships, Outcomes, Strengths, Purpose, and Engagement.<sup>75</sup> These seven characteristics are what is needed for human beings to flourish. The PROSPER framework has been used as ‘an organiser for positive psychological interventions that can help people, groups, organisations or communities’.<sup>76</sup> The PROSPER model was based

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<sup>67</sup> Larry Richard, ‘We need a Chief Resilience Officer’ on LawyerBrain, *What Makes Lawyers Tick* (21 August 2013), < <https://www.lawyerbrainblog.com/2013/08/we-need-a-chief-resilience-officer/> >. Bowling makes a similar point, stating that ‘encouraging and promoting well-being beyond merely the treatment of illness will increase professional competence, professionalism, and work satisfaction’. See Daniel S Bowling, ‘Lawyers and their Elusive Pursuit of Happiness: Does it Matter?’ (2015) 7(35) *Duke Forum for Law & Social Change* 50.

<sup>68</sup> Vijayendran, above n 26. According to a study conducted in the USA, 90 per cent of lawyers tested scored below the 50<sup>th</sup> percentile.

<sup>69</sup> It has been proposed that law schools should learn from the science of positive psychology. See Todd David Peterson and Elizabeth Waters Peterson, ‘Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology’ (2009) 9(2) *Yale Journal of Health Policy, Law, and Ethics*.

<sup>70</sup> Toni Noble and Helen McGrath, ‘PROSPER A new framework for education’ (2015) 5(2) *Psychology of Wellbeing* 1.

<sup>71</sup> Southwick, Bonanno, Masten, Panter-Brick & Yehuda, above n 69.

<sup>72</sup> Peterson and Peterson, above n 59, 362.

<sup>73</sup> For a list of his publications, see his curriculum vitae, available from <<https://ppc.sas.upenn.edu/sites/default/files/seligmancv2018.pdf>>. He has published more than 30 best-selling books and hundreds of scholarly publications.

<sup>74</sup> See Martin Seligman, *Building a State of Wellbeing: A strategy for South Australia*, (2013).

<sup>75</sup> Noble and McGrath, above n 70, 1.

<sup>76</sup> *Ibid.*

on the well-known PERMA-V Model developed by Seligman,<sup>77</sup> and has been specifically proposed and adopted as a framework for positive education.<sup>78</sup> Positivity (P) is about optimism, happiness and life-satisfaction. Engagement (E) requires the crafting of more flow experiences. Relationships (R) should involve authentic, meaningful, life-enhancing connections. Meaning (M) includes creating purpose, passion and fulfillment. Achievement (A) includes accomplishment inspired action, and vitality (V) refers to optimal wellness and strong and healthy bodies.<sup>79</sup>

Resilient individuals have built up a set of 'core competencies' that give them 'mental toughness and mental strength, optimal performance, strong leadership and tenacity'.<sup>80</sup> Resilient people are 'less prone to giving up when they experience setbacks'.<sup>81</sup>

## VII Teaching and Developing Resilience

Resilience can be developed in two ways:

- It can develop naturally (spontaneously), without any intervention or program aimed at the developing of resilience<sup>82</sup>, or
- It can be developed by design, through a purposive program or considered actions.

Although some individuals are naturally resilient, or may develop resilience through the trials and tribulations of life, there are advantages in enhancing resilience-development through dedicated programs. The United States Army for example in 2011 adopted a program for the systematic and deliberate development of resilience in the form of the Comprehensive Soldier Fitness (CSF) program.<sup>83</sup> Its three components<sup>84</sup> were 'based on PERMA: positive emotion, engagement, relationships, meaning, and accomplishment — the building blocks of resilience and growth'.<sup>85</sup> Despite some of its limitations,<sup>86</sup> 'tests demonstrate the effectiveness of the [CSF] program in building emotional and social fitness, and some tests demonstrate the positive impact of positive psychology...'.<sup>87</sup> Not all resilience training needs to be as comprehensive as the CSF program to deliver benefits, and findings suggest that 'resilience training, particularly [training initiatives] based on mindfulness and/or cognitive and behavioural skills, may be able to enhance resilience'.<sup>88</sup>

Other examples of successful resilience programs outside the military include resilience development in elite sportspersons<sup>89</sup> and teachers.<sup>90</sup> In workplace settings, for example, the

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<sup>77</sup> The components of the PERMA-V model are: Positivity, Engagement, Relationships, Meaning, Achievement, and Vitality. Seligman originally conceptualised the PERMA Model, and the PERMA-V model was a later adaptation to include the aspect of Vitality. This element was added by Emilya Zivotovskaya, a former graduate student of Seligman, and Seligman has since incorporated vitality into his original model.

<sup>78</sup> See Noble and McGrath, above n 70.

<sup>79</sup> See Seligman, above n 77.

