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Teaching Students How to Practice Law: A Simulation Course in Pretrial Practice

Lloyd B. Snyder

With a colleague, Jack Guttenberg, I team-teach a four-credit, one-semester simulation course at the Cleveland-Marshall College of Law called Pretrial Practice. We have taught Pretrial Practice seven times since we first offered it in the spring of 1988. The course takes students through the process of preparing two cases for trial, beginning with initial client interviews and culminating in one case with a settlement negotiation and, in the other, a final pretrial conference with a local judge.

Pretrial Practice provides students with an opportunity, in one semester, to engage in all the activities necessary to develop and prepare a case for trial in a law office setting. Very few of our law school's courses give students a chance to prepare cases for litigation. Most of our skills courses introduce students to the process of trying a case or presenting an appellate argument. These courses begin with a prepared set of facts presented in a simulated record. The students have little or no opportunity to establish additional facts to fill out the record. Nor do they have an opportunity to talk with a client and determine the client's concerns and goals. The purpose of these courses is to teach litigation skills, not to teach students what to do before they walk into the courtroom.

In my view, learning pretrial practice skills is at least as important as learning trial advocacy or appellate practice skills. Most cases settle before trial, and their settlement value depends on the quality of preparation by counsel. Having the ability to ferret out necessary information, to develop cogent legal theories consistent with available information, to assess the strengths and weaknesses of a case and overcome or minimize the weaknesses,

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I thank Jack Guttenberg both for his helpful suggestions about this article and for his contribution to making Pretrial Practice a successful course. He exemplifies the spirit that we try to convey to students: that a partnership can succeed only when both parties are willing to do more than half the work.

Editors' Note: This article was not part of the Simulations Symposium as originally conceived by authors Feinman, Dallas, Vaughn, and Okamoto, but clearly it contributes to that conversation. We include it here with the concurrence of Lloyd Snyder and of Jay Feinman, who organized the symposium.

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and to be able to set out a client's position clearly and concisely is at least as important as the ability to present a polished opening argument or a bristling cross-examination at trial.

The Pretrial Practice course evolved from the experience Jack and I gained while supervising students in our law school's clinical program. Clinic students, unlike the students in other law school courses, do gather and develop information to support the claims of their clients. Clinical courses are open-ended. There are no given facts. There are only clients who have stories to tell. The students must verify data, get additional relevant information, and determine the legal consequences of the information, including whether their clients have legally cognizable claims or defenses.

But there are some problems in using a clinical program to teach legal practice skills. While it is possible for some students in clinical courses to engage in a broad range of pretrial preparation activities, not all (or even most) will be able to do so. It is difficult to find cases that clinic students can take through the entire pretrial process in one semester. And a student's experience is likely to turn on some anomalous feature of the case, such as whether a client shows up for interviews, whether the case becomes moot before trial, or whether a hearing or pretrial conference is delayed beyond the end of the school term.

One of our goals in developing a pretrial practice course was to establish a simulation course that provides a full range of pretrial activities and also parallels, as closely as possible, the process of representing actual clients as students do in clinical courses. There is no substitute for hands-on training with real clients in actual cases. But we have tried to develop a course that, as much as possible, retains the dynamics of representing actual clients while minimizing the problems inherent in clinical training.

The course includes all the basic tasks that attorneys undertake when they represent a client in a matter that will be litigated: interviewing clients, investigating facts, developing legal theories, establishing case strategy, preparing pleadings and pretrial motions, planning and engaging in discovery, counseling clients, negotiating with opposing counsel, preparing a trial notebook, and doing whatever else may be necessary to provide competent representation.

We also require the students to perform the tasks necessary to run a law office: keeping time sheets, paying bills, sending periodic billing statements, maintaining communication with clients, setting up client files, establishing a calendaring system to keep track of appointments and deadlines, and working with associates in an office setting. As part of the client billing process, the students must discuss fees with their clients during the initial interview and prepare written retainer agreements setting forth the terms.

When we began to develop the course, we also intended that a significant component would deal with issues of professional responsibility. We attempted to structure the cases so that they would raise the major issues of legal ethics that can arise in the course of litigation. But it didn't take long for us to realize that we could not deal adequately with those issues and simultaneously focus on basic trial preparation skills. Now we simply advise the students to be on the

lookout for possible ethical problems. During the semester a number of professional responsibility issues inevitably arise, and we require the students to address them just as they address the other issues that pertain to case preparation.

Overview of the Course

Pretrial Practice requires exactly twenty-four students divided into twelve two-person law firms. We have not had a problem meeting this requirement: the course has been oversubscribed every year. Because we begin client interviews during the second week of classes, we tell the students at the first class that they will have to decide whether to drop the course by the following class, well before the end of the drop-add period for other courses. We also invite one or two students on the waiting list to attend the first class in case anyone decides to drop the course.

