

**Of Learning Civil Procedure, Practicing Civil
Practice, and Studying *A Civil Action*: A Low-Cost
Proposal to Introduce First-Year Law Students to
the Neglected *MacCrate* Skills**

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INTRODUCTION

This article proposes three exercises designed to help introduce¹ law students to four of the lawyering skills that the American Bar Association's *MacCrate Report*² has identified as fundamental, but that legal scholarship has largely ignored: factual investigation, client counseling, recognizing and resolving ethical dilemmas, and organization and management of legal work.³ My goal in devising these exercises has been to allow a professor teaching a traditional, first-year civil procedure class to incorporate them into her syllabus at low cost to herself (in terms of time expended and doctrine sacrificed) and to the law school as an institution (in terms of conserving financial and personnel resources). Each exercise is based on events that took place in *Anderson v. Cryovac*,⁴ the "toxic tort" case reported in journalist Jonathan Harr's hugely popular *A Civil Action*.⁵

¹ I use the term "introduce" rather than "teach" because in the context I propose—a traditional, substantive law class, rather than a clinical or skills course—it is not possible actually to "teach" students the skills at issue. To attain competence in the skills, students must exercise them repeatedly in a variety of contexts and receive thorough and individualized feedback, which is not practical in a traditional doctrinal class with a high student-faculty ratio. See, e.g., Jonathan M. Hyman, *Discovery and Invention: The NITA Method in the Contracts Classroom*, 66 NOTRE DAME L. REV. 759, 779 (1991) (teaching skills in a traditional doctrinal course deprives students of the task repetition and detailed, individualized critiques essential to skill mastery). However, it is possible in a doctrinal course to *introduce* students to the "practice" skills, see *infra* Part I.A, in a way that may spark their interest in mastering the skills during the course of their legal education at law school and after graduation.

² AMERICAN BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT]. The report is popularly known as the *MacCrate Report* after Robert MacCrate, former president of the American Bar Association and chairperson of the task force that prepared the report. See *id.* at v.

³ *Id.* at 138-40.

⁴ 862 F.2d 910 (1st Cir. 1988).

⁵ JONATHAN HARR, *A CIVIL ACTION* (1995). The book has been the subject of several reviews in the legal literature. See, e.g., Robert F. Blomquist, *Bottomless Pit: Toxic Trials, The American Legal Profession, and Popular Perceptions of the Law*, 81 CORNELL L. REV. 953 (1996) (book review); Marya Rose, *Tort Reform for a Civilized Society? Implications of Tort Reform For Toxic Tort Lawsuits*, 17 B.C. THIRD WORLD L.J. 133 (1997) (book review); Vanessa Ibsch, Book Review, 43 FED. LAW. 54 (1996); Stephen I. Lipman, Book Review, 81 MASS. L. REV. 138 (1996); S. Peter Mills, *Lessons Learned from A Civil Action*, 11 ME. B.J. 208 (1996); Alan R. Spierer, Book Review, 70 CONN. B.J. 311 (1996);

It has also spurred the generation of a legion of supplementary materials. In their recent textbook, Professors Lewis Grossman and Robert Vaughn have

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Part I sets out the goals of the exercises and explains why I have chosen to focus on the enumerated skills, why I have selected a first-year, traditional civil procedure class as the forum in which to introduce students to the skills, and why I believe that *A Civil Action* is an especially useful example of the “story” of civil procedure. The article explains that although the American Bar Association (ABA) has deemed the four skills fundamental, the legal academy has not reported, and probably has not developed, pedagogical methods and techniques for training students in these skills. Part I reasons that introducing the skills to students in a substantive law class in addition to—or if necessary, instead of—a clinical setting does not require the expenditures of time and money that clinics do, making it more likely that a greater number of students will be exposed to the skills; helps alleviate the boredom students can feel when all of their substantive law classes draw on the same set of skills; and mimics the reality of practice, in which lawyers acquire doctrinal knowledge and skills simultaneously. While a clinical setting is doubtless the best forum in which to *teach* students fundamental practice skills,⁶ *introducing* the skills in a mandatory first-year course reinforces the notion that they are “fundamental”; ensures that all students will get some practice in the skills; and allows students who become interested in mastering particular skills during their law school careers sufficient time to do so. Part I also points to the congruence between the substantive subject matter of a traditional civil procedure course and the four skills at issue, and cites skill practice as a means of enlivening a course students traditionally find somewhat dull and esoteric. Finally, Part I examines why so many law schools have assigned students to read *A Civil Action* and concludes that the book is especially useful as a gripping story of the

reproduced many of the case documents, arranging them topically to illuminate various litigation stages and accompanying them with commentary and suggested discussion questions. LEWIS A. GROSSMAN & ROBERT G. VAUGHN, *A DOCUMENTARY COMPANION TO A Civil Action WITH NOTES, COMMENTS, AND QUESTIONS* (1999). The Berkman Center for Internet and Society at Harvard Law School and the Films for Justice Institute at Seattle University School of Law co-sponsor a website that hosts a variety of resources for research about the case and provides links to other on-line resources. The Berkman Center for Internet and Society, Harvard Law School, *The Lessons from Woburn Project*, at <http://cyber.law.harvard.edu/acivilaction> (last visited Dec. 14, 2000). While these materials will be invaluable for a professor who is interested in structuring a class largely or wholly around *A Civil Action*, the exercises described here are designed to be a relatively small component of a traditional first-year civil procedure course and do not require students to read anything other than their civil procedure casebook and *A Civil Action*.

⁶ See *supra* note 1.

way that law, and particularly procedural law, can deeply affect real people. As the story of a lawsuit from commencement to appeal, it is a valuable pedagogical tool for the civil procedure professor and provides helpful examples of the way that substance and procedure, knowledge and skills, and law and facts interrelate in legal practice.

Part II centers on the exercises. It begins with an overview of the exercise mechanics: the tasks of the students and the professor, the oral and written components of each exercise, and suggestions as to grading. It then details a set of guidelines under which the students are to complete each exercise, explaining the ways in which the guidelines introduce students to organizational and managerial skills. Finally, it describes the three exercises, the skills they are designed to foster, and the substantive subject matter they should help students understand.

The article concludes that although students cannot begin to master practice skills in the context of a substantive law course, as opposed to a clinical or simulation setting, the interested professor can introduce such skills in a first-year substantive law class without spending inordinate amounts of time or money to do so, and without sacrificing coverage of doctrinal matter. The exercises I suggest can animate the class, help students understand abstruse procedural issues by placing them in a particular, familiar factual context, and most importantly, send the message that the skills are, indeed, fundamental.

I. GOALS AND PARAMETERS

A *Why Focus on the Skills of Factual Investigation, Client Counseling, Recognizing and Resolving Ethical Dilemmas, and Organization and Management of Legal Work?*

The four skills on which this article focuses—factual investigation, client counseling, recognizing and resolving ethical dilemmas, and organization and management of legal work—are among the ten lawyering skills that the ABA identified as “fundamental” in the *MacCrate Report*, the 1992 report of the ABA’s Task Force on Law Schools and the Profession.⁷ The task force, composed of practitioners, judges, law professors, and law school deans,⁸ was charged with preparing a report on how to narrow the “gap” that separates the legal education community from the

⁷ MACCRATE REPORT, *supra* note 2, at 138-40.

⁸ *Id.* at v-vi.

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practicing bar.⁹ Its members decided early on that they could not bridge that gap, if such a gap indeed existed, without first identifying the skills that each lawyer should acquire before she assumes responsibility for handling a legal matter.¹⁰ Consequently, the task force conducted an in-depth study of the skills and values that a lawyer needs and released a *Statement of Fundamental Lawyering Skills and Professional Values* (“*Statement*”) in which it set forth its view of those skills and values.¹¹ The ten skills that the *Statement* names are problem solving, legal analysis and reasoning, legal research, factual investigation, written and oral communication, client counseling, negotiation, litigation and alternative dispute-resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.¹²

Although some commentators have criticized the *MacCrate Report* for what it fails to include,¹³ the *Statement* is “generally accepted as containing a useful list of basic lawyering skills” in

⁹ *Id.* at 3. Numerous commentators have bemoaned what they see as the “gap” between legal education and law practice, a gap they say results from the fact that the skills and knowledge that law schools impart to law students are not those that the students require to practice law. Judge Harry T. Edwards is one of the most prominent critics of this perceived gap. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

A discussion of whether this gap indeed exists—and if so, whether law schools, law firms, the bar, a post-graduate educational institution or some other entity should train students in the skills they need to become practitioners—is outside the scope of this article. The article is directed at law professors who may be interested in introducing students to practice skills because they are skills to which the students might not otherwise be exposed in law school, or at least not in their first-year or substantive law courses.