<sup>80</sup> Davis-Laack, Richard, and Shearon, above n 52.

<sup>81</sup> Ibid.

<sup>82</sup> Typically resilience can develop as a response to adversity. See Noble and McGrath, above n 70, 13.

<sup>83</sup> See Seligman, above n 74, 51. The program developed by the United States Army was based on a program originally developed by the University of Pennsylvania. The program was interactive and included short video clips that could be accessed by soldiers on demand.

<sup>84</sup> It consisted of three components: a test for psychological fitness, self-improvement courses available following the test, and "master resilience training" (MRT) for drill sergeants.

<sup>85</sup> Martin E P Seligman, 'Building Resilience', (2011) APRIL 2011 *Harvard Business Review* 103.

<sup>86</sup> The CSF program has been criticised on many grounds, including for not having combatted depression and PTSD in USA Army personnel as well as had been hoped when it was first implemented. It was also extremely expensive.

<sup>87</sup> National Centre for Biotechnology Information, *Preventing Psychological Disorders in Service Members and Their Families: An Assessment of Programs: Chapter 4 Evidence for Department of Defense Interventions for Preventing Psychological Disorders* (2014) <[https://www.ncbi.nlm.nih.gov/books/NBK222171/#sec\\_0151](https://www.ncbi.nlm.nih.gov/books/NBK222171/#sec_0151)>.

<sup>88</sup> Ibid.

<sup>89</sup> See for example Stephen P Gonzalez, Nicole Detling and Nick A Galli, 'Case studies of developing resilience in elite sport: Applying theory to guide interventions' (2016) 7(3) *Journal of Sport Psychology in Action*.

<sup>90</sup> See for example Caroline F. Mansfield, Susan Beltman, Tania Broadley and Noelene Weatherby-Fell 'Building resilience in teacher education: An evidenced informed framework' (2016) 57 *Teaching and Teacher Education* 77.

READY program has been successful in promoting 'psychosocial well-being'.<sup>91</sup> Programs for the intentional development of resilience has also been adopted by educational institutions, including the University of Pennsylvania and Duke University.<sup>92</sup> In Australia, resilience development has also featured in the program adopted by South Australia in 2012.<sup>93</sup> Resilience training also features in legal vocational training. The Australian College of Law, an institution which teaches professional legal training to graduate lawyers for purposes of admission to legal practice, requires of students to complete a compulsory module, which was developed in collaboration with leading law firms, that also includes resilience training.<sup>94</sup> The College of Law has also run a Resilience and Wellbeing in Practice program since 2010 in collaboration with several major national law firms.<sup>95</sup> Resilience training has also been used successfully in law 'incubators'.<sup>96</sup> Further, a recent study concluded that '[r]esilience interventions based on a combination of CBT [cognitive behaviour therapy] and mindfulness techniques appear to have a positive impact on individual resilience'.<sup>97</sup>

## VIII Competitive Mooting as a Way to Develop Resilience at Law School

Participation in competitive mooting provides an excellent opportunity for the development of resilience in law students. Firstly, as explained above, competitive mooting is a form of experiential learning, and therefore well-suited to the development of practical skills and behaviours,<sup>98</sup> including skills such as resilience. Second, the learning environment of members of a competitive moot team is unlike that of their usual LLB or JD classes as it involves small group academic and practical coaching.<sup>99</sup> It is a learning environment where independent learning is the norm, and where, as in practice, students are required to work in a collaborative team environment so as to do well in the competition. It is a learning environment that has much in common with that of a practical legal training program in which positive results were achieved with resilience training.<sup>100</sup>

### A Developing Resilience Naturally Through Competitive Mooting

Competitive mooting naturally provides opportunities for the development of resilience, and it is likely that students will automatically develop resilience incidentally as a consequence of being part of a competitive moot team. There are significant challenges and stressors in moot competitions that present opportunities for the growth and development of resilience, as noted

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<sup>91</sup> See for example Nicola W. Burton, Ken I. Pakenham & Wendy J. Brown 'Feasibility and effectiveness of psychosocial resilience training: A pilot study of the READY program' (2010) 15(3) *Psychology, Health & Medicine*.

<sup>92</sup> Duke University has a course on 'Well-being in the Practice of Law'. Danile S Bowling, 'Lawyers and their elusive pursuit of happiness: does it matter', (2015) 7(37) *Duke Forum for Law & Social Change*, 51.

<sup>93</sup> See Seligman, above n 74.

<sup>94</sup> The College of Law, above n 35.

<sup>95</sup> Ibid.

