



2010

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## Recommended Citation

William J. Bridge, *The Non-Musical Career of Fred Moss: A Precis*, 63 SMU L. Rev. 923 (2010)  
<https://scholar.smu.edu/smulr/vol63/iss3/3>

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# THE NON-MUSICAL CAREER OF FRED MOSS: A PRÉCIS

*William Bridge*

FREDERICK C. Moss joined the Faculty at SMU Law School in fall 1978 and retired from active faculty service at the end of fall 2009, completing a thirty-two-year distinguished career. Moss's thousands of students know, and benefitted from, his ceaseless dedication to teaching. Readers of his scholarship have relied on his careful research and practical guidance. From scores of faculty meetings, his colleagues know Fred Moss is known as the careful legislator and, occasionally, exasperatingly detailed adjudicator. Budding trial lawyers across the country know Moss as a tireless teacher and organizer of trial advocacy continuing education programs. International students, visiting professors, and newly arriving colleagues know him and his wife Martha as warm and gracious hosts.

Moss taught core courses with large numbers of students including first-year Criminal Law, required Professional Responsibility, virtually required Evidence, Trial Advocacy, and, only rarely, a seminar in one of those subjects. Each semester, it was as if he approached each course for the first time. Professor Moss worried over the selection of teaching material and then over organizing or re-organizing his selection to serve the students best. He prepared meticulously for each class session, worrying every doctrinal wrinkle, every statutory or rule provision, and every interpretive nuance like a dog a bone. After each class, in a post-mortem, Moss re-evaluated his answers to (unanswerable) questions of theory in each subject—he and other teachers of the same subjects would argue over the finer points of the defense of impossibility, conflicts of interests, the definition of hearsay, as if they were particularly precocious, or slightly compulsive, graduate law students. Moss's students were the beneficiaries of his tireless re-evaluation and refinement of both his theoretical struggles and his classroom pedagogy. "Heraclitus Moss" never stepped into the same course twice.

Twenty years ago, the law school revamped its first-year curriculum (as did many law schools) and then reverted about a decade later (as did many schools). Part of the curricular change included adding a "lawyering" course to the first year—a legal writing course on steroids. Fred Moss agreed to take the lead in designing the course, in staffing it, and in managing its first few years. There were some examples at other law schools, and some intermittent assistance (and many suggestions) from

colleagues, but the laboring oar—the only oar—was Moss's. He designed a six-credit first year course in a year, cajoled six full-time colleagues and secured six part-time colleagues to join the idealistic adventure. Students worked hard, while resenting being the object of the experiment. Instructors worked harder and resented more. Throughout the first few years, however, Moss worked the hardest, watching his full-time colleagues return to more conventionally rewarding work, coordinating dedicated lawyers teaching part-time, and diplomatically fielding student "questions" about weekly papers, opinion letters, and grading norming across twelve sections. Part of the lawyering curriculum survived the reversion to an earlier, more Langdellian model of the curriculum, yet it cannot be said that the experiment was a success. What can be said is that Fred Moss gave the most effort in the lab.

Others with a debt to Fred Moss and his worry over theoretical and presentation issues include the authors of the casebooks he used. Each got (many) suggestions from him. The advent of the listserv gave him greater access to the editors. None ever blocked his messages, for they led to clarifications and improvements in later editions. In that way, Fred Moss, the persistent consumer of casebooks, became the friendly questioning collaborator of their editors. Moss, therefore, shared enough of his worries with law-student users of the books across the country. Many editors kindly included Fred Moss in their acknowledgments in those later editions. Moss was also an active conversant in the subject-matter listservs, especially for Evidence, Criminal Law, and Professional Responsibility. No matter how basic (or insipid) the question, Moss was eager to shed light. Each of those lists had, and has, members who can be, for some, (accurately) described as nuisances; even for them, Fred Moss was the patient teacher, teaching "101" to the nonspecialist.

