

Reality Programming Meets LRW: The Moot Case Approach to Teaching in the First Year

Kenneth D. Chestek*

TABLE OF CONTENTS

I. INTRODUCTION	58
II. WHY A "MOOT CASE"?	60
III. WHAT IS A "MOOT CASE"?	62
A. <i>Introduction</i>	62
B. <i>Format</i>	64
C. <i>A Sample Syllabus</i>	66
D. <i>Results</i>	68
IV. SHOULD YOU TRY THIS?	70
A. <i>Advantages</i>	70
1. Students Can "Try On" the Role of the Attorney	70
2. Students See the Legal Problem in Helpful Context	70
3. Students Gain a Sense of Ownership of the Problem	71
a. Assignments are Completed Timely	72
b. Students Feel They Are Representing a Real Client	72
c. Students Gain a Sense of Camaraderie	72
4. Students are Encouraged to Work and Learn Collaboratively and Cooperatively	72
5. Students Must Learn to Deal with Competitors with Civility	73
6. Ethical Considerations Can Be Realistically Introduced and Analyzed	74
7. It's Fun!	75
B. <i>Disadvantages</i>	76
1. There Is Less Class Time Available to Teach and Practice Traditional Writing and Research Skills	76

*. Clinical Assistant Professor of Law, University of Michigan Law School. This Article is based upon a presentation by the author at the Tenth Biennial Conference of the Legal Writing Institute in Knoxville, Tennessee, in May of 2002. I thank Grace Tonner and Phil Frost, respectively the director and associate director of the Legal Practice Program at Michigan, for allowing me the freedom to approach teaching the Legal Practice course in this way, as well as their support and helpful input as I "worked out the bugs" in the technique. I also thank my colleagues Ted Becker and Mark Osbeck for their insightful comments on an earlier draft of this Article.

2. The Professor Must Be Flexible as Students Come Up with Ideas She Had Not Thought About	77
3. It is a Lot of Work	78
a. For the Professor	78
b. For the Students	78
4. A Poorly-Selected Moot Case May Be Too Much for First-Year Students	79
5. The Method is Litigation-Centric, but Many Students Will Not Become Litigators	79
6. Not Every Student Will Experience the Case in the Same Fashion, Potentially Leading to Claims of Lack of Fairness in Grading	81
C. <i>Suggestions About Implementation of the Method</i>	81
1. Define Your Goals Clearly	81
2. Prioritize Your Goals	82
3. Communicate Your Goals to Your Students	83
4. Provide Time for Reflection and In-Class Evaluation	83
5. Problem Selection is Key	84
V. CONCLUSION	84
SELECTED BIBLIOGRAPHY	86

I. INTRODUCTION

Let me stake my claim clearly, up front: a course in legal analysis, writing and research¹ is the most important course law students will take during their first year, and possibly in their entire law school career. This course builds the foundation not only for good analytical skills during law school but also for sound lawyering in the “real world” of summer clerkships and post-graduation jobs. Until that foundation is properly laid, anything built upon it (such as a legal career) will be unstable.

Because the legal writing course is taught in such a different way than other first-year classes, some students think of it as an anomaly, unworthy of the same level of attention as the other more “substantive” courses. Besides, it is much more interesting for a first-year student to debate the public policy behind the felony-murder rule than to learn how to write legal citations in proper Bluebook or ALWD format. The challenge for the legal writing professor, therefore, is to find a way to capture and retain the attention of first-

1. Although the term “legal analysis, writing, and research” is not the traditional name for the first-year course covering these skills, I choose to use this term because this is the actual sequence in which the skills are usually taught. I will use the more conventional shorthand “LRW” in this Article to mean the same thing.

year students, while imparting the skills they will need upon entering the profession. Connecting with today's students, who grew up in the age of computer games and MTV, may require some new and innovative teaching methods.²

This Article suggests the traditional skills that serve as the focus of most first-year legal writing courses (legal analysis, predictive memo writing, persuasive writing, and legal research) can be taught in an engaging way by tying all or most of the assignments into a single problem, which the students then work on all year as if they were lawyers. Using the "moot case" technique suggested in this Article, the teacher can introduce first-year law students to a wider range of lawyering skills beyond traditional skills. By assigning one section to represent one side of the case and another section to represent the other side, the students can gain a broader sense of what it means to represent a client from the inception of a case and to argue a case against a colleague (classmate) on a professional level. It also provides a sense of the context in which real legal writing is done in a law office. By doing so, the single-problem, or moot case, approach to first-year legal writing addresses students' need to see the real-world application of what they are learning. It also gives them a vehicle for some friendly competition with classmates, and thus holds their attention more completely than the more traditional approaches to the course.

Part II of this Article briefly describes the rationale for attempting to teach the first-year LRW course on the basis of a single "moot case." Part III describes the technique in some detail, while Part IV discusses some of the significant advantages and disadvantages of the method, ending with some recommendations for professors who decide to implement this teaching method.

2. One "Generation Xer", a former Wall Street lawyer, has written a book for the business manager seeking to connect with Generation X employees. BRUCE TULGAN, *MANAGING GENERATION X* 17-18 (2000). His basic premise, that the "Baby Boom" generation of corporate managers misunderstand the social climate in which Generation X grew up, and therefore have difficulty managing young workers (defined broadly as anybody born after 1963), may be useful by analogy to professors in the law school classroom. *See id.* Tulgan argues that because Generation Xers grew up in an era of rapid technological and social change, they define themselves

in terms of [their] own creative abilities. Since childhood [they] have found [their] existential proof by defining and solving for [themselves] the problems of everyday life, from making frozen dinners in the microwave when [their] parents had to work late, to making friends in a new school when [their] parents moved, to figuring out the challenges of a new video game to keep [them] company when [they] were alone.

Id. at 48-49.

II. WHY A "MOOT CASE"?

In recent years, scholars have debated the continuing vitality of the traditional Socratic, case-centric method of legal education.³ Some have suggested that it is based on outdated concepts of what students need and how they learn, and should be replaced (either selectively or wholesale) with problem-centered learning or other devices (such as simulations).⁴ It is not my purpose to enter the debate that is largely moot for the legal writing professor.⁵ It is very difficult to conduct a Socratic dialogue on the proper form of citation, or when a researcher might want to use the Decennial Digest rather than a state-specific digest, for example. We must of necessity employ other methods to teach, at least for significant portions of the subject matter we cover.⁶

3. See, e.g., Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 352 (1998); Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654 (1984); Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 518-19, 532-33 (1991); David D. Garner, Comment, *The Continuing Vitality of the Case Method in the Twenty-First Century*, 2000 BYU EDUC. & L.J. 307, 323-24.

