

# UNSCRIPTED MOCK TRIAL AND FULL-SCALE LITIGATION IN A COLLEGE SETTING

Robert A. Kearney\*

## ABSTRACT

Mock trial programs in colleges do more than give students a taste of the lawyer's life. At their best, they serve students: by connecting them to professional standards, by placing them in a competitive, though simulated, environment that requires critical thinking, teamwork, and resilience, and by giving students "authentic" learning activities not possible in the classroom. But in order to provide students with more than just a taste of litigation, one liberal arts school's business program annually offers an open-enrollment, unscripted mock trial class that is both mock trial and full-scale litigation, complete with hours of depositions, tedious discovery, motion work, and court appearances. The course is replicable by other schools and is nothing short of experiential learning on steroids.

## I. INTRODUCTION

For years, lawyers and law schools have worried alongside pre-law programs that universities are not preparing students well for their lives as lawyers.<sup>1</sup> Certainly, law programs are effective at teaching the fundamentals of law, including civil and criminal practice, and putting students in a position to pass state bar exams. Passage rates on those exams are healthy,<sup>2</sup> and though self-selection among high-achieving students is probably part of the reason, law schools deserve credit, too. Still, there has always been reason to believe that the important work of getting students ready for their

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\* Edward R. Telling Professor, Illinois Wesleyan University. This article is dedicated to every student who has taken the "Trial Class" and to my family, which gives me the green light to teach it.

<sup>1</sup> David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, (Nov. 19, 2011), <https://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?auth=link-dismiss-google1tap>.

<sup>2</sup> "The percentage of graduates from American Bar Association-accredited law schools who passed the bar exam on their first try climbed to 80% in 2019 from 75% the previous year, according to new ABA data." Karen Sloan, *Check it out: Law Schools with the Highest Bar Pass Rates in 2019*, LAW.COM (February 19, 2020), <https://www.law.com/2020/02/19/check-it-out-law-schools-with-the-highest-bar-pass-rates-in-2019/>.

professional lives,<sup>3</sup> which will largely not be in courtrooms and instead often will be sedentary and stressful,<sup>4</sup> falls elsewhere and perhaps on the disaggregated work done by colleges and universities.<sup>5</sup> After all, once a student enters law school, the conversation about what a lawyer's life is really like falls into the category of too little, too late.<sup>6</sup>

Sixteen years ago, faculty at a national liberal arts university set out to create a special course not generally available to undergraduate students while also filling some of the gap between professional practice and preparation. The class is taught as a combination of litigation skills and trial advocacy, and its overriding purpose is to give prelaw students across the university a realistic picture of a civil litigator's life. It should be no surprise, then, that the jury trial that ends the course occupies only one day out of the 100-plus days in the semester.

The course is unique. During those 100 semester days, students experience nearly the entirety of civil litigation in a completely unscripted environment. To make the course interesting and timely, the class shadows the actual litigation of a complex civil case, often a tort case; in other words, the actual case litigated by the class is ripped from the headlines in much the same way that "Law & Order" scripts its shows.<sup>7</sup> The cases range from class

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<sup>3</sup> These professional lives will likely span decades and will require the lawyer to learn on-the-job. See Anthony G. Amsterdam, *Clinical Legal Education: A 21<sup>st</sup> Century Perspective*, 34 J. LEGAL EDUC. 612, 616 (1984) (A lawyer's "thirty or fifty years in practice will provide by far the major part of the student's legal education whether the law schools like it or not").

<sup>4</sup> Patrick R. Krill, et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICT. MED. 46, 52 (2016) ("Depression, anxiety, and stress are also significant problems for this population and most notably associated with the same personal and professional characteristics."); see also Dina Roth Port, *Lawyers Weigh In: Why is There a Depression Epidemic in the Profession?*, ABAJOURNAL.COM (May 11, 2018), [https://www.abajournal.com/voice/article/lawyers\\_weigh\\_in\\_why\\_is\\_there\\_a\\_depression\\_epidemic\\_in\\_the\\_profession](https://www.abajournal.com/voice/article/lawyers_weigh_in_why_is_there_a_depression_epidemic_in_the_profession).

<sup>5</sup> But see Menachem Wecker, *Future Law Students Should Avoid Prelaw Majors, Some Say*, USNEWS.COM (Oct. 29, 2012), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/10/29/future-law-students-should-avoid-prelaw-majors-some-say> (noting that ABA discourages any one undergraduate major as a run-up to law school).

<sup>6</sup> It is also too late to reconsider the expense of law school tuition. See Sara Randazzo, *New Lawyers Are Swimming in Debt*, WSJ.COM (Nov. 27, 2019), <https://www.wsj.com/articles/new-lawYERS-are-swimming-in-debt-11574890294>. Colleges are also facing intense pressure to justify their high tuitions on the basis of likely student outcomes. See Charlie McGee, *Is Your College Worth the Cost? Here's What Students Say About Their Colleges*, WSJ.COM (Sept. 4, 2019), <https://www.wsj.com/articles/is-your-college-worth-the-cost-heres-what-students-say-about-their-colleges-11567640341>; Jeffrey J. Selingo, *Business is the most popular college major, but that doesn't mean it's a good thing*, WASHINGTONPOST.COM (Jan. 30, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/01/28/business-is-the-most-popular-college-major-but-that-doesnt-mean-its-a-good-choice/>.

