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1987

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Stephen Simon
University of Minnesota Law School, simon001@umn.edu

Bertrand Poritsky

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Recommended Citation

Stephen Simon and Bertrand Poritsky, *Judicial Trial Skills Training*, 37 J. Legal Educ. 428 (1987), *available at* http://scholarship.law.umn.edu/faculty_articles/473.

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Judicial Trial Skills Training

Stephen M. Simon and Bertrand Poritsky

The University of Minnesota Law School and the Minnesota Supreme Court Office of Continuing Education for State Court Personnel have initiated a unique and dynamic Judicial Trial Skills Training Program. Newly appointed judges participate in videotaped simulated trials designed to present the participating judges with numerous evidentiary and trial relationship issues. The videotapes of these trials are reviewed and critiqued by the participating judge and a senior judge to give the participating judges immediate feedback on their performance. The review session is used to discuss the various skills that judges must develop in order to conduct fair and efficient trials.

This program was developed because judges use unique and complex skills that they did not need as attorneys. Foremost among these unique skills is the ability to supervise the conduct of trials. Trial supervision skills are complex. They involve regulating in a fair and efficient manner the conduct of parties in a dynamic adversarial process. They also include the judge's ability to apply his or her knowledge of the law to procedural and other issues.

Because of the intensity of the trial setting and its adversarial nature, attorneys and witnesses often become emotionally involved in the proceedings. Attorneys often become involved in their clients' cases because they are their advocates. Witnesses are often parties to a dispute that typically involves significant injuries or an alleged criminal act. In this intense setting created by heightened emotions and complex legal questions, it is the responsibility of the judge to conduct a trial that is not only fair, orderly, and efficient but a trial that allows all the parties an opportunity to assert fully their positions in a process that they perceive to be fair and just.

In addition to the ability to conduct trials, judges must have a thorough knowledge of evidentiary law. Generally, judges make evidentiary rulings without the luxury of briefs from the parties or time to research and reflect; the ruling must be made quickly, and on the basis of the law as the judge—rightly or wrongly—understands it to be. In general, evidentiary law is the one area of the law of which it might fairly be said that if a judge does not know that a rule of law exists, then it does not in fact exist.

Stephen M. Simon is Director, Judicial Trial Skills Training Program, University of Minnesota.
Bertrand Poritsky is District Court Judge, Second Judicial District, Minnesota.

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How then do new judges acquire or develop these necessary skills? Because of tradition, judges do not observe other judges presiding over trials. While many judges had extensive litigation experience before joining the bench, the focus in those experiences was on adversarial skills. Judges are not adversaries, however, they are conductors, moderators, and decision makers. Their adversarial skills are of little use to them. The nature of judicial trial skills is such that they cannot be adequately developed solely by observation. Until recently, these skills had to be learned and developed on an individual, unstructured basis. No formal training was available. Judges developed their trial supervision skills without any feedback or perspective on the effectiveness of their performance.

In recent years this situation has changed. State courts have developed orientation programs for new judges. These programs typically involve observing experienced judges in actual courtroom proceedings.[1] These observation programs are beneficial in that they introduce new judges to judicial skills, but they do not offer judges an opportunity to implement the skills in a situation in which they can obtain structured feedback on their conduct. Most judges go immediately from this orientation/observation program to their own courtrooms. They begin acting as judges and acquire and develop their skills by reflecting on what is happening or has happened in their courtrooms. As soon as they join the bench they must deal with whatever complex cases or difficult parties are assigned to them. They do not have the luxury of second chairing another judge and handling just the simpler aspects of a trial at first. In this context it is difficult for judges to develop quickly the effective and sophisticated trial supervision skills that would allow them to keep the trial moving, limit the excesses of attorneys, and avoid confrontation between the attorneys or between the attorneys and the judge.