4. Cynthia G. Hawkins-Leon, *The Socratic Method-Problem Method Dichotomy: The Debate over Teaching Method Continues*, 1998 BYU EDUC. & L.J. 1; Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 244-45 (1992). The Journal of Legal Education recently devoted half of one issue to a "Symposium on Simulations", in which various professors described how they used simulations in traditional courses. See Symposium, 45 J. LEGAL EDUC. 469 (1995). The California Western Law Review also devoted an entire symposium issue to the subject of *Conceiving the Lawyer as Creative Problem Solver*, and included a number of articles about incorporating problem-solving teaching techniques into the law school curriculum. Symposium, 34 CAL. W. L. REV. 267 (1998); see also Carol R. Goforth, *Use of Simulations and Client-Based Exercises in the Basic Course*, 34 GA. L. REV. 851 (2000) (describing the use of simulation exercises in the basic business associations course); Jonathan M. Hyman, *Discovery and Invention: The NITA Method in the Contracts Classroom*, 66 NOTRE DAME L. REV. 759 (1991) (describing the use of simulations in a first-year contracts class); Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solvers*, 32 AKRON L. REV. 107 (1999) (describing an elective first-year course using simulations to find creative solutions to legal problems); Thomas A. Robinson, *Simulated Legal Education: A Template*, 42 J. LEGAL EDUC. 296 (1992) (describing the use of simulations in an estate planning course); Steven J. Shapiro, *Teaching First-Year Civil Procedure and Other Introductory Courses by the Problem Method*, 34 CREIGHTON L. REV. 245 (2000) (describing the use of the problem method in first-year civil procedure classes).

5. For an excellent survey of existing literature on incorporating skills training into traditional law school courses, see Arturo López Torres, *MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 NEB. L. REV. 132 (1998).

6. Of course, most professors of LRW do use a Socratic dialogue for some things, especially early in the course when teaching legal analysis, reasoning, and case synthesis.

Research suggests that active learning is almost always a more effective way to learn than passive learning.⁷ The two principal methods of teaching in most law school classes, Socratic dialogue and problem-solving, are active learning techniques because both require students to affirmatively engage and work with the material, rather than sit passively and listen to lectures.⁸ Legal writing courses typically use active learning techniques by requiring students to write frequently and participate in critiquing. But is there more we can do to foster active learning in the legal writing classroom?

The typical legal writing class is a far different kind of experience for the students than any of their doctrinal classes. In the doctrinal classes, students read cases and then engage in a dialogue with the professor to force students to analyze each case, discern the rationale for the rules enunciated in the cases, then assimilate that understanding into a base of knowledge of similar legal rules. This work is done at a high level of abstraction, so students learn not merely what a particular case holds, but also what principles of law were applied to support that holding.

The legal writing class requires a more practical approach. It is insufficient for students to master theoretical principles of what good legal writing ought to look like or where answers might be found; students must actually learn and apply the principles of good analysis, research, and writing.

While some similarities remain between what students do in the legal writing classroom and the doctrinal classroom, there are important differences as well. The doctrinal professor and the legal writing professor both use case law, but for different pedagogical purposes. Where the doctrinal professor uses cases to help students draw inferences about the substantive rules and principles of the law itself; the legal writing professor uses cases to help students learn how to think about and understand legal principles in general. Thus, while the doctrinal professor focuses more on the *ratio decidendi* of the case, the legal writing professor focuses more on the analytical *process* that the

7. Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 402 (1999). The author suggests that learning styles exist on "a continuum of increasing levels of activity." *Id.* at 401. On one end of the spectrum students sit passively in class listening to lectures. *Id.* As students become more engaged in learning, they take notes, question what they hear, participate in class, and organize the concepts they are learning. *Id.* Professor Hess suggests that the most active end of the continuum is reached when students "discuss concepts or skills, write about them, and apply them in a simulation or in real life." *Id.*

8. *But see* Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. COOLEY L. REV. 201, 206 (1999). Professor Randall points out that, because "even the best of socratic questioners can only actively and effectively engage four to eight students per fifty minutes. . . . within the typical socratic classroom environment, most students are passive participants in the learning process." *Id.*

court used to reach its decision.

This difference suggests that it may be advantageous for the legal writing professor to approach cases in a different way. While it may be sufficient for a doctrinal professor to focus on the result of a case, the process orientation of a legal writing professor is better served by engaging in a broader study of how courts decide cases.

Studying the law by reading appellate decisions is akin to a horticulturalist studying horticulture by examining dormant or dead plants in the wintertime. The horticulturalist may learn something from studying the dead leaves, branch structure, roots, seed heads, and other remains of the plant; she may even learn a great deal more by studying many similar plants in relation to each other and drawing some inferences about how those plants grew. Yet, her understanding of each plant would be enhanced by observing the plant through its entire life cycle, from germination in the spring, through its early growth, blossoming, and eventual withering and death.

The law student can also gain much from studying the entire “life cycle” of a lawsuit. The reported decision is a dead thing; it memorializes the remains of a living lawsuit between real clients. How much more might a student learn if she studied the germination of the case (when the client first arrives in the law office); watched it grow (as the lawyer does research to determine the legal issues and possible remedies); watched the case adapt to different growing conditions (as the opposition files motions or seeks to defeat the claim); watched the case bloom (in trial and argument); and then saw how the fruit produced by the case might be harvested (through negotiation and settlement).

The “moot case” approach to LRW attempts to give students a complete view of how a case develops. This approach shows students how lawyers handle cases. By engaging in the actual process of developing a case from its inception, the students also work actively with the material, and thereby learn more easily the skills they will need in the actual practice of law. It fosters student cooperation and collaboration and adds an element of competition with fellow students, which improves students’ motivation to learn. Finally, it provides a context for learning. Students can see immediately why research and writing skills are necessary and how they are used to solve problems in the “real world” of practicing law.

III. WHAT IS A “MOOT CASE”?

A. *Introduction*

A traditional first-year legal analysis, writing, and research course usually begins with a study of legal analysis and proof. It then proceeds through predictive writing, research, and persuasive writing and concludes with an oral

argument exercise known as “moot court.” In most cases, the “moot court” assignment is an appellate-level proceeding based on a fact pattern created by the professor and given to the students as an appellate record.⁹

One problem with the traditional approach¹⁰ is that it is highly unrealistic. Very few lawyers ever encounter a case for the first time at the appellate level. In most cases, the lawyers arguing the cases in appellate courts have lived with the case since the client first hired the lawyer. By representing that client from the day he walks in the door, through the trial and the appellate processes, the lawyer has a deep understanding of the real issues the case presents.¹¹ No moot court exercise can replicate that understanding.

The “moot case” approach is designed to address this shortcoming. By introducing students to the case early in the year and having them work through the entire case from start to finish, students see how cases develop and change. By participating actively in the development of the entire case, students gain a sense of ownership of the problem, which translates into a better understanding of the issues involved and better writing and oral advocacy.

The concept is simple: study one case during the course, from start to finish.¹² In doing so, students will learn not only the traditional LRW topics

9. The Association of Legal Writing Directors (“ALWD”) and the Legal Writing Institute (“LWI”) conduct an annual survey of legal writing programs, gathering data about the curriculum. In the 2002 survey, ALWD and LWI asked responding schools which of fifteen different types of writing assignments were incorporated into the curriculum for the required LRW program. The three most common assignments were “office memorandum” (150 of 154 schools reporting, or 97.4%), “appellate briefs” (126 of 154, 81.8%) and “appellate brief argument” (115 of 154, 74.7%). ASS’N OF LEGAL WRITING DIRS. & LEGAL WRITING INSTITUTE, 2002 SURVEY RESULTS 7-8, available at www.alwd.org (last visited Nov. 6, 2002) [hereinafter ALWD/LWI 2002 SURVEY]. None of the other twelve choices were used in more than 50% of the reporting schools. *Id.*

10. By traditional approach I mean a LRW course that teaches persuasive writing primarily through an appellate moot court problem, disconnected from prior work in the course. Since nearly 82% of the schools responding to the 2002 ALWD/LWI survey report assigning appellate briefs, it is fair to say that this is the predominant method of teaching persuasive writing. See ALWD/LWI 2002 SURVEY, *supra* note 9, at 7-8.

