

MORE ABOUT REALISM IN PRACTICE COURT

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This is not a reply to Professor Green's statement which appeared in the preceding issue of the Journal;¹ it is, I hope, a continuation of the discussion. I think that I am in full agreement with the propositions set forth in Professor Green's paper. To one who has been trying his hand at practice court for a good many years it is gratifying to note the increase in the number of those who believe that some degree of realism is possible. Yet I suspect that there still remains a considerable number of persons, in and out of law faculties, who will say that a man learns practice by practicing and not in law school, although practice so learned is learned to a considerable degree at the expense of the clients of the tyro lawyer. Long ago I came to the conclusion that the fact that no law school can turn out a finished practitioner, ready to do battle with the seasoned veteran, is not proof that something worth while cannot be done, nor an excuse for refusing to do what is possible.

But the ideal or the optimum is not within the reach of all who may be assigned to this work. Much—very much—depends upon the amount of time and the amount of money available for the job. The professor cannot work miracles if he is allowed only one afternoon or one evening a week for this work. He may consider himself favored among men if he is allowed, as once I was, to use four afternoons each week. Then he may hope for real results. Even then he will not be satisfied. Indeed, I would say that any man who is satisfied with his results simply is not fit to handle a practice court. He is too devoid of imagination.

I am sure that all who have had experience in this work will give unqualified agreement to the emphasis which Professor Green has placed upon realism. Without it there is only the noise of sounding brass and tinkling cymbal in one's "courtroom."

Even in Professor Green's method there remains a degree of unreality, for he states that before the case is tried he secures waivers from the parties. The student knows that he is "running for Sweeney." He knows that he will not have to see the baleful look in the eye of his client if the case turns out badly. He knows that nobody is going to have to dig down into his pocket and pay out good money. This does not detract from the fact that his method has gone farther in the direction of reality than any other. Even the use of motion pictures falls far short of it.

An especially good source of living cases which Professor Green might have emphasized is the college paper. If at one's university there is a student paper, there will inevitably appear, during any one year, items that will furnish the basis of more than one good libel action. Experience with these has satisfied me that plenty of fire and plenty of action can be generated, and if the "case" happens to be seasoned with personal animosities

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¹ *Realism in Practice Court*, 1 J.LEGAL ED. 421 (1949).

there will be a pretty close assimilation to the realities of practice. Once I had to stop a fist-fight between "counsel." It happened that my dean chose the next few succeeding minutes for bringing visitors to my court. My stock as a professor rose measurably, and the next day he complimented me upon the realism which we had attained. Being human, I took the credit and did not mention the fight. The question is not whether one should seek realism, but how much realism can be attained within one's curricular and other limitations.

For many years I have been allowed only a fraction of the time necessary if one is to do students any great service. As a suggested basis for improvement rather than as a pattern to be followed, I am impelled to amplify somewhat the kind reference to my technique in Professor Green's statement. It is unquestionably open to improvement, but may offer some aid or consolation to those whose time may also be limited.

First let me say that I have a purpose beyond giving students an initial familiarity with the operation of the court machine. For this reason the normal performance requires that a student shall participate in three cases, rather than merely one. The cases which I select are chosen so that they may cumulatively demonstrate the importance of the choice of theory. It will only be by a rare stroke of good fortune that actual local controversies will serve this purpose. Likewise I am able to select a group of cases that present nice problems of substantive law, which go together to make a sort of pattern, so that it is not unusual to have students comment upon the amount of substantive law which they have learned in the practice court. My assurance that they have only been using the law that they had already learned in other courses seems never quite to dispel this illusion, for law in action does not look like the same law they saw embalmed in a decided case. I doubt that I could serve either of these purposes as well were I to rely upon controversies fortuitously arising in my community.