The students deal with two civil cases. The Rice case concerns an automobile accident; the Campbell case is a will contest. Each law firm develops both cases for trial, one case as plaintiff's counsel, the other as attorney for the defendant. Each law firm has the same opposing law firm to deal with in both cases: Law Firm One, representing plaintiff in the Rice case against Law Firm Seven, defends against Law Firm Seven in the Campbell case. We permit the students to select partners if they wish, and we pair the remaining students randomly. Each firm is known by the students' names. When Alice Bell teams up with James Watson, they form the firm of Bell & Watson.

One of the first things we tell the class is that they should consider themselves to be first-year associates in a law firm rather than students in a law class.¹ When we meet, we meet as a law firm to discuss law firm issues. Jack and I are senior partners in the firm, not law school teachers. Students can call us by our first or last names, whichever suits them, but we are not to be addressed as Professor. When a participant in the class has a problem with an assignment, the question should be not "What does the professor want me to do?" but "How will this serve my client?" An attorney who isn't sure how to proceed should talk to her partner, or to one of the senior partners.² Attorneys should also use the resources in the library extensively.

We assign a textbook for the class³ and suggest readings for several assignments. We tell the attorneys that neither the author nor the senior partners have the definitive word on the ideal way to do all the tasks required to prepare a case for trial. We advise them to look at the text as a resource for all the assignments, but also to look for other resources that may be useful, such as form books, other texts in the library, advice from other attorneys they may

1. We have not yet had a student ask about the incongruity of first-year associates working for a firm that bears their name. If someone from Bell & Watson should ask, I would say that Alice's great-uncle, Albert Bell, founded the firm with James's grandfather, Colonel Ludwig Watson, in 1908.
2. Having instructed the students to consider themselves to be attorneys for purposes of the course, I shall call them "attorneys" in this article.
3. Thomas A. Mauet, *Pretrial*, 3d ed. (Boston, 1995).

know, and other faculty members. I have mixed feelings about assigning a text. One of the lessons of the course should be the importance of using the library for practical as well as academic research. Assigning a text invites students to read that text to the exclusion of other resources. On the other hand, the text provides a convenient starting point.

We make clear that we do not assume that the participants know how to do the exercises, and they should not aim to impress us with how well they perform. The assumption is that they don't know how to do most of the assignments, and they should figure out how to get the help needed to overcome that problem. The senior partners have an open-door policy. An attorney who gets stuck should see one of us. The people who do well in the course are the ones who talk to us frequently, not the ones who hide their ignorance and try to fake it. This is a difficult undertaking for many participants. Law students aren't used to working in groups, with the possible exception of study groups. Many students are reluctant to admit to us that they don't understand the material. We have to keep reminding them that they are attorneys seeking to help their clients, and that the obligation to provide competent representation demands that they seek help when they aren't sure how to proceed.

We also emphasize that we will base the course grade on how well a team prepares the two cases for trial. We do not determine grades by counting the number of mistakes the attorneys have made during the term. What matters is whether the attorneys learn from their mistakes and take steps to correct them. Nor do we base grades on a comparison of the outcomes of the cases. There are too many variables, including the instructions given by the clients, to assume that when the parties meet to try to settle their cases, all of the cases will be identical. Nor are the attorneys to assume that they have done badly if their cases do not settle. If they have assessed their cases accurately, and if the opposing attorneys are not being reasonable, and if their clients are prepared to go to trial in the absence of a reasonable settlement, they should be willing to reject inadequate offers. By the same token, if their clients have made clear that they do not want to go to trial, and that they will accept whatever offer is on the table, the attorneys must settle no matter what their personal beliefs about the advisability of settling.

We tell the attorneys that they will have to rely on their partners to help them succeed. That means keeping in contact with their partners and discussing problems as they arise. If the two attorneys are in disagreement about how to proceed and cannot resolve their differences, they should consult with a senior partner. Usually the partners get identical grades for the course. But every semester it becomes clear to us that one or two students have done much more work than their partners, and we have adjusted grades accordingly. At the beginning of each semester we tell the students that their grade is likely to be the same as their partner's. We suggest that partnerships work best when both partners are willing to do more than half the work. If there are problems because one partner is not performing, the other partner should raise the issue. Communication between the partners is important. If the partners cannot resolve their problems, they should take up the matter with one of the senior partners.

