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Practice Court at Notre Dame

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THE PRACTICE COURT
AT NOTRE DAME

Twenty-five years ago a distinguished federal judge was quoted as saying: “It is idle for law schools to give courses in federal practice. Once they [their graduates] come before my court they will learn more in three weeks than a law school can possibly teach them in a year.”¹ The admonition has not been followed. Legal education has since traveled in an opposite direction. Not only are courses in federal practice offered but there is an increasing response to demands that law schools pay more attention to “imparting professional skills.”² The Practice Court course reflects to some extent the changing emphasis.

Theoretical and practical objections are advanced against attempts to give training in the techniques of trial practice and in the skills of advocacy. The implication that the law school might become a “trade school” sends shivers down some academic spines. Legal education is to produce thinkers,³ not tinkerers. The law school must not slip its moorings as part of the university. “Bread-and-butter” subjects must somehow be lifted to lofty levels befitting the intellectual adventure of university education.⁴

What, then, of the demand that the law graduate applying for his first job in a law firm, or (hardy soul!) hanging out his own shingle in the grand old tradition, should be as competent in drafting a complaint or a con-

¹ The late Judge Charles M. Hough, quoted in FRANKFURTER & KATZ, FEDERAL JURISDICTION AND PROCEDURE, Intro. v. (1931).

² “It is not right that young lawyers should learn the skills required in the profession at the expense of their clients.” An address by A. T. Vanderbilt, delivered at the dedication of the New York University Law Center. 36 A.B.A.J. 297,299 (1950).

³ “The law is the calling of thinkers.” Holmes, The Profession of the Law, in COLLECTED LEGAL PAPERS 29-30 (1921).
tract as he is in writing law review comments on the vagaries of appellate court opinions? Pressure for the inclusion of "skills" courses comes from practitioners, equally impressed by the graduate's doctoral learning on the sociological nuances of the "latest spring line" of Supreme Court decisions and by his abecedarian ignorance of passing title on an abstract. Hence the trend towards "Legal Writing" and "Office Practice" courses in the law schools.

"Moot courts" and "mock trials" as media of imparting skills are not new in legal education. "Mootings" have a venerable lineage. "Putting a question" to the neophyte in the Inns of Court of older days was a major technique and the "put men" were the modern law professor's progenitors. The ancient tradition enjoys a "second spring" in the American law school "moot courts" in which students brief and argue hypothetical cases before imaginary appellate courts. "Moot courts" at the trial level, "Practice Courts," as the term is used here, have

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4 "To teach all there is in books is not, however, the business of a university; still less, to turn out finished practicing lawyers. A law school is not a law office nor a court room. In these days of overemphasis upon the immediately practical, it cannot be insisted upon too often that a university law school is part of a university. Intellectual issues are its concern—the systematization of knowledge at once significant and susceptible of scientific ordering, the continuous critique of all lawmaking and law-administering agencies in those aspects that are peculiarly within the competence of scholars, and the promotion through formulated reason of wise adjustments of the multitudinous and increasingly conflicting interests of modern society." FRANKFURTER & KATZ, op. cit. supra note 1. (Emphasis added.)


6 "As men were at dinner or supper one of the older men might put a case and draw out all those at the table as to what action should be taken and what pleading used. Young men walking about the quadrangles were encouraged to put cases to one another, and those who were skilful became known as put-case men. Law, said Serjeant Maynard, was a bablative art; men should study all morning and talk all afternoon. A plan for a new building in one of the Inns was opposed because it would cut down the walking space and so interfere with put-case men." NOTESTEIN, THE ENGLISH PEOPLE ON THE EVE OF COLONIZATION 89 (1954); Cf. also, 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 428 (1909).

7 In this connection attention should be called again to the National Moot Court Competition annually sponsored by the Association of the Bar of the City of New York.
had indifferent success. Practical difficulties stand in the way. Some critics claim that the cases "tried" are so fantastic and the attempts to project reality so labored that prodigious amounts of time are wasted in producing in the end more harm than good.

