The controversy over whether, and to what extent, law schools should ensure students’ practice readiness is, in one sense a controversy over ‘cases.’

The American Bar Association (ABA) recently adopted a resolution calling for law schools “to implement curricular programs intended to develop practice-ready lawyers.” Within the law school community, the ABA resolution has been greeted with both delight and derision. Writing and clinical professors—who see themselves as teaching law students how to practice law—typically applaud the turn toward practice-readiness. Doctrinal professors, on the other hand, may interpret the “practice-ready” slogan as the sign of an unwelcome incursion into the realm of legal academia. On this view, law school is intended to impart knowledge of complex legal concepts divorced from other disciplines and skills.

The controversy over whether, and to what extent, law schools should ensure students’ practice-readiness is, in one sense, a controversy over “cases.” There is an underlying ambiguity in the term. Doctrinal professors tend to teach law as a science, a method of induction to legal propositions from judicial cases. Skills professors, on the other hand, tend to teach law as an art, a practice crafted from clients’ cases. The pressing concern for addressing practice-readiness in the law school curriculum, then, is how to transition from a casebook method (focusing on judge-authored cases) to a case method (focusing on client-centered cases).

From Casebook Method to Case Method

The casebook method is unique to the law school curriculum. It teaches not only the content of a particular field of law, but also a more generally applicable method of reasoning from judicial opinions to legal propositions. The casebook method focuses on cases—judges’ written interpretations of the legal authorities they used to decide concrete legal disputes. By reading these cases, the law student is shepherded into the fold of legal reasoners. The lesson is: as judges think, so you must think also. Law students learn to reason by ferreting out the rationales lurking within these cases. These cases, these judicially crafted opinions, are concrete entities—texts—that can be found in books, databases, and websites. As one early critic described it, the casebook method seems to be enamored with the law, but primarily the law found in the library.

The case method focuses on persons, not books. The case method is used primarily in medical and business schools and teaches the professional practice as an art. In medical schools, for instance, treatment and diagnosis are taught by focusing on the patient and her constellation of presenting symptoms. Although the medical student must have a wealth of scientific knowledge (particularly

---

1 This article is based on a presentation I gave on December 2, 2011, at the Columbus, Ohio, installment of the Legal Writing Institute’s One-Day Workshops. I thank my co-presenter that day, Professor Kathryn Mercer, for encouraging me to turn that presentation into this paper.


5 The idea of transitioning from the casebook method to other, more practical, methods of instruction, at least after the first year of law school, is not new. See, e.g., Arthur D. Austin, Is the Casebook Method Obsolete?, 6 Wm & Mary L. Rev. 157 (1965). For a modern version of the balanced approach to legal instruction, see Todd D. Rakoff and Martha Minow, A Case for Another Case Method, 60 Vand. L. Rev. 597 (2007).

about anatomy, physiology, and epidemiology), that knowledge is used for a practical purpose: to diagnose and treat a particular patient’s health concerns. The focus for medical school is on patients.

The case method could be used in law schools. For those professors who adopted the case method, legal training would focus on the client, not on judicial opinions. The client's case would be the case the lawyer took when she represented her client. The lawyer's theory of the case would be the the theory the lawyer used to further her client's legal interests. And, although the lawyer would have to be trained how to discern relevant court interpretations by researching pertinent judicial opinions, the client's case would not be some fixed, historical entity. The client's case would be viewed as something the lawyer created from information gleaned from the client and from the lawyer's own investigation and research.

Often the current legal writing approach is not successful in simulating a client-centered case. Regularly, legal writing professors invent a short fact pattern designed for students to spot legal issues so they can write an office memorandum (or some similar document). The prepackaged fact pattern approximates a doctrinal exam in that it hides theoretical Easter eggs for the student to find. These issue-laden fact patterns are not good models of client representation because they assume a finite, closed system of relevant law and pertinent facts. Even client-based assignments (such as Multistate Performance Test style exams) dedicated to producing an actual court document assume a closed universe of facts and law. The student is asked to find the appropriate law to apply to the relevant facts to decide what sort of argument to make. In these writing exercises, as in many doctrinal exams, the student is overwhelmed with the feeling—rarely experienced in the practice of law—that there is a right answer out there somewhere, if only she can find it.

