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**TEACHING EVIDENCE: USING CASEBOOKS, PROBLEMS,
TRANSCRIPTS, SIMULATIONS, VIDEO CLIPS AND INTERACTIVE
DVDs**

MIGUEL A. MÉNDEZ*

I. A PERIOD OF INNOVATION IN TEACHING METHODS

I have been teaching Evidence in some form for over twenty-five years. In that time, I have seen more changes in the approach to teaching Evidence than in any other subject. I began teaching the course in what once was considered the traditional mode—using a casebook chockfull of appellate opinions which focused principally on one or two rules. That was the way I was taught, and it was not long before this approach reminded me of the shortcomings of the course I took as a student.

More than dissatisfaction with the traditional casebook approach prompted me to seek other ways to teach Evidence. When I joined the Stanford faculty in 1977, the law school was beginning to experiment with a series of courses that employed innovative teaching methods. While the focus eventually shifted to the first-year curriculum, much of the impetus for the change stemmed from a very successful effort by the law school to enrich the second and third year curriculum with “clinical” courses. These courses did not resemble the kinds of courses associated with today’s clinics. Their purpose was not to teach students by having them handle aspects of cases accepted by law school sponsored or affiliated clinics. Rather, the goal was to teach advanced substantive law courses through exercises that simulated the conditions practitioners encountered in a particular field. The assumption was that students could best master and critique a field of law when they were required to put theory into practice.

The first of these “clinical” courses was Advanced Criminal Law, taught by Professor Anthony Amsterdam with the help of a psychiatrist. Students taking this course were expected to conduct a full direct and cross-examination of mental health experts testifying in hearings involving mentally disordered defendants raising diminished capacity and insanity claims. Another was Advanced Criminal Procedure, a course which I designed. Students played the role of prosecutors or defense counsel in a criminal proceeding, from

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arraignment through trial, including a hearing on a suppression motion. As in the case of Professor Amsterdam's Advanced Criminal Law course, use was made of forensic experts and police officers, and much of the course was devoted to the direct and cross-examination of experts. Members of the Palo Alto community served as jurors.

Juvenile Law, taught by Professor Mike Wald, was one of the earliest of the clinical courses and had both simulation and live client components. Students who successfully completed the simulation part were allowed to represent clients in the local juvenile court under the supervision of a faculty member. By the early 1980s, the number of "clinical" courses had expanded to include Advanced Real Estate Transactions, Injunctions, Freedom of Information, Expert Testimony, Complex Litigation, and Advanced Evidence.

The clinical courses proved to be enormously popular. To assure participation by the maximum number of students, the clinical faculty devised its own application process. Students admitted to one course were dropped to the bottom of a waiting list when applying for a second course. By the early 1980s, about one-third of the upper division students could be offered an opportunity to take one clinical course.

In part, the "clinical" courses were popular because they contrasted sharply with the teaching methods employed in the traditional classes. In the late 1970s, Stanford faculty still adhered to the Socratic method as the principal mode of teaching and assessing doctrine. In contrast, the tasks the students were asked to perform in the clinical courses required the students to go beyond case analysis and engage in systematic problem-solving in concrete situations similar to those encountered by practitioners in diverse fields. Particularly in clinical courses emphasizing adversarial hearings, students learned that it would be up to them to decide which witnesses to call, the order in which to call them, and the content and order of the questions asked. Because the settings for the clinical exercises were adversarial, students learned that much of what transpired in their cases depended on their initiative as lawyers. Of course, performing these tasks required a mastery of Evidence.

Much class time was devoted by the clinical instructors and class members to assessing the performance of the students doing the exercises. Camcorders (thought of at the time as a kind of movie camera) were just coming into use and provided an almost "instant replay" means to review and critique what students did right and wrong. Students who were not doing the exercise were required to lead the critique of a particular exercise, such as the direct examination of an expert. Forms were developed by some instructors to guide the students in providing a useful assessment. Use of the tapes foreshadowed the use of the now popular "video clip" to assist in illustrating some Evidence rules.