At University of Michigan Law School, most of the LRW faculty use trial-level problems in conjunction with other skills training, such as client interviews.

11. This deep understanding has significant implications for the persuasive writer. A writer who is intimately familiar with the real people involved in a conflict will probably be able to write with more passion than a complete stranger who comes to the case late and must rely only on a dry written record. Cf. Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, 7 CLINICAL L. REV. 123, 126-27 (2000) (identifying “generating passion in our students” as one primary achievement of clinical education).

12. This method is not unique. Cleveland-Marshall College of Law at Cleveland State University, for example, has, for a number of years, taught a course in pretrial practice to upper-level students, using very similar techniques. See Lloyd B. Snyder, *Teaching Students*

(analysis, writing, and research), but will also be introduced to broader topics such as client and witness interviews, framing issues and drafting pleadings, negotiations, and trial tactics and strategies.¹³ The technique also creates excellent opportunities to introduce students to real-world ethical dilemmas that lawyers routinely face and gives students a sense of what it is really like to practice law, while still focusing on the core skills of legal analysis, research, and writing.

B. *Format*

I have used the “moot case” format to teach first-year students, and found it to be an effective way to hold student interest throughout the semester. I teach two sections of a first-year course, called Legal Practice, arbitrarily assigning one section to be a law firm representing the plaintiff, and the other section to represent the defendant. I generally play the role of the senior partner in both firms, and my teaching assistants play the role of senior associates. Class members thus become junior associates in the law firms, to whom most research assignments flow.¹⁴

How to Practice Law: A Simulation Course in Pretrial Practice, 45 J. LEGAL EDUC. 513, 513 (1995). The University of Pennsylvania also offered an elective first-year course making extensive use of simulations. See Lerner, *supra* note 4, at 112. What is unusual about the “moot case” technique described herein is the application of this method to the required first-year course in legal analysis, writing and research.

13. An American Bar Association report on the state of legal education identifies ten “Fundamental Lawyering Skills” that the commission argued should be addressed by legal educators: (1) problem solving, (2) legal analysis and reasoning, (3) legal research, (4) factual investigation, (5) communication, (6) counseling, (7) negotiation, (8) litigation and alternative dispute resolution, (9) organization and management of legal work, and (10) recognizing and resolving ethical dilemmas. AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION; NARROWING THE GAP 135 (1992) [hereinafter MACCRATE REPORT]. The moot case technique incorporates most of these skills into the LRW course.

For an excellent discussion of the pedagogical pros and cons of introducing additional skills into the traditional first-year LRW course, see Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 269-84 (1996).

14. University of Michigan Law School’s first-year, two-semester required course, called “Legal Practice I and II”, is defined more broadly than the first-year courses at many other schools. As the course name implies, my colleagues and I see the course as encompassing more lawyering skills than just the traditional skills of analysis, writing, and research. Although each faculty member is free to design his or her own syllabus, most of us cover fact investigation, client interviewing, negotiations, and other skills. Most of us also divide our classes up into smaller “law firms” or other groupings to allow students to work collaboratively with each other on smaller assignments, and incorporate “presentations to the senior partner” or other simulated law-firm-like activities into our classes.

In developing the case, I choose a fact pattern taken from a real case, although I modify the facts as necessary to create a relatively balanced fact pattern (to give both the plaintiff and defendant law firms reasonable arguments). I like to choose cases that did not result in any reported decisions so no student will stumble upon the “answer” in doing research. The cases may be set in any jurisdiction.

During the course, I reveal the facts in stages, akin to the development of a real case. For example, the first few assignments might be based upon a fictional memo from the senior partner in which the partner reports that a client called with a question. The client provides sketchy facts, sufficient only to set up the legal issue that the student lawyers will research and write about.

As the semester progresses, more facts are revealed, but only as the students ask. For example, early in the second semester, when the course turns from predictive writing to persuasive writing, the client may appear in class to be interviewed, either by the senior partner, the senior associates, or the junior associates. The client reveals only what a client might be expected to know, which may include the names of other relevant witnesses. Those witnesses are also interviewed and, if necessary, deposed by the student lawyers. This allows them to have a stake in the development of the record upon which their persuasive writing will later be based.

The first time I taught the course in this manner, I asked class members to play “witnesses.” The second time I recruited acting students from the undergraduate theatre department, who were assigned to play roles as part of a drama class.¹⁵ In both cases, I provided the actors a character information sheet which specified a basic personality for each witness, as well as a list of relevant and irrelevant information known by the witness. The actors had to develop the characters based upon the sketches and improvise answers to often unpredictable questions posed by the student lawyers.

In using this technique, students were able to watch the case develop as it would in a real law office. When students began interviewing and deposing the witnesses, a great deal of information came to them—some of it was conflicting and much was irrelevant. Much in the way practicing attorneys operate, the students had to sift through all this undifferentiated data to make decisions about which facts were legally relevant, which had persuasive value, and which could simply be discarded.

The “record” developed through this method, including documentary evidence which I created and depositions taken by the students, formed the basis for the dispositional phase of the case. At this stage, the students had to

15. The theatre students received credit for their drama class. From their perspective, because they only had a basic character personality and a general list of information, it provided excellent training in improvisational theatre.

write briefs in favor of or in opposition to some dispositive motion, either a motion for summary judgment or a post-trial motion. Each student was paired with an opposing attorney in the other section. They exchanged letters during the discovery phase of the case. Then, during the dispositional phase, they exchanged briefs and argued the merits of the case. Finally, they were assigned to negotiate a settlement within parameters specified by the senior partner.

All of the traditional first-year writing assignments were incorporated into the moot case. A sample syllabus showing how these assignments fit within the structure of a case is set forth in the next section.

C. A Sample Syllabus

A full-year course taught on the moot case method might look like this:

TABLE 1 — A SAMPLE SYLLABUS¹⁶

Fall Semester:

WEEK(S)	TOPIC	SKILL(S) TAUGHT	ASSIGNMENT
3 to 5	Legal analysis	Synthesis and legal analysis; writing	Predictive memo (closed universe memo relating to some preliminary or tangential aspect of moot case)
6	Introduce additional facts of moot case	Issue spotting	
7 to 10	Discuss legal issues arising out of moot case (sharpen analytical skills)	Issue spotting; legal analysis; research; writing	Predictive memo (open universe research memo)

16. This model assumes two thirteen-week semesters and covers only those assignments directly relating to the moot case problem. It also breaks down into the traditional categories of teaching objective or predictive writing in the fall semester and persuasive writing in the second semester.

Fall Semester:

WEEK(S)	TOPIC	SKILL(S) TAUGHT	ASSIGNMENT
11	Writing to non-lawyers	Writing	Letter to client (based upon predictive research memo)

Winter Semester:

WEEK(S)	TOPIC	SKILL(S) TAUGHT	ASSIGNMENT
1-2	Fact investigation	Interviewing; oral communication	Client/witness interviews
3	Develop legal theories	Writing; legal analysis; persuasion	Letter to opposing counsel (staking out initial positions in moot case)
4	Drafting	Legal analysis	Drafting pleadings
5	Discovery	Fact research; persuasion	Interrogatories and/or depositions
6 to 7	Persuasive writing	Writing; research; persuasion	Short persuasive memo on preliminary motion/side issue in case
8 to 11	Persuasive writing	Writing; research; persuasion	Full brief on merits of claim (e.g. brief in support of or opposition to summary judgement, etc.)
12 to 13	Oral advocacy	Persuasion; oral communication	Oral arguments
12 to 13	Negotiations	Negotiations; research; persuasion	Settlement negotiation

The issues for the writing assignments depend upon the problem selected.

