Integrating Experiential Learning in Traditional Classrooms

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I. Introduction[1]

When I began law school in 1971, my Civil Procedure professor assigned a short pamphlet that consisted of several legal documents. After assigning it, the professor never referred to it again. That was my last exposure to realistic legal documents until I began working during the summer after my second year. We lived in different times in those days, when law firms expected to train new associates. Few employers expected graduates to know much about how to practice law.

I began teaching Civil Procedure in 1977 and for many years watched students struggle with arcane concepts of procedure. About 15 years ago, I introduced simulation exercises into my course with immediate benefits for my students. More recent developments in legal education convinced me that traditional professors needed well designed simulation material that could be integrated into their "podium" courses.

Even before the downturn in the job market for lawyers, the 2007 Carnegie Foundation's *Educating Lawyers: Preparation for the Profession of Law* faulted the traditional law school curriculum for failing to teach law students to act like lawyers. It criticized law schools for the separation of theoretical learning from skills training. More recently, critics of legal education, including a reporter for the New York Times, have gained the attention of prospective applicants. One of their criticisms is that law schools don't teach students the skills they need to practice law. In discussing issues like these with partners in law firms in northern California, I became aware of their desire to hire associates who can bring "value-added" to the job. As one partner said, "we want associates who can solve real problems."

Many legal educators recognize the changes afoot. During the summer of 2011, the Association of American Law Schools hosted an event in Seattle. The Association advertised the Conference on the Future of the Law School Curriculum in urgent terms: "We are at a pivotal moment in the history of legal education." Forces from inside and outside of the academy are calling for changes in the law school curriculum. One suggested area of change was greater incorporation of experiential learning into the traditional curriculum.

One way in which legal educators can respond to the demand for graduates who can add value to their employers sooner rather than later is by having them develop practical skills from the beginning of their law school careers. Rather than teaching students only abstract concepts, for example, those of us in the academy should teach our students how to apply those concepts in realistic settings.[2]

That is the purpose of my simulation books. For example, during a 5 unit yearlong course, using the Bridge to Practice book, my students argue a motion on personal jurisdiction in front of a "magistrate judge," (a/k/a one of my research assistants), conduct an evidentiary

[1] This material is adapted from Michael Vitiello, *Bridge to Practice Series: Civil Procedure Simulations* (West 2012) and is used with permission of West Academic Publishing Co.

[2] Because of financial realities of legal education, reliance on expanded clinical offerings is not feasible.

hearing to determine the state of the plaintiff's citizenship, submit a memo involving a Rule 12(b)(6) challenge, engage in discovery, submit a memo involving a Rule 15(c)(1) amendment issue, and submit a memo relating to a motion for summary judgment.[3] My hope is that students will realize why procedural rules matter and why those rules may be far more important than substantive law in deciding how cases will be resolved. My presentation at this conference is to show you how I begin my course, using the first class meeting to get students to see that a course in procedure is not about locating the courtroom and counting the days in which one has to file an answer. Instead, my hope is that they will begin to understand the importance of procedure in resolving real human dilemmas.

II. Background about your assignment

This exercise gives you an opportunity to interview a client. In doing so, you should be aware of several goals that you should have for your interview. This section reviews those goals. Thereafter, the chapter consists of an assignment that your employer has given you, which requires you to prepare for an interview with your client. In doing so, you will need to review the four case summaries found below.

Being a successful lawyer involves more than sheer legal knowledge. Like doctors, lawyers need to develop good "bedside manner." Many clients seek advice of counsel when they are facing extremely difficult circumstances. As a result, they may be emotionally distraught and be in need of comfort. As a result, you will need to develop rapport with your client.

That cannot be your only goal when you meet your client. You have a limited amount of time to accomplish the work required of you. You need to get to work collecting relevant factual material. You need to learn whether your client's case meets all of the legally required elements to state a claim for relief. As a young lawyer, you may have done some background legal research in advance of the interview. But as you learn the facts, you may need to return to the library for additional research.

Before filing suit, an attorney has an obligation to make a reasonable investigation into the factual allegations in the plaintiff's complaint. As you will learn in a number of courses in law school, the term "reasonable" lacks a precise definition and is often determined on a case-by-case basis. As you will see in this case, time is of the essence. Your ability to do an extensive factual inquiry may destroy your chances of avoiding the harm that your client most fears. In many cases, another goal during the first interview with the client is assessing her credibility. In a case where you have so little time to investigate before you must file the action, that assessment becomes all the more important when the question is whether you have fulfilled your obligation to do a reasonable investigation.