In my twenty-seven years at Stanford, no period can compare with the late 1970s and early 1980s as a time when interest in experimenting with new

teaching methods was paramount. Stanford was a recognized leader in pioneering the use of simulations in teaching advanced substantive courses. But although there was significant cooperation among faculty teaching the clinical courses, neither the administration, the students, nor the professors viewed the courses as a distinct concentration. What was taught in a given year depended on the interest and availability of regular faculty, visitors, and the effectiveness of students lobbying for a particular course.

The dependence on faculty willingness to teach a clinical course proved to be a major weakness. The departure in the early 1980s of a number of instructors devoted to clinical teaching reduced significantly the number of clinical courses taught by tenure-line faculty members on a regular basis. The amount of time required to teach in the simulated mode further reduced the number of clinical courses. Those of us involved in clinical teaching soon discovered that it simply was not possible to teach in this mode and have the time necessary to devote to scholarly endeavors. Since in hiring and promoting faculty Stanford did not distinguish between professors using traditional teaching methods and those employing clinical approaches, many instructors gave up their clinical courses to free up time for their scholarly projects. Still, the success of the clinical courses had two immediate effects. First, it encouraged other professors to use some clinical methods, such as problem solving and simulations, in their courses. Equally important, the success of the courses led to the “B Curriculum,” which for a number of years was an alternative to the traditional first-year curriculum at Stanford.

I have described the successes and failures of the “B Curriculum” in an article on teaching Criminal Law from a trial perspective¹ and will not recount that history here. But I do want the reader to know that my experimenting with diverse teaching methods in Evidence arose during a period when innovative teaching was highly prized at Stanford. Institutional support is crucial to innovations in pedagogy.

II. FROM TRADITIONAL TO NON-TRADITIONAL APPROACHES

California was among the first jurisdictions to adopt an evidence code.² When I took Evidence in the mid 1960s, California was on the cusp of adopting the evidence code. Although the California Evidence Code was the product of a multi-year study undertaken by the California Law Revision Commission to determine whether the state should adopt the Uniform Rules of

1. See Miguel A. Méndez, *On Teaching Criminal Law from a Trial Perspective*, 48 ST. LOUIS U. L.J. 1181 (2004).

2. The California legislature adopted the California Evidence Code in 1965. Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129, 131 (1987). The Evidence Code went into effect on January 1, 1967. See CAL. EVID. CODE § 12 (2006).

Evidence,³ the casebook my professor assigned did not give a single hint that codification of the rules had been the subject of ample study. This was surprising since the codification effort had begun early in the twentieth century.⁴ By 1942, the American Law Institute had approved the Model Code of Evidence.⁵ The Model Code was succeeded in 1953 by the Uniform Rules of Evidence when the National Conference of Commissioners on Uniform State Laws sought to eliminate some of the objections that had been raised to some of the provisions of the Model Code.⁶

The failure of the casebook to draw attention to the codification efforts was unfortunate. It left us, the students, with the impression that Evidence was a common law subject in which the rules were “discovered” and “announced” by appellate judges resolving discrete evidentiary disputes. We came to believe that learning the rules and some of their justifications depended on our ability to research appellate opinions in a given jurisdiction. Even mastering the rules in the cases selected by the casebook editors depended on the skills we learned in the first year of law school about how to read and analyze appellate opinions. This case by case approach to the rules of evidence prevented us from viewing the subject as one essentially concerned with regulating the kinds of information that should be presented, especially to jurors, and precluded a consideration of the rules from a trial advocacy perspective.

In one of the most popular Evidence casebooks, Professors John Kaplan, David Louisell, and Jon Waltz sought in 1968 to supplement the common law approach to Evidence by including pertinent sections of the California Evidence Code.⁷ When the Federal Rules of Evidence went into effect in 1975, some of its provisions were added in subsequent editions.⁸ Although the incorporation of the statutory material helped to alert students to the codification that had begun to replace the common law approach to Evidence, appellate cases focusing on one or two rules remained the main pedagogical tool.⁹ Professor Waltz recognized some of the shortcomings of the appellate opinion approach. A good example is the section of his and Professor Park’s book dealing with the use of other misdeeds to prove not character, but such

3. Imwinkelried, *supra* note 2, at 132.

4. Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 431–32 (1989).

5. *Id.* at 432.