<sup>7</sup> The popular NBC television serial trades in "classic ripped-from-the-headlines storytelling." LAW & ORDER: LA: ABOUT THE SHOW, <https://www.nbc.com/law-and-order-los-angeles> (last visited April 18, 2020).

actions and civil liabilities in mass shootings to Hollywood sexual harassment and opioid abuse:

- Year 1 9/11 victims v. Airlines, Aircraft maker<sup>8</sup>
- Year 2 United States v. Philip Morris<sup>9</sup>
- Year 3 Woods v. Southwest Airlines, Boeing, City of Chicago<sup>10</sup>
- Year 4 Ordidge v. Comcast<sup>11</sup>
- Year 5 Doe v. Penn State, Second Mile<sup>12</sup>
- Year 6 Axelrod v. Cinemark, Smith & Wesson, Warner Bros.<sup>13</sup>
- Year 7 Flight 214 Passengers v. Asiana Airlines, Boeing<sup>14</sup>
- Year 8 Lewis v. Sandy Hook Elementary, Town of Newtown<sup>15</sup>
- Year 9 Crosby, Ruiz & Reyes v. Pulse Nightclub & Social Media<sup>16</sup>
- Year 10 Anthony v. The Weinstein Co., Miramax, Disney<sup>17</sup>
- Year 11 Nez Perce Tribe v. Purdue Pharma (Opioids)<sup>18</sup>
- Year 12 Foss v. JUUL, Altria, Philip Morris<sup>19</sup>

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<sup>8</sup> See *In re September 11 Litig.*, 280 F. Supp. 2d 279 (S.D.N.Y. Sept. 9, 2003).

<sup>9</sup> See *United States v. Philip Morris USA Inc.*, 449 F. Supp. 1 (D.D.C 2006), *aff'd in part and vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009) (per curiam).

<sup>10</sup> See *Woods v. Southwest Airlines Co., Inc., et al.*, 523 F. Supp. 2d 812 (N.D. Ill. Oct. 18, 2007).

<sup>11</sup> See *People v. Triplett*, 2019 IL App (1st) 161686.

<sup>12</sup> See *Doe v. The Second Mile, et al.*, Case No. 111102968 (Penn. Ct. Com. Pl. Nov. 30, 2011).

<sup>13</sup> See *Axelrod v. Cinemark et al.*, 65 F. Supp. 3d 1092 (D. Colo. 2014).

<sup>14</sup> See *In re Air Crash at San Francisco, Ca*, on July 6, 2013, 2017 WL 3484643 (N.D. Cal. Aug. 14, 2017).

<sup>15</sup> See *Lewis v. Town of Newtown*, 191 Conn. App. 213 (Conn. App. Ct. 2019).

<sup>16</sup> See *Complaint, Crosby, Ruiz & Reyes v. Twitter, Google & Facebook*, 2016 WL 7383679 (E.D. Mich. Dec. 19, 2016).

<sup>17</sup> See *Complaint, Geiss et al. v. The Weinstein Co., Miramax Film Corp.*, Case No. 1:17-cv-09554 (S.D.N.Y. Dec. 6, 2017).

<sup>18</sup> See *Complaint, Nez Perce Tribe v. Purdue Pharma et al.*, Case No. 3:18-cv-00222-REB (D. Idaho May 18, 2018).

<sup>19</sup> See *Complaint, Foss v. JUUL Labs Inc., Altria Group, Philip Morris USA*, Case No. 1:19-cv-05557 (N.D. Ill. Aug. 19, 2019).

While the underlying case is always real, the pace of the classroom litigation is accelerated, as it must be in a one-semester course.<sup>20</sup>

## II. WHAT MOCK TRIAL PROGRAMS OFFER STUDENTS

Mock trial “is a competitive experiential learning activity in which participants plan and execute a simulated civil or criminal court case.”<sup>21</sup> There are multiple variations of mock trial at the collegiate level;<sup>22</sup> though whatever the form, the consensus appears to be that mock trial is particularly useful for students who aspire to be litigators.<sup>23</sup> Indeed, there is evidence that mock trials are better at building skills than forecasting actual jury results.<sup>24</sup> When they adhere to realism and avoid what ails grand, public trials such as the trial of Socrates or whether Shakespeare authored his own plays, the trials can be riveting displays of legal talent by students who are learning the ropes of professionalism.<sup>25</sup> Lessons about professionalism may be more lasting and useful than actual trial advocacy skills, as the odds of a lawyer actually trying a case to a civil jury have been shrinking for years.<sup>26</sup>

As there also is a consensus that law school does not prepare a student for “real world” law practice,<sup>27</sup> the issue is whether a mock trial experience does any better. Certainly lawyers need to be critical thinkers, and some scholars have argued that in this category mock trial may stand alone in terms

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<sup>20</sup> There was a break in the course offering from 2008-2011 while the author assumed administrative duties and in 2016 due to a sabbatical.