<sup>96</sup> M Mark Heekin, 'Implementing Psychological Resilience Training in Law Incubators' (2015) 15 *Journal of Experiential Learning* 286 <[http://www.tourolaw.edu/JEL/Articles/vol1-2-15/IMPLEMENTING\\_PSYCHOLOGICAL\\_RESILIENCE.pdf](http://www.tourolaw.edu/JEL/Articles/vol1-2-15/IMPLEMENTING_PSYCHOLOGICAL_RESILIENCE.pdf)>. The author proposes an approach similar to that adopted by the US Army due to certain commonalities he identifies between the practice of law and preparing for combat

<sup>97</sup> Sahbh Joyce, Fiona Shand, Joseph Tighe, Steven J Laurent, Richard A Bryant, Samuel H Harvey, 'Road to resilience: a systematic review and meta-analysis of resilience training programmes and interventions' (2018) *BMJ Open* 7 <<https://bmjopen.bmj.com/content/8/6/e017858.long>>.

<sup>98</sup> See also Heekin, above n 96, 294. The author argues that the best place to include resilience training is in simulated practice programs at universities in experiential settings, or in his words, law incubators. He laments the lack of buy-in from some professional programs, and points out that 'students are young and idealistic and are therefore more likely to take on the resilient qualities necessary for professional life'.

<sup>99</sup> It is small group coaching by a (hopefully) committed coach.

<sup>100</sup> See Tang and Ferguson, above n 26, 46-47. The authors note: 'Team work is not uncommonly a source of stress and conflict. Similarly, a supported environment where mistakes are tolerated, if not encouraged, can facilitate deep learning and professional development, but often in ways which are not entirely foreseeable or controllable. However, such experiences can also be transformed, with guidance from mentors and team members, into useful learning experiences about working with others under pressure'.

above. Situations that arise in the competitive moot experience where students can learn and develop, include:

- having to deal with unknown and complex legal materials and areas of law;
- conducting large volumes of research, and the difficulties encountered whilst researching, for example difficult and sometime fruitless research;
- working closely with team members in stressful situations over an extended period of time;
- developing new skills, e.g. oral advocacy skills, with varying degrees of success;
- experiencing pressure to perform well from team members, coaches and/or universities; in strict and short time-limits;
- the fear of public embarrassment, and the fear of letting the team down;
- actual embarrassment in public or in front of guest moot judges, and actually letting the team down in a competitive situation; and
- the mere duration of a moot competition that can span from 2 to 8 months, where the workload is intense and there are many uncertainties.

Competitive moot can therefore naturally bring out and develop character strengths that are developed by 'significant cognitive, emotional, and physical challenges',<sup>101</sup> such as 'courage, teamwork, optimism, honesty, persistence, leadership, and self-regulation'.<sup>102</sup> This occurs while students negotiate the challenges and stressors through their own efforts, and with the assistance of a coach and their team. Competitive moot also provides an excellent opportunity for the development of grit, an important aspect of resilience. Grit is in essence the ability to passionately pursue long-term goals,<sup>103</sup> which personified a competitive moot which can span many months.

Further, the practice of moot judges giving feedback to students after all practice moots<sup>104</sup> naturally provides opportunities for students to debrief and reflect, important components of building resilience. Students can during the preparation phases see how their knowledge and skills have increased over the weeks or months. The normal trials and tribulations of competitive moot – wins and losses, good moots and bad moots, successful arguments and failed arguments – all contribute to building resilience. Sometimes teams may be eliminated early in a competition, and team members will have to process and deal with their disappointment of not seeing their work of many weeks coming to fruition. In short, there are many occasions in competitive moot where students will have to pick themselves up, dust themselves off, and carry on. Finding that they can do it, develops confidence in the students. The process itself requires students to step up, manage themselves, be positive and carry on. The process of developing resilience can be significantly augmented by a skilled and passionate moot coach, who is willing to engage with the team members' emotions and growth.<sup>105</sup> With a supportive and engaged coach, students will also have the opportunity to debrief and reflect, and can be encouraged, mentored and guided.

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<sup>101</sup> Cornum, Matthews & Seligman, above n 101, citing M D Matthews, *Positive psychology: Adaptation, leadership, and performance in exceptional circumstances* in P. A. Hancock & J. L. Szalma (eds.), *Performance under stress* (Ashgate, 2008).

<sup>102</sup> Ibid.

<sup>103</sup> Cornum, Matthews, and Seligman, above n 101, citing A L Duckworth, C Peterson, M D Matthews, & D R Kelly, 'Grit: Perseverance and passion for long-term goals' (2007) 92 *Journal of Personality and Social Psychology*.

<sup>104</sup> Preparing for a competition requires teams to do many practice moots, often in front of volunteer judges that can include academics, practitioners or alumni. These practice moot judges will generally provide feedback to the students on their performance in oral advocacy, and also on the content of their legal arguments.

<sup>105</sup> See for example Prue Vines, 'Working Towards the Resilient Lawyer: Early Law School Strategies' (2011) Research Paper No 31, University of New South Wales, Faculty of Law Research Series, 8 <<http://law.bepress.com/cgi/viewcontent.cgi?article=1300&context=unswwps-flrps11>>. She laments the fact that law teachers are sometimes unwilling to engage with mental health issues of students, as it does not relate directly to the careers of the academics. Moot coaching may however fall in a different category of academic engagement with students.

