Teaching Skills in a Business Law Setting: A Course in Business Lawyering

David R. Herwitz

With the increasing interest in clinical training for law students these days, teachers of business law are understandably anxious not to remain on the sidelines. But finding a toehold has not been easy. The primary emphasis of clinical development to date has been on those areas of law which the economically disadvantaged encounter, for the obvious reason that it is in these areas that clients are available for law students to represent. In legal aid programs and legal services offices, students have the opportunity to deal with live clients confronting real problems—typically, housing matters, consumer issues, family law difficulties, and the like. While these might not be areas in which many of the students will ultimately practice, the chance to experience the legal system in action adds a unique dimension to law school training which cuts across all courses.

Of course the phenomenon of law students representing the poor is not new: programs of this kind have been part of the law school scene for many years. What is special about the modern clinical development is the effort to bring student experiences back into the classroom, or perhaps more accurately, to relate the work of the clinical course to the lawyering the students are doing in their placements. Thus the efforts of the students on behalf of their clients in the field informs the study of the related doctrine in consumer law, housing, domestic relations, or whatever.

Of particular significance is the focus in the classroom on the lawyering skills involved—interviewing the client, counseling, or negotiation—as well as on the process of litigation itself. Traditionally, these matters were ignored in the law school curriculum in favor of almost exclusive emphasis on doctrinal analysis. Earlier it was thought that lawyering skills could best be learned on the firing line in practice, first by watching more senior colleagues in action, and then by actual doing, often under the watchful eye of those seniors. Further, there were doubts that academics were equipped to teach about lawyering skills.

But of course students in clinical courses were, in fact, already on the firing line, so the need for some training in practical skills was apparent.

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And the teachers in the clinical courses were either right there on the line beside the students or had recently come from such practice, so no one could doubt their ability to provide the necessary guidance for the students. Thus the teaching of lawyering skills became identified with clinical courses involved in providing legal services to the disadvantaged.

Legal education benefited from this opportunity to blend doctrinal analysis with learning about skills. Clinical teachers rose to the challenge and undertook to teach students what lawyers actually do and how they do it. Nevertheless, rooting skills training exclusively in service to the poor has its cost. In particular, notions about interviewing and counseling techniques may be skewed when the clients involved are dependent upon the largesse of others and have little or no freedom of choice. Much of the commentary on interviewing and counseling unmistakably bears the imprint of this situation, emphasizing the need to show appropriate regard for the client and make him feel like a collaborator in the process. Of course this message is sensible in any circumstances; but it is really quite unnecessary in ordinary private practice, where the rigors of the market enforce the norms for behavior toward clients, who will "vote with their feet" if a lawyer fails to display sufficient empathy and consideration.

In any event, ideally there should be opportunities for skills training in a wide variety of subjects and among clients of many social levels. The commercial field is a natural, since interviewing, counseling, and negotiating (plus drafting, of course) is what business lawyers spend their time at. However, it is not possible to apply the pattern of the poverty clinical courses to the business area by arranging for students to represent impecunious business clients. Not that there are no enterprises in financial difficulty which could use the help: but even losing businesses are expected to pay their way, and the organized bar would not take kindly to student volunteers siphoning off this source of potential revenue. In addition, business counseling typically calls for more experience and know-how than most law students would be able to supply. Still, the lack of opportunity for actual experience in the field need not be an insuperable obstacle to skills training in business lawyering. Simulated business problems can provide a reasonable substitute for the real thing and can give students a chance to play the role of lawyers in dealing with the problems presented. The simulation model parallels that which has long been used successfully on the litigation side in the trial practice courses that abound in today's law school curricula. And this approach has one great advantage over the poverty clinical model in that the lawyering by the role-playing students takes place right in the classroom, where it can be reviewed and discussed by the other students. Using the lawyer role-plays by the students as the vehicle for class discussion enables the other students to learn not only from the demonstration they have observed but also from the shared analysis that follows; at the same time the role-player receives immediate feedback on his performance, a factor that can be a substantial plus. If the "clients" play their parts appropriately, the students will have an experience closely akin to practice in the field.

What follows is a description of the effort to develop a course at Harvard

Law School designed to achieve these objectives under the elaborate caption—"The Business Lawyer: Representing Modest Business Enterprises."

The impetus for this course originally came from Wilton Sogg, a distinguished practicing lawyer in Cleveland. As a part-time teacher at a law school in Cleveland, Will had become interested in trying to give students more of a practical sense of what business lawyers do. This effort was of special value to his students, since many of them could expect to enter practice on their own, or in small offices, where they would not have the luxury of the in-house training that large corporate law firms may afford. Will developed a course that emphasized the pragmatic aspects of business practice, calling on a substantial number of guest lecturers from the spectrum of related professionals with whom business lawyers must deal—accountants, insurance agents, and bankers. The secretary of state of Ohio was also in the cast, to give the students a feel for the important role his office plays in corporate practice.

Will Sogg eventually proposed a similar practice-oriented course for Harvard Law School to Professor Gary Bellow, the pioneer in the development of the clinical poverty law courses at Harvard. Gary had long hoped to expand the clinical motif into the commercial areas, and with the support of Dean Albert Sacks it was decided the approach should be given a try. I became involved in the venture largely because of my work in the business planning field.

Early in the game we decided that the primary focus of the course should be on instruction in the skills used by business lawyers. While most of our students spend at least one summer with a law firm, their exposure to business practice typically involves watching rather than doing. So to lay the basis for classroom instruction we decided to start with some semblance of a hands-on experience for the students.