¹⁰ MACCRATE REPORT, *supra* note 2, at 7.

¹¹ *Id.* at 7, 135-221.

¹² *Id.* at 138-40.

¹³ See, e.g., John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of Legal Education*, 43 J. LEGAL EDUC. 157 (1993) (criticizing *MacCrate Report* for ignoring the financial costs and substantive “trade-offs” required to implement its recommendations); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994) (criticizing *MacCrate Report* as too rigid, “scientific” and inattentive to the “human” aspects of lawyering); Burnele V. Powell, *Somewhere Farther Down the Line: MacCrate on Multiculturalism and the Information Age*, 69 WASH. L. REV. 637 (1994) (criticizing *MacCrate Report* for failing to recognize how the diversification of the legal profession and enhanced communication in the information age will shape the skills and values needed in the future).

which law schools should offer training to students.¹⁴ In fact, law school administrations may view the *Statement* not merely as a useful list, but as a “to-do” list. While the *MacCrate Report* disavows any intent that its *Statement* “serve as a blueprint or a measure of performance” in the process in which the ABA accredits American law schools,¹⁵ and warns that “[a]ny direct, compelled use of the *Statement* in the accreditation process would be antithetical to its purposes and goals,”¹⁶ it simultaneously urges that the *Statement* “should be an essential reference in the accreditation process.”¹⁷ Given that the task force recommendations may thus “create an implied canon for accreditation,”¹⁸ law schools are likely to take them very seriously. Indeed, when the Association of American Law Schools surveyed reactions to the *MacCrate Report* shortly after its release, fifty-nine percent of the responding law school deans answered that they were likely or very likely to use the *Statement* “as a measure of performance in the accreditation process.”¹⁹ While more debate on which skills lawyers should acquire (as well as how, when, and where) is inevitable and necessary, the *Statement* will be a useful reference point as the legal academy considers how to train students in the lawyering skills they will need as professionals.

In the hundreds of scholarly articles that law professors have published describing how they teach or instill the *MacCrate* skills, they have largely ignored four of the skills: client counseling, factual investigation, recognizing and resolving ethical dilemmas, and organization and management of legal work.²⁰ In compiling a

¹⁴ Mary Jo Eyster, *Designing and Teaching the Large Externship Clinic*, 5 CLINICAL L. REV. 347, 361 n.18 (1999).

Just as a discussion of whether a law school or some other entity should teach students the “practical” skills they will need as practicing attorneys is outside the scope of this article, *see supra* note 9, so too is a critique of the *Statement’s* assessment of which practical skills are the necessary ones. I assume, for the purposes of this article, that the task force’s designation of the skills that are necessary for practice is credible as the product of a hard-won consensus between the representatives of the practicing bar and the legal academy.

¹⁵ MACCRATE REPORT, *supra* note 2, at 128.

¹⁶ *Id.* at 267 (alteration in original) (italics added).

¹⁷ *Id.*

¹⁸ Wallace Loh, *Introduction: The MacCrate Report—Heuristic or Prescriptive?*, 69 WASH. L. REV. 505, 513 (1994).

¹⁹ *Id.* at 512-13.

²⁰ 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, 136-37 (1998). Professor Torres identifies 204 articles published in or before August 1997 that discuss at least one of the ten *MacCrate Report* skills and describe how the professor teaches or instills the skill or skills in the classroom. *See id.* at 136. The

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recent bibliography of articles that discuss one or more of the *Statement's* ten skills and describe how the authors train students in such skills, Professor Arturo López Torres found that only fourteen percent of the articles considered any of these four "neglected" skills.²¹

Given that the four skills are so "practitioner-oriented," the academy's failure to report pedagogical methods and techniques for training students in them is not surprising. The academy's failure to report such pedagogy likely mirrors a failure to develop and implement it.²² Law schools have tended to ignore the "practice" skills of factual investigation, written and oral communication, client counseling, negotiation and alternative dispute resolution, organization and management of legal work, and recognizing and resolving ethical dilemmas.²³ Though most schools now offer students at least some exposure to most of the practice skills,²⁴ law schools have not made a concerted effort thoroughly to train

articles do not all refer to the *MacCrate Report*; many were published before the task force released the *Statement*. Nor do they all use the terminology that the *Statement* uses. According to Professor Torres, the difference is largely a matter of semantics rather than substance; the labels are different but the description of the skills is the same. See *id.* at 133. Professor Torres uses the *MacCrate Report's* terminology, and organizes the articles accordingly, because the task force developed the *Statement* after it conducted a thorough review of the legal literature, because it defined and described each skill in great detail, and because the *Statement's* 1992 publication date suggests that its terminology is current. See *id.* at 134. For the same reasons and for consistency, this article also uses the *MacCrate Report* terminology.

²¹ *Id.* at 136-37.

²² Compare *id.* at 136 (only one of the articles in the Torres bibliography was devoted solely to the skill of organization and management of legal work), with *id.* at 137 n.15 (according to a 1996 American Bar Association survey, "only 5.7% of the 142 responding [law] schools offer law practice management as both a primary and secondary subject").

²³ MACCRATE REPORT, *supra* note 2, at 138-40.

²⁴ Loh, *supra* note 18, at 509; MACCRATE REPORT, *supra* note 2, at 267-68. Communication may be mischaracterized as a practice skill. It includes legal writing, see *id.* at 172-76, a skill that has "long been a part of the required education for all law students," *id.* at 267. Moreover, practitioners do not exercise written or oral communication skills more often, or in a qualitatively different manner, than do academic lawyers. On average, law professors without significant practice experience are surely as skilled in written and oral communication as are lawyers with significant practice experience. It is a professor's job, after all, to speak about dense and complex material to her students in a manner that elucidates it for them, and to write about dense and complex material in a manner that clarifies it for the legal community at large, the readership of her scholarly publications. Not surprisingly, then, there are more articles about teaching communication skills than any of the other skills, "basic" or "practice"; articles about teaching communication skills account for a full quarter of the total number of articles about the ten skills. Torres, *supra* note 20, at 137.

students in them, probably because practicing lawyers tend to use these “fundamental lawyering skills” more often than academic lawyers do.²⁵ In contrast, law schools traditionally and uniformly have taught their students the “basic” skills that academic lawyers use as often as practitioners do:²⁶ problem solving, legal analysis and reasoning, and legal research.²⁷

Thus, in choosing to focus this article on exercises designed to introduce students to the four neglected skills, I recognized that the paucity of scholarship on training students in these skills points to the legal academy’s “drastic need”²⁸ to develop training techniques and report them in the legal literature. I surmised that I could help fill this need, as my familiarity with these skills as a former practitioner made me relatively well-equipped to develop methods for teaching them.

B. Why Introduce These Skills in a Substantive Law Course?

There are several reasons to choose to introduce students to these four practice skills in a first-year substantive law course in addition to subsequent clinical courses.²⁹ Clinical programs are

²⁵ Many law professors had little or no experience as practitioners before they began teaching. See Debra Pogrud Stark, *See Jane Graduate. Why Can't Jane Negotiate a Business Transaction?*, 73 ST. JOHN'S L. REV. 477, 481-82 (1999). As Professor Stark points out:

One cannot comfortably [and therefore does not] teach that which one does not truly know. If a professor has not had sufficient personal experience handling litigation or transactional matters, it will be very difficult for that professor to attempt to teach the skills necessary to handle these matters. It is far easier for a practitioner to become versed in legal theories than it is for a person whose sole legal experience is law school, and perhaps a judicial clerkship for a year, to become versed in the practice of law.

Id. at 482; see also 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, 211 (1996) (noting that the number of law professors who lack significant practice experience is increasing and that “significant experience practicing law may actually disqualify an applicant for a law faculty appointment”).

²⁶ Loh, *supra* note 18, at 508-09; MACCRATE REPORT, *supra* note 2, at 267.

²⁷ MACCRATE REPORT, *supra* note 2, at 138.

²⁸ Torres, *supra* note 20, at 137-38.

²⁹ By substantive law course I mean a course whose primary aim is to teach students doctrine, such as torts, contracts, property, or environmental law, as opposed to a clinical or skills course whose primary aim is to teach students skills and techniques that they will use as practicing attorneys in a wide variety of substantive law areas.

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expensive.³⁰ The per-student cost is high because clinics can teach only a few students at a time and because operating the clinics requires significant financial resources, in addition to those required by the high faculty-to-student ratios, for which funding may be unavailable.³¹ Classes in which the “clinical” experience is simulated using canned exercises and actors also cost much more than traditional substantive classes, in part because coaching, evaluating, and giving thorough and individualized feedback to students takes so much professor time. Thus, even schools that can afford to offer live-client or simulated clinical courses cannot offer them to all students. Introducing students to practice skills in a substantive law class that all students can take—indeed, in the case of civil procedure, that they all *must* take—makes the practice opportunities much more widely available at a much lower cost to the institution.