## **B Enhancing the Development of Resilience Through Competitive Mooting: Developing Resilience by Design**

Even though competitive mooting will most likely naturally develop resilience in students, there are opportunities for moot coaches to enhance this process intentionally, instead of leaving the development of resilience to chance. There are no (or perhaps very few) opportunities in law school that rival the resilience-building opportunities in competitive mooting and moot coaches can actively leverage these to enhance the development of resilience in students. Moot coaches should be able to embody some of the principles of Positive Psychology into the moot coaching process without too much difficulty.

A good starting point is the skills that according to the American Psychological Association, need to be taught to increase resilience,<sup>106</sup> and the strategies of Positive Psychology to build a resilient mindset. These largely overlap, and can be summarised as follows:

- Employing a ‘strengths-based focus’,<sup>107</sup>
- Practicing a ‘growth mindset (using the inevitable obstacles in life to learn from) as opposed to a fixed mindset (where setbacks are seen as failures),<sup>108</sup>
- ‘Look[ing] for the good” as opposed to fault-finding. This can install neural paths of optimism in [the] brain and allow [a person] to see negative events as temporary and not pervasive’;<sup>109</sup>
- ‘Develop[ing] healthy GRIT (sic) in order to persevere with determination’;<sup>110</sup>
- ‘Incorporat[ing] more meaning and purpose in ... life, which automatically produces greater well-being’;<sup>111</sup> and
- ‘Installing more positive emotions into [the] brain on a regular basis [to mediate] depressive thinking and [promote] greater resilience’.<sup>112</sup>

These identified skills and strategies can be adjusted and applied in a moot coaching environment as suggested below. No empirical study has however as yet been done yet on the effectiveness of these strategies in competitive moot teams, and the suggestions below have been formulated based on a combination of general principles of Positive Psychology and the work of authors on the application of Positive Psychology in legal practice.<sup>113</sup>

### **1 Designing Competitive Moot Participation as an Educational Experience**

Before starting the coaching process, a moot coach can consider how they can facilitate student learning outcomes in the competitive mooting process ‘by creating an optimal learning environment and opportunities to learn specific skills that enhance outcomes and accomplishments’.<sup>114</sup> Consideration should be given to how the team can best be managed not just for competitive and educational outcomes, but also for personal development, and in

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<sup>106</sup> See Emmett, above n 31. She notes that these skills include: defusing negative self-talk, developing a positive attitude to challenges, connecting and maintaining good relationships with others, accepting what is happening in difficult situations, recognising and dealing with thoughts and feelings effectively, practicing mindfulness, developing realistic goals and moving towards them; maintaining self-control; maintaining perspective; taking decisive actions in adverse situations; looking for opportunities of self-discovery; developing self-confidence; and taking care of one’s mind and body. There’s no magic formula, but issues such as the availability of staff and other resources, provision of introductory lectures/subject matter specific orientation, selection of team members, etc should be considered.

<sup>107</sup> See Love, above n 42, 9.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> See Love, above n 42, 9, referencing Hallie Love, ‘The Benefits of Positive Emotions’ (2014) 53(29) Bar Bulletin.

<sup>113</sup> The works cited in this article have been used for this analysis.

<sup>114</sup> Noble and McGrath, above n 70, 5.

particular the development of resilience. It is recommended that the coach be transparent about how the moot experience will contribute to building resilience.

## 2 *Adopting a Strengths-Based Approach and a Growth-Mindset*

Under the PROSPER framework, resilience is developed by focussing on strengths and using a strengths-based approach including the identification of strengths.<sup>115</sup> Recognising the individual strengths that each person brings to the team is important. An approach focussed on identifying the team members' strengths right at the start of the moot competition, can be beneficial as focussing on strengths in conjunction with the adoption of a growth-mindset furthers the development of resilience. Coaches should develop and emphasise a growth mindset in the team members. That means that students should be encouraged to use the inevitable obstacles that will present themselves during the moot competition consciously as opportunities to learn. Further, a growth-mindset allows setbacks and failures to be seen as part of the natural process of growth. This is in direct contrast to a fixed mindset, where any setback is seen as a failure.<sup>116</sup> Seeing setbacks as part of a process of growth help students develop resilience skills. A growth-mindset also allows for the development of 'grit', something which is often seen to be part of resilience.<sup>117</sup> Focussing on their personal strengths and especially on any growth, improvement or development can help students be more optimistic. 'This can install neural paths of optimism in [the] brain and allow [a person] to see negative events as temporary and not pervasive'.<sup>118</sup> A student can use the strengths-based approach and growth-mindset to manage the challenges of legal practice.