The "moot court" idea, however, worked out carefully at the trial level has possibilities as the basis of a course designed to introduce the student to the techniques and skills of the trial lawyer. The present article reviews the Practice Court course developed during the past two years in the Notre Dame Law School by Honorable Luther M. Swygert and the writer. The course was begun at the suggestion of Dean Joseph O'Meara following a determination that no student should be permitted to graduate without having satisfactorily tried at least one complete case from pleadings to verdict and judgment. The requirement was to be met in the first semester of the senior year after the student had completed his formal courses in Procedure and Evidence.

While designed to introduce the student to the trial of cases, the Practice Court at Notre Dame has another subtler and at least equally important purpose; for one who has had the experience of trying a jury case from beginning to end cannot fail to read judicial opinions with a fuller appreciation and deeper understanding. And it serves still another end. At the start of the third year, when most law students everywhere have become blase and not a little bored, the Practice Court stimulates an intense interest which gives new life and zest to the study of law.

In organizing the course numerous questions arose, dif-

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8 United States District Judge for Northern Indiana since 1943; graduate, Notre Dame Law School, 1927; member of the faculty since 1953.

9 BULLETIN OF INFORMATION, NOTRE DAME LAW SCHOOL, 1955-1956, Law 156—Procedure IV, p. 27. Under a parallel requirement each student must brief and argue orally at least one case on appeal during the first year. Id., Moot Court at 10-11.
ficult as they are intriguing to the student of the practical applications of sound pedagogical theory. Limitations of time, space and equipment, plus a tight schedule had to be kept in mind. How could we secure the maximum of profitable class participation? How could suitable text material be efficiently exemplified in the classroom trial? If each student was to try a complete case, could cases be prepared to meet this requirement within the four or five hours allowed for the trial? From what fields of law should the cases be drawn? Should members of the class act as witnesses and jurymen? Faculty members who have struggled with the organization of a Practice Court course will appreciate the problems presented by the attempts to simulate in the student courtroom as high a degree of reality and as much of the atmosphere of an actual trial as was humanly (and pedagogically) possible.

The problem of the jury was solved by requiring first-year law students to serve as jurors. At the start this was simply an expedient—a way of filling the jury box. But the experience is so valuable to the beginning students that the practice of requiring them to serve as jurors is now an essential part of our Practice Court. In this way the new student, in his first weeks of study, becomes not a mere passive observer but an active participant in the trial of jury cases. The substantive rules of Torts, Contracts and Criminal Law, whose acquaintance he is making in those courses, are thus brought to life for him. Proximate cause, anticipatory breach and larceny by trick have a new look when the student must apply them, under the judge's charge, to the facts developed in the course of a trial in which he is a juryman. In consequence, the Practice Court is now as much for the benefit of the beginning law students who serve as jurors as it is for the third-year students who act as counsel. This is indicated by the following sentence from the Bulletin of Information of the Notre Dame Law School:
The aim of the Practice Court is to broaden the understanding and deepen the insight of the students—not only the upper classmen who try the cases but also the first-year men who serve as jurors—and to achieve this greater understanding and insight through active participation in the resolution of controversy by jury trial—the process which is central to and characteristic of our legal system.10

The course was inaugurated with sixty students in September, 1953. Mr. Irving Goldstein's successful trial technique11 was adopted as the required class text. However, outside of three preliminary lectures by Judge Swygert on the practical aspects of trial work, there were no formal lectures or class discussions of the text material as such. The student was urged to read the text carefully. He was also given a list of collateral readings.12

It was for him to attempt to apply the suggestions made therein in meeting the special problems of the case assigned to him for trial. He was to learn by doing. The class was divided into teams of counsel, two students comprising a team. A calendar of trial dates was agreed upon and the various teams were assigned. It was contemplated that fifteen cases would be tried during the semester, one a week on Saturday mornings, beginning at eight o'clock and ending shortly after noon.

