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## Beyond Mooting: Designing an Advocacy, Ethics and Values Matrix for the Law School Curriculum

Bobette Wolski

*Bond University*

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# BEYOND MOOTING: DESIGNING AN ADVOCACY, ETHICS AND VALUES MATRIX FOR THE LAW SCHOOL CURRICULUM

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BOBETTE WOLSKI\*

## I INTRODUCTION

Moots are a common feature of the law school curriculum in Australia and elsewhere.<sup>1</sup> While many commentators argue that moots have potential as serious learning tools,<sup>2</sup> they also express concerns over a number of issues surrounding their use. Moots have long been criticised for their lack of realism,<sup>3</sup> for focusing too much on appellate court argument and for their ‘infatuation’<sup>4</sup> with the court of last resort.

The most recent expressions of concern are that:

- 1 Mooting focuses too much on skills.<sup>5</sup> Gillespie argues that we have lost sight of the potential for the use of moots as part of the learning process and as a vehicle for the development of substantive knowledge.<sup>6</sup>

\* Associate Professor of Law, Faculty of Law, Bond University.

<sup>1</sup> Gillespie notes that moot courts can be found throughout the Commonwealth, in the US and in Ireland (Gillespie’s research concerned mooting at law schools in the UK): Alisdair A Gillespie, ‘Mooting for Learning’ (2007) 5 *Journal of Commonwealth Law and Legal Education* 19, 19. The moot has even made its way to Sweden: see Jacob W F Sundberg, ‘Moot Court: An American Idea in a Nordic Setting’ (1997) 19 *Justice System Journal* 229.

<sup>2</sup> See, eg, Gillespie, above n 1, 35; Michael V Hernandez, ‘In Defense of Moot Court: A Response to “In Praise of Moot Court – Not!”’ (1998) 17 *Review of Litigation* 69, 74; Darby Dickerson, ‘In Re Moot Court’ (1999–2000) 29 *Stetson Law Review* 1217, 1217–18; and Joel Butler and Rachel Mansted, ‘The Student as Apprentice: Bridging the Gap between Education, Skills and Practice’ (2008) 1 *Journal of the Australian Law Teachers Association* 287, 288.

<sup>3</sup> See, eg, John T Gaubatz, ‘Moot Court in the Modern Law School’ (1981) 31 *Journal of Legal Education* 87, 87; Alex Kozinski, ‘In Praise of Moot Court – Not!’ (1997) 97 *Columbia Law Review* 178, 180, 194; and Lee Stuesser, ‘Skills for the Masses: Bringing Clinical Skills to More Students at Less Cost’ (1992) 10 *Journal of Professional Legal Education* 119, 126.

<sup>4</sup> Gaubatz, above n 3, 88.

<sup>5</sup> Gillespie, above n 1, 23, 28, 35.

<sup>6</sup> Ibid 28, 35.

- 2 Mooting is used primarily for summative assessment purposes, rather than as a way in which to provide students with formative feedback on their learning of substantive law and skills.<sup>7</sup>
- 3 Mooting sometimes takes place too early in law degrees, when students' neophyte skills have not developed sufficiently to enable them to handle its complexities.<sup>8</sup> Also, little provision is made across the curriculum for the incremental development of such skills.<sup>9</sup>

Another concern canvassed in this article is that the 'traditional moot' provides limited opportunity for students to gain an understanding and awareness of legal ethics and values (as opposed to an understanding and awareness of court etiquette).

The academic literature on mooting has not, thus far, always made clear whether the concerns about mooting are intrinsic to the traditional moot, whether they arise because of the way in which moots are incorporated into the law curriculum or because of a combination of these two factors. It is submitted in this article that we need to make this distinction if we are to deal with the concerns raised about moots. Also largely absent from the literature are sustainable solutions that address the concerns raised. This article offers one possible solution.

Part II of the article deconstructs the moot — its definitions, history, salient features and objectives. Part III discusses a range of concerns about mooting, drawing on literature from Australia, the United Kingdom (UK) and the United States (US). It also examines the problems associated with mooting through the experiences of Bond University, School of Law. The concerns are divided into three categories according to whether they derive from the nature of the moot (referred to under the heading 'the moot problem'); the way in which moots are integrated into the curriculum and used by law schools (dealt with under the heading 'the integration challenge');

<sup>7</sup> Ibid 32–3 (Gillespie reports that moots were summatively assessed in all instances where moots were offered as a component of a skills-based module and in 83 per cent of all modules using moots — the percentage dropped to 83 per cent when allowance was made for discrete mooting modules 'where it would be expected that more than one moot would be undertaken'). Also see Keyes and Whincop, who maintain that 'the traditional moot is inherently summative': Mary E Keyes and Michael J Whincop, 'The Moot Reconceived: Some Theory and Evidence on Legal Skills' (1997) 8 *Legal Education Review* 1, 18.

<sup>8</sup> Gaubatz, above n 3, 91; Robert J Martineau, 'Moot Court: Too Much Moot and Not Enough Court' (1981) 67 *American Bar Association Journal* 1294, 1296. The reference to 'neophyte skills' is taken from Wade's influential work, John H Wade, 'Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges' (1994) 5 *Legal Education Review* 173, 183.

<sup>9</sup> Gillespie, above n 1, 27. This concern is raised not only in relation to undergraduate law students in the UK and Australia. It has also been raised in relation to graduate law students in the US: see, eg, Martineau, above n 8, 1296. Generally, on the lack of systematic and incremental skills development in the law curriculum, see Wade, above n 8, 183.

or both. Part IV proposes ways to address these concerns, and raises some ongoing challenges that still need to be addressed.

## II DECONSTRUCTING THE MOOT

### *A Definitions and History*

Within the context of legal education, a moot is most commonly defined as ‘a discussion of a hypothetical case as an academic exercise’.<sup>10</sup> Moots can be traced back to the English Inns of Court of the 14<sup>th</sup> century, where they were used to train barristers.<sup>11</sup> The ‘discussion’ at the centre of a moot evolved into ordered presentations by students of opposing arguments based on legal issues raised by a hypothetical case.<sup>12</sup> Lynch concludes that ‘there are three key features of mooting which have remained from the Inns of Court and continue in practice today’.<sup>13</sup> These are: students assuming the role of advocates before a simulated bench; arguing points of law arising from a hypothetical scenario; and responding to questions from the bench.<sup>14</sup> This definition is wide enough to include all mooting competitions.

### *B The Modern Moot ‘Process’ — Salient Features*

The ‘mooting process’ in law schools today is structured and formal and is now referred to as the ‘traditional moot’.<sup>15</sup> Students are usually provided with a moot problem which essentially consists of three parts:<sup>16</sup>

- 1 A common predetermined set of ‘facts’ and evidentiary findings. The facts are not in dispute in a moot and there is no requirement to present evidence.

<sup>10</sup> Della Thomson (ed), *The Concise Oxford Dictionary Of Current English* (9<sup>th</sup> ed, 1995) 883. For further discussion on the meaning of the noun ‘moot’, see Kozinski, above n 3, 194; and Terry Gygar and Anthony Cassimatis, *Butterworths Skills Series — Mooting Manual* (1997) 2.

<sup>11</sup> In the UK, see John Snape and Gary Watt, *The Cavendish Guide to Mooting* (2<sup>nd</sup> ed, 2000) 7–12; and Gillespie, above n 1, 19–20. For the history of mooting in Australia, see Gygar and Cassimatis, above n 10, 1–3; and Andrew Lynch, ‘Why do we Moot? Exploring the Role of Mooting in Legal Education’ (1996) 7 *Legal Education Review* 67–70. On the history of mooting in the US, see Hernandez, above n 2, 75; Dickerson, above n 2, 1223; and Martineau, above n 8, 1294.

<sup>12</sup> See Lynch, above n 11, 73.

<sup>13</sup> *Ibid* 70.

<sup>14</sup> There are actually some six or seven points in the list of ‘key features’ provided by Lynch. Each of them is discussed in more detail below. Perhaps the most significant, when it comes to limiting the potential of a moot as a learning tool, is its focus on ‘points of law’.

<sup>15</sup> See Keyes and Whincop, above n 7, 2 (discussing the concept of the traditional moot).

<sup>16</sup> This is a fairly typical structure for a moot. On the position in Australia, see Lynch, above n 11, 70–1 (discussing the mooting programs at the University of Queensland, Griffith University and Queensland University of Technology). In the US, see Dickerson, above n 2, 1220–1; Charles Chase McCarter, ‘Questions and

- 2 A judgment by a lower court. The judgment contains the findings, reasoning and decision of the court (and also the alleged errors on which the appeal is based).
- 3 Selected grounds of appeal.<sup>17</sup> The grounds of appeal are usually articulated in the moot problem. The grounds must be at least roughly divisible as students are generally required to work in teams of two (so two students 'appear' for each of the appellant and the respondent).<sup>18</sup> They are usually responsible for deciding how to allocate the issues arising from the grounds of appeal.

Students are required to undertake the following tasks as if they were the advocates for one or sometimes both of the parties to the hypothetical problem. They must:<sup>19</sup>

- 1 research and prepare the case;
- 2 draft and submit a written outline of argument (or a 'brief' in US jurisdictions);
- 3 construct opposing arguments on the legal issues raised; and
- 4 present (and defend) those arguments before a simulated court.

Students are generally assessed on their court etiquette (that is, on their observance of 'the conventional rules of behaviour' of members of the legal profession towards each other and the court),<sup>20</sup> their written and oral presentation skills with emphasis on the latter, the structure and quality of their arguments including demonstrated understanding of the applicable law, their knowledge and use of authority for the arguments presented, and their ability to answer questions from the bench.

A moot is most often set in an appellate court<sup>21</sup> and, frequently, in the court of last resort of a particular jurisdiction.<sup>22</sup> It is difficult to

Answers Regarding Moot Court' (1982–83) 12 *Stetson Law Review* 759, 766–7; Frank Tuerkheimer, 'A More Realistic Approach to Teaching Appellate Advocacy' (1995) 45 *Journal of Legal Education* 113, 113. The same format is used in law schools in South Africa: see Pam Watson and Jonathan Klaaren, 'An Exploratory Investigation into the Impact of Learning in Moot Court in the Legal Education Curriculum' (2002) 119 *South African Law Journal* 548, 553.

<sup>17</sup> Gillespie, above n 1, 20; Snape and Watt, above n 11, 2.

<sup>18</sup> Duncan Bentley, 'Mooting in an Undergraduate Tax Program' (1996) 7 *Legal Education Review* 98, 113. Some moots allow for three students to present for 'each side'. See, eg, the Australian Law Students Association moot and the ELSA World Trade Organization Law Moot. On the practice of splitting issues: see Kozinski, above n 3, 192.

<sup>19</sup> Keyes and Whincop, above n 7, 16; Bentley, above n 18, 112–13.

<sup>20</sup> Thomson, above n 10, 463.

<sup>21</sup> The emphasis on appeal moots is found in law schools in all jurisdictions. In the UK, see A T H Smith (ed), *Glanville Williams: Learning the Law* (12<sup>th</sup> ed, 2002) 194; Gillespie, above n 1, 20; Snape and Watt, above n 11, 20. In Australia, see Marlene Le Brun and Richard Johnstone, *The Quiet Revolution — Improving Student Learning in Law* (1994) 307; Gygar and Cassimatis, above n 10, 8; Bentley, above n 18, 113. The position is the same in law schools in the US and Canada: see William H Kenety, 'Observations on Teaching Appellate Advocacy' (1995) 45 *Journal of Legal Education* 582, 584; Tuerkheimer, above n 16, 113–14; Stuesser, above n 3, 126; Kozinski, above n 3, 178, 190; Hernandez, above n 2, 73; Martineau, above n 8, 1294; Dickerson, above n 2, 1218; Charles R Knerr, Andrew

find satisfactory reasons why this is the case. It may have occurred because of the established practice of focusing arguments on points of law.<sup>23</sup> Martineau suggests the reasons are mainly practical — appeals avoid the need for juries and witnesses, require less time, and are inexpensive as they need only minimal space and furniture.<sup>24</sup>

These practical reasons account in some measure for why moots are set in an appellate court rather than a trial court, but not for why moots are set in a superior, rather than an intermediate, court of appeal. Nor do these practicalities explain why an appeal is used as the setting for practice rather than other advocacy situations such as civil applications, pleas in mitigation of penalty and so on — all scenarios which would have precisely the same practical advantages as those claimed for the appellate moot.