## 3 *Developing Positivity*

Richard notes that 'our mindset is the biggest controllable factor in coping successfully with change'.<sup>119</sup> Positivity can be increased through a focus on positive emotions, a positive mindset, positive relationships, positive dialogue, and positive behaviour.<sup>120</sup> Students can be alerted to the extent to which thoughts influence feelings, and feelings influence behaviour. Richard argues that the appropriate ratio of positive to negative emotions needed are 3:1.

Coaches and students on moot teams should also consciously 'hunt for the good stuff'.<sup>121</sup> Students should be helped to look for the good as opposed to just finding fault.<sup>122</sup> The feedback process in mooting – although beneficial for reflection – can result in negativity. Helping students to identify what they did well, even though there is still room for improvement, especially in oral practices, can be very beneficial. A good strategy would be to ask students perhaps at the end of a practice moot, or at the end of a week of research, to identify what they did well, and should continue to do.<sup>123</sup>

Richard recommends a regular personal practice of finding 'three good things' and taking 60 seconds to savour those three good things.<sup>124</sup> He recommends consistent practice over a period of two weeks or more. This type of practice would be easy to build into the work of a moot team, for example by including a standard item such as 'let's track our progress this week' in a weekly debrief session and deliberately celebrating the positive. Innovative moot coaches will no doubt come up with other creative ideas of implementing this recommendation. Opportunities to encourage positivity and the generation of positive emotions should be actively sought.<sup>125</sup> Moot

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<sup>115</sup> Ibid.

<sup>116</sup> Love, above n 42 9.

<sup>117</sup> Richard, above n 43.

<sup>118</sup> Love, above n 42 9.

<sup>119</sup> Richard, above n 43.

<sup>120</sup> Richard notes that these strategies have a positive impact on hormones. See Richard, above n 43.

<sup>121</sup> Richard, above n 43.

<sup>122</sup> Love, above n 42.

<sup>123</sup> Love, above n 42, 9.

<sup>124</sup> Richard, above n 43.

<sup>125</sup> Noble and McGrath, above n 70, 5.



coaches can also be effective role-models of positivity, and use fun and humour in their interactions with their moot teams. Especially in challenging times, students should be encouraged and guided to generate positive emotions as these can reduce depressive thinking and promote greater resilience.<sup>126</sup> It is important to defuse negative self-talk,<sup>127</sup> and although students should acknowledge areas in which they require growth, coaches should provide perspective, emphasise the principles of a growth mindset, and counter negative self-talk. For example, a single poor performance does not make a student a 'bad mooter'. In fact, two or more successive poor moots do not mean that the student will never get it right. Guiding students to avoid catastrophising<sup>128</sup> is an important role for the coach in helping students build resilience. Instead, students should be encouraged to adopt a positive attitude to challenges.<sup>129</sup> In this regard the coach can also model behaviour, for example by acknowledging when the coach does not know the answer to something, and demonstrating how to go about finding an answer. Leading by example can be powerful.<sup>130</sup>

Albert Ellis's ABCD model is a powerful tool that students can use to develop positivity.<sup>131</sup> The ABCD model has been used in the military to develop resilient thinking.<sup>132</sup> Soldiers are taught that Adversity (A), leads to Beliefs (B) about that adversity (resulting in thoughts that are 'heat of the moment' reactions such as 'I am a failure'), that can have emotional Consequences (C) such as persistent negative emotional states. The D in the acronym is for 'Dispel' – the action of quickly and effectively dispelling unrealistic beliefs about adversity. Students should be encouraged to examine their beliefs about adversity. For example, the adversity of having been unable to answer questions in a practice moot, can lead to the belief in the student that they will never be good enough to compete, and the consequence may be that the student withdraws emotionally from the process. Dispelling such an unrealistic belief, by, for example pointing out that there is still enough time to improve, and by emphasising the improvements already made and that can still be made, can assist students to be more resilient. Students can be taught to apply the ABCD formula themselves. The use of strengths, management of emotions and avoidance of negative thinking can be effectively incorporated into the coaching of moot teams. These strategies, if internalised, form part of learning that a student can also employ later in legal practice.

#### 4 *Building Strong Interpersonal Connections*

Richard notes that building resilience in essence requires thinking differently, and connecting more.<sup>133</sup> Building and maintaining strong, positive interpersonal relationships make individuals more resilient, and learning to develop such positive relationships is an important life skill and an important part of building resilience.<sup>134</sup> The coach can help to facilitate good team relationships, but should also encourage students to balance their schedules and successfully negotiate the conflicting demands of their social schedules with friends and family. A positive relationship between the coach and the team should also be fostered.<sup>135</sup>

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<sup>126</sup> Love, above n 42 9, referencing Hallie Love 'The Benefit of Positive Emotions' (2014 35(29) *Bar Bulletin*.