When Jack and I developed the course, we knew that many of our students work for law firms during the summer or, part time, throughout the school year. But we were convinced that even students with law firm experience would benefit from our course, and that they would have no unfair advantage over the others. Student law clerks rarely sit in on initial client interviews or law firm strategy sessions. Typically, they are told to draft a document, or research a specific legal issue, without being told how the assignment fits into the overall strategy of solving a client's problem. They learn how to do the separate tasks, but they never get a chance to see the big picture. And, with the exception of keeping time records, law clerks rarely get experience in the process of running a law office. Our experience with the course has confirmed our initial assumption. Students who have worked for law firms may have an advantage at one or two specific tasks, such as drafting interrogatories, but they are no more likely to know how to develop an entire case than students without prior experience. Students with law firm experience have not, in fact, made better grades in the course than the other participants.

The Pretrial Practice course is made up of class work—described in the next section—and case work.⁴ Some of the case work involves videotaped exercises. The partners are free to divide the work in whatever manner they find convenient, with two caveats. The partners should split the videotaped exercises equally. If one of them does the initial plaintiff client interview, the other should do the initial defendant client interview. This rule is probably unnecessary, but it serves as a reminder that there should be an equal distribution of work. In fact, both attorneys sit in on the videotaped exercises and, in most cases, both take part in all the exercises. The second caveat is that both partners should be fully prepared to proceed on both cases. They cannot divide the work so that each partner does all the work on one of the cases. We remind them that on more than one occasion we have had an attorney called away by an emergency. We do not accept the excuse that a firm can not proceed with an exercise because the absent attorney was assigned to do it.

Classes

Actually, we don't hold any classes. We have law firm meetings. There are three types of meetings. One is a meeting of all twenty-four participants. We hold this sort of meeting when we need to give information about how to do an assignment—for example, when we want to discuss client interviewing, informal discovery, depositions, negotiations, and the other major components of the course. At these meetings we also hand out and discuss a number of documents that the firms will be using during the term, such as elements charts, trial notebook forms, law firm time sheets, witness forms, and task reminder lists. We also discuss time lines at a full class meeting, but we don't offer a form for use as a time line: we haven't found one that is any more useful than a blank page with a long line through the middle, or a blank computer screen.

4. I will be happy to send a copy of the syllabus to anyone interested.

The second type of meeting is a split meeting, with each half of the class being led by one of the senior partners. The twelve attorneys who represent the Rice plaintiff and the defendant in the Campbell case meet in one room, while the attorneys representing the defendant in Rice and the Campbell plaintiff meet in another. We talk about the attorneys' appraisal of the cases, information the attorneys have obtained and information they would like to get, next steps, strategy, problems, and any other matters the attorneys would like to talk about but do not want to discuss in the presence of opposing counsel.

There are a number of reasons for holding the split classes. They can benefit the teams that have gotten behind because they weren't sure what was expected of them. Some teams just don't get it. They do an assignment because it is on the syllabus, without seeing how it fits into the process of preparing the case for trial. In an open discussion among all the attorneys, these firms can get a better handle on the reasons for the work they are doing. Some firms have failed to get important information from their clients, and the split-class discussions alert them to the need for more facts. The split classes also instill the importance of talking about cases. Students need to appreciate the benefits of talking (and listening) to others when they are trying to figure out how to handle a legal matter.

There is another potential benefit to these split classes, but I'm not sure that the students fully appreciate the point even after we have discussed it. Each law firm proceeds with its cases using information provided by its clients. Because the "facts" given to the clients are identical, theoretically all the firms should be working on the same case. But the cases are never identical. One client will forget a fact, or emphasize some facts to the exclusion of others. One will be angry, another frightened or unemotional. The law firms will end up with six different cases clustered around the same general constellation of facts. The discrepancy should provide the students with a healthy skepticism about the notion that representing clients is just a matter of finding out "what really happened" and then figuring out the legal consequences. The attorneys may not appreciate this point. They are more inclined to believe that the cases are different because one or another set of lawyers did not prepare the case properly. But if it does nothing else, the discussion does underline a point I made earlier about grades: we do not base grades on whether and for how much the law firms settle their cases at the final negotiation or pretrial. Because there are actually six different cases, their settlement values are not directly comparable.

The third type of meeting is a meeting of each law firm with one of the senior partners. Each law firm meets with Jack or me every other week for thirty minutes to an hour. (Each senior partner meets with three law firms every week.) During this meeting we critique the exercises performed by the attorneys during the prior two weeks; we discuss the status of their cases and the next steps they should take; and we advise them if they are getting behind on their work. These meetings are critical, particularly during the first few weeks of the course. Some attorneys fall into the habit of doing their exercises as scheduled, then waiting for the next exercise that appears on the syllabus. A

conference provides an occasion for reminding them that they might need to take some action that is not on the syllabus. It is an opportunity to reinforce the idea that they are trying to serve the interests of their clients, not complete law school assignments for the benefit of their instructor. Rather than looking at the syllabus, the attorneys should finish each assignment by figuring out what they have learned, what other information they need, and what they should do next.

