REALISM IN PRACTICE COURT

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Practice court is one of the very few areas in which laboratory methodology is employed in the law school curriculum. Before a student is permitted to participate in a trial in practice court, he must have completed a substantial number of the elementary courses in substantive law and have received the theoretical background of pleading, evidence, and trial practice. When he engages in his practice court trial, he is called upon to put this theoretical knowledge into action and thus acquire further knowledge in the best of all possible ways—by actual doing. Some knowledge of theory in swimming or golf is a valuable asset to have before one undertakes to learn these sports, but one cannot learn to swim or play golf merely by reading a book. He must actually get into the water or take a golf club in his hands. Nor can one learn how to try a case merely by reading cases or texts; hence the practice court, where the neophyte may practice at trying a case without putting in jeopardy an actual client's neck, freedom, or pocketbook.

Most law school teachers would agree, I believe, on the general proposition that the practice court should be a valuable adjunct to legal education. However, a great many law school teachers who have had experience in conducting practice courts would have serious doubts as to the benefit derived by the student from participation therein. This doubt is due, I believe, to the fact that most practice court trials lack the ring of authenticity. They are mock trials, and are far removed from a sense of reality. The students who are the attorneys are generally given by their instructor a typewritten statement setting forth a fabricated situation. These are the facts of the case. The students are then required to find a client and witnesses to participate in the trial and to take the parts of the hypothetical parties described in their canned set of facts. The students naturally seek their friends to take these parts. The clients and witnesses are coached on the story that they will tell. When the trial actually occurs, and a client or a witness is put on the witness stand and is asked what his name is, he does not give his true name, but he gives the name of the party whom he is impersonating. Then he tells the prefabricated story which he has been told to tell. The judge, the lawyers, the jury, and the audience all realize that this is a sort of theatrical performance, and the emphasis is very likely to shift from a serious endeavor in learning to try a lawsuit to an endeavor to put on the best possible show for the judge, the jury, and the audience. The client, or the witness on the stand, is not tied to reality, except in so far as he must keep within the hypothetical limits of the canned set of facts. Within them he can use his inventive genius to manufacture all sorts of detail. When the testimony is questioned in the crucible of cross-examination by the attorney for the other side, he can shift ground rapidly and change his story, and it is extremely difficult to discredit him. One method

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which is commonly used by imaginative students is to bring in a faked "certified copy" of a conviction for perjury in a former case.

In such a mock trial, everyone has a good time; it is an enjoyable and entertaining experience, and the participants do learn a little about the trial of a case; but most critical observers who have had experience with it are not satisfied. It lacks the serious realism which would make the experiment significant.

Various devices have been employed in an endeavor to make moot court trials better educational devices by supplying greater realism.

A number of years ago Lyman P. Wilson of Cornell introduced some improvements which vastly added to the realism and educational value of his moot court trials. Instead of merely giving a canned statement of facts to each side, he developed rather elaborate scenarios. He gave a statement of facts to the plaintiff's lawyer and a slightly different statement of facts to the defendant's lawyer. He also had typed out a statement of facts for each witness, containing in some detail the facts he was supposed to know about the case. The plaintiff's lawyer did not see any of the statements which went to the defendant's lawyer, and vice versa. Thus, there was room for different versions of the same set of facts as seen through the eyes of different witnesses. In as much as these statements, or scenarios, were rather detailed, they left less room for histrionics and inventive genius on the witness stand, and made the case more realistic. Some of the scenarios were constructed from the transcripts of actual trials which had been processed through the appellate courts. I have sat as a judge in moot court trials both under the orthodox system and under Professor Wilson's system, and I can testify to the greater effectiveness of his plan. However, the students were still play-acting.

Professor Charles W. Joiner made *Time* magazine recently because he was endeavoring to secure more realism in the moot court trials at Michigan by the use of motion pictures. He staged an automobile accident on one of the streets of Ann Arbor, using drama students as the principals, and had the accident photographed from various angles by different cameras. These various films were supposed to represent the points of view of different witnesses. One camera was in the car, another was on one part of the street, still another at a different spot on the street, and so on. The pictures were not shown to the lawyers, but were shown to the students who were to impersonate the witnesses at the trial. The lawyers had to dig the facts out of these witnesses, as any lawyer would in conference with his own client or witnesses. Each witness was confined to testifying to the facts as he saw them from the movie. Professor Joiner reported that this created much more realism, and he concluded that the experiment was a success because the jury was so thoroughly confused that it could not bring in a verdict for either side. One might be permitted to criticize his criterion of success, since a hung jury results in retrial of the whole case, duplicating all trial expenses and inconveniences. Nevertheless, his approach is a novel and interesting one, and deserving of praise for its attempt to secure a greater sense of realism in the practice court.

