

Institute for Law Teaching and Learning
2011 Summer Conference Presentation
***“ENLISTING THE JUDICIARY: TEACHING A FIRST YEAR CIVIL
PROCEDURE COURSE WITH A SITTING FEDERAL JUDGE”***
Professor Michael B. Mushlin and Judge Lisa Margaret Smith
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I. Introduction

- a. In our presentation we will describe the collaboration between a full time civil procedure professor and a sitting federal judge to teach a first semester first year three credit course in civil procedure.
- b. The collaboration began in the fall of 2007, and has continued to the present. In all, we have taught using this approach, in various forms, four times.
- c. This is part of a curriculum in which civil procedure is taught for six credits over two semesters.
- d. This experiment is only for the first semester portion of that curriculum.
- e. The class sizes have varied from 50 to 70 students.
- f. The model we used as described in more detail below is a traditional law class taught by Professor Mushlin, who is responsible for the overall direction of the course and grading the students, supplemented by written and in class and out of class simulations, using a case derived from one before Judge Smith taught by both Professor Mushlin and Judge Smith, and in addition lectures by Judge Smith and a class visit to an actual court proceeding before Judge Smith.
- g. As far as our research has uncovered this is the only collaboration of its type in an American law school.
- h. We believe that there is enough potential value in this experiment, and there is enough information about it from four times tried, that it is worth sharing a description of our philosophy and methodology, along with our preliminary views of the benefits and drawbacks of this approach with our colleagues, hopefully promoting further experimentation with this approach at other schools.

II. Philosophy

- a. Our goal is to introduce students to the practicalities of law practice at the outset of their legal career; however, we are not trying to be a practical course which teaches skills; rather, our purpose is to use skills to teach and illuminate doctrine.

- b. We want through our collaboration to take the dryness and abstraction out of a course that focuses on the stages of litigation and is heavily rules driven.
- c. We were influenced in our motivation to try this technique by the McCrate Report, The Carnegie Report and the Report on the Best Practices for Legal Education.¹ These reports all call for more effort to instill practical skills into the teaching of law and also to integrate the teaching of cognitive, ethical and practical skills to law students.
- d. Our ambition is to make the concepts of pleadings, discovery, pretrial motions, summary judgment, trial and settlement come alive and to demonstrate to the students the practical and ethical applications of the rules and law governing these stages of litigation.

III. Methodology: The Three Techniques

- a. The first technique we use is *Popup v. Dickens*, a mythical case the facts of which are drawn from a straightforward diversity case that was before Judge Smith several years ago, as the springboard for written and simulation exercises described below.
- b. The second technique is appearances by Judge Smith at certain classes and lectures from her regarding topics discussed in the class including discovery.
- c. The third technique is the argument before Judge Smith of an active case on her docket by the attorneys in the case. This argument is held in the presence of the class.

IV. The First Technique: *Popup v. Dickens*

- a. *Popup v. Dickens* is a factually simple case that we have used to develop exercises.
- b. It is drawn from a real case. We have changed the names for privacy reasons and altered some of the facts in order to simplify the case and make it more appropriate for the exercises we have developed.
- c. The case is a tort action that arose following a game of whiffle ball. Paul Popup is a married man with a 12 year old son, Philip. The defendant, Charles Dickens, is Paul's college friend. They live in different states. During a "pick up" game of whiffle ball at Dickens' home, Dickens lost control of the bat he was using,

¹ William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, Less S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (2007) (Carnegie Report); Roy Stuckey et. al., *Best Practices For Legal Education: A Vision and A Roadmap* (2007); Report of the Task Force on Law Schools and The Profession, *Narrowing the Gap*, (American Bar Association Section of Legal Education and Admissions to the Bar 1992) (McCrate Report).

causing it to fly into the air and strike Philip in the face. The bat was aluminum, rather than a plastic whiffle ball bat, and it caused Philip to suffer significant injury.

- d. We use this case for exercises in drafting, discovery, summary judgment and settlement.

V. The Second Technique: Appearances by Judge Smith at Civil Procedure classes

- a. At various times Judge Smith attends the class.
- b. The purpose of these visits is to lecture on discovery, to review the work of students on written exercises and to preside at simulations.