**Novels as Client-Focused Cases**

What we need is an exercise that approximates the lawyer’s real-world interactions with clients—laypersons who cannot inform the budding lawyer which legal issues are relevant and which legal interests might be implicated by their perceived problem. At least some law school courses must acknowledge that the world is messy. Legal precedents and provisions are general, ambiguous, and vague. Clients can be self-interested and difficult. Facts, especially facts related by clients, may be unhelpful and may be, at times, irrelevant. The lawyer’s job is to create a world—a theory of the client’s case—out of this primordial soup. I have found that the best way to provide a realistic approximation of the lawyer-client relationship is to use nonlegal fiction as a fact pattern.

I use Tim O’Brien’s *In the Lake of the Woods*\(^7\) as the factual basis for my course in criminal litigation drafting. The novel is a patchwork biography of John Wade, a Vietnam veteran and former Lieutenant Governor of Minnesota, that recounts Wade’s failed attempt to become a United States senator. O’Brien presents Wade’s story as a disjointed series of recollections, evidence lists, hypotheses, and interviews focusing mainly on the disappearance of Wade’s wife, Kathy, while she and John were vacationing in upstate Minnesota. After the students read the short novel, I tell them that after many years, Kathy’s body—the torso singed along one side, the extremities marred with ligature wounds—has washed up in nearby icy waters. They must defend John Wade on a charge of first-degree murder.\(^8\)

The novel is not a typical legal writing fact pattern. In its 300 pages, there is not one passage designed to elicit a response from students about which legal issues are relevant. The novel is a story: Wade’s story. As the novel’s narrative unfolds, it describes Wade’s troubling past and troubled relationships, his successes and his shortcomings. It also introduces several characters, including those who investigated Kathy’s disappearance. Some of them think that Wade had nothing to do with Kathy’s disappearance. Others, including Kathy’s sister and some members of local law enforcement, are sure he killed Kathy and hid her body. Wade may be the least helpful character in his own story. He suffers from flashbacks, blackouts, and moral

---


8 With classes of fourteen or more students, I split the class into two teams: one team prosecutes Wade for murder, and the other team defends him.
The problem for my students is how to construct a theory of Wade’s case when it contains so many factual gaps and anticipates an as-yet-unknown body of law.

A passage from the novel provides Wade’s “account” of what happened on the night his wife disappeared:

He opened up the [boathouse] doors and stepped inside, using the flashlight to pluck random objects from the dark: an anchor, a rusty tackle box, a stack of decoys. A sense of pre-memory washed over him. Things had happened here. Things said, things done. He squatted down, brushed a hand across the dirt floor, and put the hand to his nose. The smell gave him pause. He had a momentary glimpse of himself from above, as if through a camera lens. Ex-sorcerer. Ex-candidate for the United States Senate. Now a poor hung-over putz without a trick in his bag.

He sniffed his hand again, then shook his head. The dank odor revived facts he did not wish to revive.

There was the fact of an iron teakettle. Kill Jesus, that also was a fact. Defeat was a fact. Rage was a fact. And there were the facts of steam and a dead geranium. Other things were less firm. It was a fact, but not quite, that he had moved down the hallway to their bedroom that night, where for a period of time he had watched Kathy sleep, admiring the tan at her neck and shoulders, her fleshy lips, the way her thumb lay curled along the side of her nose.

At one point, he remembered, her eyelids had snapped open.

He stood still for a moment. The wind seemed to lift up the boathouse roof, holding it briefly, then letting it slap down hard. Even in the weak light Wade could make out a number of grooves and scratchings where the boat had been dragged out to the beach. He tried to imagine Kathy handling it alone, and the Evinrude too, but he couldn’t come up with a convincing flow of images. Not impossible, but not likely either, which left room for speculation.

The thing about facts, he decided, was that they came in sizes. You had to try them on for proper fit. A case in point: his own responsibility. Right now he couldn’t help feeling the burn of guilt. All that empty time. The convenience of a faulty memory.