Professors Mueller and James at Yale are apparently keenly aware of the lack of realism in the orthodox moot court trial, and have attempted in

their own way to secure greater reality. In the Autumn issue of the JOURNAL OF LEGAL EDUCATION[1] they describe their course in Case Presentation. As outlined by them, the course is much more ambitious than the ordinary practice court, covering as it does not only trial practice but also the techniques of negotiation and settlement and also the process of arbitration. It is distinctly a great improvement over routine moot court work, and Professors Mueller and James are to be congratulated upon their experiment. Without detracting from the significant improvements they have devised, two comments might be made. First, the course is limited to twelve students, which is unfortunate; training in such fundamental procedures should be made available to all students; second, although one of the basic aims of the experiment is to secure greater realism,[2] the histrionic element still bulks large.[3]

A critic is a person who cannot get to work until somebody else has done something. It is only fair that, having enjoyed that role up to this point, I should subject myself to like criticism by describing the method which we use at Washington for introducing greater realism into the practice court trials.

I do not wish to take credit for the system which we use here at Washington. It was devised by Professor Fred G. Folsom of the University of Colorado.[4] While I was at Colorado I assisted Professor Folsom in the practice court work there and sat as a judge in many of the cases. The system seemed to work so well and was so enthusiastically received by the students at Colorado that I inaugurated it when I came to Washington.

The essence of the plan is simplicity itself. If you wish to introduce realism in the practice court, the way to do it is to use real cases. I mean just that. Real controversies, real clients, real witnesses, no play-acting. The only thing which is not "real" about them is that the court is not a duly constituted one which can render an effective judgment, and of course neither the parties nor the attorneys expect it to do so.

The advantages of this system over the orthodox method of practice court as a teaching device are tremendous. In the first place, the attorney must get the actual facts of the case from his client. His client may hold out on him, and, as clients in real life do, he very often tells only the most favorable aspects of the facts of the case. The attorney must seek out and interview the various witnesses. This part of his preparation for trial is completely genuine and absolutely real. When he gets his client on the stand he will find sometimes that the client suddenly becomes inarticulate. Then the lawyer has a tough job prying the facts out of him without asking leading questions. The client on cross-examination may make damaging admissions for which the attorney is not prepared. There is nothing "canned" about the facts

[1] 1 J. LEGAL ED. 129 (1948).

[2] "Realism" or some variation of the word is used eleven times in the course of their six-page article.

[3] The article makes frequent references to the histrionic character of the proceeding. Some sample phrases: the students "play their roles"; "a thorough and convincing job in their client roles"; "some students have gone to unusual lengths to fit themselves for their roles"; "watching the performance"; "the stage setting for the settlement conference."

[4] See his short note describing the plan in 8 ROCKY MT. L. REV. 130 (1936).

of the case. The witnesses are testifying to real events which they experienced, and they can be cross-examined and confronted with contrary evidence. Fabrication of evidence and histrionics play no part in the trial.