Martineau provides four possible educational reasons for focusing on appellate argument.<sup>25</sup> First, students were thought to be familiar with appellate procedure because they read mainly appellate decisions in their law studies. Second, appeals were thought to involve primarily legal rather than factual issues, and legal education was more about law rather than facts. Third, legal education focused on developing legal reasoning and writing skills and there was more scope for this in an appeal than at a trial. Finally, that an appellate court has both written and oral submissions, allowing both forms of communication skills to be developed. I am not aware of any study that has tested the validity of these claims. In fact, based on available literature and on the experiences of mooting as it was conducted at Bond University Law School, it is suggested that the reasoning underlying the first three claims is flawed. As to the fourth claim, there are other advocacy tasks (for example, an interlocutory application)

S Sommerman and Suzy K Rogers, 'Undergraduate Moot Court in American Colleges and Universities' (2008) 19 *Journal of Legal Studies Education* 27, 27–8. There are some exceptions: see, eg, the ELSA World Trade Organization moot, which is a first instance case heard before a panel of trade law specialists; the Willem C Vis moot on international commercial arbitration, which is heard before an arbitral panel; the Philip C Jessup International Law Moot Court Competition and the Manfred Lachs Space Law Moot Competition, both of which are before the 'International Court of Justice'. While the list of exceptions may seem long, only a minority of students take part in these competitions.

<sup>22</sup> In the UK, see Smith, above n 21, 194; Gillespie, above n 1, 20. In Australia, see Gygar and Cassimatis, above n 10, 15. In the US, see Kozinski, above n 3, 190; Gaubatz, above n 3, 88 (who notes that 'programs tend to have an infatuation with the Supreme Court of the United States'); Kenety, above n 21, 582; Knerr, Sommerman and Rogers, above n 21, 30–32; Dickerson, above n 2, 1218 (although Dickerson points out that sometimes even the court and jurisdiction is fictitious; eg, the moot might be set before a hypothetical Supreme Court named after a law school).

<sup>23</sup> This explanation is offered by Snape and Watt, above n 11, 20. They state that, '[w]ith rare exceptions, a moot must take place in an appellate court because the mooters will be arguing points of law rather than questions of fact'. The exceptions to which they refer are 'most international mooting competitions'.

<sup>24</sup> Martineau, above n 8, 1294–5.

<sup>25</sup> Ibid 1294.

which give students an opportunity to develop both written and oral communication skills in a far more realistic setting.

It has been suggested that the ability to argue on policy issues is one of the educational benefits of setting moots in an appellate court of last resort, rather than in an intermediate court of appeal. Students can submit policy arguments as to why the law should either remain as it is or be changed, since the court can depart from its own previous decisions.<sup>26</sup> However, it is submitted later in the article that this feature of the traditional moot is actually a cause for concern, rather than a benefit. Indeed, many of the causes for concern about the mooting experience follow from an overemphasis on appeals. These concerns are discussed in Part III.

### C Objectives of Mooting

Mooting is often discussed as though it were a legal transaction or a legal skill;<sup>27</sup> in fact, it is neither of these things. According to Mackie, legal work can be divided into progressively smaller units: legal *transactions* can be seen as a *series of tasks*, the performance of which requires the exercise of a *collection* of skills, while each skill may be broken down into a *series of sub-skills*.<sup>28</sup> We can therefore speak of litigation as a transaction involving a number of tasks including advocacy, a task which requires the performance of a certain collection of skills including communication skills, which in turn can be broken down into sub-skills, such as the ability to speak clearly and the ability to ask appropriate questions. In the context of litigation, the task of the advocate is to persuade the decision-maker that the client's cause ought to be successful. Mooting does not fit into this scheme. It is *not* a legal transaction — no practising lawyer ever engages in a moot on behalf of a client. Neither is it a skill.

What then is a moot? It is 'a specific form of simulation',<sup>29</sup> one which enables students to practise and develop a range of skills (although, as will be argued shortly, the objectives of mooting need not be limited to the development of skills) by performing them rather than just learning about them.<sup>30</sup> The skills which feature most prominently in mooting, and which are interrelated, are those most commonly associated with advocacy: problem-solving; legal analysis

<sup>26</sup> Snape and Watt, above n 11, 20.

<sup>27</sup> Graeme Broadbent, 'Mooting: Big Event or Regular Occurrence?' (Paper presented at the ALT Annual Conference, Durham, 2001) quoted in Gillespie, above n 1, 22.

<sup>28</sup> Karl Mackie, 'Lawyer's Skills: Educational Skills' in Karl Mackie, Neil Gold and William Twining, *Learning Lawyers Skills* (1989) 11, 18.

<sup>29</sup> Le Brun and Johnstone, above n 21, 307.

<sup>30</sup> William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (2007) 145.

and reasoning; legal research; written and oral communication; teamwork; time management; and strategy.<sup>31</sup>

These skills are not developed in isolation — they are exercised in relation to substantive content and in that process (when skills are brought to bear on content) learning of substantive law takes place. The question then arises — is the development of skills and substantive legal knowledge all that mooting can offer? It is submitted that mooting (and other experiential exercises) can be used to teach not only skills and law, but also values and ethics. Arguably, moots are not being used to achieve this objective at the present time.

In fact, in many respects, the ‘traditional moot’ makes limited use of the potential benefits of simulations and experiential learning. Its limitations are explored in the next part of the article under the heading ‘The Moot Problem’. The way in which we integrate moots into the curriculum is also important — some ways of integrating moots and other simulations are better than others for achieving their objectives. This second set of concerns is also explored in the next part of the article under the heading, ‘The Integration Challenge’.

### III CONCERNS ABOUT MOOTING

#### A *The Moot Problem*

##### 1 *Lack of Opportunity to Develop Awareness of Ethics and Values*

A number of major studies and reports into legal education and the legal profession emphasise the need to teach legal ethics, values and professional responsibility.<sup>32</sup> Students may learn rules of court

<sup>31</sup> Gygar and Cassimatis, above n 10, 3–5; Dickerson, above n 2, 1218–19; Keyes and Whincop, above n 7, 16; Lynch, above n 11, 78; Gillespie, above n 1, 23; Hernandez, above n 2, 72; Knerr, Sommerman and Rogers, above n 21, 31–3; Watson and Klaaren, above n 16, 553.

<sup>32</sup> In the US, see the recommendations of the American Bar Association, Section on Legal Education 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) 138–41 (the MacCrate Report); and, more recently, Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (2007) 60–7 (the Stuckey Report). In the UK, see the Lord Chancellor’s Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training* (1996) [1.19] and [2.4] (the ACLEC Report); Andrew Boon, ‘Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus’ (2002) 5 *Legal Ethics* 34, 56; Fiona Cownie, ‘Alternative Values in Legal Education’ (2003) 6 *Legal Ethics* 159, 171. In Australia, see the Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) recommendation 2, ch 2 (the ALRC Report 89); Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (2003) 118. For a more general discussion on the need to teach ethics, values and professional responsibility in the law curriculum, see David Weisbrot, ‘Taking Skills Seriously: Reforming Australian Legal Education’ (2004) 29 *Alternative Law Journal* 266;



etiquette and perhaps some basic rules of professional conduct (for example, that they should not mislead or deceive the court) through moot. However, in my experience, students often struggle with these rules, perhaps because they rarely receive explicit instruction about ethics until very late in their degree (most law schools teach legal ethics and professional conduct as a discrete, compulsory course towards the end of the degree). Thus, students need appropriate instruction on ethics at the time they are preparing for their first moot.

But, in any event, legal ethics is not just about the rules of professional conduct.<sup>33</sup> Students should be exposed to, and given opportunity to question, broader issues of professional responsibility such as those pertaining to:

- the advocate's role in the legal system and in society;
- the issue of who, in the lawyer–client relationship, chooses which issues to run and which to ignore;
- the question of whether or not an advocate needs to believe that justice is on the client's side; and
- whether or not a court is the appropriate forum to resolve the matter at hand.

We also have an obligation to impart to our students a critical understanding of personal and professional values.<sup>34</sup> Values are beliefs or principles of importance to an individual or group that serve as a yardstick by which an individual or group can evaluate alternative and sometimes conflicting courses of action.<sup>35</sup> As stated in the Stuckey Report:

Among the values that we should include in our instructional design are the lawyer's obligations to truth, honesty, and fair dealing; the responsibility to improve the integrity of the legal system within which

Paul O'Shea, 'The Complete Law School: Avoiding the Production of "Half-Lawyers"' (2004) 29 *Alternative Law Journal* 272.

<sup>33</sup> For a definition of 'legal ethics teaching', see June Chapman, 'Why Teach Legal Ethics to Undergraduates?' (2002) 5 *Legal Ethics* 68, 71. See also Lawrence S Krieger, 'The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness' (2005) 11 *Clinical Law Review* 425, 436.

<sup>34</sup> Eleanor W Myers, 'Teaching Good and Teaching Well: Integrating Values with Theory and Practice' (1997) 47 *Journal of Legal Education* 401, 408–10; Russell G Pearce, 'MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values' (2002–2003) 23 *Pace Law Review* 575, 579; Richard A Matasar, 'Skills and Values Education: Debate about the Continuum Continues' (2002–2003) 46 *New York Law School Law Review* 395, 411; Bethany Rubin Henderson, 'Asking the Lost Question: What is the Purpose of Law School?' (2003) 53 *Journal of Legal Education* 48, 62–3. In particular, for a summary of relevant literature, see Roger Burridge and Julian Webb, 'The Values of Common Law Legal Education: Rethinking Rules, Responsibilities, Relationships and Roles in the Law School' (2007) 10 *Legal Ethics* 72, 90.

<sup>35</sup> The Stuckey Report, above n 32, 31.

the lawyer exercises the skills that are taught; the obligation to promote justice; and the obligation to provide competent representation.<sup>36</sup>

It is important for students to appreciate the potential for conflict between competing values<sup>37</sup> and the possibilities for dealing with it. They must also ‘engage their feelings’,<sup>38</sup> and come to understand ‘how ethics are undermined’ by time and peer pressures, stress, competition and personal values, such as loyalty to an employer and employment security.<sup>39</sup>

*(a) How Should We Teach Skills, Ethics and Values?*

How then can values best be taught within the law curriculum? Perhaps in the same way as skills are best taught — through incremental and integrated learning. An incremental approach allows time for the development and acquisition of skills ‘gradually by practice’.<sup>40</sup> Ideally, students are introduced to a range of skills early in their studies and given multiple opportunities to practise those skills in increasingly complex situations as they progress through their degree. An integrated approach enables doctrinal instruction to be complemented by ‘lawyering courses’.<sup>41</sup> Ideally, ‘this experience of complementarity’<sup>42</sup> continues throughout the degree as skills are ‘taught in conscious relationship to the students’ growing understanding of particular features and areas of legal doctrine’.<sup>43</sup>

Similarly, ethics and values should be taught ‘pervasively and continuously’<sup>44</sup> and incrementally across the law curriculum.<sup>45</sup> Rhode most notably argues a case for teaching ethics by the pervasive method, to serve ‘not as a substitute for, but as a

<sup>36</sup> Ibid 125. For more on the values that we should include in our instructional design: see, eg, the MacCrate Report, above n 32, 140–1; the ACLEC Report, above n 32, [1.21], [1.5], [2.4]; the Stuckey Report, above n 32, 60–1, 66–7; Pearce, above n 34, 579; Matasar, above n 34, 425; Adrian Evans and Josephine Palermo, ‘Preparing Australia’s Future Lawyers: An Exposition of Changing Values over Time in the Context of Teaching about Ethical Dilemmas’ (2006) 11 *Deakin Law Review* 103, 109.

<sup>37</sup> On competing values, see Evans and Palermo, above n 36, 109.

<sup>38</sup> Andrew Boon, ‘History is Past Politics: A Critique of the Legal Skills Movement in England and Wales’ (1998) 25 *Journal of Law and Society* 151, 167.

<sup>39</sup> Ibid.

<sup>40</sup> Mackie, above n 28, 9.

<sup>41</sup> Sullivan et al, above n 30, 195.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid. Stuckey and his associates also emphasise the need to develop knowledge, skills and values progressively, sequentially and systematically: the Stuckey Report, above n 32, 69–70.

<sup>44</sup> The Stuckey Report, above n 32, 74; Sullivan et al, above n 30, 126–61. In the UK, see Julian Webb, ‘Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?’ (1999) 33 *The Law Teacher* 284, 285–6. For the position in Australia, see G Villalta Puig, ‘Legal Ethics in Australian Law Schools’ (2008) 42 *The Law Teacher* 29, 30.