The cost of teaching a substantive law class rather than a clinical course is lower for the professor, as well. She need not invest the same amount of time that she would teaching and providing individualized critiques for a clinical course, and she need not sacrifice doctrine for skills. The proposed exercises are aimed at teaching students doctrine as they exercise practice skills, rather than substituting one for another. Although a professor will

³⁰ See, e.g., Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 616-17 (1984) (because clinical teaching methods include subjecting student performance “to intensive and rigorous *post mortem* critical review” and are “highly individualized,” they “require very low student-teacher ratios and are therefore relatively expensive”); Elliot M. Burg, *Clinic in the Classroom: A Step Toward Cooperation*, 37 J. LEGAL EDUC. 232, 233 & n.4 (1987) (comparing cost per student credit hour for law school supervised live-client clinics, classroom courses, and typical simulation courses).

³¹ See, e.g., Torres, *supra* note 20, at 133. During the 1970s and 1980s, expanding law school enrollment and outside federal funding helped support in-house, live-client clinical programs, but during the 1990s, major sources of federal funding withered and law school enrollment fell dramatically nationwide. Norman Fell, *Development of a Criminal Law Clinic: A Blended Approach*, 44 CLEV. ST. L. REV. 275, 285 & nn. 35 & 36 (1996); see also Sandra A. Hansberger, *The Road to Tomorrow: How Much Practical Instruction Should Law Students Get?*, OR. ST. B. BULL., May 1997, at 9, 11 (two major sources of federal funding to support in-house clinical programs dried up in the mid-1990s). During the 1990s, law school applications nationwide dropped forty percent. Martha Neil, *Kent to Cut Enrollment by 25%, DePaul May Follow Suit*, CHI. DAILY L. BULL., Feb. 15, 2000, at 1. Although the 1999 academic year saw a rise in the number of applications to law schools, that translated to an insignificant, one percent increase in the overall law school applicant pool, probably because the rise in the total number of applications was largely caused by roughly the same number of applicants applying to more law schools. Victoria Rivkin, *Applications Are Up Nationwide, But Especially at N.Y. Law Schools*, NAT’L L.J., Sept. 20, 1999, at A10.

have to spend substantial preparation time the first year that she uses the suggested exercises, the preparation time should lessen each year as she becomes more experienced and can better anticipate questions and avoid problems.

While the cost issues can be major, some live-client clinical programs have a second disadvantage: They are not always ideal for teaching legal practice skills precisely because the cases are real. Clinical professors may have trouble finding “cases that clinic students can take through the entire pretrial process in one semester,” and cannot control for unpredictability—a case that settles, a client who does not show up for an interview, a hearing delay.³² While many clinical programs add simulations to fill the gaps that such unpredictable events create, some of the students who take advantage of live-client clinics may simply never get the opportunity to practice certain skills.

Moreover, students who learn substantive material at the same time that they exercise their practical skills will be better prepared for practice, since practitioners acquire substantive knowledge and skills simultaneously during on-the-job learning.³³ Although many clinical programs have a substantive law component, those clinical and skills courses that separate practice techniques from doctrine are no more desirable than doctrinal courses that teach only the “basic” skills.³⁴ From this perspective, a substantive law course that introduces students to practice skills may offer the best of two worlds and not be merely an unhappy compromise.

Finally, introducing students to skills in a substantive law class can help alleviate the boredom that some law students begin to experience as early as the middle of their first semester, as they start to feel some mastery of the traditional skills inherent in dissecting an appellate opinion. Student interest in a course may rise if it requires that they “act like lawyers” and not just “think like lawyers.” Students will likely enjoy undertaking tasks that differ from those that their other courses require and that seem both practical and real.³⁵ Additionally, teaching substantive material through the exercise of skills may mean that the professor can reach

³² Lloyd B. Snyder, *Teaching Students How to Practice Law: A Simulation Course in Pretrial Practice*, 45 J. LEGAL EDUC. 513, 514 (1995).

³³ See Paul Barron, *Can Anything Be Done to Make the Upper-Level Law School Courses More Interesting?*, 70 TUL. L. REV. 1881, 1884 (1996).

³⁴ See *supra* Part I.A.

³⁵ See Barron, *supra* note 33, at 1884.

students she might not otherwise reach because their learning styles are not suited to the traditional Langdellian appellate-case method approach.³⁶

C. Why Pick a First-Year Course?

Introducing first-year students to some of the fundamental lawyering skills will help counteract the message that effective lawyering consists mostly, or solely, of analyzing appellate opinions. That analysis is the task on which almost all law professors have first-year students spend the majority of their time, teaching students that learning to analyze an appellate opinion is the most important, or even the only truly important, skill that they will need as practitioners. The earlier that students get a contrary message, a message that tells them that other skills are also necessary and important, the more seriously they are likely to take that message. Introducing skills in a first-year, “foundational” course sends the message that the skills themselves are foundational. If none of a student’s first-year courses touch on the practice skills, even students who are introduced to such skills later in law school are bound to view them not as fundamental but as a peripheral part of their legal education.

Practice may convince lawyers to revise their initial estimation of the value of some of the non-analytical skills—the skill of negotiating with opposing counsel, for example, or of conducting an effective factual investigation—since a lawyer who lacks such skills will quickly suffer from their absence, harming her client and embarrassing herself. But practice may not change the law student’s appraisal of the skill of recognizing and resolving ethical dilemmas. It is often only the client, and not the lawyer, who suffers when a lawyer is unable to recognize or resolve an ethical dilemma, particularly when the dilemma consists of a conflict between the lawyer’s interests and those of her client, and the lawyer resolves the conflict in her own favor. The lawyer may thus have no incentive to reevaluate the worth of the professional responsibility skills. To ensure that the practitioner accords these skills the weight they deserve, the student should exercise them early and often.

Moreover, students tend to become more bored and jaded as

³⁶ See Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 *LOY. U. CHI. L.J.* 449, 483 (1996) (“law schools can try to accommodate students’ different learning styles by . . . diversifying daily teaching methodology within the context of a single course.”).

they continue through their three years of law school,³⁷ whereas new students are generally eager and engaged, and, therefore, most receptive to new information.³⁸ Even a casual introduction to practical skills may make a greater impression on these new students than a deeper exploration later in their law school careers.

Introducing skill practice in a first-year course also ensures that all students will get at least some practice in the skill, since at most law schools, all or almost all of the courses taught during the first year are mandatory.³⁹ Further, the early introduction helps prepare law students for issues that may arise in their first legal jobs, which they often take during the summer between their first and second years of law school. Moreover, although the skills training students receive in a course that primarily teaches substantive law is necessarily cursory, the kind of introduction I propose may spark an interest that students can then develop in later, elective law school courses. A student who does not receive even a passing introduction to skills until her second or third year may not have the time to develop that interest in law school. The depth and intensity of the skills training in upper-level courses cannot make up for the lost opportunity.

Finally, as many clinical professors have recognized, teaching substance and skills together helps dispel the law school-fostered notion that problems walk into a law office neatly labeled “torts,” “contracts,” “property,” etc. A traditional civil procedure course clears up that misconception to some extent, since students come to understand that the procedural rules apply to the various civil causes of action that they study. The exercises I propose further reduce the “compartmentalization” of the first-year curriculum, because they raise issues common to practice in a wide variety of substantive law fields.⁴⁰

³⁷ See generally Barron, *supra* note 33 (discussing the boredom phenomenon and proposing simulations and role-playing to alleviate the boredom).

³⁸ See Shael Herman, *Dedication: Professor Ferdinand F. Stone*, 6 & 7 TUL. EUR. & CIV. L.F. 1, 1 (1991–1992) (“A law teacher, according to received wisdom, will most deeply influence students in their first year. The premise for this belief is that students newly engaged in legal analysis are uncommonly receptive to fresh ways of seeing the world.”).

³⁹ Mary Becker, *Questions Women (and Men) Should Ask When Selecting a Law School*, 11 WIS. WOMEN’S L.J. 417, 421 (1997).

⁴⁰ See Daan Braveman, *Law Firm: A First-Year Course on Lawyering*, 39 J. LEGAL EDUC. 501, 502 (1989) (noting that in a first-year “law firm” course that introduces several lawyering skills, using problems that explore issues common to several substantive areas helps “integrate” the first-year curriculum and reduce its “compartmentalization”).