For example, the closed universe assignment in the first semester could be a basic legal issue about whether a cause of action exists under the rudimentary fact pattern. The research memo might be a collateral issue or a different theory of recovery based on some additional facts revealed by the senior partner. In the second semester, the first persuasive writing might be a brief on some procedural issue arising out of the case; for example, a motion to disqualify counsel, a discovery issue, or perhaps an issue relating to preliminary injunctive relief.

To provide a measure of realism as well as to insure that fresh research assignments are required for different assignments, the initial case evaluation based upon the sketchy facts might suggest three or four related causes of action.¹⁷ As students research law and investigate facts, it may turn out that one or more of the causes of action are not viable, leaving only one or two significant legal issues at the disposition stage late in the year. This technique makes for very interesting class discussions; students need to analyze and re-analyze the case as it develops and make informed choices about how the case should proceed. Once again, students have a sense of participating in the development of a real case, and can confront the legal and ethical issues that lawyers encounter daily in the real practice of law.

D. *Results*

The effectiveness of this model is hard to measure. There is anecdotal evidence, however, that the students enjoy the class. That alone may be sufficient reason to use this method.

Students frequently comment on their end-of-year evaluation forms that they enjoyed the moot case and learned a great deal during the course.¹⁸ The

17. For example, the first year I taught the course using this method, I created an employment discrimination problem in which a female soccer coach was fired under circumstances that led her to believe she was the victim of gender discrimination. The problem was based upon Pennsylvania law. Students were asked to research one of four possible theories of recovery: (1) an employment discrimination claim based upon Title VII; (2) a simple wrongful discharge claim based upon state law; (3) a claim under the Pennsylvania Equal Rights Amendment; and (4) a common-law claim for libel and/or slander. After the initial memoranda were written, I handed out the best from each of the four topics to the entire class, and used these memoranda to lead a discussion about which theories were viable, what additional facts we needed to make that decision, and ultimately which of the theories the plaintiff should plead.

18. In the course evaluations, the students must agree or disagree with various statements on a five-point scale, with 5 being "strongly agree" and 1 being "strongly disagree." In the Winter 2002 end-of-year student evaluations, out of 37 responses, 31 students either agreed or strongly agreed with the statement "I learned a great deal from this course," while only two disagreed or strongly disagreed with this statement.

end of the semester, a high-stress period for students, is usually a “dead” period for LRW courses, but students in my classes seemed highly engaged in the moot case as it headed for the final showdown of oral argument. Students report that the moot case becomes a favorite topic of conversation in the dining halls around the end of the second semester. They enjoy debating the merits of the moot case with both their law firm colleagues and adversaries. Several students commented that watching the case develop from the beginning, participating in the development of the case, and sticking with one client throughout the year, gave them a sense of representing a real client and a higher degree of motivation to do a good job.

Over the past two years I have received numerous student comments about the moot case technique, a sampling of which follows:

- *The moot case was great Oral arguments were lots of fun—they showed the case could go either way and that the case was something people could really get into.*
- *Although the work maybe should have given us 3 credits instead of 2, I definitely feel like I know a lot more about the nuts and bolts of practice*
- *I really enjoyed the moot case.*
- *Format of class was great—taking a case from beginning to end was a great way to teach [the legal practice course].*
- *I thought the case was a really interesting way to learn how the law really works and to apply what I’d learned in Legal Practice and in my other classes to a real world situation. . . . I feel like . . . I was more motivated, and that I was anxious to see how the case [developed] as the course propelled.*
- *Having one case run through the course gave us more focus and helped me understand and synthesize the assignments better. I think it also motivated us since we were assigned to represent one side of the case and gave me more of a stake in the assignments.*
- *Talking to other 1L’s and upperclassmen, I really believe doing all the steps of a case will help us more in summer employment and beyond (esp. negotiations, summary judgement, etc.).*
- *Using a hypothetical case as a means of moving through the course was an excellent way to keep me interested and motivated.*
- *The biggest plus is that I felt much more invested in the work by being thrown in the middle of a case for which I was responsible. Specifically, I tried to research more carefully; I was aware of the need to make convincing arguments (rather than just producing some thing that would get the assignment done. [emphasis in original])*
- *I found the structure of the course to be a fantastic tool for making*

our "theoretical" courses more relevant.¹⁹

IV. SHOULD YOU TRY THIS?

Like any teaching technique, this method has both advantages and disadvantages.

A. Advantages

1. Students Can "Try On" the Role of the Attorney

One common complaint from law students is that law school is too theoretical, and does not prepare them adequately for practicing law.²⁰ Indeed, this has been a common complaint of the organized bar.²¹ The influential 1992 report of the American Bar Association's Task Force on Law Schools and the Profession recommended that law schools provide students with opportunities "to perform lawyering tasks with appropriate feedback and self-evaluation."²²

The moot case technique does this. Students perform tasks similar to those done by practicing attorneys. Student lawyers participating in a moot case interview clients and witnesses, draft and review documents, develop a theory of the case in light of applicable legal principles, interact with other lawyers both cooperatively (within the firm) and competitively (with lawyers from the opposing firm), and negotiate with opposing counsel. Not only do the students get a glimpse of what life as a lawyer is really like, they get to try on the role of being a lawyer in order to see how they might fit into the profession. More importantly, they get a head start on bridging the gap between law school and practice.

2. Students See the Legal Problem in Helpful Context

Most law school classes depend upon the examination of appellate court decisions, forcing the student to analyze the legal principles behind the

19. Most of the negative comments about the technique on the student evaluations dealt with workload issues, since this method does require a greater effort on the part of the student. See *infra* Part IV.B.3.

20. William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 222 (1996).

21. Cynthia V. Ward, *A Response to Professor Vernellia R. Randall's The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 111, 112-13 (1995).

22. See MACCRATE REPORT, *supra* note 13, at 331.

decisions and to synthesize the rules of law embodied therein. While this is certainly valuable training and an effective teaching method, it has been criticized as insufficient.²³ Students only see the end result of a very few disputes, and do not get a complete picture of how the disputes developed. It is easy for a law student to overlook the fact that every case had its origins in a lawyer's office, when a client walked in the door and told the lawyer, "I have a problem."²⁴

The moot case technique provides missing context for the legal dispute.²⁵ Students see and interact with the client. They get a picture of how a client interacts with others. Students must take the more practical aspects of that client's larger goals into consideration when deciding which theories of recovery to pursue or which defenses to raise. They can see how a client's emotional involvement influences strategic decisions. They discover that the other side has legitimate arguments, and that cases in progress are rarely as black and white as the final decisions sometimes make them appear to be.

3. Students Gain a Sense of Ownership of the Problem

A related benefit of the moot case approach is that the students feel more invested in the problem, and therefore are able to write more passionately about it. Active learning is widely considered to be more effective.²⁶ The moot case concept requires a high level of active participation, which pays dividends on several levels.