<sup>21</sup> See Kyle C. Kopko, et al., *Four Variations in Delivery and Design of Mock Trial for the Undergraduate Student*, 2 JOURNAL OF EXPERIENTIAL LEARNING 63, 64 (2017).

<sup>22</sup> *Id.* at 71.

<sup>23</sup> *Id.* at 68 (“The skills and knowledge gained through mock trial participation is especially useful for students who are potentially interested in careers as litigators.”).

<sup>24</sup> See David L. Breau & Brian Brook, *Mock’ Mock Juries: A Field Experiment on the Ecological Validity of Jury Simulations*, 31 LAW & PSYCHOL. REV. 77, 90 (2007) (reporting on the results of a field experiment studying the “ecological validity” of jury simulations, which asks whether an effect is “representative of what happens in everyday life”).

<sup>25</sup> In a thorough examination of these publicized mock trials, including those dedicated to Shakespeare’s authorship, former Circuit Judge Richard Posner concludes that a “lack of realism and cheap humor are the commonest causes of the low quality of so many of the [public] mock trials.” Richard A. Posner, *Mock Trials and Real Justices and Judges*, 34 CARDOZO L. REV. 2111, 2148 (2013) (criticizing the fact that “many, perhaps most, of the judges want to show how sharp and funny they are, and that many, perhaps most, of the members of the audiences for the mock trials are looking for a good time”).

<sup>26</sup> See Rodolfo Rivera & Frank Morreale, *Can We Learn Anything From Mock Trial Exercises If We Rarely Go To Trial?* 35 ACC DOCKET, no. 4, 2017 at 58, 60. (“It is widely accepted that since 2009, almost 99 percent of civil cases are resolved before trial.”). There are many theories about what has caused the decline, ranging from litigation expense to the rise of mediation and early resolution. See *id.* at 59. “But, regardless of the reasons, it is indisputable that there are fewer trials today.” *Id.*

<sup>27</sup> “It is a universally acknowledged truth that law school does little to prepare one for the trials and tribulations of ‘real world’ law practice.” Todd Bruno & Kathryn Sheely, *Avoiding Mock Trial by Ambush: A Trial Advocacy Competition Primer*, 14 APPALACHIAN J.L. 21 (2014).

of skill development.<sup>28</sup> Experiential learning<sup>29</sup> lies at the heart of mock trial and is generally accepted as “a critical component of a core education.”<sup>30</sup> When care is taken to truly simulate a lawyer’s experience, a “mock experience closely mirrors the real practice of law”<sup>31</sup> and provides students with the type of “authentic activity”<sup>32</sup> that makes them more engaged and enthused by giving them ownership. Still, there is less evidence that mock trial at the undergraduate level gives students an academic advantage in law school.<sup>33</sup>

All mock trials appear to share one important dimension: competition. Students who self-select by taking the course and perhaps aspire to a lawyer’s life may be more competitive in the first place, or it may well be that the nature of litigation and opposition focuses a student on winning. In all events, the desire to win can be a powerful motivator, so long as the fun of the experience is not lost.<sup>34</sup> Yes, “trial advocacy is supposed to be fun,”<sup>35</sup> too, and in successful mock trial programs instructors ensure that “the spirit and joy in performance is not sucked out in the process”<sup>36</sup> of competing.

### III. COLLEGE STUDENTS LEARN TO BE LAWYERS: THE LAYOUT

In the unscripted mock trial experience practiced in the author’s university, the format of the experience and workload of the students is as follows:

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<sup>28</sup> See Daniel J. Herron, et al., *Enhancing Critical Thinking Skills Through Mock Trial*, 14 ATLANTIC L.J. 147, 148 (2012) (“In our combined teaching experience of more than 60 years, we have found mock trial to be the single most effective vehicle for teaching critical thinking skills.”).

<sup>29</sup> Teresa Nesbitt Cosby, *To the Head of the Class? Quantifying the Relationship Between Participation in Undergraduate Mock Trial Programs and Student Performance in Law School*, 92 ST. JOHN’S L. REV. 797, 806 (2018) (“Experiential learning involves active interaction by the student with the concepts or theories being studied.”).

<sup>30</sup> *Id.* at 806-07.

<sup>31</sup> *Id.* at 809.

<sup>32</sup> *Id.*; Cosby draws on the work of Susan Williams and other researchers. See Susan M. Williams, *Putting Case-Based Instruction Into Context: Examples from Legal and Medical Education*, 3 THE J. OF LEARNING SCI. 367, 372 (1992); see also Molly Nicaise et al., *Toward an Understanding of Authentic Learning: Student Perceptions of an Authentic Classroom*, 9 J. OF SCI. EDUC. AND TECH. 79, 81 (2000); Meg Wilkes Karraker, *Mock Trials and Critical Thinking*, 41 COLL. TEACHING 134, 134 (1993).

<sup>33</sup> See Cosby, *supra* note 29, at 829 (“Rather, the data show that there is no significant academic advantage for mock trial participants over their non-mock trial colleagues.”).

