A JUDGE'S PERSPECTIVE

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Trial advocacy is a broad, and at times, irrationally complex field. Rules of evidence and procedure, with origins that are centuries old, are used to address principles of substantive law that sometimes involve a limitless array of facts. This is done in an adversarial contest that is simultaneously presented to three different audiences: the jury as the judges of the facts; the trial judge as the legal gatekeeper and instructor; and the reviewing court. This juggling act is first experienced in trial advocacy class. The class brings together students who already know the evidentiary and procedural rules with students that are familiar with the substantive legal rules that apply to specific cases. But the students have not been challenged to apply that knowledge in a multidimensional forum, with an opponent testing and a critical judge overseeing, each move that the student makes. It can be a maddening experience, for the students, and the instructor. At times, the exercises must seem like a group of children pounding square pegs into round holes. However, there is also an occasion for laughter, as instructors and students inevitably find themselves in impossible predicaments that even Rumpole of The Bailey would enjoy. Additionally, trial advocacy class presents, sometimes, real artistry.

A trial court judge might welcome the opportunity to instruct a trial practice course to law students for the same reasons that a law student might wish to enroll in such a class. The trial practice class offers (at least it did for this beginning judge) a chance to hone one's knowledge of evidence, the time with which to develop a clearer understanding of the trial process, and a chance to live through the gut-wrenching difficulties of trying a case for the first time. The trial practice class gives each of its participants a forum within which to integrate the abstract knowledge of the law with the practical skills that are necessary to try a case competently. Just as every surgeon must one day operate on his or her first patient, a judge and a lawyer must eventually step into the courtroom to try his or her first case. The prospect is a daunting one.

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In addition to the fear of personal embarrassment and public humiliation, is the appreciation that real lives and important issues depend upon the fulfillment of one's responsibilities as a lawyer or a judge. The beginner is like a skier, poised at the top of a steep run, peering into a narrow snow field lined with trees below. If that skier thinks—even for a moment—that he or she might not be good enough to get through the run without falling, then what follows usually involves a tentative start, and a nasty spill. So for both the judge/instructor and student, the trial practice class ought to provide a dose of self-confidence. The class should to some extent still, or at least muffle, the nagging voice in each of us, warning that what lies ahead is just too much. All of the participants should acquire the confidence to begin a trial that only experience can provide.

The trial court judge may find that the classroom provides an ideal laboratory within which to work on and possibly to resolve evidentiary and procedural issues. In actual trials, skilled and experienced lawyers prepare cases with a thorough understanding of the legal hurdles and practical problems that lie ahead. Stipulations are reached, foundational problems are obviated, and the resulting trial can become almost a shorthand exercise through a maze of legal problems, with little, if any, effort expended in the resolution of those tough issues. Evidence is adduced without resort to "the books," because a particular unsettling problem has, quite often, been addressed before the trial starts.

The classroom thus becomes the place where students can gain, and judges can regain, a working understanding of interrelated issues like: Rule 612 refreshed recollections; how Rule 612 might differ from the Rule 803 past recollections recorded; and the procedural differences between these two rules and the Rule 803 records of a regularly conducted activity. These three examples deal with a very common evidentiary problem that is encountered in nearly every administrative proceeding. The question becomes: where is the evidence? In the witness' memory, or in a document? Do not try to engage a trial lawyer with twenty or thirty years of experience in a discussion on the niceties of these very ordinary issues. He or she may be so habituated to their use and avoidance, that they may be unable to discuss them at all. In fact, the issues are rarely presented in trials because counsel have worked them out in advance. Trial practice class is the forum where these nuances are explored.

The trial practice class is also an opportunity for the judge/instructor and the students to engage in an exchange of perspectives: one's experience for the other's enthusiasm and fresh insights. The trial judge's trial experience as a lawyer and a judge can provide the
students with a good deal of useful courtroom insights. This experience puts the trial court judge in a position to facilitate the development of competent and effective advocacy skills. In the current semester for example, the writer has observed opening statements and cross examinations that were every bit as proficient as those of trial advocates with many years of experience. In return, the students bring to the course their (perhaps more) contemporary legal knowledge, and a beginner's enthusiasm, which always more than balances out this instructor's contribution. Trial advocacy classes are, from this judge/instructor's vantage, a worthwhile experience, and they are often a lot of fun.