<sup>45</sup> Michael Robertson, ‘Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective’ (2005) 8 *Legal Ethics* 222, 237.

supplement to separate coursework specifically focused on ethics'.<sup>46</sup> As Rhode has stated, '[t]he primary rationale for addressing ethical issues throughout the curriculum is that they arise throughout the curriculum'.<sup>47</sup> Additionally, if we teach legal ethics in context, we give students 'a more realistic picture of how ethical issues arise and are addressed in legal practice'<sup>48</sup> and assist them to see the relevance of ethical issues.<sup>49</sup>

There are, however, risks in teaching skills, values and ethics in an integrated, pervasive way. The quality of instruction is 'peculiarly vulnerable to the variable enthusiasm of teachers for its implementation'.<sup>50</sup> This may result in superficial and inconsistent coverage of material. Some suggestions for overcoming these problems are offered in Part IV.

Assuming that a law school wants to use an incremental and integrated approach to teach skills, legal ethics and values, what then is the most appropriate method of delivery? Most law schools remain heavily dependent on large group lectures,<sup>51</sup> supplemented in most instances by smaller group seminars and tutorials.<sup>52</sup> While these are the primary methods used to impart knowledge, they are far from ideal when it comes to teaching and learning skills, ethics and values. To the extent that clinical education 'enables students to integrate skills and theory with practice'<sup>53</sup> and emphasises structured student experience and thoughtful feedback on that experience,<sup>54</sup> it may be the most effective methodology for teaching these goals.<sup>55</sup>

<sup>46</sup> Deborah L Rhodes, 'Ethics by the Pervasive Method' (1992) 42 *Journal of Legal Education* 31, 50. Also see O'Shea, above n 32, 272 who argues for the formal integration of 'values' and 'ethics' into the teaching of all the core 'black letter' subjects.

<sup>47</sup> Rhodes, above n 46, 50.

<sup>48</sup> Bruce A Green, 'Less is More: Teaching Legal Ethics in Context' (1997–1998) 39 *William & Mary Law Review* 357, 360–1, 378–9.

<sup>49</sup> Ibid 388; Alice M Noble-Allgire, 'Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report into a Doctrinal Course' (2002–2003) 3 *Nevada Law Journal* 32, 37.

<sup>50</sup> Chapman, above n 33, 82.

<sup>51</sup> The 'large lecture method is once again favoured because of the pressure to transmit basic doctrine': Margaret Thornton, 'The Idea of the University and the Contemporary Legal Academy' (2004) 26 *Sydney Law Review* 481, 486; Mary E Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537, 552.

<sup>52</sup> Even small group tutorials are threatened: Thornton, above n 51, 486; and Keyes and Johnstone, above n 51, 552.

<sup>53</sup> Ross Hyams, 'The Teaching of Skills: Rebuilding — Not Just Tinkering Around the Edges' (1995) 13 *Journal of Professional Legal Education* 63, 71.

<sup>54</sup> Kathy Mack, 'Bringing Clinical Learning into a Conventional Classroom' (1993) 4 *Legal Education Review*, 89, 91.

<sup>55</sup> Boon notes that '[a]mong those addressing the issue of how to teach ethics there is almost universal agreement that clinical courses provide the most effective vehicle': Boon, above n 32, 60. For more on the potential benefits of clinic and simulation courses, see, generally, Roy Stuckey, 'Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses' (2006–2007) 13 *Clinical Law Review* 807, 827.

However, only a minority of law schools offer clinical courses and those that do offer the opportunity on an optional basis to a minority of students.<sup>56</sup> Financial constraints impact the ability of many schools to offer clinic courses, and therefore our best hope for the future rests with simulations and other experiential learning activities. It is essential then that we use them effectively.

*(b) Experiential Learning and Effective Use of Simulations*

Experiential education or learning is defined as learning by ‘doing, reflecting, applying and evaluating’.<sup>57</sup> It is essential for developing skills and an understanding of, and appreciation for, ethical standards, social roles and the responsibilities that mark the profession.<sup>58</sup> David Kolb describes experiential learning as a ‘sequential, recurring four-stage cycle’<sup>59</sup> consisting of concrete experience; reflective observation (collecting information through analysis of the cognitive, performative and affective aspects of the experience); abstract conceptualisation (organising the information into a theoretical framework and drawing out general principles for future use); and active experimentation (testing the generalisations in new situations) which leads the learner back to concrete experience.<sup>60</sup>

A sequence of activities appropriate for teaching skills and relevant ethics and values, commencing at the abstract conceptualisation stage, is as follows.

- 1 Preparing for experience: before practising a skill, students receive instruction in the theory relating to the skill.<sup>61</sup> Theory

<sup>56</sup> See, eg, statistics given by Boon, above n 32, 63. This is also the case in Australian law schools where Robertson predicts that clinics ‘will continue to be rationed into the foreseeable future’: above n 45, 233. For further information on the position in Australia (and the resource problems associated with clinical courses), see Lyndal Taylor, ‘Skills Skills — Kind Inclusion and Learning in Law School’ (2001) 3 *University of Technology, Sydney Law Review* <<http://www.austlii.edu.au/au/journals/UTSLRev/2001/>> at 23 December 2009.

<sup>57</sup> Richard Grimes, ‘The Theory and Practice of Clinical Legal Education’ in Julian Webb and Caroline Maughan (eds), *Teaching Lawyers’ Skills* (1996) 142.

<sup>58</sup> Stuckey, above n 55, 809–10, 812; Sullivan et al, above n 30, 28; and the Stuckey Report, above n 32, 133.

<sup>59</sup> David Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (1984) 20–1. Kolb’s model builds on the work of earlier educational theorists: see Caroline Maughan, ‘Learning How to Learn: The Skills Developer’s Guide to Experiential Learning’ in Webb and Maughan, above n 57, 70; Ron Downs, ‘Experiential Learning: In a Practical Legal Training Course’ (1989) 7 *Journal Of Professional Legal Education* 141, 142–4; Graham Gibbs, *Learning By Doing: A Guide to Teaching and Learning Methods* (1988) 9.

<sup>60</sup> For an overview of Kolb’s four stage experiential learning model, see Gibbs, above n 59, 40; Maughan, above n 59, 63–4, 70–1. For more detailed discussion on experiential learning, see Susan W Weil and Ian McGill (eds), *Making Sense of Experiential Learning: Diversity in Theory and Practice* (1989) 12; David Boud, Rosemary Keogh and David Walker (eds), *What is Reflection in Learning, Introduction to Reflection: Turning Experience into Learning* (1985) 12–13.

<sup>61</sup> The term ‘theory’ as used here refers to the concepts and categories that individuals use to predict, explain, and extract information from episodes of experience in a

is then linked with behavioural practice by demonstrations and modelling of the elements of effective performance.

- 2 Providing substitute experiences with simulations: students are given the opportunity to practise the skill in simulations and other experiential exercises. As an alternative to the instruction–demonstrate/practice sequence, students might first attempt performance and then extract a model from their practice.<sup>62</sup>
- 3 Reviewing and reflecting on experience through assessment and feedback: student performance is then formatively assessed. Ideally, students are provided with written assessment criteria<sup>63</sup> and individualised feedback on their performance<sup>64</sup> that they can use to reflect on their experience and plan for improvement.<sup>65</sup> This is followed by further teaching<sup>66</sup> and assessment.<sup>67</sup>
- 4 Providing opportunity for further practice in subsequent assessment activities: students are then provided with the opportunity to test new ideas and to transfer their learning to new situations, with further practice. It is preferable for student practice at this stage to be assessed again and for students to receive further feedback.<sup>68</sup>

Simulations are an integral part of experiential learning. They can stimulate a deep approach to the learning of law in both its theoretical and practical dimensions.<sup>69</sup> They can encourage students to take responsibility for their own learning,<sup>70</sup> fostering skills needed for the transfer of learning and for lifelong learning.<sup>71</sup> They can enhance

systematic way: Gary L. Blasi, 'Teaching Lawyering as an Intellectual Project' (1996) 14 *Journal of Professional Legal Education* 65, 68. There are a multiplicity of theories that inform skilled behaviour and a variety of perspectives from which it can be examined (eg, professional, ethical or social justice contexts): 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' (1994) 69 *Washington Law Review* 593, 609–10.

<sup>62</sup> Mackie, above n 28, 20.

<sup>63</sup> Richard Johnstone, Jenny Paterson and Kim Rubenstein, *Improving Criteria and Feedback in Student Assessment in Law* (1998) 6–7; Mackie, above n 28, 17; Gibbs, above n 59, 28.

<sup>64</sup> Gibbs, above n 59, 51; Derek Rowntree, *Assessing Students: How Shall We Know Them?* (2<sup>nd</sup> ed, 1987) 26. Generally, on the characteristics of effective feedback: see Maughan, above n 59, 87–9; Johnstone, Paterson and Rubenstein, above n 63, 39–41.

<sup>65</sup> For a detailed explanation of the process of reflection, see Gibbs, above n 59, 40; Caroline Maughan and Julian Webb, 'Taking Reflection Seriously: How Was it for Us?' in Webb and Maughan, above n 57, 261; see generally, Boud, Keogh and Walker, above n 60.

<sup>66</sup> Rowntree, above n 64, 122.

<sup>67</sup> Ibid 200.

<sup>68</sup> Keyes and Whincop, above n 7, 10–11; Rowntree, above n 64, 200.

<sup>69</sup> Jay M. Feinman, 'Simulations: An Introduction' (1995) 45 *Journal of Legal Education* 469, 471. This is one of the reasons that skills are so often taught in conjunction with substantive law courses.

<sup>70</sup> Julian Webb, 'Why Theory Matters' in Webb and Maughan, above n 57, 44; the Stuckey Report, above n 32, 133.

<sup>71</sup> David A. Binder and Paul Bergman, 'Taking Lawyering Skills Training Seriously' (2003) 10 *Clinical Law Review* 191, 215.

student motivation to learn,<sup>72</sup> providing them ‘with a sense of the relevance of their law school training to what they will be doing as lawyers.’<sup>73</sup> Simulations can also provide a realistic (but controlled) context for students to explore the relationship between lawyer and client, to experience the ethical dimensions of practice, and to consider issues of professional responsibility.<sup>74</sup>

However, the potential educational value of simulations can only be fully realised if the following conditions are met:

- 1 Simulations should ‘replicate actual practice’<sup>75</sup> or ‘approximate reality’.<sup>76</sup> By definition, a simulation ‘puts a learner into a situation that closely approximates what might be experienced in the practice of a profession and requires him or her to react in an appropriate fashion.’<sup>77</sup>
- 2 Simulations should be perceived by students to be relevant, meaningful and interesting.<sup>78</sup> Students are more likely to perceive simulations in this light if the tasks they are required to undertake resemble those that might confront a practising lawyer. If possible, new experiences should be linked to the existing experience of students.
- 3 The tasks that are set for students should be achievable in the sense that students have ‘a reasonable expectation of success’.<sup>79</sup> Ideally, students are given the opportunity to master simple tasks before being required to undertake complex tasks — a process referred to as scaffolding.<sup>80</sup>

<sup>72</sup> Ibid.

<sup>73</sup> Paul J Spiegelman, ‘Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake’s Ladder in the Context of Amy’s Web’ (1988) 38 *Journal of Legal Education* 243, 260.

<sup>74</sup> Sullivan et al, above n 30, 158–9. See the Stuckey Report, above n 32, 135 for objectives that can be achieved through use of simulation-based courses. Also see Myers, above n 34, 401.

<sup>75</sup> The Stuckey Report, above n 32, 133.

<sup>76</sup> For definitions and discussion of the potential educational value of simulations, see Robyn M Duncan, ‘Teaching Legal Skills for Transfer of Learning: Is Simulation the Answer?’ (1984) 2 *Journal of Professional Legal Education* 64, 68; Russell Stewart, ‘Making Simulating Stimulating’ (1985) 3 *Journal of Professional Legal Education* 51, 53; Spiegelman, above n 73, 263; Robert Park, ‘Appropriate Methods for the Teaching of Legal Skills in Practical Training Courses’ (1990) 8 *Journal of Professional Legal Education* 161, 175–6; Feinman, above n 69, 470.

<sup>77</sup> Cyril O Houle, *Continuing Learning in the Professions* (1980) 220, quoted in Stewart, above n 76, 51; Binder and Bergman, above n 71, 215. See also Stuckey on the importance of having students perform ‘the tasks that lawyers perform’: Stuckey, above n 55, 816.

<sup>78</sup> John B Biggs, ‘Teaching for Better Learning’ (1990–1991) 2 *Legal Education Review* 133, 142; Mackie, above n 28, 15. Kift confirms that it is ‘the learner’s conception of future practice’ which is important: Sally Kift, ‘Lawyering Skills: Finding their Place in Legal Education’ (1997) 8 *Legal Education Review* 43, 58.

<sup>79</sup> Biggs, above n 78, 142.

<sup>80</sup> David A Binder, Albert J Moore and Paul Bergman, ‘A Dispositions Course: Tackling the Challenge of Teaching for Professional Skills Transfer’ (2006–2007) 13 *Clinical Law Review* 871, 886.