Although the course is scheduled to meet twice a week, we don't have class meetings during many of the scheduled periods. When the attorneys are doing pretrial exercises, we don't hold classes. For example, during the second week of classes we hold only one class to talk about client interviewing. For the rest of the week the attorneys hold interviews with their clients.

At the beginning of the semester we inform the attorneys that they should consider every scheduled meeting to be a law firm meeting. They are to attend every meeting and be on time, just as they would if they were working at a law firm and were scheduled to meet with a senior partner. If an attorney cannot attend a meeting, she should inform the senior partner in advance and make certain that her partner will be present.

In addition to the two cases that the attorneys prepare, we use a third case—a short problem unrelated to the two other cases—during the classes in which we discuss the various exercises. We use the fact pattern in that problem when we discuss such matters as how to prepare a time line and what matters to pursue in discovery. That way, we avoid giving away information in the two cases that the attorneys are preparing.

Actors

The clients and two of the major witnesses are portrayed by first-year law students. The law school gives them the same pay as student research assistants. Each client actor is represented by three of the law firms. Thus, for each case, there are two actors serving as the plaintiff and two as the defendant. The actors get case summaries explaining the salient facts, and copies of the documents they would be expected to have. We invite the actors to fill in information not contained in the case summaries, and tell them not to be concerned about ruining the cases by giving "wrong" information. So long as what they say is consistent with the information contained in the case summaries, they are free to improvise. If they are concerned about offering some piece of information, they can say that they will get it and then talk to Jack or me before providing the information to the attorneys. Because each actor will be represented by three different law firms, we advise them to be consistent about any additional information they provide to the firms. It would be difficult for an actor to remember which firm he told that he screamed in pain for five minutes before passing out, and which firm he told that he lost consciousness immediately.

We also tell the actors that they should be as natural as possible during the representation. If an attorney asks them a question that they are uncomfortable answering, they have every right to ask the reason for the question or

otherwise express their concern. It is not improper for them to let their feelings show. If they have concerns about how their attorneys are serving them, they should discuss the problems with their lawyers. If they are confused because their attorneys are using technical terms or jargon, they should say so. They should treat the cases as if they were real, rather than try to guess what we want them to say.

We also tell them that they should familiarize themselves with the facts, but they need not memorize them. They can take the case summaries with them during the exercises and refer to them as necessary. Many actors are more comfortable having the information at their fingertips during the initial interviews. Fairly early in the process, they master the facts and stop relying on the summaries for support. They may neither show the summaries nor give copies to their attorneys. The only thing they may give the attorneys is the documentary evidence we have given to the actors. They may turn over these documents if the attorneys indicate a need for them.

We have had no problem getting the actors for the course. Often we have had to draw lots for the positions because more students wanted to serve than we could accommodate. In addition to earning some money, the actors learn how it feels to be a client, an experience that many attorneys never have. Both the actors and the attorneys develop an appreciation for the vulnerability clients feel when they place their futures in a lawyer's hands. The actors learn about the different turns that the cases can take, depending on what questions attorneys ask and where the attorneys focus their attention. They also see the effects of the different attorneys' personalities on the development of their cases.

Our Investigator

We do not have live actors/portraying all of the witnesses in the cases. We use a fictional investigator, Paul Drake, to get information from the secondary witnesses.⁵ Paul works for the law firm for a set hourly fee. An attorney who needs information sends a note to Paul, who responds within a reasonable time, usually within twenty-four hours. In most cases there will be some standard bit of information that the witness can supply. We maintain the information in our computer base, and at the beginning of the semester we make copies of the answers to the most frequently asked questions. When an attorney asks for information, we simply put the information into the attorney's mailbox and mark on the law firm's file (a file that we set up and use for evaluation and grading) the date that the firm requested it. If an attorney asks for some information that we don't have, we either make up the information and create a new document for future use, or we prepare a Paul Drake memo saying that the information is unavailable. After we had taught the course twice, we rarely had to prepare new information for Paul Drake requests.

5. As I get older, a depressingly smaller number of students recognize that Paul Drake was Perry Mason's investigator. A teacher who has a brittle ego or is not a fan of Erle Stanley Gardner may wish to choose a different investigator.

Paul Drake serves other purposes than obtaining information from known witnesses. He will obtain accident reports, hospital records, and similar data, or check out leads and look for possible witnesses. For example, he will respond to a request to check around the neighborhood where an accident occurred to see if there are witnesses.