D. Why Choose Civil Procedure?

Of the first-year courses, a civil procedure course may be the most logical forum in which to introduce the *MacCrate* “practice” skills. Students tend to link civil procedure and practice,⁴¹ so it makes sense to introduce them to some of the practical aspects of the profession in the course. The four neglected *MacCrate* skills, in particular, are well suited to a civil procedure class. Pretrial discovery devices are among the primary factual investigative tools that civil litigators use; it seems reasonable, then, to pair a discussion of the rules and doctrine governing pretrial discovery with an exercise designed to teach students the skill of factual investigation. Similarly, because Rule 11 of the Federal Rules of Civil Procedure codifies an attorney’s ethical duty to refrain from abusing the judicial system,⁴² it is sensible to partner a discussion of Rule 11 with a more general discussion of attorneys’ ethical duties. Finally, given the common student perception that civil procedure is dry, esoteric, and boring,⁴³ it is rational to enliven it by giving students a chance to practice being practitioners.

E. Why Base the Exercises on A Civil Action?

A *Civil Action* is Jonathan Harr’s best-selling account of the legal battle that plaintiffs’ lawyer Jan Schlichtmann waged on behalf of eight Woburn, Massachusetts families in *Anderson v. Cryovac*.⁴⁴ The families sued two huge corporations—W.R. Grace and Beatrice Foods—claiming that the companies dumped toxic chemicals that poisoned the local water supply, and that the polluted water caused the leukemia that killed their children and other family members. The book begins from the plaintiffs’ perspective, from their initial suspicions that their water was poisoning them to their first contacts with an attorney, but then describes the course of the litigation from the perspective of the attorneys in the case. It takes the reader from the filing of the complaint, through the discovery process, pretrial hearings and trial, to post-trial wranglings over discovery abuses.

At least fifty law schools, including Harvard, Yale, and Columbia, have assigned the book in one or more courses because it

⁴¹ Robert G. Vaughn, *Use of Simulations in a First-Year Civil Procedure Class*, 45 J. LEGAL EDUC. 480, 485 (1995).

⁴² Rule 11 provides that a lawyer should not abuse the judicial system by making frivolous objections and claims or by harassing, needlessly delaying, or imposing unnecessary costs on a litigation opponent. FED. R. CIV. P. 11.

⁴³ Vaughn, *supra* note 41, at 485.

⁴⁴ 862 F.2d 910 (1st Cir. 1988).

reads like a novel, portrays the story of a lawsuit in vivid detail, and compellingly demonstrates how the rules of civil procedure and evidence can profoundly affect the course of civil litigation.⁴⁵ As the lawyer for defendant Beatrice Foods pointed out, “the *Anderson* case, with its four years of discovery and motion controversy, its 78 day trial in 1986 and its extensive post-trial proceedings, illustrated almost every important procedural issue the Federal Rules [of Civil Procedure] have to offer from the initial pleadings to the final opinion of the First Circuit.”⁴⁶ The legal community and the general public’s great interest in the book has spurred fans to release a wide variety of related materials—pleadings from the case, documentary evidence, and photographs of the key places and players⁴⁷—that affords law students an even more complete picture of the case than Harr’s account paints.

As a teaching tool, *A Civil Action* is most useful because of the way it shows how law affects real people. Although its perspective is somewhat one-sided, concentrating on the plaintiffs, the plaintiffs’ counsel and the plaintiffs’ case,⁴⁸ the bias allows students to empathize with those whom the rules affect most deeply.⁴⁹

Civil procedure professors who have used other journalistic accounts of “real-life” cases, such as the case reported in the book *The Buffalo Creek Disaster*,⁵⁰ have found that case studies like *A Civil*

⁴⁵ William Glaberson, *Best-Seller Account of a Lawsuit Spurs Law School Change*, N.Y. TIMES, Dec. 26, 1998, at A1.

⁴⁶ Jerome P. Facher, *The Power of Procedure: Reflections on A Civil Action*, in GROSSMAN & VAUGHN, *supra* note 5, at xvii.

⁴⁷ See, e.g., GROSSMAN & VAUGHN, *supra* note 5 (reproducing dozens of documents including pleadings, briefs, discovery requests and responses, court orders, attorney letters, deposition transcripts, and photographs from the *Anderson* case); *Index of Pleadings in Anderson v. Beatrice Foods*, at <http://www.law.fsu.edu/library/faculty/gore/index.html> (last visited Apr. 16, 2000) (reproducing documents filed in the case); *The Lessons from Woburn Project*, *supra* note 5 (containing various research resources and links to other on-line sites about the case).

⁴⁸ Harr wrote the book from his vantage point inside the plaintiffs’ camp, where he was privy to the attorneys’ daily strategy sessions, witness preparations, and client meetings starting in early 1986. See HARR, *supra* note 5, at 493. By his own choice, he did not seek the same access to defendants W.R. Grace and Beatrice Foods, or their lawyers, to avoid inadvertently providing confidential information to either side. See *id.*

⁴⁹ Law school offers students ample opportunity to practice seeing both sides of a case. Their primary reading material—the appellate opinion—is written from the viewpoint of the appellate judge, the player who is (or is supposed to be) the most neutral, objective, and fair in presenting and considering both sides of an issue.

⁵⁰ GERALD STERN, *THE BUFFALO CREEK DISASTER* (1976). The book tells the story of the civil litigation that 625 survivors brought against a coal mining company

Action have virtues in addition to showing how procedure affects real people. The case studies help students understand procedural issues by placing them in a specific factual setting; revitalize the course with “dramatic content”; examine the relationship between substance and process; and expose the “astonishing array of issues that may arise in a particular factual context.”⁵¹ They offer a way to approximate, without the attendant costs, the connection to the “real world” that clinical courses offer students.

Studying the story of a single lawsuit from commencement to appeal helps students understand the sometimes esoteric world of procedure. The subject matter of contracts and torts courses is not as alien to new students as the subject matter of a civil procedure course.⁵² Many students have experienced broken leases or negligent drivers, but they are not likely to know many stories about procedural rules and doctrine. Telling a civil procedure “story,” filled with real people with whom the students can identify and empathize, can make the course real and relevant to students whose own life stories do not (yet) contain any civil procedure chapters.

II. THE EXERCISES

A. *The Mechanics*

For each exercise, the student’s job is to meet in groups (“law firms”) of four to six students (“associates”) outside of class, and to discuss, collaborate on, and turn in to the professor the written assignment portion of the exercise. Additionally, each student-member of the firm must submit a time sheet detailing the tasks that the member carried out in fulfillment of the assignment and the time he or she spent on each task. The three written assignments, described in detail below, include devising a list of questions that the student-associates propose to ask prospective clients and a brief

whose coal-waste refuse pile collapsed into a stream and caused a flood that killed 125 people and destroyed 1,000 homes in West Virginia. *Id.* at ix-x (citing *West Virginia v. United States*, 479 U.S. 305 (1987)).

⁵¹ Charles A. Rees, *A Calendar of Buffalo Creek Hypotheticals for the Civil Procedure Course*, 18 OHIO N.U. L. REV. 233, 242 (1991); see also Lawrence M. Grosberg, *The Buffalo Creek Disaster: An Effective Supplement to a Conventional Civil Procedure Course*, 37 J. LEGAL EDUC. 378 (1987) (discussing advantages of using *The Buffalo Creek Disaster* in a civil procedure course).

If the case study is used as the sole or primary textbook for the class, or as the source for a large number of the hypotheticals that a professor poses, however, students may tire of it over the course of the semester. Rees, *supra*, at 242, 243.

⁵² See Grosberg, *supra* note 51, at 380.

description of the kind of information they hope to elicit; drafting an answer to one paragraph of a complaint; and proposing five or six written interrogatories and ten to twelve document production requests designed to elicit factual information to support a discrete claim in a complaint. Each law firm turns in only one written assignment for each exercise, plus one time sheet per student.⁵³

Before the firm turns in the written assignment, each member of the firm must receive a copy. On the day that each assignment is due, each firm must bring to class one copy of its paper for the professor, plus enough additional copies so that each student in the class can independently review two papers produced by firms other than her own.⁵⁴ Each student must pick two papers on which he or she did not work. Each student then must review, on her own, the two papers. On the day that the class is to talk about the completed exercise, each student must come prepared to discuss her firm's paper and the two others she examined. Within a day or two of the class discussion of the exercise, while the discussion is still fresh in her mind, the student should write her comments on the papers she reviewed and return the annotated papers to the professor. The professor will then return the annotated papers to the firms that authored them.⁵⁵

The professor's task is to review all of the written assignments, note common choices or mistakes, and facilitate the in-class discussion of the exercise, focusing on the substantive, doctrinal information that the exercises are meant to reinforce and the skills that the exercises are intended to teach. The professor should also briefly examine each student's comments on her classmates' work product to ensure that she has completed the peer review portion of the assignment. Finally, the professor should review the time sheets

⁵³ In a class of 120 students, for example, the professor would receive for review twenty to thirty papers and 120 time sheets for each of the three exercises.