4 Students should be required to undertake practice in different settings and on varied topics. A diversity of tasks is needed.<sup>81</sup>

In their current form, moots may fail to meet these conditions. They do not give students adequate opportunity to experience the ethical and professional dimensions of practice. If they take the traditional format, students will not be exposed to diversity in practice, as one moot differs very little from the next. There is also evidence that students find the mooting experience to be unrealistic and overwhelming.

In the next part of the article, I discuss a number of concerns that have been raised about mooting. In most instances, I rely upon observations of mooting as it was conducted at the Bond University Law School (where that is the case, Bond Law School is specifically mentioned). In every instant, the same problem has been raised by one or more commentators observing moots at law schools in the US. In the latter case, all observations were made of mooting in its traditional format. It is difficult to assess the extent of these problems in other law schools in Australia. As far as I am aware, there have been four major articles published on mooting in this country.<sup>82</sup> Only one of them directly addresses weaknesses in our mooting programs.<sup>83</sup>

## 2 *Overemphasis on Appellate Moots*

It is submitted that many of the assumptions underlying the reasons why law schools use appellate moots are flawed. The focus on appellate level oral argument has been repeatedly flagged as a cause for concern. The problems associated with traditional mooting were observed first hand at Bond University School of Law which operated a traditional mooting program from the time of its inception in 1989 to 1996. Moots were a required component in three compulsory substantive law courses. Typically, students undertook their first moot in their first semester. In each moot, students were required to argue contentious points of law by way of appeal before a simulated

<sup>81</sup> Mackie, above n 28, 17, 19.

<sup>82</sup> Lynch, above n 11 (describing the mooting programs at University of Queensland, Queensland University of Technology and Griffith University Law Schools); Keyes and Whincop, above n 7 (critiquing the traditional moot); Bentley, above n 18 (describing the use of moots in an elective tax law course at Bond University Law School); and, most recently, Butler and Mansted, above n 2 (describing a new appellate advocacy and mooting elective at Bond University Law School). Reference can also be made to a number of mooting manuals (eg, Gygar and Cassimatis, above n 10) and to more general literature on skills teaching and learning which addresses mooting, but only in passing.

<sup>83</sup> See Keyes and Whincop, whose main concern was the lack of formative feedback in traditional mooting: Keyes and Whincop, above n 7, 15. They propose 'the formative moot' as an alternative procedure. The only other potentially negative comment about moots in Australia is raised in the research conducted by Lynch, who found that students experienced a great deal of stress (and terror) in undertaking moots: Lynch, above n 11, 88.



court, typically a court of last resort. A number of problems were observed when the program was evaluated in 1996–97, as discussed below.<sup>84</sup>

*(a) Lack of Familiarity with Appellate Procedure*

It can be a mistake to assume that students have a familiarity with appellate procedure, especially in the first year of their law degree program. Even when students have covered the basics of court procedure (as they might do in an introductory law course) they may not necessarily connect this knowledge with what they are required to do in a moot; that is, students might not make the connection between theory and practice unless the connection is made explicit. This problem may be overcome with better integration of moots, both later in the degree program and in the context of relevant substantive law courses. It is considered below in more detail as one of the challenges of integration.

*(b) Ignoring the Facts*

It is a mistake to assume that the law (and legal education) is concerned primarily with legal issues although that may be the impression given to students when only appellate moots are used. The facts have been funnelled at appellate level. They are fixed and predetermined.<sup>85</sup> This limited and sterile treatment of facts can have several consequences. It may:

- 1 give students the impression that facts in real life are defined, concrete and knowable rather than uncertain, slippery and complex;<sup>86</sup>
- 2 encourage students to take a narrow view of the relevance of facts in the operation and practice of the law. Many students at Bond University School of Law applied the law in a factual vacuum — without reference to the facts in the problem or the problems of the individuals concerned. We did not teach the lesson that ‘the facts make the issues truly understandable’;<sup>87</sup> and

<sup>84</sup> During this period, the author and at least one other member of faculty observed student performances in 20 moots each semester for six successive semesters (making a total of 120 moots). The same faculty members examined supporting documentation prepared by students for their moots and observed the debriefing sessions conducted by assessors and students after each moot. At the completion of the course containing moots, students were required to complete an evaluation form pertaining to the moot exercise. Originals of all documentation are on file with the author.

<sup>85</sup> Gygar and Cassimatis, above n 10, 5.

<sup>86</sup> Duncan notes that we live in a factually-ambiguous world characterised by uncertainty and value-conflicts: Nigel Duncan, ‘The Skill of Learning: Implications of the ACLEC First Report for Teaching Skills on Undergraduate Law Courses’ (1997) 5 *Web Journal of Current Legal Issues* 1, 4.

<sup>87</sup> Gaubatz, above n 3, 99.



- 3 give students little opportunity to sort relevant facts from the irrelevant; to identify facts that are ‘missing’; to collect and construct facts, and to select and organise them. Students at Bond University experienced difficulty integrating facts into their argument. They failed to use positive facts in the problem before them to highlight the merit of their client’s case and to acknowledge or explain adverse facts. These are all critical skills for lawyers and should be nurtured and developed.

These problems might be attributed to a poorly drafted moot problem or to a poorly prepared student cohort at Bond University except that the same problems have been mentioned in literature published in the US. For instance, Kozinski argues that we teach students that ‘facts don’t matter on appeal, because that’s where you argue law’;<sup>88</sup> Kenety maintains that the typical moot problem ‘does not require the sorting or mastering of facts’;<sup>89</sup> while Martineau simply argues that appellate moots fail to emphasise the significance of facts.<sup>90</sup> Moots, if restricted to appeals, cannot offer the same flexibility or opportunity for handling facts as might be offered with say, an interlocutory application.

Duncan suggests that, in order to make real the context in which the law operates and to give students the scope to explore the ambiguity of ‘facts’, we need to provide students with ‘problems where the facts are slippery (containing conflict and ambiguity), not given’;<sup>91</sup> where people give contradictory accounts of an event and where there are variations in evidence. In addition to giving a more realistic view of the world and affording students the opportunity to use facts constructively, simulations based on varying accounts of events and factual gaps and uncertainties also give students the ‘opportunity to explore the ethical dimensions of practice’.<sup>92</sup> Of course, there is hardly universal agreement that universities should be focused on preparing students for practice. University law schools have multiple interest groups, missions and emphases.<sup>93</sup> Yet, despite the diversity, there is wide agreement that one of the goals of undergraduate legal education is ‘to introduce students to basic competencies required

<sup>88</sup> See Kozinski, above n 3, 188 (he attributes the problem directly to the format of the moot). Also see Gaubatz, above n 3, 99; and Hernandez who notes that moots ‘commonly focus primarily, if not exclusively, on pure issues of law’: Hernandez, above n 2, 73.

<sup>89</sup> Kenety, above n 21, 582.

<sup>90</sup> Martineau, above n 8, 1297.

<sup>91</sup> Duncan, above n 86, 4.

<sup>92</sup> Ibid 5.

<sup>93</sup> See, eg, Cownie, above n 32, 161 (where she notes that there are many views on the proper nature and purpose of the university law school). Also see the Stuckey Report, above n 32, 28; Sullivan et al, above n 30, 13; Andras Jakab, ‘Dilemmas of Legal Education: A Comparative Overview’ (2007) 57 *Journal of Legal Education* 253, 264 (where the author concludes that different countries have adopted different solutions to the issues of goals, content and methodologies).

in legal practice.<sup>94</sup> There is also wide agreement that law programs should include a mix of knowledge, skills, ethics and values.<sup>95</sup>

There are several advocacy contexts in which contradiction and uncertainty in facts can easily be introduced, without having to go into the practical difficulties involved in a trial — for example, pleas in mitigation of penalty and interlocutory applications.

(c) *Limited Opportunity to Develop Skills in Legal Reasoning, Analysis and Writing*

One of the benefits claimed for mooting (and, in particular, for appellate mooting) is that it allows students to develop skills of legal reasoning, analysis and writing. However, several features of the traditional moot format may unnecessarily limit the opportunity students have to develop these skills sets. Relevant features are discussed below.

Students are rarely required to identify and formulate the grounds of appeal themselves. In most moot programs, the author of the moot problem formulates the grounds of appeal. This was the case at Bond University Law School. We discovered that many students failed to identify and address errors in the decision of the lower court (when acting for the appellant) or to demonstrate that the appellant's allegations of error were ill founded (when acting for the respondent). Occasionally, students made no reference to the decision, reasoning or findings of the lower court. There is, it is submitted, some causal connection between these problems and the fact that students were supplied with grounds of appeal. Students are less likely to focus on 'errors' and the error-correcting function of appellate courts, when they are not charged with the task of identifying errors. Students are also less likely to go back to the judgment and to distil the reasoning used by the judge. In short, they are less likely to see how and why the judge got the decision right or wrong. Why deny students 'the real lawyer's problems of issue spotting and record combing'?<sup>96</sup>

Gaubatz, Martineau and Kozinski all observe that pre-occupation with appellate court moots encourages students to over-rely on policy arguments,<sup>97</sup> while not allowing them an opportunity to appreciate the use of authority in lower courts.<sup>98</sup> They argue that

<sup>94</sup> Keyes and Whincop, above n 7, 13. Also see Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) 58; John de Groot, 'Acquiring Basic Legal Skills and Knowledge: What and Where?' (1994) 12 *Journal of Professional Legal Education* 1, 1; William Twining, *Law in Context: Enlarging a Discipline* (1997) 194; Wade, above n 8, 175; John Goldring, 'The Future of Legal Education: Why? And How? Doubtful Assumptions and Unfulfilled Expectations' (1993) 11 *Journal of Professional Legal Education* 149, 150. For more general discussion on the purposes of law school, see Taylor, above n 56.

<sup>95</sup> See references above notes 32–43.

<sup>96</sup> Gaubatz, above n 3, 88.

<sup>97</sup> Ibid; Martineau, above n 8, 1297; Kozinski, above n 3, 191.

<sup>98</sup> Gaubatz, above n 3, 88.

it avoids the need and the more challenging task of dealing, as inferior courts must, with binding authority.<sup>99</sup> Martineau observed students routinely ignoring the error-correcting function served by intermediate appellate courts.<sup>100</sup> Kozinski claims that students do not develop the ability to rely on authority when favourable; or to distinguish it when it is adverse to their case. He claims that moot court teaches ‘students the wrong lesson that policy, not law, plays the key role in arguments in most of the courts where they will appear’.<sup>101</sup> Students in the moot program at Bond University Law School experienced the same problems. Their focus was not on case analysis but on floodgates and appeals to justice writ large.

The written aspect of advocacy is often down-played for its oral component.<sup>102</sup> In all the moots at Bond University Law School, students were required to prepare and hand up a written summary of their argument. However, little, if any, specific feedback was given to students in relation to their summaries. The emphasis was on the oral component of the moot over written argument. Understandably, students in our program gave written summaries only cursory attention<sup>103</sup> and perceived them to be incidental to their main performance — the oral presentation. This is apparently a common problem. Kozinski refers to ‘the overemphasis of oral argument over brief-writing’ as ‘one of moot court’s most notorious shortcomings’.<sup>104</sup> This overemphasis creates a number of problems.

First, students are not given sufficient opportunity to develop sound writing skills. We discovered a range of common errors in written ‘Summaries of Argument’ in the Bond University moot program, including incomplete or superficial coverage of issues, absence of, or incorrect, statements of legal principle, and flawed structure in arguments.

Second, in downplaying the importance of written argument, we ignored two aspects of the reality of advocacy practice: the role played by writing in preparation for an appearance and the role played by writing in persuading the court to a client’s cause. Careful

<sup>99</sup> Kozinski, above n 3, 191.

<sup>100</sup> Martineau, above n 8, 1297.

<sup>101</sup> Kozinski, above n 3, 192.

<sup>102</sup> It is acknowledged that some international mootting competitions place heavy emphasis on written submissions or memorials. However, this is not normally the case with moots that take place within the curriculum. On the lack of emphasis given to the written component of traditional moots in law schools in Australia, see Keyes and Whincop, above n 7, 21–2. In the US, see Kenety, above n 21, 584; Kozinski, above n 3, 186; Hernandez, above n 2, 80, all of whom argue that insufficient attention is given to written argument.

<sup>103</sup> There is a direct relationship between assessment, motivation and positive learning outcomes: see Johnstone, Paterson and Rubenstein, above n 63, 7–8; Rowntree, above n 64, 22. Keyes and Whincop also observe that students have little motivation to develop written skills when the traditional moot format is used: Keyes and Whincop, above n 7, 21.