<sup>34</sup> See Bruno & Sheely, *supra* note 27, at 23.

<sup>35</sup> *Id.* at 72.

<sup>36</sup> *Id.* at 73.

### A. Real Judge

The importance of partnering with an actual judge cannot be underestimated. In our case, we have had the opportunity to partner with a sitting circuit court judge who is distinct in many respects: the first female associate judge in the county, the first female chief judge, and an alumna of our school.<sup>37</sup> All of those attributes turned out to be important for different reasons. The fact that the judge was a sitting jurist underscored the real-life nature of the course and the level of seriousness the students were expected to embrace. In the early years, the gender imbalance in the course was noticeable; over time, having a female judge in the course has given women thinking about taking the course a direct role model and caused them to think about pursuing their own career as a judge. The alumni connection is even more powerful as the judge is part of our school family and can set out norms and expectations not just for a practicing lawyer, but a lawyer from this school.

Of all the roles occupied by the judge, the most important for the course is just that: jurist. The judge never diminishes or confuses her role, does not provide lectures in the course, and does not break from her role whenever she is wearing her judicial robe, which is whenever the student-lawyers are present. Of course, this is not to say that the judge does not provide important mentorship and teaching when it comes to what it means to meet deadlines, respond to emails professionally, and act as an officer of the court. But she also would do these things in court for young lawyers, and her facility for doing it well has been important. In terms of contact with the judge, the pattern of the course is that the students have two to three court hearings prior to the jury trial. The hearings are standard and expected: an initial case management conference in weeks three or four; a major motion hearing that includes dispositive motions and motions in limine about two weeks prior to trial; and a pre-trial conference.

While there is work to do in these hearings, the students also benefit from the courtroom practice prior to the jury trial. They are encouraged to arrive early, with plenty of time to go through security, and even early enough to watch other hearings. Perhaps the most special part of the class is that the courtroom work and jury trial are not relegated to Saturdays or evening hours when the courthouse is unoccupied. Rather, the students litigate their case in a courtroom next to other cases, whether child custody or criminal matters.

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<sup>37</sup> The Honorable Elizabeth Robb (retired) has served as our judge since the course's inception. Robb was the "first woman to serve as associate judge, circuit judge and chief judge of the circuit that serves McLean, Logan, Woodford, Livingston, and Ford counties." Edith Brady-Lunny, *Chief Judge Robb Announces Retirement*, THE PANTAGRAPH (Sept. 4, 2014), [https://www.pantagraph.com/news/local/chief-judge-robb-announces-retirement/article\\_2123c3e8-0c0b-50b3-81b9-9475977d7a6a.html](https://www.pantagraph.com/news/local/chief-judge-robb-announces-retirement/article_2123c3e8-0c0b-50b3-81b9-9475977d7a6a.html).

Early in the semester, it is communicated to students that their level of access to the courthouse is unusual; they are expected to act with appropriate decorum at all times. The “all times” can be a challenge during a jury trial, with witnesses lining the hall ready to participate in this complex civil case, and some students continuing their preparation in the hallway while other hearings are in session. Given the side-by-side nature of our case with actual cases, it is not surprising that the students finish the semester on a “high,” brimming with self-confidence and self-direction.

Of course, a real judge can mean real consequences, too. Students quickly learn that being an officer of the court means candor as well as zealotry. They are taught that the legal world is a small and largely self-regulated one where reputations matter.<sup>38</sup> For some students, this is a shift from the everyday world we live in: often a world of rumor and exclamations. In that world, to be wrong carries little consequence,<sup>39</sup> especially within a friend group or a forgiving social media audience. It is different when rules of professionalism and ethics rule out what they can get away with in a non-legal environment.<sup>40</sup>

In one iteration of the course, a trial team was sanctioned by our judge after misstating the record during a pretrial hearing. The misstatement was not outcome-determinative, but it was material, and it was not immediately corrected on the record though the team had the chance to do so. The team later corrected the record and the Judge issued a rule to show cause. Ultimately, the judge issued sanctions by assigning ethics readings and extending discovery. As it always is in professional practice classrooms, the purpose was to learn the hard lesson now, in a laboratory environment, and not when an actual client and case (let alone the lawyer’s reputation) is on the line.<sup>41</sup>

It is not surprising that the Judge’s credibility in a course like this is essential. A sanction from an actual judge, even in a classroom environment,

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<sup>38</sup> See Camille Chaserant & Sophie Harnay, *Self-regulation of the Legal Profession and Quality in the Market for Legal Services: An Economic Analysis of Lawyers’ Reputation*, 39 EUR. J. LAW. ECON. 431, 435 (“In the market for legal services, a lawyer is interested in having a good individual reputation as it attracts clients and increases future income.”).

<sup>39</sup> Neville L. Johnson et al., *Defamation and Invasion of Privacy in the Internet Age*, 25 SW. J. INT’L L. 9 (2019) (“Given a largely unregulated Internet landscape and boundless international access to information online, it is no surprise that the Internet has become a minefield of defamation and invasion of privacy violations.”).

