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DYNAMICS OF TRIAL PRACTICE:

PROBLEMS AND MATERIALS

Fourth Edition

Ronald L. Carlson

Edward J. Imwinkelried

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■ ■ ■

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Professor Carlson dedicates his work on this project to the memory of Mason Ladd.

Professor Imwinkelried dedicates his work on this project to every adjunct trial advocacy professor he has been privileged to work with at the University of California, Washington University, and the University of San Diego.

PREFACE

THE CENTENNIAL HISTORY OF HARVARD LAW SCHOOL 84-85(1918) reported that "[e]fforts have been made from time to time to give students some experience in the trial of cases by substituting a trial . . . before a jury for the argument of questions of law . . . ." However, THE HISTORY added that those efforts succeeded primarily "in affording amusement [rather] than in substantial benefit to the participants." *Id.* THE HISTORY concluded that although a mock trial "now and then is . . . worth while," its value is "only as a relief to the tedium of serious work." *Id.*

Trial practice teaching has made great strides since the publication of THE HISTORY early this century. In part in response to former Chief Justice Burger's criticism of the quality of trial advocacy in the United States, both the bar and law schools have substantially revised their programs for training litigators. As Professor Steve Lubet has pointed out, "Over the last fifteen years trial advocacy teaching has matured from a sideline into a discipline." Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy,* 37 J.LEGAL EDUC. 123, 124 (1987). There are numerous signs of that maturation. To begin with, although the trial practice course was formerly "largely the province of part-time instructors," at most schools the course is "now taught by full-time tenured faculty." *Id.* Moreover, the past fifteen years have witnessed a dramatic growth in the body of literature on trial advocacy. Law professors, litigators, psychologists, and communications experts all have contributed to that growth.

Despite the progress made to date, however, there are those who are skeptical of the value of contemporary trial practice instruction. Bellow, *Clinical Legal Education Undergoes Changes,* 13 SYLLABUS 7 (Dec. 1982). Traditionalists emphasize that "[t]rial practice has remained a course that deals essentially in [forensic] technique . . . ." Lubet, *supra* at 126. The course seems to slight the development of analytic skills. The thrust of the criticism is that every law school course must contribute to the school's primary academic mission of developing students' analytic ability. In the skeptics' minds, if the trial practice course does not do so, the course does not deserve a "place in the academy." *Id.* at 130. To meet this criticism, an "injection of analytic instruction" is imperative. *Id.* at 135.

Our hope is that the publication of this text will help bring the trial practice course squarely into the mainstream of the law school curriculum. To be sure, this text discusses the forensic techniques of witness examination and jury speech. However, this text attempts to teach the student far more than forensic technique. Throughout this text, we have emphasized the need for strategic evaluation of the case-rational, systematic planning. Since the release of our first edition, we have conducted a series of continuing legal

education programs, based on this text, throughout the country. The attendees' comments at these conferences have convinced us that we are on the right track; again and again attendees remarked that they found the program useful precisely because the topic of strategic case evaluation was largely neglected in their law school advocacy course. Strategic planning demands the type of precise fact analysis and predictive judgment which Karl Llewellyn described as the *raison d'etre* of the law school curriculum. For an instructions conference in law reform litigation, the trial attorney must draft a jury instruction on his or her legal theory. To do so, the attorney must be able to identify the facts triggering the social policies which will motivate the trial and appellate courts to reform the law-an analytic skill learned in the most Socratic law school courses. In making such decisions such as the choice of a theory of the case and the exercise of strikes during jury selection, the litigator makes difficult predictive judgments. Llewellyn himself wrote that one of the most important lessons for law students to learn is that the so-called rules of law are essentially predictions of legal behavior. K. LLEWELLYN, THE BRAMBLE BUSH 77 (1960).

We have stressed fact evaluation in this text to help achieve the objective of making the trial practice course a "linchpin of the curriculum." Lubet, *supra* at 126. In this respect, we share Professor Llewellyn's optimism:

> It is worthwhile to mark off a course in . . . trial practice . . . and set [it] apart. . . . [I]t should be marked off for the most intensive study. . . .because [it is] of such transcendent importance as to need special emphasis. [I]t should be marked off not to be kept apart and distinct, but solely in order that [it] may be more firmly learned, more firmly ingrained into the student.

LLEWELLYN, *supra* at 17.

RONALD L. CARLSON
EDWARD J. IMWINKELRIED

February, 2010

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Professor Carlson acknowledges the influence on theories of evidence and trial practice imparted by Dean Mason Ladd, who was born in 1898 and died in 1980. Dean Ladd served the legal profession as Dean of the Law School at the University of Iowa from 1939 until 1966. After completing a career at Iowa that began in 1929, first as professor and then as dean, he became the first dean of the Florida State University Law School. He established an outstanding evidence program at Florida State, and the Mason Ladd Memorial Lecture Series at both schools—Iowa and Florida State—are tributes to his memory.

When the Fellows of the American Bar Foundation conferred the 1979 Fellows Research Award on Dean Ladd, they stated in part: "Few law academicians have equalled the productivity and excellence of Dean Ladd's contributions. His research work, including chairmanship of the American Bar Foundation Research Committee, has been of inestimatable value to scholars and practitioners."

Whether writing or teaching, Dean Ladd always warmed to subjects that involved discussion of trial proof and practice. The mix of insight and good will that Dean Ladd brought to teaching and scholarly writing is almost

unequalled. He made a lasting impact and matchless impressions upon the law as well as his family, friends, students, and other teachers.

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