⁵⁴ For example, with 120 students in thirty firms, each firm would turn in nine copies of each assignment.

⁵⁵ Requiring students to review their peers' written work product serves four purposes. First, it allows students to understand that there is not a single "right answer" and that there are choices that differ from those that the student and her firm made but that are equally valid. Second, it permits students to self-evaluate by comparing their work to the work of their colleagues. See MACCRATE REPORT, *supra* note 2, at 331 (noting that effective teaching of lawyering skills will provide students with opportunities for self-evaluation in addition to professor's evaluation). Third, it helps students better understand the professor's comments about common choices and mistakes, since it is often easier to recognize mistakes in others' work than in one's own. Finally, it provides students with more informed feedback on their work without unduly increasing the professor's workload.

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to ensure that no student has spent insufficient or excessive time on the assignment and that the firms have divided tasks among their associates in a manner that is not obviously inequitable or inefficient. I do not anticipate any need to spend substantial class time on the time-sheet portion of each exercise. Time management, the skill that the preparation of the time sheets is designed to facilitate, is best mastered through experience rather than extensive group discussion.

To conserve the professor's time and promote fairness, I suggest that the written portion of each exercise be graded on a pass/fail basis, and that firms whose work on an exercise is not passable be given the opportunity to revise the work until it is sufficient. Letter grading requires significantly more time than grading on a pass/fail basis. Moreover, the requirement that students collaborate on the work product—a requirement that promotes organizational and managerial skills⁵⁶—makes the work difficult to grade fairly. Even with the detailed time sheets that students will submit, attempting to discern the contributions of each member would be an ambitious and thankless task. On the other hand, giving each individual in a group the same grade might unfairly penalize students paired with associates who do less than their fair share.⁵⁷

B. Guidelines: Organization and Management of Legal Work

To introduce students to the set of skills that the *MacCrate Report* task force grouped under the rubric “organization and management of legal work,”⁵⁸ I propose not a single exercise but a set of guidelines that govern how students will carry out each of the other exercises. That is, in undertaking each of the other exercises, students will also practice the organizational and managerial skills that the *MacCrate Report* deems fundamental. The *Statement's* formulation of the “organization and management of legal work” skill concentrates on “central aspects of practice management—efficient allocation of time, compliance with deadlines, and effective

⁵⁶ See *infra* Part II.B.

⁵⁷ The professor might consider “bumping up” the final grade of any student whose individual contributions have been obviously, consistently, and particularly valuable. Such “bumping” may be a less desirable option in classes for which the school enforces a mandatory mean or curve, however, since in that case, rewarding some students with higher grades necessarily lowers the grades of and penalizes other students.

⁵⁸ MACCRATE REPORT, *supra* note 2, at 140.

collaboration with others—which are applicable regardless of whether a lawyer is a solo practitioner, a partner or associate in a firm, or a lawyer in public service practice.”⁵⁹

First, the organizational and managerial components of the exercises require that students collaborate on each assignment in “law firms” composed of four to six students. Collaborative efforts are the norm in legal practice. In law school, however, moot court competitions often offer students their only opportunity to learn how to work together effectively with their colleagues.⁶⁰ Working collaboratively in a relaxed setting outside the classroom, without oversight by a professor acting as interrogator and assessor, may also allow some students to grasp substantive law principles more easily than in the competitive, isolating atmosphere of a class taught in the traditional Langdellian mode. Moreover, it may enhance student participation in the classroom. Students who practice articulating their ideas in a relatively less intimidating setting and refine them based on the comments of a few peers they know well will, ideally, feel more comfortable and confident presenting those ideas to the professor and the larger group.

Second, to reinforce the importance of efficient time management and compliance with deadlines, the proposed organizational and managerial guidelines require that the student-associate members of each law firm meet with each other outside of class, at times and places of their choosing. The student-associates in each law firm must impose on themselves whatever interim deadlines they need to ensure that the firm meets the deadline for submitting to the professor the written component of each exercise.

To further promote time-management skills and introduce students to the concept of accountability to clients,⁶¹ the guidelines also require that each associate keep track, on a standard time sheet form, of the amount of time she spends completing each exercise.⁶² The members of the firm will be required to assemble the time sheets and hand them in with each written assignment, having first gone over the time sheets and highlighted time spent on tasks that

⁵⁹ *Id.* at 202-03.

⁶⁰ Paul Bateman, *Toward Diversity in Teaching Methods in Law Schools: Five Suggestions from the Back Row*, 17 QUINNIPIAC L. REV. 397, 418 (1997).

⁶¹ See MACCRATE REPORT, *supra* note 2, at 200-01.

⁶² The time sheet should include the time she spends in discussion with the other members of the firm as well as the time she spends completing the portion of the project that the firm delegates to her. The time sheet must show the time she began and ended each task and describe the task briefly but completely.

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they have decided were unnecessary, duplicative, inefficient, or would otherwise be unfair to bill to a client.

Finally, while the members of each firm may choose to delegate work among themselves, they should be prepared to discuss whether such delegation proved efficient. In any event, each member will be accountable for the written work that the firm produces. If the work is not passable, the entire firm must continue working together until it is, unless its members have made the professor aware of special circumstances that would make such a rule unjust. This requirement reflects the realities of firm practice: The firm is responsible for the mistakes of its partners and associates.

C. Exercise One: Client Counseling

The first exercise is designed to introduce students to the skill of client counseling. Effective client counseling—counseling clients about “decisions the clients have to make or courses of action they are considering”⁶³—requires a lawyer to be familiar with the nature and bounds of a proper counseling relationship with a client, to understand how to establish such a relationship, to gather information relevant to the client’s decision, to analyze the decision to be made, to counsel the client about the decision, and to ascertain and implement the client’s decision.⁶⁴ These skills, in turn, require the attorney to understand, *inter alia*:

- (1) The ethical rules and professional values that govern who has decision-making authority;
- (2) The extent to which a lawyer may attempt to persuade a client to take or avoid particular courses of action, and what she should do if her client is unwilling to follow her advice;
- (3) Her responsibility to be dispassionate and objective, but at the same time able to view options from her client’s perspective;
- (4) How to acquire relevant legal and factual information and ascertain her client’s objectives and concerns, keeping in mind how personal, cultural, and emotional differences between her and her client may affect differences in their perceptions and judgments;
- (5) The various options the client has, their costs and

⁶³ MACCRATE REPORT, *supra* note 2, at 176.

⁶⁴ *Id.* at 176-84.

benefits, and the degree to which each will further the client's objectives; and

(6) How to explain these options and the client's rights and responsibilities to her in language she will understand.⁶⁵

Although students cannot begin to master the necessary client counseling skills without the opportunity to practice those skills with a live "client," whether genuine or portrayed by an actor, the exercise I have designed introduces them to some of the counseling skills without great cost to the institution or the professor. A client counseling exercise that required first-year law students actually to meet with a live client would require significant time investments. If the client were genuine, the professor's ethical obligations as supervising attorney would require that she personally monitor and, if necessary, participate in the meeting. If the client were portrayed by an actor, the actor would have to be willing, or paid, to invest the time to learn and play the part. The professor's ethical duties would not require that she sit in on the meeting, but she still would have to know what actually occurred in order to provide meaningful critiques. Attending live interviews or reviewing videotaped interviews would be extremely time-consuming. Evaluating twenty to thirty written "meeting plans" and offering general feedback based on students' common choices should not be as onerous. Having the student law firms collaboratively draft a meeting plan not only reinforces the organization and management skills discussed above,⁶⁶ but also allows all students equal opportunity to participate at relatively low cost.

The client counseling exercise I have devised should be given near the beginning of the course⁶⁷ but after the students have read *A Civil Action* in its entirety. It asks the students, in collaboration with

⁶⁵ *Id.*

⁶⁶ *See supra* Part II.B.