<sup>104</sup> Kozinski, above n 3, 186.

writing of submissions prepares an advocate to deliver a persuasive and convincing argument in court. It forces an advocate to exercise selectivity in choosing issues, to develop arguments logically and sequentially, and to consider their choice of language carefully. And today, more so than ever before, written submissions 'are as much exercises in advocacy as the oral argument.'<sup>105</sup> In fact, in practice, there is increasing reliance placed on written submissions and limits imposed on the duration of oral presentations.<sup>106</sup> Written submissions are the first, and perhaps the primary, tool of persuasion.

(d) *Lack of Realism*

Perhaps the most often-raised criticism about mooting is that the emphasis on appeals does not reflect the reality of practice.<sup>107</sup> Few advocates will undertake appellate work in their early years of practice. Fewer still will appear before the High Court of Australia or its equivalent in other jurisdictions.<sup>108</sup> Appearances on interlocutory applications, guilty pleas together with submissions in mitigation of penalty, and perhaps some trial work in the lower courts, make up the first years in practice as an advocate. Students are well aware of these practice trends. Bond law students who completed evaluation forms in the first review of the program conducted in 1996–97 made the following remarks when asked to comment on changes that they would like to see made to the mooting program:

- Greater emphasis on mooting at Magistrates' Court level.
- Shift of focus to the lower courts, as young lawyers very rarely get to do appellate court work.
- More opportunity to practise litigation skills (particularly those relevant to lower courts).<sup>109</sup>

There is also a valid, though separate, argument that appeal moots do not reflect the realities of appellate court practice; for example, by placing too much emphasis on oral submissions and policy

<sup>105</sup> Lord Alexander of Weedon, 'The Art of Advocacy' (1991) 9 *Bar News* — *The Journal of the New South Wales Bar Association* 14, 14. Generally, on the role and importance of written submissions, see James L Glissan, *Advocacy in Practice* (2005) 195.

<sup>106</sup> This trend is likely to continue: see Justice Michael D Kirby, 'Ten Rules of Appellate Advocacy' (1995) 69 *Australian Law Journal* 974, 975; David F Jackson, 'Practice in the High Court of Australia' (1996–1997) 15 *Australian Bar Review* 187, 198.

<sup>107</sup> See, eg, Gaubatz, above n 3, 87; Martineau, above n 8, 1297; Stuesser, above n 3, 126.

<sup>108</sup> For relevant statistics on the number of appeals to the High Court of Australia, see Jackson, 'Practice in the High Court of Australia', above n 106, 197–8. Gillespie agrees that it could be many years before a barrister appears before the Court of Appeal and much longer still before they appear before the House of Lords in the UK: Gillespie, above n 1, 20.

<sup>109</sup> Bond University School of Law's Student Evaluation Forms of substantive courses containing moots taught in the period 1996–97.

arguments.<sup>110</sup> In order to meet the need for realism and relevance, a change in the moot itself is required or other simulations need to be substituted. The second course of action may meet with less resistance from academic staff. For some authors and educators, mooting has become synonymous with appellate advocacy and they may be reluctant to alter the traditional moot format.<sup>111</sup>

## B *The Integration Challenge*

### 1 *Mooting at Law Schools in the United Kingdom*

The most recent research on mooting concerns the approach taken by law schools in the UK.<sup>112</sup> In a study conducted in 2006,<sup>113</sup> Gillespie and Watt found that the most popular way in which moots are integrated into the law curriculum in the UK (a total of 71 per cent of the modules where moots are used) is as part of a discrete module (a skills module or a mooting module) unattached to substantive law courses. Moots are attached to substantive law courses in only 22 per cent of cases (and, according to Gillespie, this may occur by default rather than by planning or specific design).<sup>114</sup> Gillespie argues, on the basis of these findings, that law schools in the UK see mooting as a vehicle predominantly for legal skills development rather than substantive law, a matter of concern to him.

Gillespie's second major concern was about the way in which moots are assessed. He and Watt found that, in 83 per cent of modules where mooting was included in the curriculum, the moot was summatively assessed; that is, it was used for the purpose of giving students a grade,<sup>115</sup> rather than for providing formative feedback on their learning of substantive law and skills.<sup>116</sup> Typically, students are given the opportunity to participate in only a single moot. They are not given feedback which can be used to improve subsequent performance in a second moot.<sup>117</sup>

<sup>110</sup> Kenety, above n 21, 582–4; Tuerkheimer, above n 16, 113–15; Kozinski, above n 3, 178, 190.

<sup>111</sup> For example, Dickerson states that '[m]oot court is an activity in which students practice appellate advocacy skills': Dickerson, above n 2, 1218; while Gygar and Cassimatis use the phrases 'university mooting program' and 'university appellate advocacy program' interchangeably: Gygar and Cassimatis, above n 10, 6.

<sup>112</sup> Gillespie, above n 1, 19.

<sup>113</sup> Alisdair A Gillespie and Gary Watt, *Mooting for Learning* (2006) UK Centre for Legal Education <<http://www.ukcle.ac.uk/research/projects/gillespie2.html>> at 23 December 2009. Unfortunately, Gillespie and Watt did not ask institutions to indicate whether or not mooting was compulsory; nor did they ask them to indicate how mooting competitions were accommodated within the curriculum, if at all.

<sup>114</sup> Gillespie, above n 1, 22.

<sup>115</sup> The results of the survey do not indicate whether students are given a pass/fail grade or ranked.

<sup>116</sup> Gillespie, above n 1, 32–4; Keyes and Whincop, above n 7, 18.

<sup>117</sup> Gillespie, above n 1, 33–4.

It is suggested that the two major concerns mentioned by Gillespie arise because of the way in which moots are integrated into the curriculum. They are best considered to be challenges of integration rather than as problems intrinsic to the moot.

Gillespie and Watt also found that the majority of the mooting (56 per cent) that takes place as part of the curriculum occurs in the first year of the undergraduate law program.<sup>118</sup> This led Gillespie to raise two additional concerns; namely, that the skills involved in moots were too advanced for first-year students and that no provision had been made for the incremental development of these skills. It is suggested that these concerns are a product of the nature of the moot and the way in which they are integrated. Consideration of these concerns is thus deferred, to be dealt with under the heading 'other concerns'.

## 2 *Mooting at Law Schools in Australia and the United States*

In Australia, moots are offered within the curriculum in virtually all law schools. They may be offered, on either a compulsory or elective basis, as:

- 1 a component of a discrete skills module or mooting module. Where the moot is part of a skills course, that course is most often a first-year research and writing course. Where mooting is offered as an elective, it is often a limited enrolment later-year elective;
- 2 a required component of substantive law courses; or
- 3 an optional form of assessment in a substantive law course.<sup>119</sup>

In all of these models, the moots are assessed.

In Australia, the most common way in which moots are incorporated into the curriculum is as electives. As explained shortly, many moot competitions are accommodated within the curriculum in this manner.

Similar trends are evident in the US, where mooting takes place:

- 1 'typically' as part of compulsory first-year legal research and writing courses;<sup>120</sup>
- 2 occasionally, as either a compulsory or optional part of substantive law courses; or

<sup>118</sup> Ibid 27.

<sup>119</sup> These results are based on a survey of the course requirements, course offerings and newsletters published by university law schools in Australia (viewed at 11 October 2008), and on published literature such as the stocktake of legal education conducted by Johnstone and Vignaendra, above n 32, 133-55; Gygar and Cassimatis, above n 10, 129; Keyes and Whincop, above n 7, 16; and Lynch, above n 11, 72.

<sup>120</sup> Lucia A Silecchia, 'Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?' (1996) 100 *Dickinson Law Review* 245, 249; Gaubatz, above n 3, 90; McCarter, above n 16, 759; Martineau, above n 8, 1295; Dickerson, above n 2, 1218.

3 as limited enrolment ‘upper-level electives’.<sup>121</sup> Some competitions are incorporated into the curriculum by way of elective.

The first model appears to predominate in the US although incorporation of moots by way of upper-year electives and moot competitions is also popular.<sup>122</sup>

All law schools in Australia offer students an opportunity to participate in moot competitions. At some universities, this may be the only way in which students can participate in moots. Competitions may be intra-school, interschool, regional or state, interstate, national and international. The majority of the competitions are purely extra-curricular in nature and not assessed, but some of them — the major international competitions — are treated as electives, and students who successfully obtain one of the limited spots on the moot teams in these competitions are given credit and awarded a grade as for any other course.<sup>123</sup>

Some of the models of integration mentioned above are more effective than others for achieving specified objectives — these are covered in the following discussion. To the extent that moot competitions are ‘integrated’ into the curriculum as electives, the analysis includes moot competitions.

### 3 *Mooting as a Discrete Module — Too Little Law?*

When moots are offered as part of discrete skills modules or moot modules,<sup>124</sup> although they are based on substantive law, they are usually not linked to particular substantive law courses (and, in some programs, they may not be confined to one substantive law area). Students may be required to argue a case in areas of law that they have not specifically studied. Consequently, the moots are not necessarily designed to further substantive law objectives. In one Australian school, using this model, mooting is viewed as a way to ‘develop students’ research and advocacy skills not as a means for students to learn a specific area of substantive law’.<sup>125</sup> This model has its supporters who claim that the experience is realistic to the extent that legal practitioners may be faced with problems involving

<sup>121</sup> Silecchia, above n 120, 249. Generally, for a discussion of the position in law schools in the US, see Knerr, Sommerman and Rogers, above n 21, 27; and Dickerson, above n 2, 1218. On skills teaching generally in US law schools: see Sullivan et al, above n 30, 87–8.

<sup>122</sup> Dickerson, above n 2, 1223; Knerr, Sommerman and Rogers, above n 21, app.

<sup>123</sup> This appears to be a fairly common way for schools to accommodate major mooting competitions within the curriculum: see references above n 119. The competitions in this category include the Philip C Jessup International Law Moot Court Competition, the ELSA Moot Competition on WTO Law, the Willem C Vis International Commercial Arbitration Moot, and the International Maritime Law Arbitration Moot Competition.

<sup>124</sup> The first model has been used for many years at the University of Queensland, Australia.

<sup>125</sup> Lynch, above n 11, 73.



overlapping substantive and procedural points some or all of which are new to them.<sup>126</sup> However, this is also the model which led Gillespie to assert that moots were being used ‘merely’ for the development of skills.<sup>127</sup> I disagree. It is submitted that while this particular model of integration is not the optimal way to facilitate students attaining substantive law and skill objectives, a moot is always more than a vehicle for the development of skills, no matter how it is integrated. As maintained in the discussion about the objectives of moots, skills and theory are inextricably linked, and an appropriately crafted simulation is never limited to skills. This claim will be elaborated upon below.

#### 4 *Mooting as a Component of Substantive Law Courses — Theory and Practice Reinforced*

When moots are a component of substantive law courses,<sup>128</sup> the skills involved can be consciously and explicitly taught in combination with, and in the context of, relevant substantive law. It is an ideal approach to integration, one that is premised on the principle that theory and practice are complementary and most effectively learned together.<sup>129</sup> Literature, old and new, supports the teaching and learning of skills in the context of substantive law.<sup>130</sup> The learning of relevant skills can encourage students to adopt a deep approach to theoretical learning and so enhance their learning of substantive law.<sup>131</sup> An understanding of theory is necessary for students to apply and reflect upon the application of skills.<sup>132</sup> In a practical sense, skills and substantive components can be designed to ‘feed off each other while achieving their own objectives and learning outcomes’.<sup>133</sup>

<sup>126</sup> Gygar and Cassimatis, above n 10, 128–9; Lynch, above n 11, 72–3.

<sup>127</sup> Gillespie, above n 1, 35.

<sup>128</sup> Both Griffith University Law School and Bond University Law School use this model.

<sup>129</sup> William Twining, ‘Preparing Lawyers for the Twenty-First Century’ (1992) 3 *Legal Education Review* 1, 2.

<sup>130</sup> For example, the authors of the Stuckey report urge us to develop a program of instruction which integrates the teaching of theory, doctrine and practice: see the Stuckey Report, above n 32, 71.

<sup>131</sup> Stuesser, above n 3, 119; Lynch, above n 11, 91, 93; Noel Jackling, ‘Academic and Practical Legal Education: Where Next?’ (1986) 4 *Journal of Professional Legal Education* 1, 4; Keyes and Whincop, above n 7, 34. Generally, on deep, achieving and surface approaches to learning, see Biggs, above n 78, 138–40; Gordon Joughin and David Gardiner, *A Framework for Teaching and Learning Law* (1996) 5.

