

**Live Cases v. Fictitious Cases: A Moot Court Experiment**

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Moot Court exercises are an effective tool for students to engage the material in Constitutional Law courses (Hensley, 1993). The pedagogical value of Moot Court assignments is not the focus of this presentation. Instead the presentation focuses on the structure of Moot Court assignments. The question I ask is whether live cases or fictitious cases provide a better opportunity for students to learn.

For several years I have taught courses on Civil Liberties and Civil Rights and Constitutional Law. I always use moot court exercises in the courses for the outside research portion of the course. The moot court also encompasses the largest piece of writing the students complete for the course. I fluctuate between live and fictitious cases for the moot court assignment. I find both types of cases bring unique learning experiences for the students as well as unique problems for the instructor. I have observed in an unscientific fashion the benefits and problems with both types of cases. This presentation investigates the relationship between live and fictitious cases and their impact on student performance.

Live cases are cases that are currently in the judicial system, fictitious cases are cases made up by the instructor. The benefits of live cases are that the information is readily available for both the students and instructor. The drawbacks of live cases are that students tend to be less creative in their arguments relying too closely on the lawyer's briefs that are available online. The instructor using live cases must be wary of plagiarism by students. On the other hand, fictitious cases require the instructor to describe a case in detail for the students to argue. Students benefit from the fictitious

case because the instructor can design the case in such a manner to highlight important concepts from the course. Student research on the case tends to be more difficult but the likelihood of plagiarism is considerably diminished as students trust themselves to make the best arguments in the case. The biggest drawback in the fictitious case is the lack of direction for the students. Students often have difficulty knowing where to start in a fictitious case. Another problem with fictitious cases is that the instructor may inadvertently left gaps in the case that students uncover during their research.

*Literature Review:*

Most of the literature on moot court presentations falls into two categories first is the literature that extols the virtues of moot court as an academic exercise. This literature ranges from high school to law school moot court exercises. Most of the literature concedes that the hands on approach that moot court exercises provide enhance students' interest in the material (Bell, 2002). Increased student interest results in improved student learning as evidenced through better writing and oral presentation skills (Carlson and Skaggs, 2002).

The second aspect of the moot court literature focuses on the structure of the moot court. This literature focuses on how to set up a moot court and to a lesser degree how to assign grades for moot court participation (Ringel, 2004). Most of the literature in the structure sub-area describes moot court as having four components, the case, the written arguments, the oral arguments, and the decision (Ringel, 2004). The case aspect is where this presentation will focus. I hypothesize that junior level college students will present

better written and oral presentations when the moot court case is live as opposed to fictitious.

### *Description of Moot Court*

In the fall of 2006 this researcher taught two upper division courses that leaned themselves to moot court exercises; Constitutional Law and Civil Liberties and Civil Rights. While these courses differ in the content of the material, the structure and learning objectives for the students are similar. For one course I used a live case for the other course I used a fictitious case. For the purposes of this experiment the cases were purposely made similar to allow for better comparison. The largest problem I faced was different levels of participation in the two courses. In the Constitutional Law course (fictitious) I had 11 students. In the Civil Liberties Course (live) I had 17 students. Due to the difference in size of the courses I had fewer justices in the fictitious case than in the live case.

In each course the moot court was designed in a similar fashion while accounting for the differences in class size. The setup of the moot court is simplistic each course was divided up into lawyers and justices the students that represent justices were randomly assigned a justice. Each case received three lawyers per side, the lawyers worked together to provide one written brief per side. The lawyers were also responsible for oral arguments (in preparation for oral arguments both courses listened to about fifty minutes of oral arguments from *Hamdi v. Rumsfeld*). Oral arguments consisted of five minutes for opening statements, followed by ten minutes of argument and five minutes for rebuttal and closing. The appellant's side went first in each of the three segments.

Justices were allowed to interrupt oral arguments at any time; in fact it was made clear to both courses after listening to *Hamdi v. Rumsfeld* that interruption of the lawyers was expected. The justices were responsible for writing a seven page justice biography of their justice. The biography was to include biographical information along with the justice's general jurisprudence and specific jurisprudence related to the pending case. The justices were also required to participate in a justice conference. The conference takes place following moot court, each justice is given three minutes to discuss the direction and reasoning behind their decision on the various issues. Finally the justices are to individually present a written decision which will explain their decision using case law for justification. The justice's decision is to be five pages in length.