The moot cases I used in the past have by design been too large and

23. See *supra* notes 3-4 and accompanying text.

24. Janeen Kerper states "Before there are cases, there are human beings with problems." Kerper, *supra* note 3, at 353.

Thomas McDonnell suggested that law schools today still teach legal research from a "formalist perspective . . . embodying Langdell's ideas that law consisted of scientifically identifying the relevant rules and applying them to the individual case." Thomas Michael McDonnell, *Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems*, 67 UMKC L. REV. 285, 286 (1998). Professor McDonnell recommends adopting an approach to teaching research that combines realism and rhetoric, namely, what the officials of the law and any other relevant decision-makers do when faced with a dispute. These decision-makers (relevant audiences) include . . . attorneys, the parties, and other critical players, such as complaining witnesses, who have some power to influence the outcome of the case or transaction.

Id. at 289. The moot case technique helps the law student see the dispute in the more realistic context of being populated by attorneys, parties, and other witnesses.

25. Deborah Maranville wrote, "Adult learning theory suggests that our students will learn best if they have a context for what they are learning." Maranville, *supra* note 11, at 128.

26. See *supra* note 7 and accompanying text.

complex for a first-year law student to handle entirely on her own. They included multiple legal issues and a significant number of fact witnesses, which in turn created a fairly hefty factual record. Thus, it was only possible to properly develop these cases through a strict division of labor. I divided the classes into small groups to research and write about different issues. For the factual development, each student was assigned to either interview or participate in the deposition of a single witness. Several class periods were then devoted to round tables where the students shared with each other what they learned in doing the legal research or in developing some part of the factual record.

The benefits of this group work follow.

a. Assignments Are Completed Timely

Because each student was responsible for a small part of the overall case and aware that other students were depending upon them to complete the assignments timely and competently, the students had a significant incentive to do a thorough job on each assignment. Almost without exception, assignments were completed on time.

b. Students Feel They Are Representing a Real Client

Several students commented that the moot case technique enables them to more fully identify with their client. They wanted to do a good job for the client because they had a sense of how important the case was to the client. This also made it easier for the students to make informed distinctions between legally-relevant facts, emotionally-appealing facts, and wholly-irrelevant facts.

c. Students Gain a Sense of Camaraderie

A related benefit is the sense of camaraderie that develops within each law firm. Since a great deal of class time was spent sharing thoughts about legal theories, strategies, factual discoveries, and the like, the students began to sense what it is like to work in a law firm. As a result sense of identity began to form within each section.

4. Students Are Encouraged to Work and Learn
Collaboratively and Cooperatively

A closely-related benefit is that students must learn to work together. Law

firms are both collaborative and cooperative institutions.²⁷ It is common for lawyers in a firm to collaborate by relying on each other's work product, either created specifically for the case or for similar cases. Collaboration is encouraged and even institutionalized, for example by creating a firm brief bank. Law firms also actively engage in cooperative work when lawyers roundtable various cases, either through a formal process or by popping into another's office to discuss ideas.

Cooperative and collaborative learning between law students is also recognized as an effective teaching method.²⁸ Students learn a great deal from each other. Organizing and verbalizing one's own thoughts as part of a discussion with another student helps the speaker understand and retain those ideas. Seeing how another student organizes and verbalizes her own thoughts on the same subject can lead the listener to rethink and refocus an idea. Both speaker and listener gain immeasurably from the experience.

The moot case technique is ideal for fostering collaboration. Because each student is directly responsible for only a small piece of the whole case, but must ultimately write a brief dealing with the entire case, students are required to share what they learned throughout the project.

5. Students Must Learn to Deal with Competitors with Civility

Much has been written about the general decline of civility in litigation.²⁹ Some scholars suggest that law schools need to take the lead in changing this culture for the better,³⁰ and that "problem solving and role-playing" exercises by students are effective ways to "enhance skills in moral analysis and build awareness of the situational factors that skew judgment."³¹

The moot case technique can be a piece of this sort of training. When

27. "Cooperative learning" focuses "on individual mastery of the subject via a group process," while "collaborative learning" focuses "on group work toward a unified final product." Clifford S. Zimmerman, "Thinking Beyond My Own Interpretation: Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum," 31 ARIZ. ST. L.J. 957, 961 (1999).

28. See Randall, *supra* note 8, at 204. Professor Randall argues "Cooperative Learning produces higher achievement, reduces student attrition, increases critical thinking, betters attitudes toward subject matter, increases social support, improves social adjustment, and increases appreciation for diversity." *Id.*; see also Jay M. Feinman, *Simulations: An Introduction*, 45 J. LEGAL EDUC. 469, 474 (1995); Zimmerman, *supra* note 27, at 961.

29. See, e.g., Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1 (1993); Jean M. Cary, *Teaching Ethics and Professionalism in Litigation: Some Thoughts*, 28 STETSON L. REV. 305, 306 (1998).

30. Cary, *supra* note 29, at 305.

31. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 46 (1992).

students are randomly assigned to opponents in the other section, they get their first taste of dealing with a peers as adversaries. In many cases students assigned to oppose each other will know each other outside of class.³² Often they consider each other friends. Their first experience as working lawyers, therefore, requires them to tread lightly and treat each other respectfully.

6. Ethical Considerations Can Be Realistically Introduced and Analyzed

The American Bar Association requires law schools to teach the “duties, values, and responsibilities of the legal profession and its members.”³³ The MacCrate Report also recognized that “[l]aw schools . . . have an important, and varied, role to play in developing the skill of ‘recognizing and resolving ethical dilemmas’, . . . [L]aw schools can help students to recognize ethical dilemmas and can provide the rudiments of training for resolving them.”³⁴

The moot case technique provides a wonderful opportunity to expose students to a wide range of ethical problems they will encounter in the practice of law.³⁵

The possibilities for planting realistic ethical dilemmas that appear at unexpected times in a moot case are virtually endless.

- A witness or a client might tell a “friendly” law firm during an interview one version of the facts, but tell a subtly, or more blatantly, different version under oath during the deposition. Was the witness lying under oath? What are the lawyer’s responsibilities?
- A client may withhold certain critical information, which the lawyer discovers through other methods. How does the lawyer confront the client

32. The two sections I teach are both drawn from the same larger first-year section, so that all of the students in my two sections have every other required first-year class together.

33. AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302 (b) (2001).

34. MACCRATE REPORT, *supra* note 13, at 235. Some scholars suggest that teaching ethics in context is a more effective way of showing how ethical problems arise and how they can be handled by the ethical lawyer. *See, e.g.*, Robert P. Burns, *Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism*, 58 LAW & CONTEMP. PROBS., Autumn 1995, at 37, 38; Bruce A. Green, *Less Is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 359 (1998). While I do not suggest that the course in LRW can or should substitute for a basic course in legal ethics, it certainly can emphasize ethical issues in the daily lives of lawyers.

35. Carol Goforth also reports that she finds simulation exercises “offer an excellent opportunity to integrate ethical issues applicable to representation of business clients into the basic course. Students are thus required to deal with substantive business law in the context of a lawyer’s ethical responsibilities, which I believe cannot be overemphasized.” Goforth, *supra* note 4, at 853.

with the new information? If the new information changes the theory of the case, how does the lawyer change course in mid-stream (especially after the pleadings are closed) without divulging client confidences?

