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IT has been said that the "years drift slowly on legal education," that the law, the courts and the law schools "have a tendency to be a little backward in moving from one century to the next."[1] Perhaps so.[2] And yet, from time to time, there develop insistent demands with respect to legal education which accelerate the pace and, of greater significance, lend direction to the movement.

Chief Judge Charles S. Desmond has been one of those perceptive leaders who have been urging law schools to be concerned with advocacy and particularly with trial advocacy.[3] Neither he nor any other leader in what is becoming an effective movement would expect polished trial-court performers to emerge from what must at best be primary-level training.

More modest goals are appropriate, but their significance should not be underestimated. It is possible to offer an adequate, effective program of training in trial advocacy which, without pretending to turn out skilled trial lawyers, can be expected to result in certain minimum achievements.

What are these? First, hopefully the student will acquire a better understanding of the judicial process and particularly of litigation on the trial level. This is of no mean significance whether or not he ever tries a case in the course of his career at the bar. Second, the student can be expected to achieve greater skill in the performance of simple tasks, those which he is likely to have in the early months after law school. He will be able, with an added measure of self-assurance, to take depositions, to prosecute small claims, and to appear in police court.

The student's newly acquired skills carry a valuable by-product. Learning begets learning. The neophyte who sits in a courtroom observing two lawyers as they try a case may profit little, at least relatively speaking. He needs first an appreciation of the problems which face the attorneys, of the pitfalls, and of the criteria of success. It is only after he has achieved a more sophisticated understanding that he is truly likely to profit from his observations. The law school must help make him ready to learn.

Finally, and perhaps more important of all, as a result of a law school course in trial advocacy, many more students may develop an interest in an active trial practice. Without such training, trial work is ignored and by this very fact is assumed by some to be an unworthy step-child.[4] In any

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1. Desmond, *What the Courts Expect of Bar Examiners*, 33 Bar Exam. 38, 43 (1964).

2. The same article recognized some curricular changes which had taken place, *id.* at 39, and others might point to the development of seminar programs, the problem method of instruction, "small-group" courses and the like.

3. *Id.* at 40.

4. Evidence is so often taught as a problem of appellate review that even its presence in a curriculum may leave the student with the view that trial work is being ignored. The same can be said to be true of certain offerings in civil procedure. No doubt, however, that many teachers make these subjects come alive as trial-court subjects.

event, an appropriate program can make visible the affirmative attractions. It may provide stimulus and spark interest, particularly if it utilizes practitioners of the art, successful advocates who make the "law come alive," who, without over-dramatizing, are able to afford some insights into the excitement and the challenge of courtroom life.[5] This appears, in some measure at least, to have been a motivating factor for the American College of Trial Lawyers which is developing materials for the teaching of trial advocacy to law students, in conjunction with the Section on Judicial Administration of the American Bar Association and the Association of American Law Schools.[6]

There are, of course, limitations on what should be undertaken at the law school level. It would be wrong for the law schools to attempt an undue amount of advanced training in the practical skills of the trial lawyer. It is better for the school to leave undone what can be done elsewhere more efficiently, more effectively and more properly. More efficiently and more effectively, because there comes a point at which there is no substitute for learning by doing, a point at which the would-be clinician must leave the laboratory;[7] more properly, because in the inevitable press for priority among competing demands, the law school can neither ignore nor subordinate its primary tasks, the development of intellectual skills and the achievement of intellectual goals. Let us therefore concede that it is wrong to attempt too much, but doing nothing at all is the greater wrong and presents the more serious risk on the contemporary scene.

The decision to teach trial advocacy is but a preliminary step in introducing the subject into a law school's program; few courses present so many challenging problems of implementation. Standard techniques were either patently unsuitable or proved themselves lacking in effectiveness. Neither the socratic method, nor seminar-type discussions, nor lectures by successful practitioners were able to meet the basic need. Moot court procedures raised problems of their own. Innovations were common in the law school world, but often seemed to flower only in native soil. Understandably, no consensus has yet been reached in the profession and diversity abounds. In this situation there is, perhaps, some utility in a brief description of a program which, over the years, has yielded a measure of success for the students of at least one school. If the description serves to stimulate useful experimentation and modification by others, if it sparks reconsideration and resultant innovation, it will have advanced the ends of those who seek to promote the more effective teaching of advocacy.

The Trial of an Issue of Fact, as this course is known at the University

5. Desmond, *Idea of a Law School*, 1 Vill. L. Rev. 5, 7 (1956).

6. George A. Spiegelberg, Esq., is chairman of the Advisory Committee which is composed of representatives of each of the three organizations named in the text. The author is Director of the project and Harold Cramer, Esq. is Assistant Director.