III. The Interview

Assume that you are a junior associate in Connell and Cooper, LLP, a law firm located in Cuomo City, New York. The senior partner called you late last evening and told you that s/he received a frantic call from Sarah Nobile, a young woman, whom the partner says the firm is going to represent. After giving you a brief factual overview of Ms. Nobile's legal problems, the

[3] For the first time this year, I used the last three class meetings to conduct a trial of the case and an appeal. I am also considering additional exercises, including drafting and answering the complaint.

partner told you to do some research on the torts of defamation and invasion of privacy in New York and Connecticut. S/he told you that you needed to be prepared to brief the partner on a number of legal issues in connection with a meeting that you and the partner would be having the next morning.

Dutifully, you spent a good part of the night researching the law of New York and Connecticut. Despite reading numerous cases, you have found four cases, excerpted below, and edited them for the partner. Those cases give a good summary of the relevant legal rules that may govern the firm's new client's case. The partner also told you that you should prepare to interview Ms. Nobile at the meeting scheduled for 9:00 A.M.

Although you were a little groggy when the partner called, you scribbled some notes. You think that they summarize accurately what the partner told you about Ms. Nobile. You will certainly want to do a more thorough follow-up during the interview.

Here are the facts that you learned last night: about a year ago, Ms. Nobile moved to Cuomo City to take a job at Breeze and Associates, a well-known boutique plaintiffs' class action firm. She has an apartment in Cuomo City but still spends a lot of time in Doddville, Connecticut, where she went to law school and used to work for a prominent judge on the Connecticut Court of Appeals. You recognize the name of the judge, John Elliot, and vaguely remember some details about the judge.

The partner also tells you that Ms. Nobile recently learned that an Internet journalist Mike Ridge intends to publish a story that will name her and Judge Elliot as having been the target of a criminal investigation three years ago. Ridge claims that he has proof that the judge was able use his political connections to quash criminal charges against him and Nobile for possession of child pornography. Ms. Nobile explains that three years ago, police raided the judge's chambers and found pornography on two of the office computers. She claims that someone else must have had access to her computer and that she never went to such a site and would never had downloaded such vile material. She suspects her former co-clerk, a man named Nathan Loewe. He did not get along well with the judge and resented her close relationship with the judge.

The partner also tells you that Ms. Nobile fears that the story will destroy the judge's attempt to make a political comeback. Ms. Nobile also knows that, if the story is published, she may lose her job. Finally, the partner tells you that Ridge seems more interested in "nailing" the judge than he does in humiliating Ms. Nobile; despite that, Ridge has made clear that he will name her in his story and will do so in the very near future.

You will meet Ms. Nobile today. Consider any additional questions that you need to ask her.

To prepare for the conference with the partner and the interview with Ms. Nobile, consider the following questions:

1. What is the obvious practical problem that you face given that the harm feared by Ms. Nobile will occur if you do not stop Mr. Ridge immediately? How do the Federal Rules of Civil

Procedure deal with the problem that Ms. Nobile faces? Review Rule 65 to see how the federal rules handle the problem.[4]

2. Does Ms. Nobile have a claim for relief against Mr. Ridge? Assume that the plausible rights of action are libel and invasion of privacy. Examine the two New York cases, *Freihofer v. Hearst Corp.* and *Chapadeau v. Utica Observer-Dispatch*, and the two Connecticut cases, *Goodrich v. Waterbury Republican-American, Inc.*, and *Knize v. Knize*, summarized below. You are licensed in New York and are familiar with the local courts. As a result, you would prefer to file the action in New York. Are Ms. Nobile's chances of getting relief better under New York or Connecticut substantive law? If you file in a New York court, will New York substantive law necessarily apply? What assumptions have you made in reaching a conclusion to the previous question?

3. Apart from your personal preference to file the action in a court in New York, what kinds of considerations may influence a person's decision to file in one state as opposed to another state? New York and Connecticut are not far apart (although some areas of New York, like Buffalo, are over 400 hundred miles from Connecticut). Further, some rural areas of New York are quite different culturally from more urban states like Connecticut. To make the point more clearly, what if a plaintiff from Mississippi was choosing whether to sue a defendant from New York in Mississippi or in New York? If the plaintiff can meet all of the requirements to file suit (including personal jurisdiction, venue and the like), can you see practical reasons why she may want to sue in one state or the other?

4. Can Ms. Nobile file her action in a federal court as opposed to a state court? Examine 28 U.S.C § 1332.[5] Can you think of any reasons to choose a federal, rather than a state, court? In this case, Mr. Ridge has yet to publish the story. In light of that fact, if you file in federal court on behalf of Ms. Nobile based on § 1332, will you be able to meet the jurisdictional

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[4]Rule 65 states, in relevant part:

(b) Temporary Restraining Order.