- A client may have an unrealistic, or even illegal, ultimate objective in mind. How does the lawyer counsel the client?
- A poorly-drafted discovery request may lead to a question about whether a particularly damaging document is covered within the scope of a request for production of documents. What is the duty of the lawyer to produce the damaging document?
- One firm might represent an institutional client. How far “down the line” does the attorney-client privilege reach? Does it extend to former employees? What if a disgruntled employee approaches the lawyers for the other side and wants to “blow the whistle” on his employer?

The discussions that occur when such ethical problems arise are usually among the liveliest of the semester. Since students see how such problems arise in the context of a “real” case, they take the issues much more to heart and hopefully internalize the lessons more completely than if they merely studied ethics from a casebook of decided opinions.

7. It's Fun!

The moot case is fun for both students and professors. Professors should not underestimate the value of this benefit. The first year is long and tiring for everyone, so a little entertainment along the way keeps the students' interest and, correspondingly, the opportunity for teaching is enhanced.³⁶

Students almost uniformly reported that they had fun with the moot case problems. They enjoyed working with the acting students and interacting with each other. Several students even reported that classmates in other sections were jealous that they did not get to participate in their own moot case.

From the professor's point of view, it is also a great deal of fun to create the factual scenario and the characters who inhabit it. Watching the acting students breathe life into the characters I invented was immensely enjoyable. Furthermore, I must confess that I had a great deal of fun placing ethical traps and odd little twists and turns into the case as it played out over the year. Real cases never go according to plan. Thus, it was very realistic, not to mention entertaining, to toss in an occasional plot twist, to keep the students interested and alert, but more importantly to teach them how to adjust their legal analyses and theories based upon subtle changes in the available facts.

36. *Id.* at 852.

B. *Disadvantages*

The moot case technique is not, of course, without its risks and shortcomings. Here are a few problems a professor needs to consider.

1. There Is Less Class Time Available to Teach and Practice Traditional Writing and Research Skills

There are only so many class periods during the semester. This technique is likely to add to the demand for class time.

Many legal writing programs still emphasize the traditional skills of analysis, predictive and persuasive writing, and research, and do not spend much time teaching other lawyering skills.³⁷ Professors in such programs may feel they need all available class time to teach the traditional skills. Adding the lawyering skills required to make the moot case proceed smoothly can eliminate class time for traditional skills.³⁸

One solution is simply to recognize and affirm the pedagogical value of teaching these additional skills, because students will need the skills in order to practice law. Moreover, there is substantial overlap between the traditional skills and the additional skills introduced through the moot case method. When students undertake the fact investigation phase, for example, they do so in the context of tentative legal theories which they have previously researched, analyzed and written about. Deciding what facts must be uncovered to support or defeat certain legal theories provides students a new and highly engaging way to practice the skill of legal analysis. This not only helps them to see the value of accurate legal analysis, but also provides an opportunity for alternative analyses they may not have discovered based on a dry, fixed set of facts handed to them by a professor.

But even without such changes in thinking, this problem can be ameliorated by compressing the fact-development stage of the moot case (*e.g.*, by simply handing out the interrogatories or other discovery documents in class

37. The ALWD/LWI annual survey does not track which skills are taught in the first-year course. However, as noted previously, the most common assignments (office memoranda, appellate briefs, appellate arguments, pre-trial briefs and client letters) all suggest an emphasis on the traditional analysis, writing and research skills. See ALWD/LWI 2002 SURVEY, *supra* note 9, at 7-8.

38. Note that in the sample syllabus provided in Table 1, *supra* Part III.C., between four and five weeks of the second semester are devoted to the development of the factual record through interviews, pleadings, and discovery. This is time that the professor cannot devote to detailed critiquing of student writing. Schools like University of Michigan Law School, that take a broader view of the course and already cover some or all of these additional skills, will likely not view this as a significant problem.

without having the students actually draft and respond to these documents). However, too much compression risks compromising the benefits of the approach. Many positive aspects of this approach outlined in the previous section derive from the collaborative work of the students during this phase of the case.

Another possible solution is to borrow some additional class time as well as significant assistance by teaching LRW in collaboration with civil procedure. For example, professors could use the moot case facts as the basis for exercises in drafting pleadings. This technique has the additional benefit of showing students the connection between the doctrinal courses and LRW.

In the end it comes down to a careful balancing of the benefits of this technique against the risks of spending less time on the more traditional aspects of the course.

2. The Professor Must Be Flexible as Students Come Up With Ideas She Had Not Thought About

Another risk of this teaching method is that the professor is not in complete control of how the case will turn out.

As indicated above, one beneficial aspects of this technique is that it gives students a stake in the development of the record. In order for that to work, however, the professor must be ready to deal with whatever eventualities arise. Students will never ask all the questions you expect during depositions. Witnesses may make mistakes. Questions you did not anticipate will be asked. Moreover, a good acting student will improvise answers which may change the fact pattern in subtle or overt ways. While the professor may retain the prerogative of editing transcripts to correct errors or conform facts to what the professor thinks necessary, too much editing will lessen students' connection to the record.

No matter how well researched and planned the basic moot case problem is, students will almost certainly think of factual or legal issues that the professor had not considered. The best ideas often can be incorporated into the problem, giving the students a sense of empowerment in the development of the case. But the professor needs to be flexible, ready to adapt the problem as new ideas and facts are discovered.

This, of course, accurately reflects real cases. There are always surprises, twists, and turns in the development of a lawsuit. A lawyer generally has very little control over how any case will come out. The LRW professor using this method should be ready to embrace the uncertainties inherent in this method, and to adapt as needed.

3. It Is a Lot of Work...

Because the moot case technique teaches more than just the traditional skills, it is also more work for both the professor and students.³⁹

a. For the Professor

In order to keep students' interest in a single fact pattern throughout the entire semester, it is necessary to create fairly complex facts raising numerous interesting legal issues. With a complex fact pattern, the professor can selectively disclose facts at opportune times to provide a springboard for the next assignment. The problem must include various legal issues (perhaps a combination of procedural and substantive issues) that can be sequenced in some logical fashion in order to create a sufficient supply of research topics. Students will not learn to research effectively if they are required to research one topic all year.

Coming up with such a factual situation requires extensive research and advance planning that must occur prior to the fall semester.⁴⁰ Once appropriate legal issues are developed, the professor must sketch a plausible scenario; obtain or create relevant documentary evidence; create character sketches for the actors who will play the roles of the clients and witnesses in the case; write the office memoranda or other assignments; and coordinate the schedules of the actors and students as they conduct interviews and depositions.

In addition to the extensive advance planning, additional impromptu work must be done as students raise new ideas the professor wishes to incorporate into the problem.⁴¹

b. For the Students

Students may also be working harder than their counterparts in more traditionally-structured LRW classes. They will be meeting and interviewing clients and witnesses, taking depositions, and participating in document reviews and discovery. They will almost certainly have a much more substantial record to review and digest in order to write their final briefs than would students in a more traditional class.

39. The additional demands on the clerical staff, especially at "crunch times" such as the transcription of numerous depositions, may also be a significant consideration.

40. Stephen Nathanson argues that "nothing can be more important than the design of good problems." Stephen Nathanson, *Designing Problems to Teach Legal Problem Solving*, 34 CAL. W. L. REV. 325, 328 (1998).