<sup>132</sup> Susan L DeJarnatt, ‘In re MacCrate: Using Consumer Bankruptcy as a Context for Learning in Advanced Legal Writing’ (2000) 50 *Journal of Legal Education* 56, 56; Philip A Jones, ‘We’re All Reflective Practitioners Now: Reflections on Professional Education’ in Webb and Maughan, above n 57, 292–3; Spiegelman, above n 73, 262.

<sup>133</sup> Bentley, above n 18, 109 (describing the use of moots in a tax law course at Bond University Law School).



### 5 *Compulsory Moots — Time Limitations*

When moots are a component of compulsory substantive law courses all students are exposed to them. However, because of the large number of students normally enrolled in compulsory courses and the time and labour involved in conducting moots, the mooting experience may be abbreviated (for example, students may have as little as five minutes to present arguments in an informal setting).<sup>134</sup> While students may receive feedback on their performance and on their use of relevant substantive law, unless those learning objectives are assessed again in a substantive course, students have little opportunity and no motivation to put the feedback they receive to use. Students typically will have the opportunity to do only a single moot in a course. Although they may be required to participate in moots in subsequent substantive law courses, there is generally no connection between the relevant courses.

Consequently, in this model, feedback on learning and opportunity for repeat performance of relevant skills is limited. In these circumstances, it is more likely that mooting will be used for summative assessment purposes. A possible solution to this problem is offered later in the article.

### 6 *Electives and Optional Moots — Too Few Students Exposed to Mooting*

In some models, students can avoid moots if they wish, either by not taking the course (in the case of electives) or by choosing not to do a moot as a component of assessment (where the moot is optional).<sup>135</sup> In the case of electives, some students who wish to participate may actually be prevented from doing so either because student enrolments are capped and/or because the relevant electives are offered only intermittently.

On the positive side for electives, there is often more time available for feedback on performance and for repeat performance of moots — because there are fewer students involved. The disadvantage of this model is that only a relatively small number of students have the opportunity to participate. Additionally, when moots are offered as optional forms of assessment, the offer tends to be made at the

<sup>134</sup> Lynch, above n 11, 72 (describing the first moot in the curriculum at Griffith University Law School).

<sup>135</sup> It has been argued that not all law students want to become lawyers and that they might not want to develop the skills involved in mooting. This argument loses sight of the potential for moots to develop substantive law, and ethics and values, in addition to skills. It also overlooks the fact that almost all of the skills developed through mooting are generic in nature: see Penny Crofts, 'Crossing the Theory/Practice Divide: Community-Based Problem Solving' (2001) 3 *UTS Law Review* 40, 40, 46; Kift, above n 78, 52–3. On the relationship between generic skills and legally-specific skills, see William Twining, 'Taking Skills Seriously' in Mackie, Gold and Twining, above n 28, 4.

initiative of individual course coordinators. Many teachers prefer not to undertake moots because of the time involved. Thus, the moot assessment may come and go with coordinators. The problem then becomes one of a lack of consistency in the activities offered to students over time — some students may not get the opportunity to do even a single moot.

A concern that has not yet been raised in the literature relating to mooting is that not all students are exposed to it. It is not necessarily a cause for concern that some students are exposed to more mooting than others, but if we have an obligation to assist all students to develop basic competences in fundamental legal skills and to enhance professionalism, and rely partly on the moot as the vehicle for this development, then it is a cause for concern when some students have no exposure to moots at all.

### 7 *Most Models — Lack of Formative Feedback*<sup>136</sup>

Some of the models discussed above may incorporate feedback on learning, in other words, feedback that students can use to improve their learning of substantive law and skills.<sup>137</sup> There is potential for feedback to be given when mooting is offered as a discrete subject<sup>138</sup> (although, even then, the focus is on skills, not substantive law) and when moots are offered as electives. But experience suggests that most models do not explicitly incorporate formative feedback. This concern was most recently raised by Gillespie.<sup>139</sup>

To address the problem, Gillespie suggests that tutors could give feedback on skeleton arguments before students are required to present oral argument, a strategy suggested earlier by Keyes and Whincop.<sup>140</sup> Such a process would be time-consuming and, ultimately, not sustainable. Additionally, Gillespie suggests that formative feedback on skills could be provided with a mini-moot (a reduced speech) or a composite moot (where one student starts the presentation and the

<sup>136</sup> Feedback has been described as ‘evaluative information which may be used by students in reflecting upon and improving their performance in a learning activity’: Keyes and Whincop, above n 7, 10.

<sup>137</sup> Formative assessment is designed primarily to assist students to learn. It usually occurs as part of a progressive or ongoing learning exercise. Summative assessment is designed primarily to test and certify achievement and generally results in provision of a grade to students. It is usually associated with terminal activities such as end of semester exams. However, in practice, assessment is rarely purely formative or summative in nature and the teaching–learning and certification aspects of assessment are often linked: see Rowntree, above n 64, 122; Johnstone, Paterson and Rubenstein, above n 63, 7.

<sup>138</sup> This does not always occur. The author completed two discrete mooting subjects as part of her law degree and neither one of them incorporated formative feedback.

<sup>139</sup> Gillespie, above n 1, 33–4.

<sup>140</sup> Gillespie, above n 1, 30; Keyes and Whincop, above n 7, 2, 37. The time and resource demanding nature of the model proposed by Keyes and Whincop (which requires a commitment in excess of five to six hours for each moot) might preclude its use in compulsory courses with large student enrolments.

second student finishes it). These last two strategies free up more time for feedback by shortening the time taken for performance but are, as Gillespie concedes, less than ideal.<sup>141</sup> No provision is made for repeat performance of activities. Taken together, the strategies do not, it is suggested, overcome the challenges associated with incorporating formative feedback on learning in moots.

### *C Other Concerns about Mooting*

Some of the problems encountered with moots are a product both of the characteristics of the moot and the way in which it is integrated within the law curriculum.

#### *1 Appellate Moots are Too Complex for Beginners*

Appellate advocacy is a specialist area of practice demanding mastery of a range of skills. Experience of mooting at Bond University Law School (and literature about mooting in the US) suggests that it is too complex an area of practice for most students to handle well in their first or second semester of study.<sup>142</sup> As mentioned previously, students at Bond University were required to undertake an appellate moot in their first or second semester. This appears to be the case at some other Australian law schools.<sup>143</sup> It also occurs at schools in the US.<sup>144</sup> At this stage in the degree program, students have not yet had time to acquire a sufficient understanding of legal doctrine, legal process and legal institutions to use the moot effectively as a learning tool.<sup>145</sup> Nor have they acquired the skills to competently and comfortably handle the complexities of an appellate moot.<sup>146</sup> Students are only just beginning to develop these skills. As discussed shortly, students learn best by increments and we should put those increments in place for them.

The following problems were observed in the mooting program at Bond University Law School. The problems were most noticeable in the first semester moot.

<sup>141</sup> Gillespie, above n 1, 33.

<sup>142</sup> These concerns are raised not only in relation to undergraduate law students in the UK and Australia: see, eg, Gillespie, above n 1, 27. They have also been raised in relation to graduate law students in the US: see, eg, Martineau, above n 8, 1296; Gaubatz, above n 3, 91.

<sup>143</sup> The Johnstone and Vignaendra report mentions three law schools where moots are offered in the first year program: see Johnstone and Vignaendra, above n 32, 133–55. Moots have also been offered in the first year program at Griffith University Law School: Lynch, above n 11, 72; Keyes and Whincop, above n 7, 16; and at the Queensland University of Technology Law School: Lynch, above n 11, 72.

<sup>144</sup> Gaubatz, above n 3, 91; Martineau, above n 8, 1296; McCarter, above n 16 (where the author discusses the moot court experience of a first-year research and writing course which he claims is required at many schools in the US).

<sup>145</sup> Martineau, above n 8, 1296.

<sup>146</sup> Ibid.

*Lack of understanding of the court system and procedural law:* Students appeared to have little understanding of the hierarchical structure of the court system. Some students had no understanding of the significance or effect of the doctrine of precedent and of the difference between binding and persuasive authority. Nor did students understand basic trial and appeal procedure. Some students did not know which party to a judgment would institute an appeal and what relief that party would seek. On a few occasions, students assumed that the plaintiff in the trial automatically became the appellant on appeal.

*Inability to perform a series of complex skills:* As already discussed, we discovered that students had difficulty analysing issues in the moot problem and in using applicable case law and legislation. Our experience in this regard is shared by some other law schools. Martineau encountered first-year law students who were ‘just beginning to develop their legal reasoning and writing skills’.<sup>147</sup> He asserts that the ‘appellate court format is more of a hindrance than an aid in achieving the goals of first-year research and writing programs because it unnecessarily complicates the written and oral communication features of the program and detracts from them’.<sup>148</sup>

Students in the Bond University Law School program showed a number of weaknesses in oral presentation skills. The most common weaknesses included:

- Poor communication skills (for example, speaking too quickly, using distracting mannerisms, and not making or maintaining eye contact).
- Overreliance on written notes.
- Lack of selectivity in choosing the arguments to advance to the court. Some students left their strongest arguments until last, and invariably, ran out of time to deal with them.
- Difficulty answering questions from the bench.
- Failure to identify and adapt to the court’s concerns.
- Lack of understanding of basic techniques of persuasion.

We observed common errors in teamwork including failure to share the workload equitably, incorrect and inappropriate division of functions (such as in relation to entering appearances, introducing issues and summarising arguments), and failure to divide and deal with relevant issues in a logical and cohesive manner.

*Scaring students to death:* Although some students might perceive moots to ‘be fun’, many students report that participation in moots induces feelings of ‘terror’ and ‘fear and stress’ in them.<sup>149</sup> When students are overwhelmed, they are more likely to adopt a surface

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> This is how some students described their experiences of mooting in a survey conducted by Lynch: see Lynch, above n 11, 88, 91.

approach to learning in order to cope.<sup>150</sup> At best, they gain only a superficial understanding of the substantive and procedural issues involved. It is unlikely that students will perceive the exercise to be achievable (without high levels of anxiety). ‘Achievability’ is not just about being nice to students; it is a key requirement for effective use of simulations.

## *2 No Provision for Incremental Development of Skills and Knowledge*

It is a tall order to require students to grapple with a bundle of complex skill sets simultaneously in their first year at law school. It is not a particularly effective way to develop skills or to encourage deep learning for it is well-settled that skills are best-developed gradually by increments.<sup>151</sup>

Specifically, on the subject of advocacy skills, several authors in the US (where the first-year law student is a graduate student) suggest that students should be given the opportunity to develop skills one at a time using less complex simulations than a moot. For example, Gaubatz suggests that students be given ‘a single-issue’ argument requiring minimal research before they attempt the appellate exercise.<sup>152</sup> Martineau suggests that first-year law students should be given an ‘uncomplicated’ oral presentation<sup>153</sup> with minimum procedural requirements and specialised advocacy techniques (such as a motion to dismiss or for summary judgment) so that they can focus on developing essential and basic skills.<sup>154</sup>

As to when students might be ready to undertake appellate level argument, there is no definite right answer. Martineau believes that upper-level (second- and third-year) moot programs are also inadequate to the task of teaching appellate procedure, practice, and advocacy and he urges us to put them in ‘their proper and logical place — at the culmination of a study of trial and appellate procedure’.<sup>155</sup> This may mean that appellate moots are never introduced in some law schools where trial and appellate advocacy courses are not offered at all or only offered as limited enrolment electives. That is not the course of action suggested here. Students should be given an opportunity to do an appellate advocacy exercise precisely because it requires the exercise of a range of complex skill sets; however, the later it is introduced in the degree program, the better. Students must first be taught how to perform the basic sub-elements of the tasks

<sup>150</sup> Biggs, above n 78, 138–40; Joughin and Gardiner, above n 131, 5; Paul Ramsden, *Learning to Teach in Higher Education* (2<sup>nd</sup> ed, 2003) ch 4.

<sup>151</sup> Mackie, above n 28, 9.

<sup>152</sup> Gaubatz, above n 3, 91.

<sup>153</sup> Martineau, above n 8, 1296.

<sup>154</sup> Ibid. Also see Stuesser, above n 3, 126.

<sup>155</sup> Martineau, above n 8, 1297.

involved — skills must be introduced gradually, built, and reinforced over time.

#### IV ADDRESSING CONCERNS ABOUT MOOTING

The above concerns about mooting may be addressed through two initiatives. First, some of the traditional moots in the curriculum can be replaced with other simulations that not only better reflect the realities of practice compared with the traditional moot, but which also take full advantage of the benefits of experiential learning. Second, the challenge of integration can be addressed by integrating simulations into the curriculum by way of a *matrix course*; that is, one which consists of numerous components which are attached to various designated compulsory substantive courses, and which are taught and assessed throughout the law degree program (rather than in a single semester or year) in such a way as to form a single entity.