<sup>40</sup> See, e.g., MODEL RULES OF PROF’L CONDUCT Art. VIII (2010) (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”).

<sup>41</sup> Sanctions against attorneys in the real world often appear in published opinions and send a message to the bar. See, e.g., *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 585 (7th Cir. 2000) (issuing rule to show cause and noting that lawyer said “nothing about the judge’s accusing him of submitting what amounts to a fraudulent claim of attorneys’ fees and of doing this, moreover, in case after case”).

carries a punch and a message that eludes a professor. In our world, a syllabus would likely tell both the professor and student what consequences there may be for misbehavior, running from non-attendance on one extreme to plagiarism on the other. Syllabi are useful, but they contribute to an overly formalized and, indeed, legalistic professor-student relationship. In our Trial Class, there is something refreshing about having a judge (and other counsel) call out a bad act simply for what it is: wrong, and consequential. The right-and-wrong dichotomy brings everyone back to their childhood, their beginnings, and their first principles. It is really little different from the Golden Rule.<sup>42</sup>

The Golden Rule approach to lawyering sounds revolutionary at the same time it reflects common sense. In some years, we have found students attracted to gamesmanship and it shows in discovery requests and, indeed, in their answers. It is easily spotted in answers that are too clever, or questions that are too numerous.<sup>43</sup> Outside of exemplary pleadings, the pace and tight schedule of the semester do not allow for more than a few hours of instruction on appropriateness on this score. Students are instructed that discovery is a funnel and that most questions and requests should come early, not only so that the answers are useful during depositions, but also out of decency. Students are told not to expect quick turnarounds on discovery requests when we are in our deposition week.

## B. Case Selection

In the early years of the course, students did not participate in selecting the class case, which was instead chosen by the professor. The upside of that approach was that the students could hit the ground running on Day One, and the sense was that because the course was novel, involving students in selecting an appropriate case would be inefficient, unhelpful, and perhaps even counterproductive. Announcing the case on the first day of the semester created a theatrical moment, like a drama teacher unveiling this year's musical, and firmly put the professor in the traditional role of content-creator and ultimate authority. The downside is that there have been years when the case spoke more to the professor's interests, or, in the case of airline disasters, the teacher's fears, and the lack of startup ownership may have robbed students of full participation in an early aspect of the course. After all, if the

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<sup>42</sup> The Golden Rule, or a version of it, connects people of faith or of none. See, e.g., *Address of the Holy Father to a Joint Session of the United States Congress* (Sept. 24, 2015), [http://www.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco\\_20150924\\_usa-us-congress.html](http://www.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150924_usa-us-congress.html).

<sup>43</sup> Practicing lawyers make the same serious mistakes. See *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 635 (7th Cir. 1996) (pointing out a party's answer to an interrogatory and stating, "[a]lthough this response may have seemed clever at the time, a jury could see it as an attempt to stonewall").

fundamental prime directive of the course is to exactly mirror the work of lawyers, who pick their own cases and clients, then not letting the students have an early say violated that directive.

### *1. Growing Student Role.*

In recent years, the students have been directly involved in proposing and picking the class case and, in some years, there is even a class vote. Devoting a class, or even two, to discuss the pros and cons of a water contamination case versus opioid litigation is an indulgence but also a teaching opportunity. Even at that early stage of the semester, students are encouraged to visualize how the case will unfold and what testimony will be needed, especially fact witnesses. The professor is in a good spot to talk about the drudgery of discovery and the need to choose a case that will keep student interest in the weeks where they will be staring at screens more than preparing witnesses. Given the benefits of student ownership in the course, it is unlikely that the class will return to the professor-heavy model of deciding the semester's case from on high. Indeed, in the most recent two iterations of the class, the professor has not even been a voter when it came time to conduct a secret ballot election to choose between two case alternatives. This year, the selection of the case was decided by one vote.

### *2. Facts and Law.*

The list of cases over the years demonstrates the preference for those with complex facts and simple law. Often, the law is negligence, as the elements of the tort are easily explained to students and the concept of reasonable care in the context of personal injury falls into the category of common sense for most students. The complexity of the facts is important as the students are expected to do several weeks of discovery, and if those facts require learning chemical reactions or plane engineering, then even better. As the course is open and often taken by non-business students, including biology, environmental studies, and political science students, they are well-positioned to get up to speed quickly on what they need to know. As explained below, they are helped by the witnesses, often professors, that they choose to use in their case. Because the course is housed in the business program, it has encouraged cases with deep civil pockets on the defendant side so that issues of bankruptcy and immunity are minimized.

### *C. Trial Teams: Game On.*

Once the case is selected, students are asked to identify their trial teams. Some enter the class with teams in mind, while others are free agents. During

course registration, students are told that neither is preferred. Indeed, some trial teams that have come into the semester pre-made have ended the semester wishing they had been free agents from the start. The point is that everyone is welcome. A class of sixteen to twenty students is optimal, and even that is a challenge to fit into a county courtroom; the goal is four trial teams of four to five members each. The numbers allow for a division of labor but not dissolution of responsibility. In most years, there is one plaintiff team and three defendant teams, though a two and two divide also works.