Since student counsel were to begin with the pleadings and motion stages prior to trial, a simple set of rules adapted to our needs and circumstances was drafted by the writer.13 These rules were a modified version of the

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10 Id. at 28.
11 GOLDSTEIN, TRIAL TECHNIQUE (1935).
12 The list included, for example, the valuable monographs of the American Law Institute and the Practicing Law Institute. During the summer months immediately preceding the senior year students are required to read the ART OF ADVOCACY by the late Lloyd Paul Stryker. At the first session of the class each student is given a complete appellate record which contains all the pleadings and all the testimony and exhibits in an actual case. For this purpose the appellate court records of New York courts are most helpful.
13 E.g., the motions addressed to pleadings under our rules are adaptations from NEW YORK RULES OF CIVIL PRACTICE, Rules 90, 102-107, 109-111. Students are referred to TRIPP, A GUIDE TO MOTION PRACTICE (rev.ed. 1949).
Federal Rules of Civil Procedure with some necessary borrowings from the older code systems. Thus, circumstances did not permit use of the valuable discovery and pre-trial conference procedures of the Federal Rules. It was therefore necessary for us to follow the older practice and insist that the complaint state "facts" constituting a "cause of action." It was also necessary to make provision for obtaining a bill of particulars. Service of process on the defendant was dispensed with. The court was deemed to have acquired personal jurisdiction over the defendant when the action was begun by serving a copy of the complaint on opposing counsel and filing the original with an admission of service in the writer’s office. All cases were to be tried in the "Superior Court of Marion County, State of Hoynes," described in our rules as a court of general jurisdiction both legal and equitable in civil cases where the defendant is a resident of the

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14 E.g., rules governing motions for orders directing service of bills of particulars.

15 "The new Federal Rules of Civil Procedure do not proceed upon the assumption that the function of pleading is to prepare the case for trial. It is recognized that 'issue-pleading' of the common law does not sift out the real issues, the 'fact-pleading' of the codes the real facts. The generality of allegation contemplated by the Rules indicates the influence of the newer concept of 'notice pleading': the object of the complaint is to indicate to the defendant which grievance is being pressed; the object of the answer is to indicate to the plaintiff which defenses are being relied upon. What have been thought to be the objects of pleading — the narrowing of issues, the revelation of facts — will be served by several devices more precisely adapted to their fulfillment: the familiar motions for certainty, the new pre-trial hearing, and the not new but completely renovated procedure for depositions and discovery." Pike and Willis, *The New Federal Deposition—Discovery Procedures*: I, 38 COLUM. L. REV. 1179 (1938).

16 N. Y. CIV. PRAC. ACT § 257 was modified for our purposes.

17 Practical considerations dictated this. It should be noted also that under our rules all witnesses are assumed to have been properly subpoenaed by the respective parties calling them. A special rule provides for procedures when a subpoena duces tecum is necessary.

18 The rules provide for time limitations on the service of pleadings and motion papers. Generally counsel for the plaintiff must begin the action within two weeks after the case is assigned for trial.

19 The name "Hoynes" honors the memory of the late Colonel William James Hoynes, Dean of the Notre Dame Law School from 1883 to 1918.
county or a corporation doing business therein.\textsuperscript{20}

In preparing suitable cases for trial the main consideration was to present close questions of fact as well as serious questions of law so that, if the case were properly tried, issues of fact would remain for the jury. The cases must also be fairly balanced between the plaintiff and the defendant. Their trial should take the student through all the normal and usual steps from the opening statement to the summation and requests for instructions. Each case should have also its special problems of trial techniques and tactics. For example, one case might involve procedure in the proper introduction of written evidence; another, the use of diagrams, charts, maps or X-rays;\textsuperscript{21} still another, the methods of qualifying an expert witness. In addition to such technical problems the case should be deliberately prepared to illustrate the more intangible skills of advocacy. Thus one case might call for special care in marshaling evidence in summation; in another, the student might be given an early but lasting lesson in the wisdom of refraining from profitless cross-examination. The possibilities of thus coordinating text material with a live experience of the student were endless.

In 1953 and 1954 assigned cases ranged over wide fields in Torts, Contracts and Criminal Law. Eight were criminal; twenty-four were civil. Criminal cases involved prosecutions for murder, manslaughter, robbery, larceny and embezzlement.\textsuperscript{22} Civil cases included actions for damages

\textsuperscript{20} Since our program also contemplates the trial of criminal cases the court is assumed to have criminal jurisdiction when the crime charged has been committed in "Marion County." A set of rules governing the procedure in criminal cases has also been prepared. Student counsel prepare the indictment after interviewing witnesses for the prosecution. The indictment is assumed to have been found by the Grand Jury of the County. The necessary substantive penal statutes are prepared by the writer.