The suggestions made here are not hypothetical. Bond University Law School introduced a skills, ethics and values matrix in 1997.<sup>156</sup> Advocacy is one of the modules comprising the matrix. It replaced the traditional mooting program that had previously operated.

##### *A Overcoming the Moot Problem*

Law schools are not charged with teaching moots. And for the reasons discussed above, moots are not currently a particularly effective method to teach the knowledge, skills, legal ethics and values that we are charged with teaching. Moots can be replaced with a number of more effective advocacy simulations. In 1997, the Law School at Bond University replaced its mooting program with an advocacy program comprising of five components based on the following simulated tasks:

- 1 Parliamentary sessions.
- 2 Pleas in mitigation of penalty.
- 3 Written appellate argument.
- 4 Oral appellate argument.
- 5 Interlocutory applications.

The components are taken throughout the law degree program in the order set out above (the process of integrating these components into the curriculum is described in the last section of the article). Students begin practice with a relatively simple task and are gradually introduced to more complex ones. In this way, they get an early sense of achievement and the confidence to tackle more

<sup>156</sup> For a detailed description of this skills program: see Bobette Wolski, 'Why, How and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum' (2002) 52 *Journal of Legal Education* 287.

difficult tasks.<sup>157</sup> The five components are described in more detail below. The description is based on information collected in a further program review conducted in 2007 and 2008.<sup>158</sup>

### *1 Parliamentary Sessions*

The first advocacy exercise builds on students' pre-university experiences — most students have undertaken some oral presentations at school or college. However, many of them are still afraid of public speaking. This exercise is designed to assist students to come to terms with that fear. This goal is best accomplished with an activity in which students can concentrate on improving their oral communication skills 'unencumbered' by any legal or procedural complexities. The exercise is set in a non-courtroom environment. The students' brief is to persuade 'parliament' to their point of view on a controversial topic. The exercise is incorporated into the first year introductory course 'Contemporary Issues in Law and Society'. This substantive course lends itself to a variety of interesting topics, such as the legitimacy of pornography, euthanasia and same sex marriages.

Students have two opportunities to hone their presentation skills. They are required to give two presentations at intervals during the semester. Before their presentations, students are instructed on the role and techniques of persuasion and on principles of effective oral communication, and are required to practise a number of techniques in mini-exercises in lectures.

For the first session, students are given four minutes during a tutorial to prepare a short presentation on one of a number of topics that are provided at the tutorial. Once prepared, students then have three minutes to present their arguments to the class. The second session takes the same format; that is, students are given three minutes to make a persuasive presentation. However, this time they are given a list of topics in advance of the tutorial so that they may prepare thoroughly. After each presentation, students receive feedback from the tutor and their peers. They are also required to evaluate their own performance using a checklist of performance criteria. The aim is to generate a list of three strengths and three areas in which they

<sup>157</sup> This approach to learning (referred to as an incremental or building block approach or as scaffolding) is one way of creating 'linked progression in the structure of skills learning': Mackie, above n 28, 16, 18.

<sup>158</sup> This review was conducted using the same methodology as that used for the Bond University Law School 1996–97 moot program review. Original documentation is on file with the author. In fact, each advocacy component is evaluated, separately from the substantive course in which it is contained, each time it is taught using student evaluation forms. The evaluation form is designed to elicit qualitative comments from students, using a series of open-ended questions. Students are also asked to comment on things they liked and did not like about the component, and on any changes they would like to see made to it.



can improve. Students are required to record feedback in a learning journal and to carry it over from one session to the next (or, in the case of the second session, to the next advocacy component in the program).

Students are introduced to the concepts of ethics and morality in this component of the program. They are required to consider whether or not politicians should lie or stretch the truth, whether the ends achieved ever justify the means used, and to reflect upon whether or not passion and engagement with cause are fundamental to effective advocacy. They must compare the role and perspectives of lay people, politicians and lawyers.

Ultimately, students are assessed on the basis of their improvement between the first and second presentations, on their demonstrated proficiency in a range of oral presentation skills, and on the reflective accounts which they are required to submit to the tutor at the end of the semester. The journal entries are marked and returned to students.

Additional aims of this exercise are to:

- 1 Stress the importance of preparation (having limited time to prepare for the first presentation underscores the need for preparation, while having opportunity to prepare for the second presentation highlights the difference that preparation can make).
- 2 Assist students to give, and to make use of, peer and self-assessment.
- 3 Enable students to learn how to reflect and how to learn from reflection.

## 2 *Pleas in Mitigation of Penalty*

The next component is undertaken in the course criminal law, which most students take in their second semester of study. The component complements that part of the course dealing with the principles of sentencing criminal offenders (and the first exercise is timed to coincide with lectures on this area). Students also receive instruction on the procedure for entering a plea and making submissions in mitigation of penalty, on the use of case theory and theme,<sup>159</sup> and on the structure of pleas in mitigation of penalty. Procedural content such as this adds to the realism of simulations. Prior to undertaking their first exercise, students are required to attend a real Magistrates' Court to observe sentencing procedures.

To complete the component, each student must present two 'submissions in mitigation of penalty' on behalf of fictitious defendants who plead guilty to one or more criminal offences

<sup>159</sup> For a discussion of the concepts of case theory and theme, see David Napley, *The Technique of Persuasion* (4<sup>th</sup> ed, 1991) 9; Thomas A Mauet and Les A McCrimmon, *Fundamentals of Trial Techniques* (2001) 9–11; Kirby, above n 106, 971–2.



(usually misdemeanours). The presentations are made at intervals during the semester before a simulated Magistrates' Court. A period of 10 minutes is set aside for each presentation, allowing five minutes for oral performance and five minutes for feedback. Again, students record feedback in their learning journals — the same journals that they commenced in the first component of the advocacy program. The component is not completely true to life as there is no 'police prosecutor' present when students make their presentations. Instead, students are provided with 'a statement of facts by the prosecution' and with additional 'confidential client information'. Invariably, there are some differences between the two sets of facts. Students have to decide:

- 1 which prosecution facts, if any, they should dispute and how far they can take the issue before they reach the point where the submission is inconsistent with a guilty plea; and
- 2 what client information, if any, they should disclose to the court in order to satisfy their duties to the court, to the client, and to the public.<sup>160</sup>

At the conclusion of each submission, the 'Magistrate' imposes a sentence on the fictitious client. The sentence has no bearing on the student's mark.

The component allows students to concentrate on the constructive use of facts and on developing basic principles of effective oral communication in court in a relatively simple legal setting. There are no complicated issues of law to be argued and very little research is required.

For the first time, students are introduced to and required to critique formal rules of professional conduct. In a group debriefing session, students must complete a 'true/false' exercise on ethical matters that arise in relation to 'guilty pleas', many of which cannot be satisfactorily answered with either a 'true' or 'false' response. Students must justify their answers. They always have mixed feelings about representing clients who have 'confessed' guilt, particularly in serious crimes. Our aim is to encourage students to scrutinise relevant ethical rules (such as the cab rank rule), to be aware of and open about their feelings for an accused person, and to explore and articulate values such as those of access to justice, rights of accused persons and rights of victims. More general issues, such as the role of the advocate (and the specialised role of a prosecutor) are examined and compared to the role and functions of a judge.

Most students perform very well in this assessment component and their confidence is bolstered as a result. It also appears that students get a psychological boost and an early feeling of professionalism from representing their first 'client'.

<sup>160</sup> On an advocate's duties to the client, to the court and to the public, see Richard Du Cann, *The Art of the Advocate* (1993) 43–9; Napley, above n 159, 66–72.

### 3 *Written Appellate Argument*

In the third advocacy component, students are provided with a fictional judgment involving the law of torts and asked to appeal the judgment. Students work alone. They are required to prepare a 'brief' of approximately 3000 words consisting of a Notice of Appeal (or Notice of Cross-Appeal if they act for the respondent) and written submissions. They are assessed on the basis of the brief. Tutors use a written pro forma feedback sheet to give feedback.

Instruction is given on the function of appellate courts, on the different categories of error, on the tests used to determine appealable error,<sup>161</sup> and on the rules of appellate procedure. Students also receive instruction on the content requirements of a Notice of Appeal, with particular emphasis on the requirements for a well-drafted ground of appeal.<sup>162</sup> They examine the elements of an effective and persuasive set of submissions (consisting of issues and arguments within an appropriate factual context). Of critical importance in this exercise is the students' ability to:

- 1 demonstrate an understanding of the function of appellate courts;
- 2 critically analyse the decision, reasoning and findings of the lower court;
- 3 articulate grounds of appeal with clarity, precision and specificity;
- 4 specify the appropriate relief or orders sought by the client; and
- 5 write in plain and persuasive English.

There is a measure of artificiality involved in this component as all students (whether for the appellant or for the respondent) have to 'file' their documents at the same time. The respondent does not actually respond to the appellant's allegations, as would occur in practice. However, this is not a problem for it encourages students to pre-empt and deal with the counter-arguments to the propositions they are advancing, regardless of which side they represent.

A number of pertinent ethical rules (such as the obligation to disclose to the court all relevant case law and legislation) are discussed in class. Students are made aware of the consequences of misstating the law or the facts, of exaggerating, of quoting passages of law out of context and so on. These rules sound straightforward but, in practice, they are not. Examples are used to identify the boundaries of permissible and/or desirable conduct; for example, when is an advocate merely putting her or his own spin on facts as opposed to exaggerating or even misleading the court. At the end of these discussions, students must add to their learning journals. The

<sup>161</sup> See, eg, the tests set out in David F Jackson, 'Appellate Advocacy' (1991–1992) 8 *Australian Bar Review* 245, 248–9.

<sup>162</sup> On the requirements of a well-drafted ground of appeal: see *ibid* 247–50.

following questions are used to prompt feedback and reflection on ethics and values:

- Was there an ethical dilemma and, if so, what was it and why was it a dilemma?
- What situational factors were relevant to the problem?
- What choices did I have?
- What values are presented in those choices?
- What conclusion did I come to and why?
- Can I justify my actions? Am I comfortable with my actions?
- What were the consequences of my decision?
- What else could I, or would I, do differently if presented with these choices again?

Student response to the component has been favourable although it is clear that this exercise does not have the appeal of the first and second components.

#### 4 *Oral Appellate Argument*

The next component of the advocacy module is taught in the course Obligations, which is undertaken by students in their fifth or sixth semester of law school. The component is similar to the ‘traditional moot’ in that it includes oral argument at the appellate level.<sup>163</sup> There are two reasons why we have retained one simulation which functions like a traditional moot — first, because our students continue to take part in moot competitions and consequently need exposure to the formalities of the ‘mooting process’; and, second, because appellate advocacy gives students an opportunity to use and bring together a complex set of skills.

Points of particular interest in this component are:

- For the first time in the advocacy module, students are required to work in teams of two, acting as senior counsel and junior counsel, respectively, and they are assessed on their ability to work cooperatively as team members.
- Each team is required to prepare a written ‘summary of argument’. The summaries are assessed separately (and weighted at 50 per cent of the marks for the component) and students are given specific feedback on their work. The summaries are marked and returned to students before they undertake their oral presentations. This is a particularly time-consuming exercise for tutors, but it is required only once in the program.
- Each student’s oral presentation is approximately 10 minutes in duration. An additional 10 minutes is set aside for each student for individual feedback. During the process, students must bring out their learning journals. Reference is made to feedback provided on other occasions. New feedback is added.

<sup>163</sup> Students have further opportunity for oral appellate argument in several internal and external mootings competitions.

While a number of students said that they felt anxious and nervous doing this component, no one reported feelings of fear.

### 5 *Interlocutory Applications*

Students undertake the fifth and final component of the advocacy program toward the end of the degree in the course, Civil Procedure. The course contains a drafting component in addition to an advocacy component (some courses contain more than one skill component). Working alone, students must draft an interlocutory application (for example, an application for an injunction or other interim relief), supporting affidavits, and an appropriate draft order for the court. These documents are marked separately from oral presentations. Importantly, students are assessed on their ability to comply with the evidentiary and procedural requirements for applications and affidavits. All the evidence necessary to support their arguments must be contained, in an admissible form, in their supporting affidavits.

Students then present their application to a 'judge'. Each student has 15 minutes for oral presentation and feedback. By the time students complete this exercise, they have developed a useful learning journal on advocacy and related skills. In addition to demonstrating the usual features of good advocacy, students are expected to articulate the facts and evidence necessary to satisfy relevant legal tests and to identify and deal appropriately with ethical dilemmas.