The Law Firm Office

The law firms use a common room in the law school for their office work. It has a four-drawer filing cabinet for office files. There is a class rule that under no circumstances should an attorney in one firm look at the files of any other firm. Such conduct is considered a violation of the law school's honor code as well as grounds for assigning a failing grade. We have never had any indication that a student has violated this rule.

The law firms keep case files and prepare trial notebooks for both cases. Preparing the trial notebooks is one of the most difficult assignments the attorneys face. Because they have a hard time figuring out what is important, they tend to put everything in their trial notebooks, which then look like duplicate copies of their case files. We spend one class talking about trial notebooks and explaining how they can be used to make trial preparation easier. We also look at the trial notebooks periodically, and make suggestions about their use during the individual law firm meetings.

In addition to keeping case files and trial notebooks, the firms must keep a record of fees and expenses as well as time sheets for the attorneys. We ask the attorneys to submit the time sheets to us the day before their law firm meetings with a senior partner. We use these to determine whether they are spending too much time on tangential issues, how long it is taking them to do the basic tasks, and whether one attorney is being saddled with too much work. The time sheets also confirm whether the attorneys are simply doing their assignments as instructed and then waiting for the next assignment, without trying to figure out what to do next.

Members of the law firms are free to take case files out of the office as needed. We remind them that they should be careful about removing files for long periods because their partners may need to use them, and because documents tend to get lost when files are not kept in a central storage area.

Each law firm also has a mailbox in the common room. We tell the attorneys to check their boxes at least every other day for memos, notes, communications from clients, and responses to Paul Drake requests. Paul Drake also has a box for messages from attorneys, and Jack and I have a mailbox for messages when we are not around.

An Individual Evidentiary Assignment

When we began structuring the course, Jack and I wanted the students to have one assignment that would require them to obtain information from the real world. We thought about having them get an accident report from the Cleveland Police Department, but we recognized that the records clerk would not appreciate having twenty-four different requests for the same report.

Instead of giving an assignment related to the two cases, we have asked the attorneys to obtain a birth certificate for one of their parents or guardians. They must get it from the issuing agency rather than the parent or guardian. We explain this assignment during the first class meeting, and we note on the syllabus the date the birth certificates are due. We don't talk about the assignment again until the due date.

The purpose of the assignment is to make the attorneys aware that getting information in the real world is not as simple as getting information from student actors and fictitious investigators. The class meeting on the day the birth certificates are due is usually enlightening for all the students. Many of them obtain the birth certificates with no trouble. A few students put off the assignment until the last week, then struggle to get the certificates in time. Some have extraordinary problems getting birth certificates despite their best efforts. One year three students tried to get birth certificates from the same agency and were given three different sets of instructions about how to do so. They all got the birth certificates, albeit with various degrees of torment.

At the class held when the birth certificates are due, we go around the room asking all the students to tell what they did. The responses provide a clear message on the importance of planning in advance for gathering information, even information that should be readily available. The attorneys also learn how frequently an assumed fact turns out to be inaccurate. Every term at least one student will report that something they and their parents "knew" turned out to be wrong: a name was spelled differently than they assumed, or someone's birth certificate had a different middle name from the one he has used, or the document listed no middle name at all. On occasion, a "known" birth date turns out to be wrong. This assignment drives home, more clearly than any lecture we could give, the need for attorneys to exercise care and foresight when obtaining information on behalf of their clients. It also encourages a certain skepticism about the accuracy of information they get from their clients.

We have had a few students complain about this assignment either because there is some cost associated with getting the birth certificate or because they think the assignment is unnecessary. But we are convinced that the assignment is useful, and we will continue to require it or some similar document-gathering assignment in future classes.

Case Work

The heart of the course is the pretrial exercises that law firms undertake during the semester. Many are videotaped. The first exercise is the initial client interview. Six firms interview the plaintiff in the Rice case; six firms interview the plaintiff in Campbell. We put a phone message in each firm's mailbox saying that the client has called the firm about a problem and the attorney should call back to schedule an interview. The message gives the name and phone number of the student actor and says the client can be reached at that number. The attorney is told to ask for the student and, when the student takes the phone, to ask to talk to the client. This is the actor's cue

to step into character and begin the process of setting up the interview. We realized, early on, that problems arose when attorneys called and immediately used the client's name: a spouse or roommate would say that the caller must have the wrong number and would hang up before the attorney could explain.

The law school has two offices available for videotaping the exercises. The attorneys are responsible for setting up the interviews, marking the time and location on a time chart posted on each office door, and making sure their partners know when each interview is scheduled.