He stepped outside, closed the doors, switched off the flashlight and walked back up the slope to the cottage.

Of course, my students know more than they think they know. They know that the cottage, the boathouse, and the shore where Kathy’s body washed up are all in Lake of the Woods County, Minnesota. So, they know that the case—a State charge of murder—will be prosecuted in Lake of the Woods County and that the relevant law will be found in the Minnesota criminal statutes, rules of criminal procedure, rules of evidence, and court decisions. They also know that Wade may have some viable defenses. Even if he can be prosecuted for killing his wife (did he actually pour steaming water on Kathy as she slept?), his rage and blackouts may be attributed to posttraumatic stress disorder (PTSD). Judith Herman, an expert on delayed-onset PTSD, is quoted throughout the book. Also documented are John’s traumas in childhood and in combat. As a child, John found his father’s body hanging from a beam in the family’s garage. As a soldier, John’s company participated in the My Lai massacre. John had fabricated an alter ego, Sorcerer, to suppress these painful memories. John also drank heavily to deal with his psychological stress. Perhaps John’s drinking the night before would permit a defense of voluntary intoxication.

Lessons About Advocacy and Persuasion

Defending John requires a strategy. Toward the beginning of the semester, I have my students write a strategy memorandum to their boss detailing the pretrial and trial motions that might be necessary to represent John on the charge of first-degree murder.

9 O’Brien, supra note 7, at 188-89.
The strategy memorandum informs their boss of the motions they will write and the reasons supporting those motions. For example, given the small size and potential bias of some of the locals in Lake of the Woods County, the students suggest filing a motion to change venue. Because the novel contains lists of evidence taken by law enforcement, including dead geraniums, teakettles, and photographs of the boathouse, the students realize that they must write a request for further discovery. Because the novel contains the recollections of persons who may be biased against John (his sister-in-law and the local deputy sheriff) and who may have limited and irrelevant knowledge concerning John (his fellow soldiers in Vietnam), the students realize that they must draft a motion in limine to exclude or to limit the testimony of these persons at trial. Finally, because Minnesota permits a bifurcated trial in cases where alternative defenses—both negative and affirmative—may be presented, the students realize that they should propose jury instructions concerning important legal terms for each phase of the trial. The students will not only research the law on all these filings and apply that law to the facts relevant in each procedural posture, but also condense their thoughts in a letter to their client, John. It is one thing to write all the technical details of a legal representation to your boss. It is another thing to distill all the arcane bits of legal knowledge to effectively communicate your strategy to your client.

The students begin to identify with their client over the semester-long case. They begin to see dry legal rules as tools for protecting John’s interests. The students begin to understand the context for legal rules, such as the rules of evidence, because they are forced to argue them to exclude witnesses who will hurt their client if they testify at trial. The students begin to learn lessons about persuasion—that one writes a motion for a judge differently than one writes a letter to a client, for instance. The students begin to write in a way that John might understand that John Wade isn’t a real person. As the center of their semester-long practice, he is as real as—and maybe more real than—any party in any judicial opinion they have encountered in law school.

**Lessons About Teaching**

I stumbled upon the idea of using fiction to more realistically portray the practice of law while reading *In the Lake of the Woods*. My eureka moment was a product of my pleasure reading, not of my intense study of pedagogical methods. It turns out, however, that medical and business schools have been using this case method approach—called problem-based learning (PBL)—for at least four decades and that PBL has been studied as a pedagogical method for nearly that long.10

Researchers describe PBL as incorporating at least five unique sets of values.11 First, PBL is student centered; students are responsible for locating and evaluating various resources in their field of study. Second, PBL is inductive; students are introduced to content through the process of problem solving within a meaningful context—such as a client-based case. Third, PBL challenges prior learning; cognitive conflict—say, between understanding rules of evidence as rules and understanding rules of evidence as tools—produces learning by creating new connections between subjects. Fourth, PBL requires metacognition; the problems are complex and ambiguous with no right answer and, therefore, require students to analyze, synthesize, and evaluate the complex problem to create solutions. Fifth, PBL is collaborative; students visualize other methods and strategies of problem solving by creating those methods and strategies together.