Civil Procedure lends itself to classic ethical issues, such as whether or not an advocate should put forward a purely technical defence and what are the appropriate limits of discovery of documents. Sometimes, students are required to bring an urgent ex parte application, one which raises the level of candour required of an advocate to the court. The scenarios always contain some facts which are borderline-adverse to the client and students must decide whether or not to reveal the information to the court. They must justify their decisions by reference to the professional conduct rules or other applicable norms.

Possibly for the first time in their degree, students are required to demonstrate an understanding of relevant substantive law, procedural law, and the law of evidence — in addition to demonstrating competence in relevant skills. Student response to this component is positive. Almost all students regard the component as realistic, practical and relevant to practice and to the course work covered in Civil Procedure.

Once simulations have been designed, the ongoing challenge with experiential learning lies in ensuring that all stages of the experiential learning process receive adequate attention all the time. That is the subject of the next part of the article, dealing with integration. However well simulations are designed, they must be

integrated into the curriculum in a way which allows for adequate feedback on learning and repeat performance.

### B *Overcoming the Integration Challenge*

The challenges associated with skills teaching and learning at law school have been reasonably well-documented.<sup>164</sup> There are three major hurdles to the expansion of skills programs relevant to the present discussion:

- 1 Skills teaching and learning requires a substantial commitment of labour and resources, far more than is required for teaching traditional doctrinal courses.<sup>165</sup>
- 2 Teachers and students have limited time available to them.
- 3 There is a perception that skills teaching interferes with coverage of already content-crowded substantive law courses.<sup>166</sup>

The challenge for us is to use the limited time we have available effectively and, as a result, to reduce the perception that time spent on skills, legal ethics and values necessarily takes away from time spent on substantive law. The model of integration used at Bond University Law School may prove useful in this regard. It is described in detail below.

#### 1 *Skills, Ethics and Values Components Integrated within Compulsory Substantive Law Courses*

The School of Law at Bond University uses a compulsory model of integration. The components of the advocacy program described above are taught and assessed in designated compulsory substantive law courses taken by students throughout their law degree. Wherever possible, the objectives of a component are dovetailed with those of the substantive law course into which it is integrated.<sup>167</sup> We have also endeavoured to act on Twining's advice to involve 'issues of ethics, values, and professional responsibility ... in the learning of each skill.'<sup>168</sup> This creates synergy.<sup>169</sup>

<sup>164</sup> Generally, on the challenges associated with teaching and learning skills at law school, see Wade, above n 8, 183–90; Wolski, above n 156.

<sup>165</sup> Wade, above n 8, 183; Hyams, above n 53, 75; Vivienne Brand, 'Decline in the Reform of Law Teaching?: The Impact of Policy Reforms in Tertiary Education' (1999) 10 *Legal Education Review* 109, 122–3.

<sup>166</sup> Wade, above n 8, 189; Twining, *Law in Context: Enlarging a Discipline*, above n 94, 190.

<sup>167</sup> A range of specialist skills-based and substantive law electives is offered for students who have a special interest in a particular field.

<sup>168</sup> Twining, *Law in Context: Enlarging a Discipline*, above n 94, 194; Stuckey, above n 55, 820.

<sup>169</sup> A term used by DeJarnatt to describe the effect of teaching advanced legal writing within the context of a single substantive law course: see DeJarnatt, above n 132, 56. See also Noble-Allgire, above n 49, 36–7.

The Law School at Bond University also endeavoured to make skills teaching both incremental and systematic. In order to achieve linked progression between the components and to ensure uniformity of exposure to skills teaching, we forged links between those substantive courses in the curriculum that contained advocacy components. In forging these links, we found a cost-effective way to provide students with formative feedback on their learning.

## 2 *Creating Links between Components — the Matrix*

Advocacy is but one module in the skills program at Bond University School of Law. Besides Advocacy, there are modules on Legal Research and Analysis, Writing and Drafting, Negotiation and Dispute Resolution, and Client Interviewing and Communication. There are five components in the advocacy module, but altogether there are 20 components in the skills program. The other 15 components are also integrated into substantive law courses taken by students throughout their law degree. Students can complete the 20 skill components over a period of eight semesters, in two and two-thirds years.

We have created links between the components by forming a course with those components — a matrix course — which overlays and connects all other courses in the curriculum.<sup>170</sup> This matrix is depicted in Table 1 below.

The teaching and assessment of each component in the program is linked. The same sequence is followed for every component: preparation (including special instruction); performance in simulations; assessment with feedback in small group debriefing sessions, followed by student reflection;<sup>171</sup> and then further practice in more complex simulated situations, more assessment and more feedback.

As will be apparent, instruction–demonstration, further skill practice and assessment take place in a different substantive course, depending on where the next advocacy component is located — it may occur in a subsequent semester.<sup>172</sup>

Students receive a mark for each skill component they complete. The mark is recorded for the substantive law course in which the skill component is contained (where it carries anywhere

<sup>170</sup> The word ‘matrix’ seems appropriate to describe this structure. The term is defined in the Oxford Dictionary as ‘a rectangular array of elements in rows and columns that is treated as a single entity’: Thomson, above n 10, 841.

<sup>171</sup> Student practice is recorded and students are encouraged to watch their ‘taped’ performance. On the potential advantages and disadvantages of using video recordings, see Gibbs, above n 59, 41; Johnstone, Paterson and Rubenstein, above n 63, 52; Rowntree, above n 64, 138; Steven Lubet, ‘Advocacy Education: The Case for Structural Knowledge’ (1991) 66 *Notre Dame Law Review* 721, 734.

<sup>172</sup> Rowntree allowed for the possibility that further teaching and subsequent assessment might take place in the following term: Rowntree, above n 64, 122.

Table 1: Matrix Used at Bond University

LEGAL SKILLS/ETHICS/VALUES COURSE

INDIVIDUAL SKILL COMPONENTS	LEGAL RESEARCH & ANALYSIS	WRITING & DRAFTING	NEGOTIATION & DISPUTE RESOLUTION	ADVOCACY & ORAL PRESENTATION	CLIENT INTERVIEWING & COMMUNICATION
SUBSTANTIVE COURSES	Australian Legal System	Australian Legal System	Australian Legal System	Contemporary Issues in Law & Society	
	Legal Reasoning			Criminal Law	
		The Law of Civil Remedies	The Law of Civil Remedies		
	Contract Law			Torts	
		Personal Property		The Law of Obligations	
	Property Law		Land Law		
	Administrative Law	Equity			Business Associations
		Civil Procedure		Civil Procedure	Evidence

from 10–25 per cent of the total marks for the course) and for the course Legal Skills (where it carries five per cent of the marks for that course). Students are given a mark for each skill module and for the skill course as a whole. The mark awarded to a student for a skill module is the total marks he or she obtains for components in that module. For example, the final mark given to a student for the advocacy module of Legal Skills is the total marks obtained for the five advocacy components in the module. The final mark awarded to a student for the course Legal Skills is based on the total marks he or she obtains for the 20 skill components in the course. In effect, the marks for individual skill components are interim marks and assessment in each skill module and in the skill course is progressive.

All students must satisfactorily complete all five advocacy components. If students fail a component, they are required to repeat it until they attain a satisfactory level of competence in the relevant skills.<sup>173</sup>

Students must pass the course Legal Skills to obtain their law degree (the cut-off mark for a pass is 50 per cent). They are awarded a pass, credit, distinction or high distinction on the basis of their marks rather than a pass/fail grade.<sup>174</sup> When students graduate, they receive the usual certification of academic achievement and a separate skill certificate that indicates the mark and grade they obtained for the course Legal Skills, together with the mark they obtained for each module in the course.

### 3 *Formative Feedback on Learning*

Assessment in each component of the advocacy program, with the exception of the last component, is formative in nature. All the prerequisites for formative feedback (set out earlier in the article) are met. The assessment incorporates feedback, it is followed by further teaching and the relevant abilities and competencies are subject to later assessment in subsequent components of the program. This has proved to be a resource-effective and sustainable way of incorporating formative assessment in teaching and learning. It is an approach that works only because of the institutional rules and routines governing the program.

<sup>173</sup> It is not necessary for students to repeat the whole subject Legal Skills but only those components which they initially failed.

<sup>174</sup> Opinions are divided on whether a pass/fail grading system is more appropriate for skills than a traditional grading system: see, eg, Myers, above n 34, 411; John K De Groot, *Producing a Competent Lawyer — Alternatives Available* (1995) 74. See, generally, Charles B Craver, 'The Impact of a Pass/Fail Option on Negotiation Course Performance' (1998) 48 *Journal of Legal Education* 176.



#### 4 *A Systematic Approach — Ensuring Consistency*

Skills and ethics teaching is planned, structured and coordinated throughout the law degree at Bond University Law School. The School appoints a continuing senior member of academic staff to coordinate the Legal Skills course (the Skills Coordinator), in the same manner as it does for any other course. The Skills Coordinator is charged with policing the operation of the course, ensuring, for instance, that sufficient time is set aside for simulations to allow each student to be adequately assessed and given individualised feedback. The Skills Coordinator also ‘controls’ (in consultation with coordinators of substantive courses) factors such as the weight attached to assessment components, the learning objectives considered important, the content, and the teaching and assessment methods used to teach skills and legal ethics. Further, the Skills Coordinator ensures that these factors do not vary with substantive course coordinators, and that agreed skills and ethics are appropriately taught at an agreed time and place within the curriculum (in fact, coordinators of substantive courses work with the Skills Coordinator in designing and assessing simulations because skills coordinators are often not experts in the relevant substantive law). For their part, substantive course coordinators are willing to live with some loss of autonomy over their courses for what is perceived to be a collective advantage for the School. In this way, consistency in skills and ethics teaching and learning over time is ensured.

### V ONGOING CHALLENGES

When the skills and ethics program first began, students were quick to point out areas where we fell short. They asked for clear performance and assessment criteria, and for appropriate examples and model answers that demonstrated the use of relevant skills. We have made a series of video presentations for use in the exercises. Effective performance of skills is also modelled by instructors.

Students reminded us of the need to ensure that all assessors have expertise in the skills being assessed and in skills teaching methodology and that assessment is properly moderated. In some skill components, the Skills Coordinator (who has expertise in the relevant skills) is actually responsible for teaching skills. In other components, skills are co-taught by the Skills Coordinator and substantive course coordinators. Where there is more than one assessor involved, they use standardised criteria checklists and multiple-marking of some performances and sample work to ensure consistency in assessment.

The most persistent problem centres on the need to provide adequate feedback to students on their performance and to allow sufficient time for student reflection. It is an inescapable fact that if

teachers are to accommodate skills and ethics exercises within their classes, they must increase the time they spend in assessment. The temptation to reduce the amount of time spent giving feedback to students is difficult to resist. At a time when the resource problems for law schools are increasing, programs such as these need multiple 'keepers of the flame'. One of the greatest benefits of teaching via a matrix course is that the load is shared among staff members — everyone has a stake in keeping the flame burning.

The final point to mention is one outside the scope of this article and one which requires further research. While law students enjoy skills assessments, attention must be paid to the total amount of assessment that students have to undertake during the course of their studies. Students in the skills program at Bond University are under a heavy assessment load and may even be over-assessed. We have not, as yet, seen evidence of surface engagement with tasks but that is one possible student response if over-assessment is taking place.

## VI CONCLUSION

The Advocacy program described in this article began operating at Bond University Law School in 1997 as part of a skills, ethics and values matrix. The program was reviewed again in the period of 2007 and 2008. It has been energetically sustained over a period of 10 years. Overall, feedback from students has been extremely positive. Students practise advocacy skills with a great deal of enthusiasm in a variety of contexts that they perceive to be realistic, relevant, interesting and achievable. The program includes mooting but as part of a progressive formative skills process rather than in its traditional format. From the Law School's perspective, we have succeeded in shifting the focus from oral presentation as an end in itself towards the development of better skills of reasoning and analysis, fact selection and use, issue identification, and persuasive writing. In the process of doing so, oral presentation skills have also improved. We have provided students with the opportunity to consider relevant ethical issues and professional and personal values continually throughout their degree.

Maintaining a program such as the one discussed in this article is resource and labour intensive; however, no more so than the usual mooting program adopted by many law schools. Other schools might find one or more of the advocacy components described in this article useful, especially if they share similar concerns about traditional mooting. It is my view that these components (or similar ones) should be used in place of traditional moots where those moots are restricted to arguments on points of law before a simulated 'appeal' court. In this way, students could experience advocacy in a variety of realistic contexts, which heighten their awareness

of critical ethical and professional issues. They can be stimulated by their experiences, not intimidated by them. The use of a matrix course enables us to integrate skills, legal ethics and values into substantive law courses in a way that maintains student motivation to learn, ensures consistency of teaching and learning over time, and uses limited time and resources more effectively than traditional moot assessment tasks.