With his erstwhile colleague and (still) friend, Vincent Walkowiak, Fred Moss redesigned the basic trial advocacy course at SMU Law School. As with many schools across the country at that time, the "new" model emulated the NITA one, with a large-class overview followed by a small-group exercise, with video review and critique. The design was difficult work; the administration, even with the help of dedicated assistants, required recruiting sixteen "instructors" who gave hours of their time each week, in a 2:8 ratio, to review and evaluate their students. Organizing sixteen trial lawyers, balancing their strengths and styles, accommodating their work and class schedules, and holding their hands as they dealt with demanding and sensitive students is a task most will never envy. The model that Moss and Walkowiak designed is the one still followed; more than a hundred students each year have suffered the slings of criticism and emerged with at least a simulated taste of trial.

Because of his trial advocacy teaching, his (real) trial background as an Assistant United States Attorney in Washington, D.C., and his turn in graduate school working in the legal clinics at Harvard Law School, Moss was naturally tapped for a stint or two as Director of the Criminal Justice

Clinic, and as Associate Dean for Clinical Education. In each role, although the large classes suffered from his temporary absence, he excelled at the small class teaching and the courtroom supervision. He managed budgets and personnel well, although that work was not to his taste. Both roles require intense hands-on teaching, administrative skill, and a deft touch for relations with the law school administration, the local bench, and the bar. Moss's standing, experience, and tact served the clinics and law school well.

Beginning with his leading 1982 Duke Law Journal article on the use of extrinsic evidence to impeach a witness on a collateral matter, Moss took on real problems in a real context.<sup>1</sup> That meant difficult research, sometimes not in pre-existing categories, finding real case applications, weaving them into a coherent theory, and drawing a conclusion that a lawyer could use in practice. Law review articles usually age faster than bread, but Moss's 1982 piece was most recently cited in 2009—not a bad shelf life.<sup>2</sup> Even a brief book review became the basis for authority in an article nearly a decade later.<sup>3</sup>

From evidence and the examination of a common law doctrine in a rules era, Fred Moss's attention turned to professional responsibility and to lawyer advertising and solicitation—what was then beginning to be called, if gingerly, “marketing.” Moss's article, *The Ethics of Law Practice Marketing*, provided an exhaustive review and prescient preview of the emerging field, or at least of practices that were then slowly emerging from the closet.<sup>4</sup> That article has been cited in court opinion, ethics opinion, appellate briefs, and dozens of articles and treatises. It was often the starting point for later commentators.

In a return to evidence a few years later, Moss wrote another article, relying on his direct experience and on the experience of his colleagues and former students in trial practice at the bar and on the bench.<sup>5</sup> Again, this work is cited by courts, law review and treatise authors, and in appellate briefs. In the article, Moss proves a negative, or at least explains its provenance. Each profession, each subspecialty in the legal profession, and each region develops its own traditions, often despite governing law, or changes in it. With a kind eye but with an analytical squint, Moss explains how the apocryphal “rule” came to be, how to make it sound a tad more legal, and what it means. It is certain that he has not rid the

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1. Frederick C. Moss, *The Sweeping-Claims Exception and the Federal Rules of Evidence*, 1982 DUKE L.J. 61 (1982).

2. State v. Curtis, No. A08-0705, 2009 WL 2925521, at \*3, \*5 (Minn. Ct. App. Sept. 15, 2009).

3. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 113 n.108 (1993) (citing Frederick C. Moss, Book Review, 59 NOTRE DAME L. REV. 840 (1984)).

4. Frederick C. Moss, *The Ethics of Law Practice Marketing*, 61 NOTRE DAME L. REV. 601 (1986).

5. Frederick C. Moss, *Beyond the Fringe: The Apocryphal Rules of Evidence in Texas*, 43 BAYLOR L. REV. 701 (1991).

system of mythical rules of evidence, but he has made it a bit safer for the real ones.

At a 2001 symposium on the ethics of law professors, Moss tackled a problem about which every law professor has furrowed a brow—whether the “casual” “advice” professors dispense to students worried about a legal problem, to even a law faculty colleague, or even assistance to one or the other in an internal university administrative proceeding creates a client–lawyer relationship. It is a problem that Fred Moss would have faced personally not only from clinic work, but from countless experiences responding to students in need and sometimes prosecuting them for misconduct or supervising proceedings that made those findings.