6. See *Recommendation of the California Law Revision Commission Proposing an Evidence Code*, xxix, xxxii–iii, reprinted in WEST’S ANN. CAL. EVID. CODE (1995).

7. See DAVID W. LOUISELL, JOHN KAPLAN & JON R. WALTZ, EVIDENCE: CASES AND MATERIALS 399, 429 (3d ed. 1976).

8. See DAVID W. LOUISELL, JOHN KAPLAN & JON R. WALTZ, EVIDENCE: CASES AND MATERIALS 901 (4th ed. 1981).

9. See generally *id.*

propositions as common plan or scheme.¹⁰ Rather than using cases to illustrate these rules, the authors quoted extensively¹¹ from Dean Charles McCormick's summary in his treatise on Evidence.¹² Equally important, to help students understand the *process* of proof, the book included an excellent piece by Professor Waltz on "Making the Record."¹³

Professors Richard Lempert and Stephen Saltzburg were among the first scholars to publish a book that abandoned the appellate opinion approach to teaching Evidence. In their path-breaking book, *A Modern Approach to Evidence*,¹⁴ they replaced the cases with text setting out the rules and discussing their significance. By abandoning appellate opinions, Professors Lempert and Saltzburg freed up valuable time to discuss the merits of the rules and to consider useful excerpts by commentators.¹⁵ Their explanation of related concepts is often invaluable. For example, they provide an excellent analysis of how Bayesian logic could help fact-finders resolve factual controversies.¹⁶ In addition, Professors Lempert and Saltzburg were sensitive to the need to introduce students to examining the rules of evidence from a trial perspective. They begin their book with a transcript of a criminal trial that contains the opening statements and closing arguments in addition to the testimony of witnesses,¹⁷ and they frequently ask students to take a trial lawyer's concerns into account when assessing some of the rules.¹⁸

Giving students an appreciation of the problems faced by trial counsel and trial judges is, in my opinion, indispensable to the successful teaching of Evidence. Appellate opinions, focusing almost exclusively on the concerns of the appellate bench, are poor material for attaining this goal. Although replacing cases with text eliminates a highly inefficient method of learning discrete evidentiary rules, even discussions about the process of proof often fail to give students a concrete idea of how the dynamics of a trial affect what trial lawyers do. I have attempted to compensate for this deficiency by writing an Evidence text¹⁹ that describes the link between the process of proof and the

10. See Jon R. Waltz & Roger C. Park, *Evidence: Cases and Materials* 402 (10th ed. 2004).

11. See *id.*

12. See MCCORMICK ON EVIDENCE § 190, at 557–65 (Edward W. Cleary et al. eds., 3d ed. 1984).

13. See WALTZ & PARK, *supra* note 10, at 1.

14. See RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES* (1st ed. 1977).

15. See *id.* at 413 (discussing Professor Tribe's article on triangulating hearsay).

16. See RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES* 157 (2d ed. 1982).

17. See LEMPERT & SALTZBURG, *supra* note 14, at 4–5.

18. See *id.* at 4.

19. MIGUEL A. MÉNDEZ, *EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES—A PROBLEM APPROACH* (3d ed. 2004).

adversarial system of trials, and that makes use of a witness examination format to illustrate how lawyers use some of the rules of evidence.

In my book, I emphasize that the rules are designed to promote reliable verdicts by limiting the kind of information that can be offered to fact-finders in reconstructing a historical event whose contours are contested by the parties.²⁰ I then explain that the application of the rules depends principally on party initiative. Under the general rule that applies in all American jurisdictions, evidence offered by a party will be admitted unless it is objected to by the opposing party and the objection is sustained.²¹ That leads to a discussion of the roles of judges, jurors, and counsel, especially of the lawyers' goals in formulating and executing a trial strategy.²² One of the most useful questions I ask students at the beginning of the course is to identify the most important actor in American jury trials. Invariably, they mistakenly select the judge, and their error leads to eye-opening discussions of the adversarial system of litigation. I also ask students, again at the beginning of the course, to identify who gets to speak at an American jury trial and when the words spoken constitute "evidence."