I can imagine that at this point even the most sympathetic reader of this note is beginning to say to himself: "This is all very well, but where do you get the cases to try?" This was the first objection which I met when I suggested that the procedure be employed at Washington. My colleagues were fearful that we could not get actual cases to try. I was more sanguine, because I had seen how the experiment worked in Colorado. There Professor Folsom had a student committee which was always on the lookout for actual cases: cases which were legally significant, but which involved amounts so small that the parties would not actually take the case to court. Also, this student committee, and the faculty, read the daily papers and the University paper carefully in search of material for practice court cases. They never had any trouble in getting more cases than they needed. For instance, there is the slight intersection accident where the only damage is a crumpled fender or a broken headlight. Perhaps the parties have adjusted the matter out of court, or perhaps they have decided to forget about it. Even though the damages are small, the legal problems involved are the same as those which would occur in a serious accident. There is the case of the householder who is trimming the branches of his tree when one of the limbs falls over and knocks some of the shingles off his neighbor's garage. There are the usual cases of student pranks, especially in fraternities and sororities. There is the fellow who comes back from vacation with a mustache only to be seized by his fraternity brothers and bound in a chair while the adornment is shaved from his lip. Here we have a perfectly good case of false imprisonment and assault and battery. The case of the man who was thrown in the frog pond against his will; the case of the local photographer who gave a picture of a co-ed to someone for advertising purposes without her permission; the case of the fraternity stunt at Homecoming which backfired and caused minor injuries; the case of the student who, when he left in the spring, paid a $5.00 deposit to secure his room in the fall, and returned to find that the room had been rented to another—the list could be multiplied, but all of these have been actual cases and have served as the basis of real controversies tried in practice court both here and in Colorado.

Certain safeguards have to be set up. In the first place, we are careful to avoid any criticism that the experience in the practice court might stimulate the winning party to start a real suit in the Superior Court for the recovery of real damages. When the cases are brought to the professor in charge he insists that, before they are approved for the practice court docket, each of the parties must sign a release of all claims against the other. There is surprisingly little difficulty in getting these releases. Also, the parties and witnesses must be willing to appear and testify in practice court. Again, little difficulty is encountered in securing this consent, for most people are genuinely interested in this type of experience and seem to get a great deal of enjoyment out of participating in the trial.

In Washington we do not use a student or faculty committee to get the cases. The class in Trial Practice does that job. At the beginning of the course in Trial Practice the students are advised that each one must participate in a trial in practice court. The plan is explained to them and each

one is told that within three weeks he must submit as his first written assignment in the course a statement of a case, giving the names, addresses, and telephone numbers of the parties and witnesses and a statement of their willingness to serve. He is advised that if after diligent search he is unable to secure a case, he must prepare and sign a certificate to that effect and hand it in. The students are of course cautioned that this type of activity should not serve as a precedent for ambulance chasing in actual practice. Although many students hand in certificates of inability to produce, there are always enough good cases which come in to supply an adequate number for the practice court docket.

After the cases have been processed by the presiding judge and the dean of the law school to exclude any which it would be impolitic to handle, they are then assigned to the students—two lawyers on each side. The plaintiff's lawyers are required to prepare and file a complaint and to have the summons and copy of the complaint served. The defendant's lawyers are then required to file the appropriate responsive pleadings. There are some interlocutory hearings on motions and demurrers, but ultimately the case is brought to issue. All this is done while the students are engaged in the regular course in Trial Practice. The actual trials are set for the next quarter, during which the students will be studying appellate practice, having presumably acquired the theoretical knowledge necessary to try a case.

The actual trials are held in the practice court room in the evenings, and one case normally consumes two evenings, from 7:30 until about 9:30 or 10:00. The procedure in the trial follows meticulously the Washington practice in all steps, including the impaneling of the jury, the opening statement, the preparation and submission of instructions, etc.

At the time the cases are assigned the students are advised that at the conclusion of the trial they will be required to submit to the court a trial brief on both the law and the facts, and that the quality of the trial brief will enter into the final grade in the course. This stimulates careful preparation. However, during the whole proceedings, until the case is submitted to the jury, the students are on their own and are not coached by the trial court or the professor in charge. However, he has made careful notes of their mistakes as the case progresses. When the case is finally submitted to the jury for argument, and the jury retires to consider its verdict, the trial judge takes the attorneys into another room and conducts a post mortem on the trial of the case, pointing out to each participant his errors and the manner in which the presentation of the case could be improved.

In spite of the fact that the students who participate in these trials put in a great deal more work and time on them than they ever did before in the moot court work, the student reaction has been enthusiastic. As a matter of fact, many students have requested that they be permitted to participate in more than one trial.

The ultimate in realism was reached in a case tried last year, where the matter involved was a property damage claim of about $30.00. In that case, the plaintiff and the defendant asked if they could not enter into a stipulation to be bound by the judgment of the practice court. We are doing everything in our power to make our practice court realistic, but we do not wish to make it so realistic that we will be investigated by the unauthorized practice committee of the local bar.