\textsuperscript{21} Through the courtesy of L. M. Bodnar, M.D., South Bend, an illuminating box for exhibiting X-rays to the jury was made available to student counsel in one case. In another a senior student in the College of Engineering prepared a diagram of a railroad crossing and profiles of the intersecting highway. The student was called as a witness to testify to the preparation of the drawings.
for negligence, fraud, wrongful death, libel, slander, breach of contract, a suit on a negotiable instrument and a jury determination of issues of fact referred by a probate court on a will contested for duress and undue influence.\textsuperscript{23} It was the writer's assignment to prepare the materials for these cases, keeping in mind the objectives as well as the limitations of the course. There were available complete transcripts of testimony given in actual cases and these could be found easily in appellate court records.\textsuperscript{24} Some instructors elsewhere have resorted to such sources in preparing trial materials. They distribute copies of the transcripts to both sides; student counsel ask classmates or acquaintances to assume the various roles called for by the script; the trial itself becomes a dramatization of the record. There are serious objections to this method. The element of surprise is reduced, the approach to reality is limited and the narrow use of the transcript curtails, necessarily, the instructor's opportunities to introduce varied problems of trial technique. He, like his students is bound by the transcript. To us it seemed unwise to follow this method. The student in the Practice Court should experience at least some of the many pressures under which he will later on work as a trial lawyer even in the most modest of his lawsuits.

The writer therefore undertook to prepare the statements of the witnesses and parties to be called in each case assigned for trial. Under our time limitations this meant that from four to five witnesses in addition to the parties

\textsuperscript{23} One of the most interesting criminal prosecutions conducted in 1954 was for murder in the first degree under a statute based on the Pennsylvania statute \textit{Pa. Stat. Ann. tit 18, § 4701} (Purdon 1945), which was stipulated to be the controlling statute in the State of Hoyes. The writer drew upon \textit{Commonwealth v. Moyer}, 357 Pa. 181, 53 A.2d 736 (1947), a "felony-murder" case.

\textsuperscript{24} As indicated, note 12 \textit{supra}, the New York appellate records are most helpful since they contained the complete record of testimony in the trial court below.
themselves would testify. Sometimes an appellate record was trimmed down and vital parts of the testimony were altered to produce a more balanced case suggesting to the student the employment of a variety of trial techniques. On one occasion a law firm made available to us the complete file of a pending wrongful death action which had been brought by it. The file was used to prepare the statements of witnesses. Permission was given to use photographs and charts contained in it. Names, dates and places were, of course, changed and the case was tried in our Practice Court by student counsel long before it was reached on the calendar of the trial court where it was then pending. Generally, however, the writer turned to reported decisions of appellate courts where no transcript of testimony was readily available. Statements of witnesses and parties were drafted to resemble what, it might be surmised from the appellate court's opinion, counsel probably had before them at trial. For example, a familiar case from the casebooks, *Iroquois Rubber Company v. Griffin*, with names, dates and places changed, sent the student back to the books on Agency, Partnership and Contracts. The imaginary statements of witnesses presented puzzling problems in testimony which might or might not call for the application of the rules discussed in the appellate court's opinion. Considerable liberties were

25 Occasionally when time permits, a longer case is assigned and the number of witnesses is increased. Thus, in a "wrongful death" action tried in 1954, ten to twelve witnesses testified.

26 The actual case was later settled before trial. One of the witnesses appearing in the Practice Court was expected to be a witness at the actual trial. Her testimony therefore was testimony with regard to a real event—she had been an actual eye-witness to the accident. Attorneys for the actual plaintiff were present during the Practice Court trial.


28 For good measure a side issue or problem in the law of bailments was introduced into the statement of one of the witnesses.
taken with the facts. While diligent student counsel could find the leading case in spite of the camouflage, the statements of his witnesses were bound to give him some anxious hours about the applicability of the leading case as controlling authority in drafting proposed instructions for the court. A practical review of substantive law principles was essential to the student's preparation of the case for trial. Aside from this, the reduction of a familiar casebook case from the appellate level to something resembling its original appearance at trial was itself an introduction for the thoughtful student to the evaluation of what Judge Frank calls the "Myth of the Upper Court." 29