Another chunky contribution to Texas evidence law, this time about a real rule, followed in 2004. There, Moss analyzed the rule on preservation of evidentiary error for later review—Texas Rule of Evidence 103.<sup>6</sup> Once again, this article has legs, most recently cited in the year following Moss’s retirement.<sup>7</sup> It cannot be said that Moss’s proposal to improve Texas law has received direct endorsement—the rule has not changed. Although Moss would not approve, perhaps the best hope is that he will have drafted an apocryphal rule that would improve the law.

Moss’s most recent article, a generation following his first, is as imaginative, witty, and yet practical as his first: *A 2006 Law Grad’s Speech to the Graduating Class of 2050*.<sup>8</sup> Moss had submitted an essay in a contest on professional responsibility in a serious fit of whimsy about betraying the results of his ruminations over years of participant-observation in the Samoa of U.S. legal education. It is written in the “style” of a graduation address, nostalgic, a bit breezy, with the *cliché recherché*—Swiftian if one sits at the author’s level. Moss’s description ranges over changes, anticipated and fancied, welcomed and un- in both the education and the practice of a lawyer. Like all prognostication, it is about the present rather than the future. It skewers humorously but nonetheless pointedly current fad. It shows, in a fanciful way, Moss’s deep understanding, stemming from his own formation as a lawyer and from his three decades of thinking deeply about the legal profession.

As a faculty citizen, Moss earned whatever the equivalent would be of the highest civilian award (a “decanal medal of servitude” rather than a “Presidential Medal of Freedom?”). He volunteered (yes, “volunteered”) for thankless committee and drafting work. He brought that same kind of restless worry to provisions about job security for clinical faculty members, voting rights for non-tenure-track faculty members, and the student code of professional responsibility. When considering new policies, new curricula, or new courses for the Law School, Professor

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6. Frederick C. Moss, *Rethinking Texas Evidence Rule 103*, 56 BAYLOR L. REV. 503 (2004).

7. *In re J.A.W.*, No. 06-09-00068-CV, 2010 WL 1236432, at \*12 (Tex. App.—Texarkana Apr. 1, 2010, pet. denied) (not designated for publication).

8. Frederick C. Moss, *A 2006 Law Grad’s Speech to the Graduating Class of 2050*, 15 WIDENER L.J. 243 (2006).

Moss, who often took the laboring oar in drafting, would painstakingly worry every detail, every contingency, and every nuance. When the discussion turned long, and the participants impatient, Professor Moss would not tire and would raise one more issue that needed resolution. Some would shift, some glare, and then all would agree we had one (at least) more detail to address before we recessed the endless meeting. Fred Moss was the Everyman and we who were impatient were the forces trying to distract him from his journey to celestial fairness.

From the beginning of his teaching career at SMU, Fred Moss was essential in drawing the Southern Regional offering of the National Institute of Trial Advocacy. He served as a faculty member at national NITA programs as well, and on the national NITA Board. He still directs a deposition program each year for NITA. For his distinguished service, Fred Moss received the Judge Robert Keeton award, a particular honor for him because of his past work with Judge Keeton and a particular honor for SMU because of Judge Keeton's Texas heritage. Each June, Moss would worry over every detail of food, housing, curriculum, and volunteer trial lawyer teachers for the NITA program, and somehow it always succeeded. Scores of lawyers better know now how to lay a foundation, cross-examine a hostile witness, and make a more convincing closing argument because of the NITA programs Moss organized and because of the dedicated trial lawyers who taught in them.

As a point of personal remembrance, if I may: Fred Moss and I arrived at the law school within three days of each other. Most years, we taught three of the same courses, and in many, used the same materials, and collaborated on examinations. The academic vocation is one of isolation among crowds. We deal with hundreds of students, collectively and individually. We deal, happily and exasperatedly, with our faculty colleagues. We deal as lawyers with our professional colleagues at the bar (as Fred Moss chose to do). Our work of scholarship, of class design and preparation, and (heaven knows) of grading is individual work. We have times of collaboration and a steady experience of mutual support it is to be hoped. Nevertheless, the work of an academic is largely in the office or library carrel—alone. It has been the grace of my professional career to have a colleague and friend as supportive, demanding, and gracious as Frederick C. Moss. May he have a career beyond law teaching as rewarding as this has been for him and for those of us privileged to have shared it.