<sup>127</sup> American Psychological Association, *The Road to Resilience* (2018) <<https://www.apa.org/helpcenter/road-resilience.aspx>>.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> See Karen Reivich, Martin E P Seligman and Sharon McBride, 'Master Resilience Training in the US Army' (2011) January 2011 *American Psychologist*. For a handy guide on the ABC model, see Dartmouth University, *Guide 3, Understanding our Response to Stress and Adversity* (undated) <<https://www.dartmouth.edu/~eap/abcstress2.pdf>>

<sup>132</sup> Yezen Nwiran and Seph Fontane Pennock, 'Resilience in Positive Psychology: Bouncing Back & Going Strong', *Positive Psychology Program* (2017) <<https://positivepsychologyprogram.com/resilience-in-positive-psychology/>>.

<sup>133</sup> Richard, above n 43.

<sup>134</sup> See American Psychological Association above n 127. See also Noble and McGrath, above n 70, 5 on PROSPER.

<sup>135</sup> See also Noble and McGrath, above n 70, 5 on PROSPER.

Team members should be encouraged to support each other, including with ‘active-constructive’ responses.<sup>136</sup>

## 5 Focussing on Meaning, Purpose and Goals

Persons display more resilience if they are connected to worthy goals. Fostering the development of a sense of purpose and meaning is important in building resilience and developing realistic goals and moving towards them can help building resilience.<sup>137</sup> Students on moot teams can be encouraged to set well-articulated and realistic team and individual goals, and can be reminded of their goals in difficult times or when team members are faced with difficult choices. Being reminded of why the students have embarked on the arduous journey of a competitive moot will also help them stay positive and build grit. This skill is an important take-away for professional life.

## 6 Developing Grit

Grit is an important component of resilience. The best way to develop grit is to shift to a ‘growth’ mindset, and in that way support the achievement of goals.<sup>138</sup> Moot teams are fertile ground to develop grit and team members can be encouraged to see development and improvement through consistent and rigorous practice and thoughtful feedback.

## 7 Giving Back and Finding Meaning

Finding meaning and purpose is important for resilience, and giving back to the community is a powerful way to do so.<sup>139</sup> Students on a moot team can ‘give back’ by coaching or mentoring other students in mooting, or volunteering in other capacities. Incorporating more meaning and purpose in life automatically produces greater well-being.<sup>140</sup>

### **C The Role of the Moot Coach**

The importance of the role of the coach cannot be overemphasised, and coaches may benefit from special training. Coaches may benefit from learning how to develop more positive relationships with their teams, and responding more effectively for example when interacting with

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<sup>136</sup> Social connection should and can be increased, The use of active constructive responses in discussions are helpful. A handy guide is provided offered by the Positive Psychology Program, ‘Active Constructive Communication: Say “Yes!” to Positive Relationships’ (2016) <<https://positivepsychologyprogram.com/active-constructive-communication/>>. This model is also used in the US Military and endorsed by Seligman. The four styles of responding are:

- *active constructive* (authentic, enthusiastic support),
- *passive constructive* (laconic support),
- *passive destructive* (ignoring the event), and
- *active destructive* (pointing out negative aspects of the event).

Students should be coached to provide active constructive responses to each other. Here’s an example. Student A says that they have finally found the key case on a particular point.

Active constructive response:

- “That’s great! How did you do that? And what does the case say?”

Passive constructive response:

- “That’s nice.”

Passive destructive:

- “I got a funny snap chat from my house mate – just check this out ....”

Active destructive

- “Well you know we still have four weeks left to finish our research and it may not even be the key case.’

Coaches themselves should also focus on providing active constructive responses rather than passive constructive responses.

<sup>137</sup> See American Psychological Association above n 127. See also Noble and McGrath, above n 70, 5 on PROSPER.

<sup>138</sup> As noted above, grit involves passion and perseverance in pursuing important long-term goals. See Richard, above n 43.

<sup>139</sup> See Love, above n 42.

<sup>140</sup> Ibid, 8-9.

the team and giving feedback (for example, learning to provide active constructive responses to positive work by the team/team members).<sup>141</sup> Coaches may also benefit from learning how to give effective praise.<sup>142</sup> For example, when a person giving feedback mentions specifics (as opposed to just saying something general like 'Good job!'), the recipients of the feedback will know that the leader 'was paying attention and that the praise is authentic'.<sup>143</sup> Coaches should therefore articulate specifically what the student did well.

Coaches can also benefit from understanding how important their role is. Coaches should challenge and support students at the same time. A coach or leader should make sure that they know the team members as individuals, and that they are given feedback on how they perform as they develop.<sup>144</sup> Fostering such a climate helps a student develop resilience.