41. See discussion *supra* Part IV.A.1-2.

Some students will appreciate the fact that the extra work is a necessary side-effect of this teaching method. They may view the work as similar to a “lab” course they took in undergraduate school—the sort of course where you worked hard and learned a great deal, for a small number of credits. Others, however, will view the workload as a distraction from their substantive classes.⁴²

For this reason, this technique may work better in a three-credit semester course than in a two-credit course.⁴³

4. A Poorly-Selected Moot Case May Be Too Much for First-Year Students

One significant risk of this method surrounds the selection of a fact pattern that presents legal issues that are too complex or nuanced for first-year students. If the problem is beyond the cognitive and analytical abilities of developing first-year students, they will become frustrated and angry. It is difficult to find a problem that presents the right level of complexity to be able to sustain itself for a year, yet is not so complex so as to cause frustration and anxiety for the students.

The solution may be to select cases that raise issues arising out of the traditional first-year courses. Because it is fairly easy to develop sophisticated and interesting fact patterns raising issues in the “gray areas” of tort, cases combining torts with various civil procedural issues work particularly well. Contract disputes also provide good fodder for moot case problems.

5. The Method is Litigation-Centric, but Many Students Will Not Become Litigators

While reliable statistics are hard to locate, it is fair to estimate that fewer than one-half of all practicing lawyers consider themselves trial lawyers.⁴⁴ The

42. Indeed, one of the most common negative comments I have received in the final student evaluations is that the course is too much work for just two credits. However, that complaint may be commonplace in non-moot case sections as well.

43. A significant pedagogical issue is whether a course such as this should be graded or pass-fail. There are strong arguments to be made on either side. The degree of collaboration required to teach a moot case effectively is a powerful argument in favor of teaching this method on a pass-fail basis. This is especially true since students will then not have to worry that they are assisting their fellow students to get better grades than they will. On the other side, grading the course may provide the students with additional incentive to perform well and to complain less, since a good grade in the course will help them with their GPA. The class I teach at Michigan is taught on a pass-fail basis.

44. One 1995 survey of Chicago lawyers found that 505 of 675 attorney respondents reported devoting 5% or more of their practice to litigation (defined to include business

moot case technique focuses on the skills needed by those types of lawyers. Is it fair, then, to subject the entire class of first-year students to a course in litigation skills, even though a large number of those students know that they will not practice extensively in that area upon graduation?⁴⁵

This criticism can also be leveled at the traditional method of teaching the LRW course. The traditional course of assignments beginning with office memos and ending with persuasive briefs frequently is based on a litigation model. However, because the moot case technique goes a step farther into the litigation model, it is more susceptible to such criticism.

There are several responses to this claim. First, to a large extent many of the benefits of this technique depend upon the litigation model. Lawsuits are inherently interesting, and the friendly competition engendered between law students helps provide motivation and a level of interest that makes the method work well. Second, regardless of whether a law student expects to become a trial lawyer, it is valuable for any law school graduate to know about litigation. Most non-litigators spend a great deal of their time counseling clients to help them avoid litigation. They also must read and understand cases affecting their area of specialization. Since each case started out as a litigated matter, litigation becomes a foundational skill. Thus, it is very useful for any lawyer to understand how case law is created through litigation.

The most important response to this criticism is that the additional skills taught through the moot case technique are not, in fact, litigation-specific. Students in the moot case project must learn to (a) evaluate a legal issue and determine what factual investigation is needed, (b) interview clients and witnesses, (c) review documents, (d) interact with colleagues, both within the firm and opposing counsel, and (e) attempt to negotiate a resolution. All of these skills are transferable to other areas of specialization, including transactional law, labor law, domestic relations law, corporate law, and even criminal law.

litigation, general litigation and personal injury litigation, both plaintiff and defense). John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 *LAW & SOC'Y REV.* 751, 765 Table 3 (1998). However, since many of those attorneys were in multi-discipline (or general) practices, the authors estimated that this represented only about 32% of the "total legal effort" produced by that group of attorneys. *Id.*

45. A related criticism might be that the moot case technique emphasizes the "lawyer as gladiator" mentality that pervasively infected the legal profession, and is bred in law schools. See Lerner, *supra* note 4, at 109.

6. Not Every Student Will Experience the Case in the Same Fashion, Potentially Leading to Claims of Lack of Fairness in Grading

One of the features I have incorporated into the moot case technique is that not every student will be assigned to write the same memoranda on the same issue of law. They will not all interview the same clients or witnesses. Each student will experience the case in a slightly different way.⁴⁶ This can lead and in a few cases has led to complaints that some students have an unfair advantage over others.

Of course, these complaints are less likely to be raised (and would have far less impact if raised) in a pass-fail course. But even in a graded course, complaints can be deflected by ensuring that students are assigned to research groups at random, and by attempting to create assignments of equal complexity. (It is, of course, impossible to ensure that every student has exactly the same workload. To some extent even two students working on the same assignment may approach the subject differently, resulting in relatively greater or lesser work depending on the approach they choose.)

C. *Suggestions About Implementation of the Method*

If you decide to implement a moot case method in the first year, here are a few suggestions:

1. Define Your Goals Clearly

Jay Feinman suggested that the first thing a professor implementing a simulation course needs to do is to define her pedagogical goals.⁴⁷ He describes three types of goals: cognitive (what students know and how they think); performative (what students can do); and affective (how students feel and experience a situation).⁴⁸

While the moot case technique presents opportunities for teaching and learning in all of these areas, a LRW professor should carefully consider which of these goals is most important, and design the problem accordingly. While the

46. This feature, of course, is not absolutely required to run a moot case. The professor could limit the number of issues so that everybody writes on the same topic, for example, or could reduce the number of witnesses, or have the entire class participate in the key interviews, etc. These stratagems, however, may make the case less interesting for the students and may render the method less effective, by discounting the value of collaborative work. See discussion of the advantages of collaboration, *supra* Part IV.A.4.

47. Feinman, *supra* note 28, at 471.

48. *Id.*

cognitive skills of issue identification, analysis and synthesis, and the performative skills of research and writing (the traditional skills covered in LRW courses) will likely occupy most of the professor's attention, the professor should also recognize and nurture opportunities for other types of learning.⁴⁹

2. Prioritize Your Goals

The moot case approach provides such a rich opportunity for teaching that it creates a temptation to do too much.⁵⁰ Once the professor has identified all

49. Here are some examples of goals that the professor teaching the first year LRW course using the moot case technique might seek to achieve. (Of course, many of these goals, especially the cognitive and performative goals, are typical of the traditional LRW course as well.)

Type of Goal	Goal
Cognitive	— To learn how to read cases and elicit the holding
	— To learn how to read several cases with divergent holdings and to synthesize a rule of law
	— To learn how to read statutes, regulations and rules, and to identify and interpret ambiguities therein
	— To learn how to organize a legal proof
	— To identify common ethical issues
Performative	— To learn how to discover the law through book and electronic research
	— To learn how to write a predictive office memo
	— To learn how to write persuasively
	— To learn how to investigate facts (through document reviews, interviews, depositions)
	— To learn how to argue orally
Affective	— To experience how lawyers handle cases
	— To learn to work cooperatively and collaboratively with peers
	— To learn how to deal with opposing counsel in a professional manner
	— To understand how a client's emotions, attitudes and other non-legal factors affect a lawyer's decision making

50. As noted above, the MacCrate report identifies ten "essential lawyering skills" that law schools could address. See MACCRATE REPORT, *supra* note 13, at 135. The moot case technique presents opportunities to address virtually all of them.

of the possible pedagogical goals that she could address, she must take a second look at the list and pare it down to reasonable expectation within the course parameters. As previously noted, a three-credit course might reasonably incorporate more pedagogic objectives than one offered for only two.