7. Kelly, *A Trial Practice Course that Achieves Reality*, 17 J. Legal Ed. 445 (1965) discusses a program which achieves reality for certain types of cases. The program is impressive.

of Pennsylvania,[8] is designed to develop skills of the trial lawyer. It is concerned with teaching how to conduct a direct examination, to introduce documents into evidence, to cross-examine, to deal with experts, to make an opening statement and a closing argument.

Trial lawyers, of course, do more than that. They weigh and choose between competing theories, they draft pleadings and attack pleadings; they research, brief and argue the subtler and tougher points of law, sometimes even in mid-trial. When we speak, however, of developing the advocate's skills, we are normally less concerned with the law governing the opening statement or the preemptory challenge than with the way to use each of these with optimum effect.

Advocacy is an art and, in the last analysis, it is developed by practice. The heart of the course is learning by doing. The student frames the proper questions and puts them to the witnesses, interposes the objections, not when someone calls on him, but when, like a lawyer, he finds it necessary to interrupt the proceedings to protect a position; he will make the necessary motions, interrogate the prospective jurors, open his case and argue it in summation.

Learning by doing, however, need not be uninformed trial and error. Demonstrations by experienced trial lawyers, critique, discussion of what might have been done and what should have been done, all these have their place in the learning process, too. They shape the doing as they inform the doer.

In short, then, there are three basic ingredients of the course: first and foremost is the opportunity for the student to learn by doing, by interrogating on direct, cross-examining, objecting or arguing. Second, is demonstration by seasoned specialists, in some cases prior to the students' efforts in order to provide a model for guidance, in other cases after the students in order to provide a basis for self-evaluation. Third, there is discussion and critique: questions posed by members of the class to learn the whys and wherefores, and questions put to the students to emphasize a point or to invite analysis and discussion.

There is a temptation to organize a course in trial advocacy strictly on the basis of chronology: begin at the beginning, no doubt with discovery or the preparation of a witness for his examination, or perhaps even at a different pre-trial point. There is much to be said for such an approach, but pragmatic considerations have moved us to opt for another alternative. The ability to conduct a simple direct examination, and to do so effectively, is basic to the entire trial process. Without it, a student cannot cope meaningfully even with the preparation of his own client for testimony at the trial. Accordingly, we begin the course with a session devoted to direct examination. A garden-variety

8. At Pennsylvania Law School, no credit is given for the course which meets, typically, for seven two-hour sessions in the semester. Students are, however, required to undertake the assigned work in return for the privilege of signing up for the course. The project mentioned at note 6 *supra* draws on the Pennsylvania experience, but is different from it in many ways and is intended for use in courses to be offered for credit.

negligence case proves a good vehicle for this purpose and the opening hour is therefore devoted to proof of a prima facie case of negligence. The problems come from the files of the lawyer who is serving as our "expert" of the session. Based as they are on actual cases, they retain a reality and a vitality not readily found in a "hypothetical." Restated simply, the problems are distributed in advance so that the students may prepare for the examinations which they are to conduct. Despite this, we find it helpful to open the first session with a demonstration by the visiting attorney.

The experienced practitioner will have difficulty envisioning how hard it can be for the ordinary student to interrogate a witness efficiently and effectively, neither leading him nor allowing him to omit facts crucial to the proof. To have a witness describe a simple sequence of events economically and elegantly is a skill which requires training and practice. For example, a pedestrian who has been hit while crossing at an intersection has to be "moved" by his lawyer from the curb to the point of impact, without being thrown out of court either for contributory negligence or for failure of proof. For the beginning student this is a challenge rather than a routine chore.

Accordingly, when the demonstration has been completed, a student is invited to take the very same witness over the identical ground. With all other members of the class serving as opposing counsel and objecting with alacrity when appropriate, and sometimes when inappropriate, this often proves to be anything but a simple task. Of course, as the class moves to the next problem, with a new witness to be examined, the sequence is changed and the students are expected to interrogate the witness prior to the demonstration.

A judge with actual trial experience sits. This lends an air of reality to the entire proceedings as he rules on objections to the admissibility of evidence or on a variety of motions: to strike, to grant a non-suit, to withdraw a juror. Moreover, there are often differences between the rulings on evidence which an academician might make and those which a judge, acting as he would in the courtroom, is likely to make. It is good for the students to get a bit of the flavor of the nisi prius judge in action. They will gradually learn that there are likely to be important differences between two judges sitting in the same court and certainly between judges sitting in urban and suburban, not to mention rural, areas of the same state. Sometimes the judge will comment that this is the ruling he would make, but he knows of other judges who would be inclined to deal differently with the same problem. And how refreshing to hear him say that he is not at all sure of the law, but his ruling would be thus and thus, nonetheless.