But even an explanation of the relationship of trial advocacy to the rules of evidence will not give students a firm sense of how evidence is actually offered and contested in a trial. The very best way to convey this sense is to ask students to demonstrate, say, the introduction of a contract in a breach of contract action by having them conduct the direct and cross-examination of the principal witness. Since this would consume too much time except in the smallest of classes, alternatives include having only some students demonstrate the exercise or simply showing a video or DVD clip of students performing the exercise. I have experimented with both methods. I have also experimented with a third method that allows students to rule and explain their rulings in class. This method is somewhat more practical in large classes. In my book, many of the problems following the principal discussion sections are in the form of witness examinations. Although not intended as model interrogations, they do give students a concrete idea of how the calling party attempts to elicit favorable testimony and how the opponent attempts to block this effort by invoking specific rules of evidence. The examinations do not provide the judge's ruling. Instead, students are expected to rule and explain their rulings in class.

III. FIVE MODELS FOR TEACHING EVIDENCE

There are, of course, more than five models for teaching Evidence. In this section, I limit myself to comparing the five models I have used.

20. *Id.* at 1.

21. *Id.*

22. *Id.* at §§ 1.02–.04.

A. Casebooks

The first, and least successful, was teaching the course from a casebook that emphasized appellate opinions. Requiring students to recall the “facts” of each case for the limited purpose of identifying and discussing one or two rules of evidence was unduly time-consuming and did not facilitate a discussion of the rules from a trial advocacy perspective.

B. Simulations and Video Reviews

Frustration with the casebook method led me to try the most labor-intensive approach to teaching Evidence: supplementing the casebook by having some students do some exercises on direct and cross-examination, including marking and offering documents, and then having all students in teams of two represent a party in a simulated civil or criminal proceeding. When I first taught the course, it was a four-unit, one-semester course. Although enrollment was limited to twenty students, a four-unit course did not provide the hours needed to cover the theory and practice parts of the course. By the time I taught the course a second time, students selected for the course had to commit their weekends and one entire weekday afternoon in addition to the regularly scheduled hours. We used about a third of the weekends in a semester to hold or review trials. Enrollment was not a problem, as at the time student interest in “hands on” courses was at its highest.

Still, the toll on the students, and especially me, proved too high. By the third time I taught the course, it had evolved into a two-semester, six-unit course. The first semester was devoted to covering the material in the casebook and the second to the exercises. Even then, however, the number of hours we met in the second semester exceeded the number allocated to the course. Typically, the trials would take from four to six hours each and the review of selected parts of the video tapes about four hours. Since students performed in teams of two, I had to script five trials in addition to the “warm up” short exercises on how to perform direct and cross-examination. Eventually, the demands proved too much, and the course was reduced first to sixteen students and finally to twelve.

Four students in teams of two played the role of lawyers in each of the trials. Some of the remaining students served as witnesses. To ensure that the other students maintained an active interest in the course, they played the role of jurors and had to deliberate and reach a verdict. At the conclusion of the trial, the “jurors” had to explain why they found for a particular party. In addition, some jurors were selected before the trial to assess the performance of one of the lawyers on the direct or cross-examination of a particular witness. To help them make informed critiques, the students were required to use an assessment form which called for specificity in their criticisms. The students, for example, were required to specify exactly what was wrong with the

question posed or with the answer given, or with the order of the examination, including the order of witnesses.

The critiques were supplemented by the video tape reviews. During the trial, I would note the number on the tape where a particularly interesting episode took place and would go to that spot during the review. Time constraints prevented us from reviewing all of the tapes of a trial, so it was important to select those portions from which the most could be learned by the “lawyers” and the rest of the class. A great advantage of video tapes was that often they did not require commentary by class members or me. The tape spoke for itself.²³

The course was extraordinarily successful by most measures. Student evaluations were very high, often perfect. Students believed they had learned not just the rules but also how to apply them. As a former trial lawyer, I knew that almost all of the students were prepared to represent a party in an actual adversarial proceeding and, equally important, could assess the rules from both theoretical and practical perspectives. Countervailing pressures, however, ultimately led to my abandoning this very successful approach to teaching Evidence. The principal one was the culture of Stanford Law School. Scholarship is prized above all other academic activities. The time required to design and teach a highly labor intensive course often left inadequate time for research and writing. Since at the time, Stanford made no distinction between instructors who used traditional teaching methods and those who used simulations, using labor intensive teaching methods was especially risky prior to attaining tenure. But even those of us who were tenured eventually abandoned the use of labor-intensive teaching methods. It did not take us long to realize that we could not advance an ambitious scholarly agenda while teaching “clinically.”