#### **D Limitations, Constraints and Further Research Opportunities**

There are however limitations to the benefits that can be obtained from resilience development in competitive mooting. One of the key limitations is scale. As only a proportionately small number of students succeed in being selected for competitive moot teams, the benefits of competitive mooting are only available to a relatively small number of law students. There are however ways to provide opportunities to a larger group of law students by providing competitive opportunities that do not depend on team selection, allowing them to share in the benefits at least to some extent. Many universities (sometimes through the law student associations) hold 'in-house' moot competitions for their students. Leveraging the benefits of competitive mooting in such situations by introducing some of the elements of resilience building may broaden the availability of the benefits to a larger number of students.

A second limitation is a potential lack of resources, including funding for competitive moot teams, but also the availability of suitably-skilled moot coaches. The purpose of the annexure to this article "Tips for moot coaches to enhance resilience building in moot team members: the nutshell version" is to provide some general and not overly technical suggestions to law teachers who may be subject matter experts, but have been tasked with coaching a moot team for a competition. These are faculty staff who may not have the time to delve too deeply into the why's and how's of building resilience, but would benefit from practical tips. This list of tips aims to put resilience 'on the radar' of moot coaches, and to at least make them aware of the opportunity to build resilience in the students on their team. It should however be acknowledged that some moot coaches may not be particularly resilient individuals themselves, and may not all have adequate responses to adversity.<sup>145</sup>

A third limitation is that students' exposure to competitive mooting may be too short to develop substantial benefits. As students may only participate in one competitive moot during their law school years, that perhaps only spans a couple of weeks (some domestic moots only run for some six weeks),<sup>146</sup> it can be argued that there may only be a small amount of development that takes place. Nevertheless, the experience and the memory of that experience may be sufficient to have a lasting impact.<sup>147</sup>

Additionally, a further limitation may be the concerns have been expressed as to whether resilience training is not something that is solely within the purview of vocational legal educators.

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<sup>141</sup> Seligman above n 85, 106.

<sup>142</sup> For example coaches may find the work of the Stanford psychology professor Carol Dweck on effective praise helpful. See for example Carol Dweck, 'Using Praise to Enhance Student Resilience and Learning Outcomes', American Psychology Association (2018) <<https://www.apa.org/education/k12/using-praise.aspx>>.

<sup>143</sup> Seligman above n 85, 106. This model has been effectively used in the military.

<sup>144</sup> See Dweck, above n 142.

<sup>145</sup> See Positive Psychology Program, above n 136.

<sup>146</sup> For example the QUT Torts Moot and the Australia New Zealand Intervarsity Moot on Animal Law.

<sup>147</sup> The memory of a past positive experience can be of assistance and it has been noted that if a person had 'positive experiences that [they] actively remember, when [they] experience difficulties, such memories can sustain [them].' See Emily Morrow, *Resilience, Self-management and the Practice of Law* (7 May 2015) New Zealand Law Society <<https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-864/resilience,-self-management-and-the-practice-of-law>>.

Resilience training can however also be accommodated in professional (i.e. not vocational) legal education. James<sup>148</sup> argues that professional identity formation of law graduates need not only include those fostered by traditional approaches to teaching law, such as 'thinking like a lawyer', adversarialism, and individualism. This is a narrow approach to the conceptualisation of a professional legal identity, and could be replaced by a 're-envisioning and reinvention of legal education' that shifts the emphasis in professional identity formation in favour of empathy and resilience.<sup>149</sup> There should be time 'developing law student emotional intelligence as well as strategies to address law student psychological distress'.<sup>150</sup> It has already been identified that law schools should develop resilience as part of the soft skills that lawyers should have,<sup>151</sup> although some authors have warned that a big shift will be required.<sup>152</sup>

A further limitation is the lack of empirical research into the area of the effects of participation in competitive mooting on graduate outcomes generally, and the building of resilience in particular.

There are however a number of future research opportunities. The author is currently preparing for an empirical research project among recent law graduates who have participated in competitive mooting to assess the extent to which the development of general professional skills are attributed to their participation in competitive mooting. The study is also envisaged to include research on the perceived development of resilience through participation in competitive mooting, and research on the strengths and deficits in the coaching received during the participation in competitive mooting. The goal of these research projects will be to provide guidance to law schools on the pedagogical outcomes of competitive moots, information that may affect the funding of moot competitions. A further goal is to assist moot coaches in improving their coaching skills in order to increase the range of skills developed through mooting, including the capacity for resilience, which is required for a career in law. Research can and should also be extended to include potential benefits from the experience of resilience coaching in other disciplines, for example resilience training in sports and the military.

## IX Conclusion

Introducing a focus on resilience in competitive moot coaching supports existing initiatives in law and legal education, and prepares students well with life skills required in legal practice in future.