Students are allowed to self-select into teams. Some students welcome the challenge of taking on big business, while other students seek the role of defendant's counsel even if it is against their personal or steady-state ethic. Before they self-identify, students are told that there is no advantage to being on either one or the other side of the "v," that all parties in the case are entitled and worthy of zealous advocacy, and that they should even consider a role that may be against their personal position on the matter. The actual machinery of forming the trial teams is simple: students are asked to stand in one of the four corners of the classroom that was assigned to a particular team. Whether because of good fortune, gentle coercion, or genuine and generous disinterest by the students, the professor has never confronted the problem of having to re-balance teams by reassigning members of the class.

Once the trial teams are formed, experience has proven that it is critical to immediately ask each team to designate a lead counsel for the case. That can be jolting, and requires explanation, as the designation is only for communication and service purposes. Every lawyer in the class is an equal, is expected to do an equal share of work, and can bind a client, but 16 lawyers cries out for streamlined communication. The students are told to pick someone who will immediately forward important emails, will respond promptly to opposing counsel, and, if necessary, will answer to the court if the team drops the ball and misses deadlines. The role is important and there have been one or two occasions when the ball has indeed been dropped and the result is reassignment of the lead counsel role.

#### D. Complaint and Answer.

The advantage of shadowing an actual case that has already been filed is the availability of quality source material. In a complex civil tort case, such as opioids or e-cigarette litigation, the underlying complaint can exceed 100 pages and is densely populated with facts. Students are expected to read the complaint, which is provided by the professor and shared on the course web page, and then synthesize it into a five to ten page complaint. For the most part, the course follows the fact-pleading requirements of an Illinois state court, so the abridgement can be a challenge. But the effort to synthesize is an important one, as students often find it harder to write less

as opposed to more, and writing less requires more mastery of subject material.

To assist the students, exemplary versions of previous Trial Class complaints, along with other pleadings, are posted on the course webpage. Students are expected to review the prior student work and are free to model their complaints accordingly, especially if the cases are similar.

While complaints and, indeed, the notion of a lawsuit are fairly easily explained, the concept of a formal answer is more elusive. Again, with the assistance of exemplary answers, students are expected to respond to each allegation in the complaint, typically by either admitting, denying, or stating they have insufficient information to respond (which is treated as a denial).<sup>44</sup> Often, the hard part is responding to a complex statement that elicits both an admission and a denial; that work is difficult for lawyers, too. It has helped to have English majors in the course who have been writing for years.

Still more difficult is for students to understand the nature and importance of affirmative defenses, which must be pleaded in the answer or risk waiver. About an hour of class time is spent listing and explaining typical defenses in tort cases, especially comparative negligence and assumption of risk, and it helps if some of the students have been exposed to these concepts in previous pre-law courses. But no affirmative defense is left unpleaded if it would find its way into the actual case litigation, including preemption, which fits in tort cases that involved drugs or other highly regulated industries where the government has a large footprint.<sup>45</sup>

The accelerated timeline of the course does not allow much downtime, even in the early phases. Once the initiating complaint is filed by the students by serving lead counsel and the judge, defendants have no more than seven days to file their answer.

#### E. Discovery.

Discovery is a challenge for the students, just as it is for lawyers.<sup>46</sup> Students engage in both written and oral discovery. If there are four civil trial teams, as there usually are, the interrogatories and document requests fly in multiple directions. If it is needed, and sometimes it is, students are given hard caps in terms of the number of requests they may propound. Certainly, they are instructed to get their work done early and they are encouraged to cast their net wide given liberal discovery rules. The message is scary and

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<sup>44</sup> See FED. R. CIV. P. 8(b)(5).

<sup>45</sup> See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>46</sup> Partly in response to complaints about runaway discovery demands, Federal Rule 26 now includes a proportionality requirement. See FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”).

simple: do not risk a surprise at trial by not seeking appropriate discovery in advance. The clock is short for the students: responses are due within seven days and no discovery can be served within a week of the cut-off date, which is the students' spring break.

The sometimes joyless nature of civil litigation is laid bare for the students – and experienced first-hand – during these days of discovery. At the start of the semester, students are told they will earn their spring break, but it is not clear why until the trial team meetings and deposition prep sessions crowd their calendars, and sometimes crowd out other pursuits. The depositions themselves are intense and carefully managed. In a typical year, fourteen witnesses are deposed for one-hour each, with the parties sharing the time in fifteen to twenty-minute increments. All the deposition lessons learned by lawyers over years of experience appear in a week: witnesses who over- or under-perform, those who make surprise and damaging concessions, and even those who appear to enjoy their role too much. As all students in the class are lawyers, the witnesses are students, faculty from across the university, staff, and even actual firefighters, engineers, and chemists. Roommates often make poor witnesses as they take their relationship with the lawyers for granted; professors work well if they accept their non-professorial role; actual experts in a particular field can transform a case and push it even further into the “this is real” realm.