⁶⁷ One reason to give the exercise at the beginning of the course is to emphasize its importance. In a recent survey of new lawyers, "[f]ew . . . reported that they had spent any significant time in law school discussing client relationships, counseling, or attorney-client decisionmaking." Rodney J. Uphoff et al., *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381, 398 (1997). The absence of discussion may be due, in part, to the fact that "a significant number of law professors never practiced law, or did so briefly in a large firm with minimal client contact, [so that] few law professors are familiar with or interested in the interpersonal aspects of lawyering." *Id.* at 397. The fact that the new lawyers surveyed did not share the *MacCrate Report's* view that the skill of client counseling is "fundamental," MACCRATE REPORT, *supra* note 2, at 138-39, 184, may in turn be caused by their professors' failure to discuss it with them. Uphoff et al., *supra*, at 397-98.

the members of their “law firm,”⁶⁸ to imagine that they are associates in the law firm Reed & Mulligan.⁶⁹ It is August 1980, and Joe Mulligan, a partner in the firm, has just met with Donna Robbins, a Woburn resident whose son died of leukemia a year earlier,⁷⁰ and her minister, Reverend Bruce Young, to discuss the possibility of representing Robbins and some of the other Woburn residents whose children are ill with or have died from leukemia.⁷¹ The student-associates are to assume that they know what Mulligan knew at that point: that since late 1964, residents of a neighborhood in Woburn, Massachusetts have complained of the look, smell, and taste of their tap water; that several Woburn children have contracted leukemia since late 1964; that researchers at the Centers for Disease Control in Atlanta are investigating the possibility that the leukemia “cluster” in Woburn is not random, but can be attributed to a common cause; and that, in 1979, the two wells that had been the source of the neighborhood’s water supply were shut down after a state environmental inspector discovered they were contaminated with two industrial solvents that the Environmental Protection Agency had listed as probable carcinogens (although they had not identified the solvents as causes of leukemia).⁷² Mulligan, who arranged with Robbins and Young to meet with more of the children’s families,⁷³ has been called out of town unexpectedly and has asked the associates to take his place at the meeting. To prepare for the meeting, each firm of student-associates must describe the kind of information its members will need to determine whether to represent them and how to advise them. They must then draft some of the key questions they would ask the families in order to elicit that information.

The goal of the exercise is to help students recognize—at the start of the course and of their legal careers—that in advising clients, the job of a civil litigator is not just to gather facts, determine what

⁶⁸ See *supra* Part II.A-B.

⁶⁹ Joe Mulligan, a partner in Reed & Mulligan, initially represented the plaintiffs in the case that became *Anderson v. Cryovac*. HARR, *supra* note 5, at 46-48 (citing *Anderson v. Cryovac*, 862 F.2d 910 (1st Cir. 1988)). Mulligan subsequently asked Jan Schlichtmann, the lawyer who took *Anderson v. Cryovac* to trial, to work on the case. *Id.* at 67. Schlichtmann left Reed & Mulligan in 1983 to start his own firm, taking the case with him. *Id.* at 124-25; Joan Vennoch, *Jan Schlichtmann [sic]: Lawyer on a Crusade*, BOSTON GLOBE, July 11, 1989, at 25.

⁷⁰ HARR, *supra* note 5, at 34, 46-47.

⁷¹ *Id.* at 46.

⁷² *Id.* at 14-48.

⁷³ *Id.* at 47.

causes of action a potential client might have, and evaluate the likely success of those claims, but to find out what the client actually wants. The litigator's task as counselor is to use her professional expertise to determine not only whether the client is likely to prevail in civil litigation, but whether litigation, even assuming that it is successful, is likely to give the client what the client wants. In this case, an astute student could recognize that plunging into litigation might not have been the only or best option. Harr's description of the Woburn families' initial meeting with Mulligan neither discloses what he advised them nor mentions whether he asked them, or whether they told him, their goals.⁷⁴ Harr's account suggests, however, that, for at least some of the families, the issue was not "a matter of money" but their desire that the parties responsible for their children's leukemia admit their guilt or be adjudged guilty.⁷⁵ A skilled client counselor would have ensured that the families understood that the vast majority of civil lawsuits settle before trial and that a successful plaintiff is far more likely to get money from a defendant than an admission or judgment of guilt.⁷⁶

I anticipate that in completing the first exercise, many of the students will be so excited by and caught up in their role as civil litigators that they will focus solely on gathering the facts needed to file a complaint and on advising their clients of the likelihood of prevailing in a civil action.⁷⁷ Most of them probably will not think

⁷⁴ *Id.*

⁷⁵ *Id.* at 442-44.

⁷⁶ By some estimates, at least ninety-five percent of civil cases are not tried to judgment; most are settled before trial. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 498 (1991). Defendants may favor settlement precisely because, while they may have to pay a sizable amount of money, they can avoid an admission of guilt. See, e.g., Anne L. Austin, Comment, *Fair Settlement and the Non-Settling Defendant: In re Masters, Mates & Pilots Pension Plan and IRAP Litigation*, 43 CASE W. RES. L. REV. 1449, 1452 (1993).

⁷⁷ Dean Richard Matasar's experience as a civil procedure teacher bears out my intuition. He customarily suggested a hypothetical to his first-year civil procedure students in which each student had to imagine that he or she was a solo practitioner who had just set up practice after graduation from law school and that a seriously injured prospective client met him or her "with the immortal words: 'Sue, sue the bastard.'" Richard A. Matasar, *Teaching Ethics in Civil Procedure Courses*, 39 J. LEGAL EDUC. 587, 592 (1989). Dean Matasar then asked students what they should do next. Generally, students responded with technically correct answers about filing complaints, summons and service, without first asking whether there were non-litigation alternatives that would satisfy the client's objectives. See *id.* Professor Matasar reasoned that "[b]ecause the class is one in civil procedure, many students assume that the right approach is to go directly to litigation and forget all the preliminaries." *Id.*

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to ask what their clients' goals are and whether litigation, even successful litigation, will achieve those goals. But ideally, as the class and the professor discuss the various firms' draft plans, the students will become aware that before they ever leap into litigation, no matter how promising a case may be, they need to ensure that they understand what their client desires and whether litigation can achieve those desires. As the course continues and as the students learn about the different procedural rules that govern the different stages of a civil action, students should be able to think back to the discussion and remember that their clients' goals and desires should guide their decisions and actions at each stage.

The exercise should also alert students to areas of potential conflict between the lawyers and clients.⁷⁸ They should be asking themselves what their "firm" wants out of the case, what they personally want, and how those goals accord with their clients' goals. As part of that thought process, they should ask how (and whether) their clients' goals mesh with their vision of the societal role that they, as attorneys, should play. These kinds of questions should begin to unveil some of the ethical considerations that affect the lawyer-client relationship and the ways that attorneys' duties to their clients, the court, society, and themselves may conflict.

D. Exercise Two: Recognizing and Resolving Ethical Dilemmas

While *A Civil Action* is rich with examples of lawyer behavior that "can leave the reader with the impression that ethics took a holiday during the Woburn case,"⁷⁹ the "ethical dilemma" exercise I have designed is intended to give students some experience in both recognizing and resolving a dilemma they are likely to face in

⁷⁸ Consider, for example, the interplay between the commentary to Rules 1.7 and 2.1 of the Model Rules of Professional Conduct: "Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client[.]" MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. (2000); "It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." *Id.* R. 2.1 cmt. More than forty states have adopted the Model Rules. Kevin E. Mohr, *Legal Ethics and A Civil Action*, 23 SEATTLE U. L. REV. 283, 288 (1999).

⁷⁹ Mohr, *supra* note 78, at 284. Professor Mohr recounts several incidents from *A Civil Action* that raise serious ethical concerns and suggests how a teacher of a professional responsibility class can supplement the course by referring to such incidents.

practice as civil litigators. The skill of recognizing and resolving ethical dilemmas requires that lawyers understand the “basic concept of law as an ethical profession” that imposes obligations on each attorney, obligations defined both by ethical rules and standards and the lawyer’s own “personal sense of morality.”⁸⁰ Lawyers should be aware of their duties to their clients, including their duties of loyalty and zealous, diligent advocacy, and be familiar with “general ethical precepts calling for honesty, integrity, courtesy, and respect for others,” as well as “general ethical prohibitions against lying and misrepresentation.”⁸¹ They should “[c]onstantly be[] alert to the possible existence of ethical dilemmas” and respond by “[r]esearching the applicable ethical rules and principles” and “[i]dentifying a solution that satisfies the applicable ethical rules and principles while at the same time accommodating any competing interests of a client.”⁸²

I envision the “ethical dilemma” exercise following the client counseling exercise for two reasons. First, it follows in natural chronological order. In the chronology of a civil lawsuit, deciding whether to take on the representation of a client and bring suit on her behalf obviously precedes the filing of the initial pleadings. Second, it takes students from the more general discussion of possible ethical conflicts that can arise between a lawyer and her client to a more focused discussion of a particular ethical dilemma.

The exercise, which a professor might assign in conjunction with a discussion of complaints and answers or of Rule 11,⁸³ requires students to imagine that they are associates in the law firm Hale and Dorr, representing defendant Beatrice Foods, which has just been served with the complaint in *Anderson v. Cryovac*.⁸⁴ The complaint alleges, *inter alia*, that toxic chemicals dumped on a fifteen acre site owned by the John J. Riley Tannery, one of Beatrice’s divisions, contaminated the plaintiffs’ groundwater and caused the leukemia that killed five children.⁸⁵ The supervising partner, Jerome Facher, has asked the student-associates to do what Hale and Dorr junior partner Neil Jacobs actually did: go to Woburn, speak with

⁸⁰ MACCRATE REPORT, *supra* note 2, at 203-06.