Paul Brest, who was then dean of the law school and an early champion of alternative modes of instruction, continued to encourage the development of innovative teaching methods. He made it clear that contributions to the development of new teaching methods would count as much as scholarly works, at least for tenured members of the faculty. Also, he was prepared to grant faculty members some release time from teaching if needed to develop courses employing innovative teaching methods. At the time, Paul and a group of faculty members were especially interested in developing “self-study” course materials that would allow students to learn on their own. I volunteered to try my hand at developing materials for teaching Evidence. Eventually, these materials became my Evidence textbook.

23. At one time I entertained the hope of editing the tapes into teaching tapes that could be used in any Evidence course to demonstrate what and what not to do during the examination of different types of witnesses. Again, time constraints prevented me from undertaking this project.

C. *The Problem Approach*

I began by using a casebook which had an excellent collection of cases, but found the process of having the students recall and describe the issues raised by the cases unduly time-consuming. Using cases presented another problem. Opinions focus almost exclusively on the concerns of appellate judges and often fail to convey a feel for the problems facing the trial judge and trial counsel. At the beginning, I tried to compensate for these deficiencies by preparing a handbook that students used in conjunction with the casebook and that presented most of the cases in the book in the form of a witness examination or a problem.

The student response to the handbook was very positive. The difficulty of trying to recall the “facts” of a case was eliminated, and using transcripts of witness examinations gave students an opportunity to visualize the process of presenting and objecting to evidence. In turn, viewing evidence as presented in court helped them understand the rules in practice as well as in theory, and it enabled them to ask important questions about the relationship of the rules to principles of trial advocacy.

The next step was to transform the handbook into self-study materials. One decision was easy—appellate cases were not to be the main source for the materials. I decided to combine the problem and witness examination approach with text—not cases—that set out the law of evidence in a clear and concise manner. The goal was to help the students learn the rules by having them read about Evidence and then having them apply their knowledge to discrete problems.²⁴ Class time was to be devoted to reviewing their “rulings” and answering their questions.

The challenge was to find a text that would work well with the problems and witness examinations. Eventually, I opted for adapting the text from an Evidence treatise which I had prepared for lawyers who practice primarily in California state and federal courts. Although derived from my treatise, the text of this book is not merely a black letter law distillation of the rules of evidence.²⁵ Most of the discussion is devoted to the policies and concepts underlying the rules. As a teacher and former trial lawyer, I believe that students will attain a better understanding of the rules by examining the concerns that initially drove judges and then legislators to place limits on the evidence parties can offer.

24. Other teachers had already adopted a text and problem approach to teaching Evidence. See *supra* notes 14–18 and accompanying text. Among them were Professors Richard Lempert and Stephen Saltzburg, whose path-breaking text was first published in 1977, and Professors Jack Friedenthal and Michael Singer, who in 1985 published *The Law of Evidence*. I do not discuss *The Law of Evidence*, as Professor Friedenthal has contributed an article to this issue.

25. *Méndez*, *supra* note 19. The text is fully annotated and can be used by students for research as well as in practice after graduation.

The book's twenty-nine chapters are organized by sections. "Questions and Problems" that follow most discussion sections contain the problems and witness examinations. The examinations are designed to raise significant evidentiary issues; they are not intended as model interrogations. Indeed, most of the objections are "late" and if sustained would require in actual practice follow-up motions to strike and admonish. But by using this approach, the student becomes aware of the nature of the contested evidence without the distraction required by offers of proof.

The following is an example of the use of witness examinations to teach the use of prior consistent statements under the Federal Rules of Evidence:

In a federal prosecution of a police officer for violating the victim's civil rights, the prosecutor calls Fellow Officer and Bystander who testify as follows:

By the Prosecutor: What did the defendant do after he arrested and handcuffed the victim?

Fellow Officer: He proceeded to beat him with his night stick for ten minutes.