A review of the evolution of the methods of teaching attorneys trial skills indicates how the acquisition of judicial trial skills can be improved. Until the late 1960s, attorneys were given no trial skills training in law schools.[2] Until that time attorneys developed their trial skills either on their own, if they were a sole practitioner, or by second chairing an experienced litigator, if they were in a law firm. In the latter situation they were slowly introduced to trial skills in a supervised environment; they started with simple issues and skills and slowly worked their way to more complex and demanding ones. In either situation attorneys could observe other attorneys in trial. In the late 1960s legal education recognized that this type of "on the job training" was inadequate to prepare lawyers for actual litigation. Too many lawyers were leaving law school and entering the courtroom without

1. Francis C. Cady & Glenn T. Coe, Education of Judicial Personnel: Coals to Newcastle?, 7 Conn. L. Rev. 423, 431-33 (1975).
2. G. Joseph Tauro, Graduate Law School Training in Trial Advocacy: A New Solution to an Old Problem, 56 B.U.L. Rev. 635, 641 (1976).

adequate trial skills. The bench repeatedly commented on the poor quality of the trial skills of lawyers.[3]

In response to these criticisms, law schools initiated trial practice courses. Law schools, recognizing the complexity and integrated nature of the skills involved, taught these courses using simulated trial exercises: students were given repeated opportunities to engage in practice litigation and received immediate feedback on the quality of their performance from experienced litigators.[4] The most recent development in the teaching of trial skills was the creation of sophisticated and intense trial practice training programs for practicing attorneys.[5]

The teaching of judicial trial skills is now evolving in the same way that the teaching of trial advocacy skills evolved. Judicial administration and education organizations that have come into existence in the past twenty years offer a wide variety of introductory and continuing education programs for judges. These programs usually consist of lectures or discussion groups.[6] Only in the past several years, however, have simulation or "hands on" judicial education courses been offered. Judges who have completed simulation courses have recognized how effective such courses can be in teaching complex and sophisticated judicial trial supervision skills. A minor impediment that had to be overcome in initiating these programs was the assumption that judges, because of their authoritarian role, would not be receptive to educational programs that involved direct criticism of their performance as a judge. This assumption has proved to be false.

It is in this context that the University of Minnesota Law School developed its Judicial Trial Skills Training Program. The program began in 1981 with the implementation of a trial advocacy training program not for judges, but for attorneys. The program was given at the University of Minnesota Law School, where sitting judges presided over mock trials in which attorneys participated. The law school has two lifelike courtrooms, each equipped with multiple remote-controlled television cameras. These cameras were used to produce videotapes of the simulated trials. Because of the multiple cameras, split-screen video pictures were produced showing the judge and witness on the top of the screen and the two attorneys on the bottom of the screen. This split-screen picture on the videotape made it possible to observe the judge's performance as well as that of the attorneys. The judges participating in the program were given the opportunity to review the videotapes of the trial with an experienced judge and to discuss their conduct of the trial. The facts and problems involved in these simulated trials had been designed to present issues for the participating

3. Deborah A. Bagg, What the Devitt Committee Recommends to Improve Advocacy in Federal Courts, 63 Judicature 309, 309 (1980).
4. Michael H. Graham, The Trial Advocacy Program Experience at Illinois: Excellence in the Teaching of Many at an Affordable Price, 29 J. Legal. Educ. 584, 585-89 (1978).
5. Skills Training—The NITA Method, ABA Consortium for Professional Education Newsletter 2 (Winter 1982).
6. Cady & Coe, *supra* note 1, at 424-27.

attorneys, and as a result many of the problems that judges are frequently confronted with in trials were not included. Even though the program and fact situations were designed primarily for lawyers, the participating judges responded very positively to the opportunity to review videotapes of their performances. Guided by this response, the law school designed a trial training program that focused on the trial skills of the judge.

The basic theory in judicial trial simulation exercises is that judges can best develop their trial supervision skills by performing them in a controlled situation in which they are presented with lifelike trial problems. Because many evidentiary and supervision issues can be built into a simulated trial, a wide variety of issues, each requiring different problem solving methods, can be raised in a short time. Videotaping these simulated trials allows judges to review immediately the simulated trial and their performance in it. Videotape is a powerful educational tool in this setting because it is an in-depth and accurate record of the exercise. Almost everything going on in the courtroom is picked up by the cameras and microphones. The assistance of an experienced judge in the critiquing process is crucial. The critiquing judge knows what to look for and can help the participating judge focus on the critical issues and aspects of the simulated trial.