The judge presides only insofar as the class session is in fact a replica of a trial. Insofar as it is still a class, the professor in charge presides. It is he who determines which students should be called on; it is he who determines when one student should be interrupted in the questioning of a witness

and another asked to take over in his stead; it is he who can most readily determine when to interrupt the proceedings for a comment on a technical point of law and when to let the matter continue to develop for subsequent discussion. In short, it is he who retains control over the proceedings as a unit, tying together demonstration, student interrogation and discussion.

Contract actions typically provide the opportunity for proving the mailing of a letter and for introducing documents into evidence. And how many students have tripped and stumbled over the marking for identification? However, by the time a problem in a subsequent session requires cross-examination of a witness by means of a signed prior inconsistent statement, the elementary techniques are comfortably in hand and the refinements can be explored.

Not every session of the course is set in a courtroom. Preparation of one's own witnessses for trial is hardly, under our adversary system, a public ceremony. It can, however, make for an exciting class. There are the elementary matters, simple and familiar: admonitions to the gum-chewer, the gaudy dresser, the sentence-trailer. Then there are the warnings about trick question on cross-examination: "Have you spoken to anyone about your testimony before testifying here this morning?"

These few examples hardly range the gamut. What of preparing a plaintiff in a personal injury action to describe his pain and suffering to a jury.

"And how did you feel after you left the hospital?"

"Bad."

An inarticulate client may be escalated from "Bad" to "Very bad" without much knowledge of technique on the part of his student-lawyer, but this is hardly likely to solve the problem if in fact the client had suffered sharp pains, severe dizziness, throbbing in the temples, ringing in the ears and sundry other unhappy sensations over an extended period of time.

Problems arise. How much may the lawyer suggest to the client? What are the proper limits of leading questions before the client ever takes the stand? Is it for the lawyer to suggest to his client, by an artfully phrased query, a means of reconciling two conflicting statements made by the client, the one under oath in a deposition, the other, far more favorable to his cause, in a statement to the lawyer himself? There are a number of points in the course where ethical problems arise. The session on preparation of witnesses is almost invariably one of them.

Lawyers disagree on the precise limits, on the propriety or impropriety of particular courses of conduct. There is no reason why the students have to achieve agreement; nor should they be expected inevitably to adopt the more stringent or "more ethical" view. What is important, however, is that they become sensitized to the existence of the problems, that they be exposed to a candid exploration of the implications of proffered alternatives, that they be invited to seek solutions rather than indulge in the bland assumption that opposing counsel would, given the opportunity, do no better.

Similar ethical problems have been raised in the course of a session on selection of the jury. Voir dire can be an exercise in establishing rapport with prospective jurors and, as some have phrased it, in "conditioning" the members of the panel so that they become more or less receptive to an anticipated claim or defense. The student is faced with the inevitable problems of tactics and with questions of law concerning the permissible and the impermissible. It is easy to see how ethical problems arise. Typically, two lawyers are present at sessions such as this and the students are sometimes able to stimulate articulation of sharp differences between them.

The session on the expert witness is inevitably a challenge. Successfully to meet the challenge requires not only a suitable legal problem, but also a live expert who can be examined and cross-examined on a subject of which he is master and on which the students can become knowledgeable. Fortunately, the practising lawyer who has recently had an interesting case requiring expert testimony is also likely to be able to call upon a suitable specialist, wise in forensic ways, to take part in the session. As a result, an amazing variety of experts have appeared before our students: an art collector-dealer, a stock analyst, a handwriting expert and, of course, a psychiatrist. The legal context and the factual issues have, understandably, been no less diversified: valuation of securities for tax purposes, the reasonable market value of a painting at the time it was donated to an educational institution, the sanity of a defendant in a criminal prosecution, the genuineness of a signature in a civil suit. Fortunately, the students are able to achieve competence in the applicable substantive law, in the relevant finer points of evidence and in the technical detail which the problem demands. When this occurs, the sessions prove exciting and richly rewarding.

At some point before the final session each student receives a complete transcript of a litigated case. His assignment: to argue to the jury. Effective argument is a significant skill in itself. This exercise, however, also affords the student the opportunity to appreciate the full significance of techniques he has learned earlier in the program. He may, for example, have the opportunity to observe the potential of a damaging admission elicited quietly on cross-examination or the impact of a statement made without bombast on direct, each now being exploited in another context by an effective advocate who has mastered his case.

There is yet an added purpose to the session. Somewhere in a program of this type the student should have the benefit of an over-view. He has probably been exposed to civil and criminal cases, to tort and contract actions, to garden-variety assignments and to specialized problems of a different dimension. This, indeed, has been a major purpose of the program's design. No less significant is the experience of seeing the applicable parts welded together into an integrated whole, the trial of an issue of fact.