VI. The Third Technique: Court Visit

- a. Once during the semester students attend a live court proceeding
- b. For the first two years of this experiment the proceeding was held at Pace Law School and involved the argument of a pending motion for summary judgment that was argued before the students.
 - i. The students received the papers in advance and met with the attorneys after the argument so they could ask questions of counsel.
 - ii. In both cases the judge rendered her decision before the end of the semester and the decision was made available to the students.
- c. For the next two years the students attended Judge Smith's courtroom to observe an argument on a pending discovery motion.
 - i. The students received the papers in advance and met with the attorneys after the argument so they could ask questions of counsel.
 - ii. The judge rendered her decision following the argument while the students were present.

VII. Exercises

We have generated four exercises and one demonstration out of the case, each designed to enliven and deepen the study of basic concepts in the first semester Civil Procedure course.

- a. Complaint drafting exercise.
 - i. In this exercise the students draft a complaint for the plaintiff in *Popup v. Dickens*, after studying the rules on pleadings.
 - ii. The complaints are reviewed by both of us and returned to the students.

- iii. In addition, we hold a class session reviewing the complaints with the students and commenting generally on them, using anonymous examples to highlight well drafted (or poorly drafted) complaints or portions thereof.
- b. Discovery exercises.
- i. These, too, are drawn from *Popup v. Dickens*.
 - ii. The second exercise is to draft a discovery plan in the case for plaintiff.
 - 1. The students are told to use the complaint drafted in the case.
 - 2. They are told that the defendant has filed an answer denying the central assertions in the complaint and asserting a number of affirmative defenses.
 - 3. They are then asked to craft a proposed discovery plan to present at a Rule 26 conference before the United States Magistrate Judge overseeing discovery in the case.
 - 4. The plans are then reviewed by us, discussed in class and returned to the students.
 - iii. The third exercise is a simulated deposition, deposing both Charles Dickens and Paul Popup.
 - 1. This exercise breaks the class into groups of two students each, One student in each group, designated "Attorney #1", is counsel for the Popup plaintiffs for purposes of the deposition of defendant Charles Dickens, and in addition will play Paul Popup for purposes of the Popup deposition. The other student in each group, designated "Attorney #2", is counsel for Charles Dickens for purposes of the deposition of plaintiff Paul Popup, and plays Charles Dickens for purposes of the Dickens deposition.
 - 2. The witness in each of the depositions may act as his (her) own attorney, and may make objections during the deposition.
 - 3. Separate instructions are given to each student attorney/witness with additional information about the case which may or may not be revealed depending upon what is discovered in the deposition.
 - 4. Before class each team of students completes the deposition exercise.

5. A class is then devoted to a simulated deposition conducted by two students chosen by Professor Mushlin. In some years we have used students from the class to play the witnesses, but this past year we found it was useful to use students from the previous year's class to be the witnesses while current class members conducted the depositions. This class is attended by Judge Smith. After the depositions of the two principals are taken time is devoted to a discussion of the purposes of depositions and the relative success or lack of success by the students in the conduct of their own deposition.
 6. Following the class the students prepare a short memorandum reflecting on the exercise and identifying specifically what each could have done better in light of what they learned doing this exercise.
- c. Argument of a summary judgment motion in *Popup v. Dickens*
 - i. Students are assigned either the role of plaintiffs' counsel or defendant's counsel and are asked to prepare to argue a motion for summary judgment in the case.
 - ii. At class two students are chosen to argue the case before Judge Smith.
 - iii. The motion papers in the actual case are made available to students in advance of the class.
 - iv. After the argument Judge Smith and Professor Mushlin use the case to discuss Rule 56 of the Federal Rules of Civil Procedure.
 - d. Simulated mediation and settlement demonstration in the case conducted by Judge Smith.
 - i. This exercise is accompanied by a memorandum prepared for each side outlining how each side assesses the value of the case going into discussions before the judge.
 - ii. We have done this exercise several ways. At times when this exercise occurred at the conclusion of the semester when exams were looming the students were not asked to prepare or conduct this simulation, and instead Judge Smith's law clerks played the roles of counsel before Judge Smith.
 - iii. This past year we scheduled this exercise earlier in the semester, when exams were not so near, and had students prepare and conduct the settlement simulation, with Judge Smith presiding.
 - iv. Following this demonstration there is a class discussion about role of settlement and the skills involved in negotiation.
 - e. The written responses from the students to the first and second exercise are reviewed and commented on in class.

VIII. Review: The Students' View

- a. We administered a confidential survey to students in the 2007, 2009, and 2010 classes.
- b. The responses indicated that the students welcomed this experiment.
- c. The suggestions made by the students in the surveys for improvement include:
 - i. More feedback;
 - ii. Less emphasis on e discovery;
 - iii. Allowing students more time to participate in classroom exercises;
 - iv. More guidance on how to understand the different roles of Judge Smith and Professor Mushlin;
 - v. Incorporating assigned reading into Judge Smith's lectures; and
 - vi. Make assignments count as part of the grade.