I believe that my criminal drafting course instilled each of these five values. The students were responsible for generating the research issues necessary to develop a strategy for representing Mr.

---


11 See De Gallow, *What is Problem-Based Learning?*, Instructional Resources Center, Problem-Based Learning Faculty Institute, University of California, Irvine, [http://www.pbl.uci.edu/whatispbl.html](http://www.pbl.uci.edu/whatispbl.html).
The students arrived at practical solutions to complex legal problems within the context of a large, messy, and largely irrelevant fact pattern. The course challenged the students’ prior learning in classes like Evidence. They were forced to use evidentiary rules to make alternative arguments: a person (a fictional character, really) should be barred from testifying at trial because her testimony’s slight probative value was outweighed by considerations of undue prejudice and because it was hearsay that could not fit under a recognized hearsay exception. The problems lying dormant within the complex narrative of the novel required the students to generate their own strategies to represent Mr. Wade. And the students, as a defense team, shared their research results and ongoing hypotheses to better serve Mr. Wade’s legal interests.

I believe that PBL is the correct foundation upon which to build new law school courses on the case, rather than the casebook, method. I hope that my *In the Lake of the Woods*-based course helps provide a model for the transition.

© 2012 Scott A. Anderson

---

**Another Perspective**

*First-year legal writing students are often confused by the relationship between the various components of the predictive legal memorandum. To clarify the relationship between small-scale and large-scale organizational components in a legal memorandum, Professor Karen Koch highlights the similarities between biology research articles and computer programming. Other legal writing professors introduce techniques of rule synthesis within the familiar context of parental decision making, the distinct patterns that stars make in forming constellations, and the strategies used by television executives to create successful television sitcoms.*

This brief survey demonstrates the popularity of non-legal examples but does not explain their frequent use. Perhaps the most well-known proponent of non-legal examples as pedagogical tools is Professor Charles Calleros. According to Professor Calleros, non-legal examples perform the vital function of making abstract concepts more concrete. For example, terms commonly used to explain the process of legal reasoning such as the predictive process, stare decisis, and rule synthesis are commonly understood by the discourse community of lawyers. Precisely because these terms are so familiar, legal writing professors can easily forget that their meanings are not intuitive for beginning legal writers. When professors fail to make abstract legal principles concrete, students leave law school unprepared to competently represent clients.

The importance of providing students with a more concrete understanding of legal terminology is heightened by the differences between the type of writing required in undergraduate school and the type of writing required in law school. Professor Anne Enquist attributes the differences to the unique relationship between the writer and the audience in legal writing. The typical audiences for legal writers are judges and lawyers—people who are extremely busy and who value prose that succinctly synthesizes the most important aspects of the writer’s research. The objective memorandum, a common assignment for many first semester legal writing students, takes its structure from the relevant legal rules. However, the memorandum’s emphasis on structure and brevity is radically different from expository prose written by the typical undergraduate.

In many ways, legal writing is the antithesis of expository writing. For example, expository writing has a fluid structure that is dictated by the relevant subject matter. Furthermore, while a first-year student writing a legal memorandum always begins the analysis with her conclusion, the typical term paper written by an undergraduate is more suspense driven because ‘the reader is slowly led up to the point the writer is trying to make. ... Many former English and creative writing majors protest that they are giving away too much too soon when they put the rule synthesis at the beginning of the rule explanation.’

Legal writing professors also use non-legal examples to demystify the legal reasoning process for first-year students. In attesting to the demystifying power of the non-legal example, Professor Calleros explains: ‘We gain nothing by shrouding our legal pedagogy in mystery. ... Unless students can relate our words to some concrete experience within their present knowledge, our explanations will remain abstractions to most students.’ According to another legal scholar, non-legal examples make abstract legal principles more accessible because ‘a nonlegal example might be easier to grasp and make a stronger impression’ by ‘starting at the students’ level of common experience, rather than assuming familiarity with the law and legal analysis ... [and] may make the transition to law school more successful for students from many backgrounds.’