The videotaped simulated trial is the core of the educational method used in the law school's Judicial Trial Skills Training Program. Experienced litigators are solicited to act as the attorneys in these simulated trials. They donate their time, although they do receive continuing legal education credits for their participation. The witnesses are law students. One of the program coordinators acts as a clerk so that the exercise can begin and end on time. For these simulated trials, fact situations and trial files that focused on problems and issues specific to the judge's role in the trial were developed. These problems and issues concern evidence and courtroom supervision, they include:

1. Attorneys objecting to their opponent's questions in an improper manner (failure to state grounds, improper grounds stated, extensive argument after objection even though not requested by judge)

2. Aggressive attorneys who constantly interrupt each other or the judge

3. Attorneys who continue to ask questions in areas previously ruled inadmissible by the judge

4. The regulation and control of physical evidence in the courtroom before it is introduced into evidence

5. The handling of dangerous evidence such as firearms, in the courtroom[7]

7. Most judges who went through the program had not given much thought to developing court-room rules concerning firearms. Most of them assumed that the firearms used in the simulated trials were not loaded. None required that the clerk or bailiff examine the guns, even though they were lying on the counsel table in easy reach of the "defendant." None asked the prosecutor, who was offering the firearm into evidence, to state on the record that the firearm was empty.

6. The impeachment of witnesses with prior non-felony convictions
7. The relevance of peripheral biographical testimony elicited from the witness
8. The adequacy of an expert witnesses' qualifications
9. Allowing prejudicial or objectionable questions that are not objected to
10. Emotional outbursts by attorneys, witnesses, or the defendant
11. The attempt to remove the judge for prejudice during the trial

Participating judges receive a copy of the trial file before the day of the simulated trial. This file contains the same kind of information which would be available in a real trial, where a judge generally receives witness statements and a complaint. In the trial skills program, judges also receive general instructions on how the simulated trial is to be conducted. Before the beginning of the trial, they also receive information on various methods they may use to control the parties. These methods include:

1. Setting trial procedure rules before commencement of the trial
2. Referring to attorneys by name when admonishing them
3. Conferences at the bench
4. Admonishing attorneys in front of the jury after warning the attorneys that this admonishment would happen if their improper conduct continued
5. Recess to chambers
6. Excusing jury
7. Imposing court costs
8. Threatening contempt
9. Holding attorney in contempt

The simulated trial lasts approximately one hour. Immediately after the trial, the participating judge meets with the attorneys to receive their comments as to how they perceived the dynamics of the courtroom. The attorneys then leave, and the participating judge and the critiquing judge view the videotape of the trial. The critiquing judge, who was in the courtroom during the simulated trial, has by this time completed a written evaluation of the participating judge's performance. The participant and critiquer review the videotape and discuss the participating judge's performance, focusing on control of the courtroom, evidentiary rulings, and the "judiciousness" of the judge's behavior.

The critiquing judges are selected because of their experience, their communication skills, and their reputations as fair and effective judges. The program is developing materials and training programs for the critiquing judges which will enable them to increase their effectiveness in the critiquing process.

Participating judges are given copies of the written evaluation so that they can review the results of the critique at a later time. A written evaluation form is very important because it is not realistic to expect the participating judge to remember all the comments made during the

critiquing process. In addition, some aspects of a critique may be critical of the participating judge's performance, and many individuals do not easily recall critical comments about themselves. The evaluation form helps them retain these criticisms. It may even encourage some judges to keep a self-teaching notebook or file in which they record evaluations of their performance in the real trials that they preside over. The program is designed to help judges acquire self-evaluation skills so they can continue to improve their skills independently.

The law school has entered into an agreement with the Minnesota Supreme Court Office of Continuing Education for State Court Personnel to provide the type of judicial trial skills training described here to all newly appointed judges in the state. At present, participation in the program is voluntarily. But in the first year that the program was offered, fifteen judges took advantage of it. The response from all the participating judges has been very favorable. Several have requested an opportunity to repeat the program after they have been on the bench for a year.

It is significant that this program is being made part of the available judicial education in Minnesota. This move reflects the growing awareness that judges can learn and develop trial supervision skills. It reflects an awareness that judicial education programs have a responsibility to provide new as well as experienced judges with skills training. And it is important because it marks the beginning of a cooperative effort between the state's major law school and the state's court system to use the educational resources and perspective of the law school to improve the quality of the judiciary of this state.