IX. Benefits and Drawbacks

- a. We have identified the following benefits of our approach. It:
 - i. Teaches students at the beginning of their law career that law is more than doctrine;
 - ii. Introduces students to practical skills that lawyers need and to ethical dilemmas that they face in the day to day practice of law; and
 - iii. Provides a workable, relatively economical and practical model, for most law schools to implement the teachings of the McCrate Commission, and the Carnegie Report and the Report on Best Practices in Legal Education into a standard first year curriculum.
- b. We have identified the following drawbacks of our approach. It:
 - i. Can be confusing to students if not adequately explained;
 - ii. Is a less efficient way than lectures to cover substantive material;
 - iii. Requires sharing the classroom with another authority figure which can be difficult for a professor to do: and
 - iv. Is time consuming as it involves reviewing student submissions and providing feedback.

X. Conclusion

- a. This method, although distinctive, is available to everyone.
- b. Practically every law school is near to some courthouse.
- c. Although a federal judge would have more familiarity with the Federal Rules of Civil Procedure than would a state court judge, the practical aspects of the

exercises described above could be equally well demonstrated by any trial court judge.

- d. Despite the drawbacks, we believe that giving students the combined insight of a professor of law and a sitting judge has been valuable to the students, and has helped both of us to be cognizant of the challenge that the Rules of Civil Procedure present to the uninitiated among our students.

Rubric for
Complaint Drafting Exercise
Submitted by
Andi Curcio
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EXEMPLARY ADVANCED WORK FOR 1L AT THIS TIME IN THE COURSE- ON A JOB THE WORK WOULD NEED VERY LITTLE REVISION FOR A SUPERVISING ATTORNEY TO USE	COMPETENT PROFICIENT WORK FOR A 1L AT THIS TIME IN THE COURSE – ON A JOB THE WORK WOULD NEED TO BE REVISED WITH INPUT FROM SUPERVISION ATTY	DEVELOPING WORK NEEDS ADDITIONAL CONTENT OR SKILLSTO BE COMPETENT – ON A JOB, THE WORK WOULD NOT BE HELPFUL AND THE SUPERVISING ATTY WOULD NEED TO START OVER
Correctly joined and named all appropriate parties*	Missed one appropriate party (or did not correctly name a party) *	Missed more than one appropriate party and/or did not correctly name an appropriate party*
Correctly identified the proper court and signed complaint per R. 11	Correctly identified the proper court and signed complaint per R. 11	Did not correctly name the appropriate court or failed to sign per R. 11
Correctly pled the necessary facts to establish jurisdiction and i.d.'d the jurisdictional basis	Correctly pled the necessary facts to establish jurisdiction and i.d.'d the jurisdictional basis	Did not plead the necessary facts to establish jurisdiction and/or correctly i.d. jurisdictional basis
Identified all potentially viable claims against each party and did not have any claims that were not viable* (per Rule 11)	Identified all but one potentially viable claim agnst each party; no claims that were not potentially viable(per Rule 11)*	Did not identify two or more potentially viable claims and/or had claims that were not potentially viable (per Rule 11)*
Pled all necessary facts to support each element of each claim and did not plead immaterial facts	Pled most necessary facts to support each element of each claim and pled few, if any, immaterial facts	Didn't plead many facts nec'y to support each element of each claim and/or pled many immaterial or unnec'y facts
Pled all necessary elements of each potential claim	Missed 1 or 2 nec'y elements in pleading claims	Didn't plead a # of elements nec'y for each claim
Had sound/logical/tactical reasons why excluded parties/claims*	Had sound/logical/tactical reasons why excluded parties/claims	Failed to i.d. valid reason for excluding parties/claims or reasons weren't based upon sound legal/tactical grounds*
Clearly and logically organized and easy to follow; allegations were concise – whenever possible, allegations contained only one fact per allegation	Generally clearly and logically organized; allegations were generally concise	Claims and facts organized in a way that made it difficult to follow the story of what happened; allegations often contained multiple facts per allegation
No grammatical, typo. or spelling errors – presentation professional;	One or two grammatical, typo. or spelling errors – presentation	Numerous grammatical or spelling errors or other typo. Errors

* If you decide not to sue certain parties or file certain claims, briefly explain why in a short memo attached to the complaint