Competitive mooting is highly suitable for teaching law students to be prepared for the requirements of resilience in legal practice. In particular, competitive mooting as experiential learning in a mock dispute resolution setting provides a unique pedagogical tool that is ideally suited to the development of resilience in law students. The development of resilience will be of great benefit to legal practitioners in the 'new law' paradigm, where the existing challenges of legal practice will most likely be accentuated as a consequence of new challenges. Competitive mooting is not a magic bullet in the development of resilience in all future legal practitioners, but it is perhaps one flame that can be lit in the darkness.<sup>153</sup>

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<sup>148</sup> See James, above n 52.

<sup>149</sup> James above n 52, 205.

<sup>150</sup> James above n 52, 205 and 209.

<sup>151</sup> Kate Galloway and Peter Jones, 'Guarding our identities: the dilemma of transformation in the legal academy' (2014) 4(1) *QUT Law Review* 18 - 19: 'In addition to innovations in legal education that teach law in broader contexts and embed skills in legal education, there has been an increasing call for embedding 'soft skills' in the law degree. Soft skills are recognised as crucial for the making of a successful legal practitioner. They include 'the ability to build and sustain interpersonal relationships ... across borders and languages and cultures ... [as well as] resilience, self-awareness, and the ability to take multiple perspectives'.

<sup>152</sup> Galloway and Jones, above n 151, 25.

<sup>153</sup> With reference to the catchy title of the paper of Rachael Field and James Duffy, Better to Light and Single Candle than to Curse the Darkness: Promoting Law Student Well-Being through a First Year Law Subject (2012) 12(1) *QUT Law & Justice Journal*.

## **X Annexure: Tips for Moot Coaches to Enhance Resilience Building in Moot Team Members: The Nutshell Version**

1. Discuss with students early on in the process that a competitive moot presents the opportunity of building resilience. Encourage students to embrace the opportunities, and at the end reflect on how they developed resilience.
2. Encourage team members to identify and share their personal strengths early on in the process, ideally when the team first starts to collaborate when devising clarification questions. Reinforce that all strengths are equal in value. Discuss how each member's strengths can and will be used. Follow through and use those strengths when the opportunity arises. Some students may have good document management strengths; others may excel at executing complex searches on electronic databases.
3. Teach the ABCD formula early on (actions – beliefs – consequences - dispel), preferably at the first opportunity when the team faces a challenge, or encounters some adversity.
4. Encourage and facilitate social interaction in the team among team members and outside the team. Invite parents and friends to occasionally attend selected practice moots.
5. Ensure a sense of social connectedness by regularly spending time with the team. Positive relationships with the coach foster resilience and also lead to the opportunity for mentorship relationships to develop.<sup>154</sup>
6. Establish and encourage volunteering among moot team members. Moot team members could for example mentor other more junior students in mooting.
7. Implement reflective practice as part of the normal functioning of the team. Ensure that reflections (e.g. post moot debriefs, post submission 'post-mortems') follow a positivity to negativity ratio of 3:1 – three positive statements for every negative statement. Give hope.<sup>155</sup>
8. Redefine success. Discourage students from defining success as winning, but rather as reaching certain measurable goals that are under their control.
9. Demonstrate resilience. War stories of past teams and how they overcame obstacles can be useful.
10. Use positive thought patterns as mantras (i.e. using motivating phrase repeatedly)<sup>156</sup> Some ideas of mantras for teams include 'Don't play small', 'There is no such thing as perfection', and 'Go for it'.<sup>157</sup>
11. Point out thinking traps to avoid, like jumping to conclusions, mind-reading, navel-gazing and self-blame, and blaming others.<sup>158</sup>
12. Help students find the icebergs – investigate the underlying beliefs of students that may fuel out-of-proportion emotions and reactions.<sup>159</sup>
13. Reinforce the following four characteristics as 'four things resilient lawyers do differently'"
  - 13.1 They stay inspired;
  - 13.2 They think differently;
  - 13.3 They use stress as an opportunity to connect with others; and
  - 13.4 They give more than they take in relationships.<sup>160</sup>

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<sup>154</sup> New South Wales Premier's Department, Practical Guide Mentoring Made Easy 3<sup>rd</sup> edition (2004) <[https://archive.dpc.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0016/19330/Mentoring\\_Made\\_Easy\\_A\\_Practical\\_Guide\\_t\\_hird\\_edition.pdf](https://archive.dpc.nsw.gov.au/__data/assets/pdf_file/0016/19330/Mentoring_Made_Easy_A_Practical_Guide_t_hird_edition.pdf) >.

<sup>155</sup> 'Martin and Rand recently asserted that "law students need hope"'. See Field and Duffy, above n 153, 146.

<sup>156</sup> Fairuz Abdullah and Annabrooke Temple, 'Train your Brain Resilience Tools for Lawyers' on San Francisco Attorney Magazine, *Legal by the Bay* (Summer 2018).

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> See Davis-Laack, Richard and Shearon, above n 52.