#### *The Cases:*

The live case was *ACLU v. NSA* filed in the eastern Michigan District Court Southern Division; the case was decided on August 17<sup>th</sup> and immediately appealed. The students were told that the Supreme Court took jurisdiction of the case due to its National Security implications. Due to congressional action on the issue under debate students were informed that any congressional or presidential action taken after August 17<sup>th</sup> 2006 was not to be considered for the purposes of the moot court. The issue the moot court was to consider was whether the NSA program violated any of the civil liberties protections provided for in the Constitution. The moot court was not to consider questions of presidential power.

The fictitious case was similar in that it dealt with issues surrounding the war on terror. The moot court for the fictitious case was only to consider issues of presidential

power, and not to consider civil liberties issues. The case created scenarios that focused around three issues; first does the president have the power to order wire tapping of both citizens and non-citizens without a warrant. Secondly, does the president have the authority to continue to detain individuals who cannot be repatriated, given the ruling in *Hamden v. Rumsfeld*? Thirdly, the Court was asked if the president could encourage, through threat, international organizations to cooperate with the war on terror. In this case The First Bank of the Netherlands was persuaded through threats by the president to provide documents that led to the arrest and conviction of a third party.

### *Methods*

The methodology for the experiment is straight forward I compared the work of the two classes in the moot court on several items. I compared the lawyer's briefs, the oral arguments, the justice bios, and decisions. I had an outside reader score the lawyers briefs to provide for a control. I am most interested in the lawyers brief because I think it is the aspect of moot court most affected by the type of case presented. The lawyer brief is the basis of the justice decision and oral arguments.

### *Findings*

My findings were mixed. The lawyer's briefs received mixed reviews from the instructor. See table 1. Interestingly the outside observer's highest grade was the instructor's lowest grade. Obviously there are some issues concerning the measurements utilized for the study. At this point I decided to not rely on the outside observer, instead relying only on the instructor to analyze the results of the moot court.

Table 1 Average scores for moot court components

	<b>LIVE</b>	<b>FICTITIOUS</b>
Lawyers Briefs (instructor)	86.85	84.67
Lawyers Briefs (observer)	72	81.3
Oral arguments	83.12	87.72
Justice Bios	82.36	83.6
Justice Decisions	82.36	82.4

As the instructor I believe that the difference between the two moot courts was negligible. The fictitious case showed more consistency the grades were clustered closer together in all aspects being measured. A couple of factors could account for the clustering of the grades, first the class size was smaller (11 for fictitious and 17 for live) thus allowing for less variation. Secondly, the entire moot court took place in one day because the class period was an hour and 15 minutes and not 50 minutes as for the live case. The live case was handled over two days and 3 students failed to attend on one of the two days resulting in a 30 point penalty on their oral arguments grade. The 30 point penalty for the three students is clearly the cause of the large discrepancy between the average for the oral arguments in the two cases (see table 1).

I ranked the lawyers briefs for the fictitious case second and fourth, and for the live case first and third. As stated earlier, the lawyers brief is the factor I want to focus on as I feel it is the one most affected by the type of case utilized and sets the groundwork for the rest of the moot court experience. The lawyers for each side in each

case must work together in a team of three to research and write an argument for the side they represent in the case.

I found the research in the two fictitious lawyer briefs to be adequate, but lacking a detailed analysis of the issues in the case. The students tended to rely on course materials, attempting to fit them to the case, rather than finding outside sources that more closely matched the issues in the case. The lawyers whose brief was ranked fourth did not do any outside research, therefore not meeting the requirements for the simulations. However, it must be noted that in the fictitious case both teams of lawyer's briefs were well written and coordinated, that is not the case for the live case.

The live case briefs were ranked first and third. As mentioned above the biggest concern about using a live case is the issue of plagiarism, luckily neither brief contained any plagiarism; however the brief that ranked first was closely linked to the actual case and drew upon many of the documents associated with that live case. The brief that was ranked third did not use much of the material available on line and showed a lack of creativity in the arguments presented. Both briefs lacked creativity focusing on arguments presented in the live case and in the course materials. However the live case resource assisted the lawyers in the first brief with being able to write in an effective manner. The writing of the lawyers for the third ranked brief was poor, and showed a considerable lack of effort.

In summary I found that the lawyers' briefs are indeed affected by the type of case and in turn affect the quality of other aspects of the moot court. I found that live cases tend to limit student creativity, and limit student interest on the positive side live cases provide better research opportunities and students tend to write better. With

fictitious cases students have more difficulty researching material, will rely more on in-class readings, and writing is not as effective, on the positive side students are more creative in their arguments, and in general seem more interested in the simulation.

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