(1) ***Issuing Without Notice.*** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

> **(A)** specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
>
> **(B)** the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) ***Contents; Expiration.*** Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry--not to exceed 14 days--that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

[5] Section 1332 provided, in relevant part, as follows: (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-- (1) citizens of different States; . . .

amount? Can you think of other reasons why a person may want to choose federal over state or state over federal court?[6]

5. When the senior partner told you about this case, s/he indicated that Ms. Nobile suspects that Mr. Ridge may have had help in getting information about Ms. Nobile. Would it make sense to join any additional defendants in the action? Can you anticipate any advantages and disadvantages with adding other parties?

6. If you decide to file the action in New York, you will need to research New York law to see how you can commence a lawsuit and how to serve a defendant with the relevant legal papers. If the defendant is an out-of-state resident, you will need to determine what the state's "long-arm" statute provides. Assume that New York's long-arm statute allows you to file the action against Ridge, will the court have personal jurisdiction over the defendant? Why may there be a problem?

7. Can you think of any other issues that you may want to discuss with the members of the firm?

All of the questions above relate to the decision about where to file a lawsuit. The plaintiff's lawyer is engaged in forum shopping, whereby s/he must decide whether the court is a proper forum. Often, a plaintiff may choose between state or federal court or between courts in different states. At this point in your legal studies, your professor does not expect you to be able to give definitive answers to the previous questions. But those questions should help you to start thinking about issues relating to selecting the best forum for your client.

Iv. Relevant case law

In light of instructions from the partner for whom you work, you focused your research on New York and Connecticut case law dealing with two "torts," invasion of privacy and libel. Here are the four cases that you provided the partner:

1. *Goodrich v. Waterbury* is a decision by the Connecticut Supreme Court in which it summarized the tort of invasion of privacy. Here are two important paragraphs from that decision:

> The right of privacy, which this court has not previously recognized, has been defined as "the right to be let alone." * * * The origins of this right, which was not expressly recognized at common law, can be directly traced to an 1890 article written by Samuel Warren and Louis Brandeis entitled "The Right to Privacy." Although the early cases were divided, the right became widely accepted after it was recognized by the American Law Institute in 1938.* * * In reviewing the body of privacy law today, we note that tort actions for invasion of privacy have been judicially recognized, in one form or another, in approximately three quarters of the states.* * * On the other hand, the courts which have refused to recognize this right of action have concluded that this issue was more properly one for legislative determination. * * * We do not agree. * * *

[6] Each state has at least one federal district. Some, like California and New York, have four districts. Those courts are usually located in larger cities. Counties in each state usually have a courthouse in the county seat. As a result, in many states, courts are likely to be located in far more rural areas than are federal courts.

> In recognizing this right of action today, we note that the law of privacy has not developed as a single tort, but as a complex of "four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone.'" * * * The four categories of invasion of privacy are set forth in 3 Restatement (Second), Torts § 652A as follows: (a) unreasonable intrusion upon the seclusion of another; (b) appropriation of the other's name or likeness; (c) unreasonable publicity given to the other's private life; or (d) publicity that unreasonably places the other in a false light before the public.* * *

As you summarized in your memo to your boss, as you understand the facts, Ms. Nobile would seem to have a claim for invasion of privacy if *Goodrich* applies to the case under either the third or fourth theories: unreasonable publicity or false light.

2. By contrast, New York courts take a narrow view of the tort of invasion of privacy. *Freihofer v. Hearst Corporation,* (a decision by that state's highest court) reviewed New York law concerning the tort of invasion of privacy. The court cited its 1902 decision in *Roberson v. Rochester Folding Box, Co.,* which held that New York does not recognize a common law right of invasion of privacy. New York courts have repeatedly reaffirmed the holding and noted that New York recognizes such a right of action only if the legislature creates such a tort. Thus far, it has done so only in instances when another person appropriates one's name or likeness for commercial benefit. News media do not violate that provision when they report a person's name or include a photo or other information about that person in a newsworthy story.

3. Connecticut law governing defamation, (here, libel, making false statements about another that are harmful to that person's reputation) is also more favorable than is New York law. While the United States Supreme Court has established special rules – based on First Amendment free speech concerns – when a plaintiff is a public official or public figure, those special rules do not seem to govern here. A court would not consider Ms. Nobile to be a public figure. As a result under Connecticut law, a private individual needs to prove only by a preponderance of evidence that the defendant negligently made defamatory statements about her. (i.e., that the statements were false and harmful to her reputation and that the defendant should have known that they were false). *See Knize v. Knize* (a Connecticut appellate court summarizing the law of Connecticut.)

4. In *Chapadeau v. Utica Observer-Dispatch, Inc.,* a well-known state trial court judge (later appointed to the state's highest court) summarized New York libel law: even when a matter was not within the United States Supreme Court cases (setting a higher standard for the plaintiff to prove), as long as a matter was within the sphere of legitimate public concern, the person defamed must establish by a preponderance of the evidence that the publisher of the information acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.