In the early years, the instructor attended some depositions but not all of them. Over the years, the instructor's role changed from coach to magistrate (with full attendance) at the depositions. In the most recent iteration, technology has allowed the instructor to wear two hats during the fourteen hours: coach, by “live-blogging” the depositions with written annotations and notes in a Google document and chat room; and deputized magistrate, by ruling on objections coming from the deposition table. The objections are infrequent and typically target argumentative or compound questions, or concerns about a question's form.

The depositions are recorded. In the early years, that was a challenge, but no longer. Though phones can record hours of testimony, there remains no easy way to transcribe and we do not retain court reporters. The students are encouraged to take notes during the depositions so they can later find the parts that need to be memorialized verbatim for either motion practice or trial.

#### F. Motion Practice and the Trial.

Coming off the highs of the depositions can be difficult, especially when it leads to the more sedentary, research-heavy work of motion practice. But at this point in the semester, around week ten, the end is in sight and the stakes seem high. The writing intensive nature of the course kicks in: students are expected to file pretrial motions, both dispositive and non-

dispositive, ranging from summary judgment to motions to strike testimony, exhibits, and even witnesses. Nearly every year a team will seek to strike an expert on the grounds that the expert's deposition revealed them to be unhelpful or unnecessary.<sup>47</sup> The students are encouraged to lean on their strongest writers and at this point the liberal arts footprint of the course takes hold. A business student's writing is different from an English major, and they benefit from taking the course together. The English major often learns to write more directly, while the business student learns that good phrasing is always more persuasive and effective.

By the time of the major motion hearing, which is scheduled about two weeks before trial, the students have appeared in court, litigated nearly an entire case, and grown into their roles. When they stand before our judge to argue their motions and support their filings, they are less nervous and self-aware; they are "feeling it" now. The purpose of multiple court hearings and communications with our judge is, in fact, so they have their sea legs by this point of the case. The hearing itself is scheduled on an actual court day, put on the docket sheet outside the doors to the courtroom, and lasts about an hour. It is the only time the instructor purposely does not attend; the students are ready to be on their own now.

Finally, on the last day of the semester ("Reading Day"), they go to court for real. With the rare privilege of litigating a "mock trial" during a regular workday, a class full of lawyers arrives at the courthouse with witnesses, friends, family, and sometimes even press (as the trials have appeared in the local media on several occasions). They have waited and prepared for months for this day and their excitement is palpable. During the first year of the course, they got off elevators on the fifth floor of the courthouse and immediately faced a line of television cameras. The press was there for the 9/11 litigation against the airlines and the government, and the press would be there several years later for the Penn State litigation involving Sandusky, and then again when it was a mass shooting case (we have since put a moratorium on the shooter cases as they are both draining and dispiriting).

After a five-hour trial, and one hour of jury deliberations, they are done. Pictures are taken, a class dinner takes place, and the prevailing party is given the original jury form. The jurors, some of whom are students, cannot leave fast enough, while the students linger. If any are upset about the verdict, it does not last long and is washed away with the accolades readily provided by their families, court watchers, and, especially, practicing lawyers who

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<sup>47</sup> See *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 580 (1993). See also *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989) ("Professor Bryan would not accept from his students or those who submit papers to his journal an essay containing neither facts nor reasons; why should a court rely on the sort of exposition the scholar would not tolerate in his professional life?").

often attend. The judge usually adds her own assessment of their work, and it is often at this point that we forget they are “just” in college: not lawyers, not law students, and not necessarily even pre-law majors. They came together to do something that would test them, and they passed.

#### IV. LESSONS LEARNED

There are a few specific curricular ingredients to the class to recommend to other colleges interested in a similar experience for their students. First, the open enrollment nature of the course is important and is consistent with the ethic of the course: all majors are welcome, just as they are in law school. Second, the course is largely, and surprisingly to the students, unstructured, aside from the march to trial, of course. Students are not told how to divide their work, which witnesses to choose, or even what initial claims to bring. They take inspiration from the exemplary pleadings and discovery, and they are frequent visitors to office hours. Class time is always instructional with in-class practice (such as modeling depositions for them) and high-energy. Over the years, we have learned that students are surprised by the lack of structure and then attracted to it: they yearn for experiences of great consequence without a heavy hand. Third, grades are largely a product of self-determination and peer review. Though the instructor has the final say, by the end of the course it is fairly clear who did the heavy lifting and who did not. While the students may have started the course with friends, they finish it with co-counsel, and their peer reviews are honest and reflective. It may also be a credit to their generation that they have facility being brutally honest with one another. Still, it is the unusual year where the peer reviews are not positive, as there are multiple opportunities to raise concerns about each other during the course, and students take advantage of them.

Still, the course could be improved in a few ways. The use of practicing lawyers as designated mentors or sources would give the students more channels of support. This past year the students benefitted from the expertise of a highly skilled litigator and alumna who visited the class and attended the entire trial. A defined role that comes with a direct channel to the students should be explored. The students might benefit from better expectations at the start, and perhaps even a learning contract, so they understand what they are taking on. Sometimes there is too little consequence for a student who does too little, leaving the trial team frustrated and overworked. It is even possible that the accelerated nature of the course would benefit from a two-semester sequence, though that is difficult in a liberal arts school with four-credit hour courses and students who carry multiple majors and programs of study.