Each exercise is scheduled for one hour, but the amount of time the firms spend varies. Typically, the initial interview takes the full hour. It is also typical for the firms to fail to get some of the information they need. The law firms may meet with their clients informally after the initial interview, obtain additional information by phone, or request information by letter delivered to the client at a student mailbox. Subsequent interviews need not be videotaped, although the attorneys may do so if an interview room is free.

The senior partners review the videotapes and make notes. Jack and I look only at the tapes of the attorneys we supervise in firm meetings. We try to get critiques to the attorneys as quickly as possible after the initial client interviews. We either give the firm a written critique or meet with the members of the firm informally after we have seen their tape. For subsequent exercises we may wait until a regularly scheduled law firm meeting to critique the attorneys.

The next steps parallel the steps attorneys generally take in civil matters. Attorneys consider possible legal theories and determine statutes of limitation for the various theories. They plot time lines to get a picture of the information they have and the information needed.

The attorneys then engage in informal discovery and research, and gather documentary evidence such as medical reports. The Rice case is based on an automobile accident that took place in Cleveland, and we encourage the attorneys to visit the accident site. The attorneys prepare elements charts for the legal theories they are considering. Many of our students don't fully understand the concept that legal claims are composed of elements, and the elements charts reflect their confusion. We frequently have to make them do elements charts a second time before they figure out what is needed.

The next step (during the fifth week of the semester) is for the attorneys to draft a complaint. During the sixth week the firms have their second videotaped exercise, the interview of the defendants who have just been served with the complaints drafted by opposing counsel.

Following the defendant client interviews, the attorneys engage in informal discovery, and they research and draft an answer to the complaint served on their client by the plaintiff's attorneys. The next exercise is drafting formal discovery documents for service on opposing counsel: interrogatories, requests for production of documents, and requests for admissions. Opposing counsel, after consultation with their clients, respond to the discovery requests. The discovery process often involves the same types of discovery motions that arise in practice. Some attorneys complain that opposing coun-

sel have failed to answer questions fully or have objected without justification to requests for information. For these discovery-related matters, Jack and I serve as motion judges. We rule on these matters significantly faster than any judge in a real case and, when appropriate, we order compliance within a very short time. We do not countenance delay in our court.

After completing the discovery by use of written requests for information, the attorneys schedule depositions. Every year we have considered having students at a school for court reporters come in to take down and transcribe the depositions. Every year we recognize that it is difficult enough to schedule four attorneys and a party for a deposition without having to arrange for a court reporter as well. We also recognize that the videotaping rooms are hardly big enough for five people. So we forgo the transcribing and simply videotape the depositions. Obviously, the attorneys cannot take the depositions of the witnesses who are not portrayed by actors. We keep prepared depositions of minor characters that we provide to attorneys who ask to depose those people. We limit the deposition exercises to depositions of the parties.

In a videotaped exercise that takes place after completion of discovery, the attorneys counsel their clients and develop settlement strategies. The plaintiff's attorneys then send settlement letters to defense counsel, who respond in writing. In one of the two cases, opposing counsel negotiate a possible settlement. We inform the attorneys that they are not bound to settle, and that they should approach the settlement negotiation as they do all other exercises. They should consider what their clients want and what they have advised their clients to do. Our evaluation is based on whether they have gotten a realistic sense of the strengths and weaknesses of the case, and whether they have reached agreement with their client about a fair settlement based on a reasonable assessment. We emphasize that it is their ability to justify the negotiation results, rather than whether they have agreed to a settlement, that will determine our evaluation of their effort.

We videotape the settlement negotiations. As is the case with the other exercises, the attorneys need not conclude the negotiations within the hour set aside for videotaping. If there is a possibility of reaching a settlement, the parties may continue talking, consult further with their clients, exchange new information, or take any other step that an attorney would take in a real case.

If the attorneys arrive at a settlement, we instruct them to reduce the settlement to writing and have both sides sign the agreement. If they don't settle, they must submit a joint statement setting forth the last settlement position of each side. This rule forces the attorneys to take their positions seriously. If they have settled, they had better be able to describe the settlement in detail; if they have not settled, they must spell out exactly what differences remain. Requiring the attorneys to put their positions in writing also provides a useful lesson on the importance of precision in communication. The process of stating a position in detail prevents the attorneys from hiding behind vague terms to gloss over settlement problems, or from settling on the basis of general language that does not take into account problems that may arise in enforcement of the settlement. Problems are most likely to arise

when one side has proposed a bizarre or quirky settlement term.⁶ Drafting a provision incorporating such terms often drives home the importance of simplicity and clarity in the settlement process.

In the second case, the attorneys attend court and hold a final pretrial with a judge. We have had good cooperation from local judges and court administrators for this exercise. The clerk's office sends regular court notices to the attorneys, and the schedulers set up the conferences during court hours: We use two judges, one for each case. Each judge schedules three pretrials. Jack and I do not attend these pretrials, believing that both the judges and the attorneys will treat them more realistically if we aren't looking over their shoulders.