When the assigned case calls for written documents or other materials, the writer prepares them and makes them available to student counsel. 30 The statements of witnesses and parties are phrased in layman's language. They contain the irrelevant as well as the relevant. It is the student's job to separate the wheat from the chaff. The statements are not made available to opposing counsel. Circumstances do not now permit provision for discovery proceedings nor for examination before trial. 31 Bills of particulars may be obtained on proper motion. For this purpose the statements prepared by the writer include material which counsel will need in furnishing such bills when ordered to do so. The statements also contain material which binds the witness when he is under cross-examination at trial. He must answer proper questions put to him according to the facts contained in the state-

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29 Frank, Cardozo and the Upper-Court Myth, 13 Law & Contemp. Prob. 369 (1948).

30 Thus, in Iroquois Rubber Co. v. Griffin, 226 N. Y. 297, 123 N. E. 369 (1919), referred to in note 27, supra, statements of the various witnesses indicated to student counsel the necessity of producing a certified copy of a partnership agreement presumably on file in the "Marion County Clerk's Office" as required by the statutes assumed to be controlling. With the writer acting pro tempore as the "County Clerk," the students were required to secure from him properly certified copies for introduction in evidence at trial.

31 It is hoped, however, that our rules may be expanded to permit illustration of such procedures in appropriate cases.
ment and according to what may be reasonably inferred from them. The necessary compromise with reality here has worked out well under the control of the trial judge, providing the statements are carefully worked out in advance.

During the first year of the course the prepared statements of testimony were distributed to counsel trying the case. They then secured the necessary witnesses. A more realistic method is now followed. The writer obtains for each case volunteer witnesses and parties who are total strangers to student counsel. These witnesses and parties receive well in advance of the trial date the prepared statements with which they are asked to familiarize themselves carefully. When student counsel are assigned to try a case they are given only the names and addresses of their respective clients, whom they are to interview as soon as possible at their homes or offices. The student is also advised that the client during the course of the interview will give him the names and addresses of additional witnesses. Thus the first time the student receives the slightest intimation of the nature of the case he is to try comes in the course of his personal interviews with clients and witnesses. The written statements are never turned over to him. It is his task to get the facts and to determine the strength or weakness of his case, the remedies available, the theories of actions to be brought or defenses to be made, from the story of the case as it comes to him in layman's language from the lips of client and witnesses. He will also have to determine the order in which witnesses are to be called, and, indeed, whether some of the witnesses should be called in any event. It is his responsibility to see to it that his client and witnesses are in court at the proper time, and when the trial date is reached he may experience the trial lawyer's typical headaches in arranging for the transportation of his witnesses or for their being excused after testifying when
private business calls them elsewhere.\textsuperscript{32}

The cooperation of these volunteer witnesses has helped to give an atmosphere of greater reality to the Practice Court. During the 1954 term (Sept. 1954—Jan. 1955) over eighty witnesses testified in the Practice Court trials.\textsuperscript{33} This number included university faculty members (from the various colleges of the University exclusive of The Law School) and their wives, businessmen from the South Bend area and off-campus students.\textsuperscript{34} Members of the South Bend Police Department gave valuable assistance as witnesses in criminal prosecutions.\textsuperscript{35} The solid proof of the soundness of our methods appears in the remarks of a visiting judge\textsuperscript{36} who presided over one of the student trials: "The illusion created was remarkable. The way those people talked on the witness stand almost convinced me that they really had seen the accident."

When he has completed his interviews, counsel for the plaintiff must reduce layman's narratives to pleader's language in his complaint. Here, in the writer's opinion, the wisdom of our rule that the complaint allege "facts" constituting a "cause of action" in the older sense of the codes\textsuperscript{37} is vindicated. The student must review a field of substantive law which, perhaps, he has not considered carefully since he closed his casebook on the course several semesters back. Now he must correlate substantive law

\textsuperscript{32} Transportation of witnesses to and from the Law School Practice Court on the Saturdays of Notre Dame home games presents unique problems for student counsel.

\textsuperscript{33} In 1953 the number was slightly smaller.

\textsuperscript{34} In some cases witnesses are selected because of their special qualifications with regard to technical matters involved in the assigned case. Thus, a bank executive testified in a case involving rather complicated banking procedures and practices.