Ultimately, the success of the course lies not just in the students' evaluations but its annual popularity. The Trial Class is known as a curious and challenging course, one not easily described as litigation practice or mock trial, and one that assumes college students are capable of lawyer-like litigation. It is not staged, scripted, or structured.<sup>48</sup> It is true to its initial purpose, now sixteen years old: to give college students a true sense of a civil litigator's life, with barely an inch of departure. On that measure, it has worked, as every year the students are asked whether they find themselves thinking about the case on their own, during school breaks, while exercising, and even in their sleep. For better or for worse, they answer like a lawyer: yes.

## V. EPILOGUE: COVID-19

In early March 2020, the Covid-19 pandemic carved a devastating and ruinous path across the United States and throughout the world. Universities were also affected, as they ordered students to clear out of their dorms and return to their principal places of residence. Like classes everywhere, the Trial Class had to adjust to a new reality of virtual meetings by Zoom instead of face-to-face learning, which liberal arts schools usually take pride in. At first the hill appeared too high to climb. Indeed, even the professor strongly considered asking the Judge to decide the case on the basis of the briefs at the summary judgment phase, which also loomed.<sup>49</sup> But within days, courts around the country facing the same dilemma announced that they would move hearings online and have parties appear in a virtual space.<sup>50</sup> After one or two online classes of their own, the students' confidence grew that the trial was more easily transferred to a screen environment than first assumed: all testimony and argument could be live, physicality – especially demeanor – could still be measured with the right camera angles and lighting, the virtual courtroom could place witnesses in a waiting room before being allowed to

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<sup>48</sup> To be sure, there are advantages of the prepared case approach offered by the American Mock Trial Association (AMTA) and other organizations, as students typically are given materials that include exhibits, witness statements, and even case law. See *Cosby*, *supra* note 29, at 801-02; see also *Herron et al.*, *supra* note 28, at 155 (describing AMTA materials). In an unscripted environment as outlined here, students must prepare their own exhibits based on public information and witnesses are free to testify both during depositions and at trial in any way that is consistent with the public record. As for case law, the student-attorneys are expected to learn the fundamentals of legal research, though the instructor assists.

<sup>49</sup> Summary judgment is hardly unusual in federal court, and, in all events, the summary judgment standard is no different than the trial standard or even post-trial standard. See *Mayer v. Gary Partners & Co., Ltd.*, 29 F.3d 330, 335 (7th Cir. 1994) (“We now adopt the federal reasonable-person standard across the board: pre-trial, mid-trial, post-trial, and on appeal, for evaluating both the merits and quantum of relief.”).

<sup>50</sup> See Laura Kusisto, *Coronavirus Forces Courts to Experiment*, WALL STREET JOURNAL (March 28, 2020), <https://www.wsj.com/articles/coronavirus-forces-courts-to-experiment-11585387800>.

enter the room, and the jury could still sit and observe prior to rendering judgment, just as they normally would do. The technology even allowed us to place the jury in a virtual “breakout” room so that the twelve jurors could deliberate in private.

But it was not quite the same. Even good lighting and cooperative microphones and computers, to say nothing of cameras, cannot replace the energy and importance of in-person contact. Witnesses and lawyers belong in courtrooms; there, their physical placement – one sitting in a chair, the other standing several feet away – connects them in a personal way at the same time the distance and boundary between them signals an important distinction and divide.<sup>51</sup> On a screen, everyone, even the Judge, is treated as having an equal role, and there is nothing to stop a witness from kicking off their shoes and getting comfortable while testifying. It is possible that telemedicine can perform well in this environment,<sup>52</sup> but if the virtual world supplants what happens in a courtroom, where healthy confrontation is important and ease and comfort are not the goal, then much will be lost and bargained away. Of course, the best is the enemy of the good,<sup>53</sup> and in this case the students proved that much could be achieved if they compromised while refusing to give up on their cases and on the dramatic ending to the course they were promised. In the end, they wanted a summation to the course that honored their work and they refused to be short-changed. They were lawyers.

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<sup>51</sup> See Bodo Winter et al., *Metaphor-enriched Social Cognition and Spatial Bias in the Courtroom*, 8 METAPHOR & THE SOCIAL WORLD 8:1 (2018).

<sup>52</sup> See Andrea L. Cheville, et al., *Effect of Collaborative Telerehabilitation on Functional Impairment and Pain Among Patients With Advanced-Stage Cancer: A Randomized Clinical Trial*, 5 JAMA ONCOL., at 644 (2019).

<sup>53</sup> The aphorism is usually attributed to French writer and philosopher Voltaire: “Le mieux est l’ennemi du bien.” See Susan Ratcliffe, OXFORD ESSENTIAL QUOTATIONS (2017), <https://www.oxfordreference.com/view/10.1093/acref/9780191843730.001.0001/q-oro-ed5-00011218>.