Following the pretrials, we call the judges to get their impressions of the attorneys. The most common reaction has been that the attorneys take the cases seriously and are better prepared than most lawyers who appear at pretrials. The most common criticism is that an attorney interrupted the judge or opposing counsel in an effort to support her position or respond to a point that was being made. We also hear from the attorneys, who normally cannot wait to tell us what happened after they return from court.

The Final Class

We don't give a final exam. An informal session closes out the course. Often we bring beer and snacks. We invite students to talk about the cases and compare notes on their experiences. We also ask for feedback and suggestions for improving the course. Jack and I chart the settlements (or the final positions of the parties that have not settled) in the two cases, and the class has a brief discussion of the factors that led attorneys to take differing positions. The variation may be based on different facts that the various clients and witnesses brought out, different assumptions by the attorneys about the strengths and weaknesses of their cases, or divergent views about the credibility of the parties and the witnesses.

We also discuss what happened in the actual cases. The class participants are always curious about what really happened, and giving them this information drives home the message that the quality of representation by the lawyers has a significant impact on clients' lives.

In some years Jack and I have offered a portion of a closing argument in one of the cases. We emphasize the strategy we would use to try to persuade a jury to rule in our favor. This is a useful way of showing, without lecturing, how we would use the strengths of each side of the case. The attorneys can then comment on how they would approach the closing, and how their strategies would differ from ours.

We invite the actors to attend the final class, and many of them do. We ask them for their impressions of their attorneys and of opposing counsel. Being

6. For example, in one negotiation over a contested will, a party tried to impose an obligation on the other party to donate a portion of the inheritance to a charity. Drafting a provision to assure compliance with that obligation proved to be a daunting experience.

first-year students, they are generally very kind to the students taking the course. They voice their criticisms gently.

The attorneys must turn in copies of their trial notebooks and their case files at this time.⁷ They also must close out the books on their cases. They have to pay the bills, and take whatever other actions have been agreed upon by the parties during the settlement. They should have their case files and time sheets in order. If the parties have settled, they should have signed copies of the settlement agreement in the file.

Grades

We base the grades for the course on how well the attorneys have prepared their cases. We expect them to have a case that they would be ready to take to trial if they haven't reached a reasonable settlement with opposing counsel. The attorneys should have obtained all the basic information and witness statements that are available. They should have a clear picture of the strengths and weaknesses of their cases. They should be able to explain their clients' positions clearly and persuasively.

When we first taught the course, I was concerned that all the students would end up with the same grades—mostly A's, with a sprinkling of B's here and there. Jack assured me that the grades would fall into the traditional law school spread. He was right.

By the end of the semester we can distinguish clearly between the attorneys who have their cases under control and understand the strengths and weaknesses of their cases, and those who do not. We know which attorneys have come to us with ideas about how to proceed or questions that showed they were considering a broad range of possible strategies, and which attorneys were simply taking part in the exercises. From the time sheets, we have a fairly good idea about which teams were doing the work and which ones were coasting. The biweekly law firm meetings also have given us a clear indication about how much time and effort each team has put into keeping on top of its cases. We know which teams have learned from their mistakes. For example, we expect attorneys to have a difficult time when they first prepare an elements chart, but by the end of the term, we expect them to have accurate elements charts in their trial notebooks.

We keep a file on each of the firms, which includes the request date for all information sought by the firm. At the end of the term we can tell whether a firm has failed to get information that it should have requested or was late in requesting the information. We also keep notes in the file about such matters as how the firms did in their exercises, what issues they raised during firm meetings, and how they responded to suggestions and criticism. The file

7. In fact, we generally give the firms extra time to get these items in shape. We have taken to reviewing the trial notebooks periodically throughout the term to make sure that the attorneys are not putting off this requirement until the last week of classes. Despite our efforts, there are always attorneys who have not completed their trial notebooks by the end of the course.

serves two purposes. It helps us determine the grades, and it helps us justify a grade if a student questions it.

We have never had a student complain to us about a grade by contending that it was the partner who brought the grade down. For the most part, any partnership problems surface in the first few weeks of the course. If we receive a complaint during the term, we look into the matter. If we don't detect a problem or hear about one, it's likely that the partnership is working out well, that the work is a joint effort that justifies a common grade, and that the partners expect to receive the same grade.