\textsuperscript{35} With the cooperation of Chief of Police of the City of South Bend, R. J. Gillen, the Practice Court was able to secure the services of ballistics and finger-print experts.

\textsuperscript{36} Hon. Charles S. Desmond, Associate Judge, New York Court of Appeals.

\textsuperscript{37} Pike and Willis, supra note 15.
principles with the "raw facts" of the case he is to try as he has heard them from the lips of client and witnesses. In drafting the complaint he is learning to bridge the gap between the law in the books and the law in action.

With the service of pleadings the case moves into the pre-trial motion stages which our rules envisage. To give due attention to this phase of the student's work the writer acts as Special Judge. All motions are heard, on notice to opposing counsel, on Thursday afternoons in The Law School courtroom. Briefs on motions are usually called for and the writer prepares written opinions on the disposition of the motion when this is necessary. During the past two years motions for orders directing service of bills of particulars were frequent, as was to be expected under our rules. Motions to dismiss complaints were not uncommon, however, and in some instances they were sustained with leave to plead anew. It is hoped that we can extend this area of practice as soon as possible in view of students' expressed satisfaction with the practical experience and training afforded.

Trial juries are impaneled on Friday afternoons in The Law School courtroom. The writer presides as Special Judge. Thus the Trial Judge's time on Saturday mornings is saved and student counsel may be introduced at greater length to the processes and problems of jury selection. Ordinarily a twelve-man jury is selected and at trial the rules provide for verdicts by two-thirds of the jury in civil cases. Peremptory challenges as well as challenges for cause are permitted and the *voir dire* is conducted almost entirely by student counsel. During the past year over two hundred prospective jurymen were examined and each freshman student averaged from three to four experiences as a trial juror. Under the rules the freshman jurymen is required to submit on the Monday following Saturday's trial a written report, signed or unsigned at his pleasure. The report states the reasons for his verdict.
as given at Saturday's trial, together with his general impressions of the conduct of the case. This is done for the benefit of student counsel, to whom the reports are referred.

During the past year at Dean O'Meara's suggestion we have experimented with a "second jury," also composed of freshman students. This "second jury" hears the entire case from the opening statements to the summations, but retires to consider its verdict before the judge has given his instructions or charges. The unofficial verdict of the "second jury" is compared with the official verdict of the jury which has heard the judge's charge. Some light may be thus thrown on the question of the extent to which verdicts are influenced by the charge of the court.

Judge Swygert, presently senior judge of the United States District Court for Northern Indiana, is the regular trial judge in the Practice Court. His long years of experience in the courtroom make student counsel's appearances before him in Practice Court trials realistic and rewarding. Under his guidance it has been possible to complete each assigned case within the allotted four to five hours. Occasionally, visiting judges from other jurisdictions have graciously served in Judge Swygert's absence and members of the bar are the guests of The Law School at most of the trials. Their comments and suggestions to student counsel on the conduct of the cases are an invaluable part of our program.

At least three days before the trial date student counsel must mail to Judge Swygert a complete trial brief. The students generally follow the form and suggestions given in the text book. Thus the trial brief contains summaries of the pleadings, the names of witnesses to be called.

38 During 1954 the official and unofficial verdicts were identical in 75% of the cases tried.

39 GOLDSTEIN, TRIAL Technique 70-74 (1935).

40 The witnesses use assumed names as called for by their statements. It should be noted in passing that we avoid the common practice of giving so-called "humorous" names to parties or witnesses.
outlines of the points to be established by their respective testimony, digests of the law involved and proposed instructions. Perhaps it is true that among many trial lawyers the practice of preparing trial briefs of such elaborateness is not common. Nevertheless, for the student it is an experience he will not forget. After he has prepared such a brief and with its aid tried a case to a jury he is likely to make it a life long professional habit. We do our utmost to encourage him to do so.

Opinions differ as to the most efficient way of securing the maximum benefit of the course described, to members of the class who are not engaged as counsel in the assigned case. Attendance at all trials by such students is not compulsory. Our experience, however, indicates that they will wish to attend and observe the trial court performances of classmates. To enable the class to follow the case on trial, with understanding and appreciation of the trial techniques for which it calls, the writer gives a brief outline of the facts involved before the court convenes. References are also made to the textbook sections discussing trial procedures and tactics which the case is designed to illustrate. Trial counsel assigned do not attend this preliminary session. As the case proceeds the writer, without disturbing or interrupting the trial itself, quietly calls the attention of the students seated outside the bar to good and bad points in the conduct of the case. The law student soon learns that his severest critics are his classmates, and we have reason to believe that a species of "continuing legal education" goes on in many an informal "bull session" long after the trial is completed.