⁸¹ *Id.* at 204-05.

⁸² *Id.* at 206.

⁸³ FED. R. CIV. P. 11 (prohibiting attorneys and parties from presenting legal and factual claims, contentions, defenses and denials that are not supported by the facts or the law or that are filed for an improper purpose, such as to harass, delay, or impose needless costs).

⁸⁴ See HARR, *supra* note 5, at 90-91.

⁸⁵ *Id.* at 90.

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John J. Riley, the tannery manager,⁸⁶ and then draft an answer to paragraph 53 of the complaint.⁸⁷ Paragraph 53 alleged that the fifteen-acre site:

[C]onsists of wooded field and marshlands. There is a well-defined dirt road located next to the marshland along which are deposited numerous tanks and drums. The drums are in various conditions: new and rusted, open and closed. Drums have also been deposited near the railroad tracks. There are some areas of distressed vegetation, indicating spills of hazardous materials.⁸⁸

The student-associates should assume that they have gone to the site and seen what Jacobs did when he went to talk with Riley: On the dirt road along the fifteen-acre site and on the site itself, there were large piles of debris, including “several 55-gallon barrels in various stages of decay.”⁸⁹ At least one of the drums oozed a thick, dark substance, the ground was darkly stained, and the air reeked with a nauseating chemical odor.⁹⁰

The student-associates should further imagine that after visiting Woburn, they told their supervising partner about what they saw on the site, and he or she responded that the firm should not “make such an admission on behalf of [its] client” because denying the plaintiffs’ factual claims to force them to produce evidence that proves each one is “part of the time-tested tradition of the law.”⁹¹ Considering their own observations and their supervising partner’s advice, each student law firm should draft an answering paragraph consistent with Rules 8 and 11 of the Federal

⁸⁶ *Id.* at 91.

⁸⁷ *Id.* at 91, 94.

⁸⁸ *Id.* at 94. The paragraph Harr quotes is actually contained in the Second Amended Complaint, which, along with several of the other documents filed in *Anderson v. Cryovac*, is available online. See *Index of Pleadings in Anderson v. Beatrice Foods*, *supra* note 47. Professors Grossman and Vaughn have also compiled those documents, plus dozens of additional documents from the *Anderson v. Cryovac* case, in the textbook they have published for use in conjunction with *A Civil Action*. See GROSSMAN & VAUGHN, *supra* note 5.

⁸⁹ HARR, *supra* note 5, at 93.

⁹⁰ *Id.*

⁹¹ *Id.* at 94. Those were Neil Jacobs’ stated reasons for writing, in the answer that Hale and Dorr actually filed on behalf of Beatrice Foods, that Beatrice “admits that the land consists, in part, of wooded fields and marshlands and has a dirt road through a portion of it [but] denies the remaining allegations contained in Paragraph 53 of the Complaint.” *Id.* Both the website that reproduces documents filed in the Woburn case and the textbook by Professors Grossman and Vaughn include Beatrice Foods’ Answer to the Second Amended Complaint in its entirety. *Index of Pleadings in Anderson v. Beatrice Foods*, *supra* note 47; GROSSMAN & VAUGHN, *supra* note 5, at 88-99.

Rules of Civil Procedure⁹² and with their duties as associates, advocates, and officers of the court.⁹³

The goal of the exercise is to have students consider both the applicable rules and their own consciences. My guess (and my hope) is that most students will readily conclude that they have a legal and moral obligation to admit to the drums, but they may be given pause by the difficulty of simultaneously satisfying their client, their firms, and their own senses of morality. The exercise forces them not only to think and talk about their dilemma, but to come to a resolution, since they must complete the exercise by drafting an answering paragraph. As with the client counseling exercise, the in-class review of the various firms' solutions to the ethical dilemma exercise should result in a lively discussion to which students can return throughout the course.

E. Exercise Three: Factual Investigation

The third exercise is designed to introduce students to the skill of factual investigation. The *MacCrate Report's* formulation of the skill of planning, directing, and participating in a factual investigation requires, *inter alia*, that the lawyer:

- (1) Recognize when a factual investigation is necessary;
- (2) Formulate a flexible "working hypothesis," revising it as needed, of the "legal and factual theories upon which the lawyer will rely to achieve his or her objectives," based

⁹² See FED. R. CIV. P. 8(b); FED. R. CIV. P. 11(b)(4) (in signing and filing an answer, an attorney certifies that "to the best of [his or her] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the denials of factual contentions are warranted on the evidence"). In addition to the Federal Rules of Civil Procedure, the professor may direct the students to the commentary to Rule 1.3 of the Model Rules of Professional Conduct, which provides that a lawyer:

[M]ay take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client.

MODEL RULES OF PROF'L CONDUCT R. 1.3. The professor might also encourage students to read Rule 3.3, which states that a lawyer "shall not knowingly . . . make a false statement of material fact or law to a tribunal," MODEL RULES OF PROF'L CONDUCT R. 3.3, and Rule 5.2(b), which provides that "[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." MODEL RULES OF PROF'L CONDUCT R. 5.2(b).

⁹³ Professors Grossman and Vaughn pose a hypothetical that uses similar facts. GROSSMAN & VAUGHN, *supra* note 5, at 100-01.

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on an understanding of the pertinent legal rules and principles and the factual propositions needed to prevail upon the pertinent legal claims;

(3) Understand the strengths, weaknesses, costs, and benefits of the basic methods of factual investigation;

(4) Analyze the possible sources of factual information;

(5) Be able to plan and conduct an effective fact-witness interview;

(6) Know how to identify, acquire, and analyze pertinent documents;

(7) Memorialize and organize information in an accessible form;

(8) Understand when to conclude the investigation; and

(9) Be able effectively to evaluate the factual information gathered.⁹⁴

The exercise I describe below focuses on the initial planning phase—in Professor Anthony Amsterdam’s terminology, the “hypothesis formulation”⁹⁵ stage—of a factual investigation carried out through written interrogatories and document production requests. It is designed to encourage students to think about the way facts and law interrelate, about what facts are needed to prove particular legal claims, and about which investigative devices will be most useful for gathering the necessary factual information.

The factual investigation exercise is the third of the three exercises for two reasons. First, the pretrial discovery stage of a civil action, the stage in which the factual investigation exercise arises, generally follows the filing of the initial pleadings.⁹⁶ Second, the professor should not assign the exercise until after students have begun to master basic legal analysis and reasoning, because the “hypothesis formulation” phase of a factual investigation requires that the person responsible for planning the investigation be able to articulate her legal theories and identify the facts that can prove her legal claims.⁹⁷

⁹⁴ MACCRATE REPORT, *supra* note 2, at 163-71.

⁹⁵ Amsterdam, *supra* note 30, at 614.

⁹⁶ Prelitigation discovery, which is allowed under certain circumstances, is a rare exception. See FED. R. CIV. P. 27.

⁹⁷ I am assuming that the civil procedure course begins in the first semester of the first year of law school, so that students will not have spent significant time mastering the skill of legal analysis and reasoning before the class commences.

Introducing students in a traditional civil procedure class to the skills of planning and directing a factual investigation in the context of pretrial discovery makes sense for a few reasons. While there are other, informal methods of investigating facts, including interviewing one's own clients and analyzing the documents they have available, these methods are not governed by the Federal Rules of Civil Procedure. Moreover, the factual investigation methods that this exercise requires students to consider—interrogatories and document production requests—are the ones for which summer associates and new attorneys will most likely be responsible. In law offices where there are junior and senior attorneys, junior attorneys are not likely to conduct client interviews or take or defend depositions, but they will probably have to plan and draft written discovery.⁹⁸ The exercise, then, mirrors reality in a way that may motivate and excite students. A factual investigation exercise that required first-year law students to plan and take a deposition or interview a client, on the other hand, would not only be unrealistic, but would require the kind of time and expense that would defeat the cost benefits I have sought with these exercises.⁹⁹

Before students can embark on this exercise, the professor will need to ensure that its scope is sufficiently narrow. First-year students will not be equipped to draw up a plan to acquire all of the evidence necessary to prove all of the legal claims of the plaintiffs in *Anderson v. Cryovac*. The professor will need to help students focus on the discrete and fairly simple legal claim to be proved by the facts that the students intend to gather through their written discovery requests: whether the defendants used the solvents that allegedly caused the plaintiffs' illnesses, and if so, where and how they disposed of the waste. Again, the gravamen of the plaintiffs' suit was that W.R. Grace and Beatrice Foods disposed of toxic chemicals that polluted the groundwater that fed the wells from which the plaintiffs' tap water came and that the contaminated tap

⁹⁸ Cf. John F. Grady, *The Unsteady Triumvirate*, 63 NOTRE DAME L. REV. 830, 833-34 (1988) (assuming that drafting interrogatories is the task of a junior associate); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 MINN. L. REV. 1, 17 (1984) (same); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 926-27 (1999) (same). The reason that written discovery is usually a new lawyer's task is not because attorneys consider it less important than other types of discovery, such as taking or defending depositions or conducting client interviews, but because a supervising attorney can review written discovery requests and correct errors before any harm is done.