* * *

By the Defense Attorney: You too were charged with beating the victim?

Fellow Officer: Yes.

By the Defense Attorney: But in exchange for your testimony here today the prosecutor promised to dismiss the charges against you?

Fellow Officer: Yes.

* * *

By the Prosecutor: Prior to initiating plea negotiations with me, did you tell anyone about what you saw on the night of the beating?

Fellow Officer: Yes, the day after the beating I said to my spouse, "The defendant proceeded to beat the victim with his night stick for ten minutes."

By the Defense Attorney: Objection, hearsay. Move to strike.

Judge: ?

Compare with:

By the Prosecutor: What did the defendant do after he arrested and handcuffed the victim?

Bystander: He proceeded to beat him with his night stick for ten minutes.

* * *

By the Defense Lawyer: Isn't it true that two days after the incident you told your drinking buddy, "The defendant only beat the victim once to keep him from kicking bystanders."?

Bystander: Yes.

By the Prosecutor: Objection. Move to strike on grounds of hearsay.

Judge: ?

* * *

By the Prosecutor: The day following the beating, did you tell anyone about it?

Bystander: Yes, I told my wife, "After the officer arrested and handcuffed the defendant, he proceeded to beat him with his night stick for ten minutes."

By the Defense Attorney: Objection. Move to strike on grounds of hearsay.

Judge: ?²⁶

The following is an example of a problem students must answer concerning the constitutionality of certain jury instructions in a criminal case:

Assume a prosecution for possessing stolen property. The prosecution must prove beyond a reasonable doubt that, in addition to possessing the property, the defendant was aware that it was stolen. The owner testifies that the property is his and that he never gave it to the defendant. The defendant testifies that he bought the property from a migrant worker and had no idea that it was stolen.

Determine the constitutionality of the following jury instructions:

If you find beyond a reasonable doubt that the defendant was a dealer in second-hand merchandise, that he bought stolen property, and that he bought such property under circumstances which should have caused him to make reasonable inquiry that the person from whom the defendant bought the property had the legal right to sell it, and that the defendant did not make such reasonable inquiry,

(a) then you shall presume that the defendant bought such property knowing that it was stolen.

26. *Id.* at 258–59.

(b) then you shall presume that the defendant bought such property knowing that it was stolen unless the defendant persuades you by a preponderance of the evidence that he did not know it was stolen.

(c) then you shall presume that the defendant bought such property knowing that it was stolen unless the defendant raises a reasonable doubt about whether he knew that it was stolen.

(d) then you may, if you wish, infer that the defendant knew that the property was stolen, unless from all of the evidence you have a reasonable doubt whether the defendant knew that the property was stolen.²⁷

My book focuses on the California Evidence Code as well as the Federal Rules of Evidence. California was among the first jurisdictions to replace the common law rules of evidence with a comprehensive code.²⁸ The influence of the California Evidence Code in shaping the Federal Rules has been substantial and can be measured in part by the numerous times the framers of the Rules cite the Code as a model. Over the years, many Evidence professors have found that students can gain valuable insights into problems of proof by comparing the approach of the Code and with that of the Rules in those instances where the two depart. The book follows this tradition by providing a systematic comparison of the California and federal approaches to admissibility.

Because the common law rules of evidence have been replaced largely by codes, today's study of Evidence necessarily involves statutory interpretation. To help students with this task, Thomson West agreed to prepare a separate statutory supplement that includes the California Evidence Code and the Federal Rules of Evidence, as well as the comments and notes prepared by their drafters. Because of space limitations, in my book I set out at the end of each chapter only those provisions of the Evidence Code and Federal Rules discussed in that chapter. The text, however, discusses key cases and official commentary as well as important insights contributed by Evidence scholars.

D. Advanced Evidence

The problem approach largely achieves my goals. Students do learn the rules of evidence from both a theoretical and practical perspective. The use of even highly abridged witness examinations helps them visualize the process of proof. Moreover, because we do not get bogged down with cases, I am able to cover much more material and in greater detail than when I used a casebook. Still, the course does not prepare students to conduct the direct or cross-examination of witnesses, much less plan and execute a trial strategy. To make up for some of these deficiencies, I now also teach Advanced Evidence, a

27. *Id.* at 635–36.