Limitations of time have compelled me to evolve a system of assignments and a type of case which will make it possible for every student to participate in three cases in the single term. First, my scenarios are so written that the issue or issues of the case can be disposed of in two afternoon sessions. Only three or four witnesses are allowed each side. You cannot do this if the controversy is real; at least, you cannot be certain of doing it in all cases, and if you do not do so some students will do a disproportionately large amount of work. Second, I designate and distribute the functions of the students case by case. This removes the possibility that any student will have handled any single case in all of its stages, but by the end of the course he will have performed all of these functions and will have had the experience of three cases instead of one. For this purpose I designate one student as chief counsel, one as associate counsel, and the third as assistant counsel. Together they form a "firm" and together they work on the case. The chief counsel presides at all conferences. It is his duty to see that a theory is selected and that a preliminary memorandum covering this decision is prepared and filed with me. At this point the associate counsel takes over and gets service upon a member of the opposing firm as though he were a real party. He handles all pleadings and motions and brings the case to issue, always with the knowledge and concurrence of the

others in his group. Then the assistant counsel tries the case under the watchful and critical eyes of his colleagues.

When the next case is assigned to this "firm" the individual students are shifted to new functions, so that after three cases have been tried each man will have performed all of the work on a case, but will have had the experience of seeing three cases through the mill. I find this almost as effective as though each had tried three cases, for I permit the assistant counsel to assign the examination and cross-examination of witnesses so that the actual trial is apportioned among the members of the group. As all have been in on the conferences on the case and have had a voice in shaping it their experience has been trebled. This is important to a full understanding of what has been done, and is much superior to listening to two cases tried by others in their entirety. A vicarious experience is present as other cases are heard, but that experience is not equal to multiplied actual participation.

Some time during the period before trial the witnesses have been secured and instructed ("coached" if you like). When such a witness comes to the stand in my practice court he is acting a part. Such a procedure has been criticized as being merely training in lying, and some have said that there is a lack of ethics in any practice court since the witness never is trying to tell the truth. No witness is ever sworn in my court, and everybody realizes that the whole affair is fictional. Still I have had some quite realistic situations. For example, in a case in which an X-ray plate was to be used, the men induced the leading roentgenologist of the community to be their witness. In memory I can still hear the gasp of the student counsel who had to cross-examine him. I have seen experienced lawyers do a worse job. In one case we needed a man to impersonate a railroad conductor on a passenger train. The students found an engineering student who had served as a flagman on a train, where he had performed many of the conductor's duties and was familiar with all of them. Cross-examination here was not lacking in realism. In another case a medical student, who had just completed his dissection of the leg and foot, was offered some experience as an expert witness. He took the opportunity and got the experience when the student counsel demonstrated the fact that the medical student did not know that the triangular ligament is in the ankle and the triangular muscle in the shoulder. There was no lack of realism in the manner in which the law student dug into the books on anatomy—perhaps acting upon the suggestion of another, more advanced medical student. There is also a simulation of realism as my synthetic witness attempts in the face of cross-examination to maintain the integrity of the character which he has assumed. I am not suggesting that my realism is adequate, but I am trying to offer a bit of consolation for those who, like myself, find that the constrictions of time adversely affect the attempt to attain proper realism. I have also been inhibited by the fear that if I were to try the techniques used at Colorado and Washington I would suddenly find myself right in the middle of a terrible jam.

I wish to seize the opportunity to say something that I have long wanted to say. I hope that some of our deans will read it, and that other members of our faculties may also give it thought. I know of no other course which has ever been assigned to me—and I have tried my hand at a good many—

which requires an equal amount of effort on the part of the man in charge. The whole success of a practice court is dependent upon the work that is done by the professor behind the scenes. The work of one year does not lighten the work of the next. There is a prodigious amount of detail that must always be repeated, and while these items are small in themselves each must receive painstaking attention. The practice court has always called for about twice the effort that other courses yielding an equivalent student credit have demanded. I bespeak for the man in charge of any practice court a full understanding of the complex and arduous task that is his.