Rather than eliminating objectives, consider streamlining the problem so the less-important objectives are handled summarily. For example, rather than having students work through the written discovery phase of the problem and requiring the students to produce or answer interrogatories and requests for production of documents, devote one class to a discussion of that phase, and then distribute copies of the written discovery the senior associates prepared in advance.

3. Communicate Your Goals to Your Students

Feinman recommends the professor communicate the pedagogical goals to the students, since “[p]eople generally learn better when they know what they are supposed to be learning.”⁵¹ Doing so helps avoid possible negative reactions by students who see the simulation as “more work, not central to the experience” of the course, as well as by students who believe the simulation is the only important part of the course because it is the most practical.⁵² By clearly defining the goals, Feinman argues, “either reaction is less likely.”⁵³

4. Provide Time for Reflection and In-Class Evaluation

The moot case technique requires students to perform lawyer-like functions (*i.e.* witness interviews, depositions, negotiations, etc.). In most cases, this will be the first time students have done such things. They will often feel unprepared or overwhelmed. They will certainly make mistakes. Yet, they will usually recognize that it is better to make mistakes and learn from those mistakes in a simulation than it would to make such mistakes in real practice.

Therefore, the key features of using this technique is to (a) require students to reflect about each experience and (b) allow class time to discuss performances and provide helpful feedback.⁵⁴ This evaluation should consist not only of praise, but also constructive criticism. Mistakes should be viewed as teaching and learning opportunities. By doing evaluation in class, the entire class will benefit.

51. Feinman, *supra* note 28, at 471.

52. *Id.* at 471-72.

53. *Id.* at 472.

54. *Id.* at 477-78.

5. Problem Selection is Key

A moot case problem must satisfy two contradictory criteria. First, it must not be so legally or factually complex as to frustrate first-year students. Second, however, it must be sufficiently complex to sustain interest throughout the year. Finding the balance between those two conflicting needs is often difficult.

In the two moot cases I led, I looked for problems that were factually complex, but not as legally complex. My decision was based on the fact that the class brings a certain collective knowledge about the world, but little such knowledge about legal principles. Such students are presumably better able to decipher and understand a complex factual pattern than a complex legal issue.⁵⁵ Thus, by keeping the legal issues relatively simple and straightforward, I create a problem that most students will be able to solve by applying knowledge gained in the substantive portions. The complexity of the factual setting, on the other hand, keeps interest in the course by forcing students to unravel an interesting puzzle and, in a very real sense, solve a factual mystery.⁵⁶

V. CONCLUSION

Simulation techniques are nothing new. They have been used in law school classes, especially clinical courses, for quite some time. What is new is the suggestion that a full-year simulation can be an effective method to teach the required first-year course in legal analysis, writing and research.

For programs that see their mission as encompassing more than the traditional lawyering skills of analysis, writing, and research, the moot case technique is an excellent vehicle to give students a glimpse of life as a lawyer. Chosen carefully, a moot case problem can engage students and hold attention

55. For example, in the 2001-2002 academic year I designed an intellectual property problem involving an allegation of the theft of a trade secret chemical formula from a major chemical company by means of computer infiltration. As it turned out, several students had backgrounds in chemistry, while others were highly proficient at telecommunications and computers. These students all shared their knowledge with their classmates and contributed significant background information into the factual investigation phase of the moot case.

56. In the employment discrimination problem I used the first time, the major legal issue (a gender discrimination claim under Title VII) was not terribly novel or difficult to research or understand. However, the fact pattern was quite complex, involving numerous witnesses to various incidents that formed the basis for the claim. Of course, since each witness saw the incident from a different perspective, each witness gave a slightly different story or put a slightly different factual "spin" on what had happened (not at all unlike witnesses in a real case). This forced students to deal with both helpful and harmful facts, and present and analyze them in light of the governing legal principles.

in ways that disconnected research and writing problems cannot. The technique provides excellent opportunities for cooperative and collaborative work. Further, it is a vehicle by which ethical considerations can be introduced in an interesting and informative way.

For programs with a narrower view of their mission, packing more content (additional skills) into the course may result in some trade-offs such as less depth of coverage of some topics. However, what is gained should be carefully balanced against what is lost. If the moot case technique increases student interest in the subject matter, as I contend it does, it is likely to increase retention as well. That increased retention should more than compensate for the fact that the professor may need to spend less time on the traditional skills covered in more depth. In the end, the student learns and retains more.

SELECTED BIBLIOGRAPHY

- Robert P. Burns, *Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism*, 58 LAW & CONTEMP. PROBS., Autumn 1995, at 37.
- Jean M. Cary, *Teaching Ethics and Professionalism in Litigation: Some Thoughts*, 28 STETSON L. REV. 305 (1998).
- James Eagar, Comment, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 GONZ. L. REV. 389 (1996).
- Jay M. Feinman, *Simulations: An Introduction*, 45 J. LEGAL EDUC. 469 (1995).
- David D. Garner, Comment, *The Continuing Vitality of the Case Method in the Twenty-First Century*, 2000 BYU EDUC. & L.J. 307.
- Carol R. Goforth, *Use of Simulations and Client-Based Exercises in the Basic Course*, 34 GA. L. REV. 851 (2000).
- Bruce A. Green, *Less Is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357 (1998).
- Cynthia G. Hawkins-Leon, *The Socratic Method—Problem Solving Method Dichotomy: The Debate Over Teaching Method Continues*, 1998 BYU EDUC. & L.J. 1 (1998).
- John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751 (1998).
- Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401 (1999).
- Jonathan M. Hyman, *Discovery and Invention: The NITA Method in the Contracts Classroom*, 66 NOTRE DAME L. REV. 759 (1991).
- Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351 (1998).

- Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solvers*, 32 AKRON L. REV. 107 (1999).
- Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, 7 CLINICAL L. REV. 123 (2000).
- Thomas Michael McDonnell, *Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Research the Law and Solving Legal Problems*, 67 UMKC L. REV. 285 (1998).
- Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992).
- Stephen Nathanson, *Legal Education: Designing Problems to Teach Legal Problem Solving*, 34 CAL. W. L. REV. 325 (1998).
- Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654 (1984).
- Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. COOLEY L. REV. 201 (1999).
- Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992).
- Thomas A. Robinson, *Simulated Legal Education: A Template*, 42 J. LEGAL EDUC. 296 (1992).
- Steven J. Shapiro, *Teaching First-Year Civil Procedure and Other Introductory Courses by the Problem Method*, 34 CREIGHTON L. REV. 245 (2000).
- Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245 (1996).
- Lloyd B. Snyder, *Teaching Students How to Practice Law: A Simulation Course in Pretrial Practice*, 45 J. LEGAL EDUC. 513 (1995).

Arturo Lopez Torres, *MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 NEB. L. REV. 132 (1998).

BRUCE TULGAN, *MANAGING GENERATION X* (2000).

Russell L. Weaver, *Langdell's Legacy: Living With the Case Method*, 36 VILL. L. REV. 517 (1991).

Clifford S. Zimmerman, "Thinking Beyond My Own Interpretation:" *Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957 (1999).