28. *See supra* notes 2–5 and accompanying text.

course that focuses on the direct and cross-examination of certain kinds of witnesses, including investigator-types and experts. In some ways, the course is not as ambitious as the simulated Evidence course. Students do not get to try an entire case, from opening statements to closing arguments. Breadth, however, is replaced by depth.²⁹ The goal is to help proponents develop a narrative on direct examination that jurors will find irresistible and then to enable opponents to do a devastating cross of that witness. Students work in *troikas*, and each member must play the role of direct examiner, cross-examiner, and witness. Students who are not performing the exercise lead the critique of the performances. The final exercise is video-taped and, if time permits, the tape is used in the critiques.

The time pitfalls of the simulated Evidence course are avoided. Only students who have taken Evidence may enroll in Advanced Evidence. Although I do have to spend some time “refreshing” the students on concepts they learned (or should have learned) in their Evidence course, most time is devoted to trial advocacy. Of greater importance, Advanced Evidence is limited to six students, each of whom conducts only two directs and two crosses. Although the total number of examinations is still large, 24, the number can be managed in the two units allocated to the course. The course is taught during our January Term, a short but intensive semester sandwiched between the Fall and Spring Terms. Classes meet everyday for two and a half hours for ten consecutive week days. The time allocated for each class is sufficient for the direct and cross of two witnesses and the critique. Meeting on consecutive days allows a continuity that enhances learning as well as the more effective use of class time. The same mistakes are made less frequently, greater creativity is demonstrated, and critiques become shorter.

E. Interactive DVDs and Video Tapes

I use interactive DVDs as an aid in teaching the problem-approach Evidence course and Advanced Evidence. When time permits, I use the DVDs in class and ask students to provide answers to the problems posed. If time constraints preclude the use of the DVDs in class, I ask students to complete at least one DVD on their own time.

The DVDs I use were developed by my colleague, Tim Hallahan, Director of Stanford’s Advocacy Skills Workshop, and include *State v. Gilbert* (general evidence review in a criminal case), *Francis v. Spindler* (hearsay in a personal injury case), *Easerly v. Letwin* (relevance and character in a real estate case), *Examining Expert Witnesses: Evidence and Tactics* (wrongful death case), and *Trial Evidence & Direct Examination Skills* (advanced evidence in a

29. Students, however, are given this opportunity in another course, Trial Advocacy.

commercial case).³⁰ In most DVDs, the student plays the role of an attorney while his or her opponent examines a witness. The student “objects” by clicking the mouse or keyboard and responds to queries of the judge and arguments of the opponent before obtaining a ruling. The student may also review tactics and techniques employed by opposing counsel. At the end of the trial, the DVD provides students with a score based on correct and incorrect rulings.

The DVDs can be done by a single student or by a group of students. I encourage students to do the DVDs in small groups in order to stimulate discussion about the proper ruling. Most students complete more than one DVD. They report finding this form of learning both enjoyable and effective.

I also use Judge Irving Younger’s video tape on the *Ten Commandments of Cross-Examination*³¹ in the problem course and in Advanced Evidence. In the latter course, I refrain from playing the video tape until after all students have completed the exercises on direct and cross-examination. Once they have mastered the fundamentals of interrogating witnesses, the students are in a position to appreciate fully Judge Younger’s advice.

IV. SOME CONCLUDING THOUGHTS

In my experience, DVDs and videos are useful aids in teaching Evidence. They help drive points home but are not a substitute for materials for teaching the course. I have found that simulations are the most effective means for teaching both evidence theory and practice, but simulations are impractical, except in very small classes, if the goal is to give each student an opportunity to do the direct and cross of at least one witness. Even when I have used simulations, I have had to provide the students with study materials in the form of a casebook or the text and problem approach I have described. Although the problem approach works better for me, many Evidence professors still prefer the traditional approach and use casebooks. Fortunately for all of us teaching Evidence, today we have many more choices in teaching materials and methods than a generation ago.

30. For additional information on the DVDs, contact Professor Hallahan at his e-mail address: thh47@pacbell.net.

31. Irvin Younger, *Ten Commandments of Cross-Examination* (National Institute for Trial Advocacy 1975).