Some Random Thoughts About Pretrial Practice

The student response to the course has been overwhelmingly positive. The comment we hear most often from students is that they have worked harder during the semester than they have in any other course, but they have also learned more about how to practice law than in any other course they have taken. Many students ask if they can keep their trial notebooks after we have reviewed them. We permit them to take the notebooks, and ask in return that they not share any information in them with students who have not taken the course. The students also ask for copies of the forms we hand out. A number of graduates have told us that they have used the forms, or variations of the forms, in their practice. One student told us that his law firm had no such forms and adopted our forms for use by all the members of firm.

This is a time-consuming course for the instructors.⁸ We look at all the videotaped exercises shortly after they are recorded. We hold meetings with the students, not only during the scheduled class hours and in law firm conferences, but also informally throughout the semester whenever they have questions. I have come to see this extra time as a positive feature of the course. I get to know these students very well. I find out about their personal lives, their personality quirks, their career goals, and their attitudes about law school. The diversity of backgrounds and interests among the members of our student body is remarkable, but that diversity gets submerged in the regular classes. It comes to the forefront in a course like Pretrial Practice, where the students demonstrate their widely varying perspectives about how to relate to clients and how to deal with their problems.

During the course of the term I frequently see problems developing that echo problems in practice: the Rambo attorney, the lawyer who plays hide-the-ball, the counselor who distorts the facts or acts unreasonably. I can deal with these issues in a way that is not possible in a classroom setting.

8. During the first few years that we taught this course, the law school provided us with a secretary who served as our office manager. She communicated with the attorneys, set up the videotape equipment, arranged office hours for the student exercises, got files and forms to the attorneys, answered Paul Drake requests, and handled a number of other housekeeping functions. For the past two years we have not had an office manager. Initially, I didn't think we could administer the course without one. But having taught Pretrial Practice a number of times, we were able to do those functions without much trouble. Still, it was particularly helpful to have had an office manager the first few times we taught the course.

I have always been impressed with how seriously the students take this course. If they think that opposing counsel has taken unfair advantage of them, they get angry. Settlement negotiations include all the emotion and tension of negotiations that take place in real cases. The participants feel a pressure to settle, even though they will not have to try the case if they cannot reach a settlement. There are some students whose personalities are such that nothing we say would change the way they approach cases. But many students see that bombast and subterfuge are unnecessary, and frequently self-defeating, if they have prepared their cases properly. They come to recognize that personalizing the dispute of the clients when dealing with opposing counsel does not result in good representation. I am convinced that most of the students who take our course see the practical advantages of being open, straightforward, and professional about their cases, and that they will be better lawyers as a result. They also see the importance of competent trial preparation, advance planning, and objective assessment of the strengths and weaknesses of a case. And they recognize that by being prepared, they can be confident in trying a case that the other side is refusing to settle for a fair amount.

If you are interested in teaching a pretrial practice simulation course, try to use real cases that come from your locality. Look for a case that has gone to trial. The file should contain deposition transcripts and discovery documents. If possible, use a case that has a trial transcript. Try to talk to the attorneys who handled the case and get their views on how the matter was handled. Although they will not be able to share privileged information with you, they can still be very helpful in making sense of the record and giving you an idea of what issues prevented the dispute from being settled. If you use a local case, change the names of the parties and witnesses. You do not want some bright law student running down to the courthouse to find the record of the actual case.

The cases can be simple and should have relatively few witnesses. It is not necessary to have complex fact patterns or arcane legal issues for a case to be beneficial to students. Domestic relations cases and automobile accident cases provide good teaching devices. Nor is it necessary for the case to be perfectly balanced. If one side has a stronger position, the case can still be useful as a teaching tool. And it is relatively simple to manipulate the facts to put the parties on a more equal footing. All that is required is that the case raise sufficient issues to justify going to trial if opposing counsel won't agree to a reasonable settlement.

Using the same case over several years has not caused us problems. We have not seen any evidence that students have retained documents to hand down to future generations of students. And we have modified the cases enough so that materials from the prior year have limited value. Small changes in the facts can make significant differences in the outcomes of the cases. We can easily change the income of a party, the amount of money in an estate, or the perspective of one or two witnesses, because most of the information is on computer.

Students should look at their videotaped exercises. The feedback they get from looking at their own performance can be as useful as your critique. They will not want to look at the tape. They will not want to take the time, and they will be embarrassed about their mistakes. You will have to remind them that they can learn much from seeing the tape, and you should suggest that their tape is similar to the others you have seen (as it surely will be) and that there is no call for undue embarrassment.

Teaching Pretrial Practice is a unique and rewarding experience. The students work hard to win the cases for their clients. They become engaged in their cases, and they do not get bored midway through the term. Although they make many mistakes, they are receptive to comments and recommendations. Many of them surprise us with innovative ideas. Most of them complete the course with a sense of accomplishment, and a recognition that they can become capable, competent lawyers.