⁹⁹ See *supra* Part II.C (discussing similar issues in context of client counseling exercise).

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water sickened the plaintiffs or their family members. The students must first recognize that the major sticking point in the plaintiffs' case was causation—whether W.R. Grace and Beatrice Foods caused the injuries at issue. Before conducting any formal discovery, the plaintiffs knew that there was a higher than normal incidence of leukemia in the families served by the wells,¹⁰⁰ that water from the wells was polluted with two solvents that had been identified as probable carcinogens but that were not known causes of leukemia,¹⁰¹ and that the contamination appeared to come from two sites, one owned by W.R. Grace and one by Beatrice Foods.¹⁰² To prevail, the plaintiffs had to prove first, that the contaminants in the well water caused the plaintiffs' illnesses, and second, that the two defendants were responsible for the presence of the contaminants in the water.

The first question—whether the contaminants in the well water caused the plaintiffs' illnesses—is not well-suited to the exercise, because its answer requires the kind of medical and scientific information that is likely to come from expert witnesses.¹⁰³ Written discovery requests directed to the defendants are not likely to elicit or point to the necessary factual information.

The second question—whether the two defendants caused the water contamination—also requires, to some extent, an answer based on scientific data more likely to be the subject of expert testimony. That is, whether solvents dumped on the defendants' sites could have leached into the groundwater and polluted the wells that supplied the plaintiffs' tap water, and whether the contamination could have come from other or additional sources, are questions of science. But whether the defendants did in fact use products that contained or produced the chemicals in question, and where, when, and how they used or disposed of such products, are questions well-suited for including in written discovery requests directed to the defendants.

Again, before students can undertake the factual investigation exercise, the professor must guide them to this point. If the students do not understand the legal claim they are trying to prove with their discovery requests, their requests will be sufficiently off-base that

¹⁰⁰ HARR, *supra* note 5, at 50.

¹⁰¹ *Id.* at 36, 50.

¹⁰² *Id.* at 78.

¹⁰³ While not part of the exercise, urging students to think about the formal and informal discovery devices they might use to track down this kind of information is also a way to animate the discussion of the pretrial discovery process.

the exercise will not have much pedagogical value.¹⁰⁴

Once students understand the legal claim they seek to prove, they should be able to start thinking about what facts might prove the claim and how they can use written discovery requests to elicit those facts from the defendants. The exercise requires that the members of each student law firm collaboratively draft five or six interrogatories and ten to twelve document production requests addressed to the defendants.¹⁰⁵ These requests should be aimed at

¹⁰⁴ It may also help students to see examples of interrogatories and document production requests before they embark on the exercise. Both the website that reproduces documents filed in the Woburn case and the textbook by Professors Grossman and Vaughn include such examples. *Index of Pleadings in Anderson v. Beatrice Foods*, *supra* note 47; GROSSMAN & VAUGHN, *supra* note 5, at 245-81, 300-11.

¹⁰⁵ The difference in number reflects the differing limitations on the number of each type of request that a party is allowed to propound under the Federal Rules of Civil Procedure. Compare FED. R. CIV. P. 33(a) (unless court grants leave or the parties stipulate otherwise, each party may serve another with no more than twenty-five written interrogatories, including subparts), with FED. R. CIV. P. 34 (no specified limit on number of document production requests each party may serve).

The professor should note that the exercise assumes that the documents sought were not produced under the rules requiring that even before a discovery request is made, parties produce or describe certain relevant documents, and that they were not produced in response to any arrangements made in the "meet and confer" that the parties must hold before they can seek discovery. FED. R. CIV. P. 26(a)(1)(B), (d), (f). When this article was written, Rule 26(a)(1) contained an "opt out" provision that allowed federal district courts to elect not to enforce the Rule's mandatory initial disclosure requirements. FED. R. CIV. P. 26(a)(1). As of March 1998, forty-nine of the ninety-four federal districts had chosen to adopt the Rule's mandatory initial disclosure requirements, though some of those did not require the disclosure of adverse material; three had chosen to reject the Rule's provisions but adopt their own mandatory disclosure rules; eighteen allowed each judge to order such disclosure in a particular case, at his or her discretion; and twenty-three had rejected such compulsory disclosure altogether. DONNA STIENSTRA, RESEARCH DIVISION, FEDERAL JUDICIAL CENTER, IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (Mar. 30, 1998), at [http://air.fjc.gov/public/pdf.nsf/lookup/](http://air.fjc.gov/public/pdf.nsf/lookup/FRC2698.pdf)

FRC2698.pdf. In September 1999, the Judicial Conference of the United States adopted amendments to Rule 26 that eliminated the "opt out" provision but significantly narrowed mandatory initial disclosure of documents, requiring in most civil actions early production or description only of those documents that the "disclosing party may use to support its claims or defenses, unless solely for impeachment [in which case they need not be produced]." Administrative Office of the U.S. Courts, *Federal Rulemaking: Rules Approved by the Supreme Court*, at <http://www.uscourts.gov/rules/approved.htm> (last visited Nov. 27, 2000). The United States Supreme Court approved the amendments on April 17, 2000, and they took effect on December 1, 2000. *Id.* (reproducing Court-approved amendments); Peter J. Beshar & Kathryn E. Nealon, *Changing the Federal Rules of Civil Procedure*, N.Y.L.J., Dec. 1, 2000, at 1 (noting that amendments took effect Dec. 1, 2000).

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discovering whether the defendants did in fact use products that contained or produced the chemicals in question, and if so, where, when, and how they used or disposed of such products. The students should not be required to sit down together and draft each request as a group (although if they try to do so, they will surely learn quickly how difficult joint drafting can be). If they choose instead to divide the work among themselves, they will have to draw on their organizational and managerial skills to make sure that each student-associate is responsible for a fair, equitable, and non-duplicative share of the work.

The exercise should help students understand how law and facts are interconnected. Before they even begin to start digging for facts, they must be able to articulate their legal theories to understand what kind of evidence might support them and where they might find such evidence. The exercise should also help students understand the value of careful drafting. Given the limits on the number of certain written discovery requests each party may propound,¹⁰⁶ sloppily-drafted discovery requests will use up opportunities for discovery without yielding helpful information. Further, the exercise should spur students to consider which discovery devices are most useful for eliciting particular kinds of factual information. Finally, the class discussion of the kind of information that the draft discovery requests might produce should help the students recognize the recursive nature of the effective factual investigation. The initial facts an attorney obtains may lead her to form particular legal theories that, in turn, provoke her search for specific factual information. In response to that information, she may revise her legal theories and claims and seek new supporting evidence.¹⁰⁷

CONCLUSION

The value of the exercises I propose is not that they will *train* students in the four neglected skills of client counseling, factual investigation, recognizing and resolving ethical dilemmas, and

¹⁰⁶ See *supra* note 105.

¹⁰⁷ The professor may consider requiring each firm to draft responses to another firm's discovery requests, an exercise that would re-introduce some of the ethical questions that the second exercise is meant to raise. Fairly early in her career, a civil litigator is likely to have to answer discovery requests that aim to produce damaging information that the lawyer knows is in her client's files, or her own. Crafting the answer to satisfy the interests of justice and her client's competing interests is a difficult test of her professional mettle.

organization and management of legal work, but that they will *introduce* students to those skills at a low cost to the law professor and the law school. The exercises do not require significant investments of time or money, nor do they require that the professor sacrifice doctrinal coverage to acquaint students with the skills. The exercises are designed to marry doctrine and skills without substituting one for the other, so that, as in a law practice, students concurrently acquire substantive knowledge and sharpen their skills. Because they draw on *A Civil Action*, a civil procedure “story” that all of the students must read, the exercises should help elucidate abstruse procedural concepts by putting them in a familiar factual framework and showing the immediacy and reality of their effects on real people. The change of pace that the exercises offer may help invigorate a class that students often find dry and difficult. Perhaps most significantly, introducing students to practice skills and to substantive law concepts in the same foundational, first-year course will teach students that the skills are indeed “fundamental.”¹⁰⁸

¹⁰⁸ MACCRATE REPORT, *supra* note 2, at 7.