The trial judge explains his rulings in the Practice Court much more fully than is customary in the actual courtroom. No better way of giving vitality to the rules of evidence can be suggested. The limits of the "best

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41 The average trial brief of student counsel runs about twenty-two pages, double-spaced, on legal cap.
evidence” rule, for example, may be reasonably clear to the student from his formal course in Evidence. There, however, he has studied the rule as it appears in the often quite dessicated appellate opinions of the ordinary casebook. Now, in the Practice Court, he is on his own grappling with the rule and its specific application to the facts of the case he himself is trying. He may theretofore have learned the names of his tools. Now he is to use them.

After the jury has retired, the trial judge and the writer conduct a brief question-and-answer session with student counsel and with the class generally. This session has to do with the conduct of the case just completed. For example, on one occasion, in response to a student’s question, the trial judge left the bench and went over step by step the proper procedure for the admission of written documents in evidence. The demonstration was worth a cart-load of textbooks. On another occasion, pointed questions from the class led the trial judge to a careful review of the charge given to the jury and a discussion of the instructions which had been refused. After the jury has reported its verdict and the court stands in recess until the following Saturday, the criticism of the conduct of the case is continued at a luncheon attended by the four student counsel, Judge Swygert, Assistant Dean John J. Broderick, who teaches Evidence, and the writer, as guests of the Dean. Each student is given a detailed review of his performance at trial.

Motions after verdict, if any, are heard before the writer as provided by the rules. In addition, the appropriate judgment papers must be filed on due notice to opposing counsel. Objections, if any, to the form of the proposed judgment are heard and with the entry of the judgment student counsel’s assignment is completed. He has now lived with his case for approximately five or six weeks since he first interviewed his client and witnesses.

At the end of the course the students take a written examination which includes problems of trial techniques,
skills and tactics. The problems are based on situations which actually arose in one or more of the cases tried during the semester. Thus there is a correlation between the written examination and the trial work done in the course. A maximum of thirty points is set for the written examination. The remaining seventy points, allotted for the student's trial performance, are distributed among the various elements, *e.g.*, the trial brief, the opening statement, the conduct of direct and cross-examination, the management of motions before and after trial, etc.\(^\text{42}\)

The foregoing is a description of our attempt at Notre Dame to introduce the law student during law-school days to the work of the trial lawyer. Foundations have been laid for the further development of the limitless possibilities of the Practice Court course, a few of which have been here suggested. We are trying to rub off at an early date some of the awkwardness of the law graduate approaching his first trial, to lessen some of the terrors of that experience and to establish a degree of confidence. Granted that the law school cannot duplicate exactly for the law student what the medical school does for the medical student through the media of clinical and hospital assignments during the third and fourth year of studies, we believe we can do more than we have done. For example, the writer suggests that Practice Court trials, instead of being conducted in The Law School courtroom, should take place in the courtrooms of neighboring courts when the latter are not in session. Here is an area in which the historic cooperation of bench, bar and law school could again be splendidly demonstrated. Student trials in an actual courtroom would lose something of the academic atmosphere which impedes our progress towards greater realism in the Practice Court.

\(^{42}\) *E.g.*, fifteen points are allowed for the trial brief, ten for direct and cross-examination, five for the conduct of the case before trial, etc. During the progress of the trial the writer evaluates each student on a scoring sheet which is submitted to the trial judge for approval at the conclusion of the trial.
We don't attempt the impossible. No matter what we do, our graduates will not be accomplished practitioners at the outset of their professional careers. Nevertheless, a well-organized Practice Court course can do much for a student, if, to borrow from Dr. Johnson, "we can catch him early enough." It can heighten his perception; it can make his early courtroom experiences less terrifying to himself and less painful to his clients; and it can help him to learn, more readily and more rapidly than he otherwise would, those practical arts a lawyer must master but whose only teacher is experience.

Edward F. Barrett*

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