Our first effort was to see how close we could come to the fieldwork model of the existing clinical poverty courses. Since we couldn't offer our students direct representation of business enterprises, we looked for placements that might provide some collateral experience in business law. One obvious choice was the Small Business Administration, where the students could get a close-up picture of how the problems confronting a small business, particularly in obtaining financing, were handled. We also located a few venture capital firms willing to take on a student or two for the projected eight to ten hours a week of fieldwork and to give them a view of promising young enterprises from the vantage point of a potential investor. Another source of placements was local community development corporations organized to assist start-up ventures in disadvantaged communities. A few students went to law firms heavily engaged in representing modest-sized business and prepared to extend themselves to give the students more first-hand experience than would be typical for even a full-time summer associate, by allowing the students to sit in on interviewing and counseling sessions and even some negotiations. For that first year, a total of approximately twenty such placements were created, which set the upper limit on the number of

students we could take in the course.

We were aware of the special difficulty involved in trying to integrate in the classroom the students' varied experiences in their different placements. Accordingly, in addition to the "regular" two and one-half hour class meeting each week, we scheduled a one-hour weekly seminar, for half the students in alternate weeks, to attempt to relate the students' experiences to the discussion of skills in the regular class sessions. We were particularly fortunate that Donald Glazer, one of Boston's leading young corporate lawyers, agreed to serve as the seminar instructor and to participate in the regular class as well.

Although the seminar sessions were well received by the students, who were sparked particularly by Don Glazer's ability to draw on his own practice for unifying themes in the business law area, we were confirmed in our fears that the students' experiences were simply too diverse to afford truly instructive interplay and generalization. It also turned out that many students who were interested in the course could not fit the nine to ten hours a week needed for a fieldwork placement into their schedules. As a result, the following year the fieldwork component was made optional, for two additional credits, and about half the students who enrolled did not elect to have a placement. That made it possible to increase the size of the class to approximately thirty students, which we viewed as the upper limit for a course so heavily dependent upon student role-plays and class discussion. In the next several years, the percentage of students who sought a placement continued to decline, and we ultimately abandoned the fieldwork aspect entirely.

It is worth adding that the elimination of the placements did not at all result from dissatisfaction on the part of the students who chose that option. Quite the reverse: in the journals the students were required to turn in each week commenting on their experiences the placements were given high praise. But the relationship between the fieldwork and the course became increasingly tenuous, particularly since the students were not actually doing the lawyering at their placements, and it no longer seemed appropriate to award academic credit for the fieldwork.

Since we could not look to the placements for the actual hands-on experience students need to learn about lawyering skills, role-playing by the students in the classroom became the dominant theme of the course. For this purpose we needed to create simulated problems with identifiable people as clients trying to achieve some objective or resolve a difficulty. In order to provide continuity and a sense of the evolution of a business enterprise, we developed a scenario featuring two clients whom we could observe and advise throughout the life-cycle of a small business, from the original deal to go into business together and the incorporation of the venture, through such common occurrences as settling a dispute, hiring a new executive employee, and executing a buy-sell agreement among the stockholders, to the ultimate termination of the relationship in a row.

Since Will Sogg took primary responsibility for the conduct of the class, Don Glazer and I were in position to play the parts of these clients. Don became Barney Bright, a slightly impetuous, self-made proprietor of a small

enterprise manufacturing electric gadgets, in his early forties, who has developed a promising new product (an energy efficient heating unit to be attached to individual desks, dubbed "Cozy Legs"). I played the well-heeled Gerald Gold, in his middle fifties, who is becoming less active in his family's publicly-owned supermarket chain; Gold thinks the new product, Cozy Legs, has considerable promise and is prepared to invest in Bright's business the amount needed to finance the production and promotion of the new product.

Before continuing with a description of how the course operates, I should pay special tribute to the contribution of Will Sogg. In addition to providing the impetus of the course for three years he led the class discussion with great skill, commuting from Cleveland every week for the fall term. In all that time he never missed a class. But he could hardly be expected to keep up that schedule indefinitely. Now Don Glazer and I share the teaching duties, as well as the client role-playing.

Turning to the conduct of the class: in the very first session we schedule an initial lawyer's interview of a new client (Gold) by two student "volunteers." It is important to have the appropriate atmosphere for this exercise, for it goes far to set the tone for the entire term. The assigned mimeographed materials for the first class include an informal outline of the relevant issues faced by a client entering a new business deal, plus excerpts from the extensive published commentary on the interview process, and all of the students are expected to be prepared to conduct this first interview. The class actually starts with a thirty-minute videotape that portrays the initial interview of a client about to join two associates in the provocative venture of owning a racehorse, followed by some informal commentary on the style and success of that interview by two law teachers skilled in the process. (It is worth adding that I insist upon attendance at the first class session, unless a student has a medical excuse, and absent students lose their places to those from the waiting list who do come to that first class "on speculation.")

That videotape makes a good lead-in for the two student role-plays. From the outset we make it clear that we take the role-playing exercises seriously. There is nothing wrong with a little mirth, but we are looking for a strictly professional approach, and any attempt to "play to the gallery" (happily, a very rare occurrence) is firmly nipped in the bud. Don Glazer and I play our client parts as "straight" as we know how, trying to react as we think the respective clients would, without either "hamming it up" on the one hand or trying to plant pedagogical booby-traps on the other. This works quite satisfactorily, since even simple, homely situations present plenty of opportunities for thoughtful lawyering (and a little humor as well).

Just as in the opening videotape, each role-play is followed immediately by a discussion and evaluation of the lawyer skills demonstrated. Since that analysis of the role-play is at the heart of the learning experience—for all the students, not just the role-player—we pay especially careful attention to how the analysis is handled on this first occasion. We have found it useful to point out right at the start that any review of a role-play is likely to have a somewhat critical hue, so it is important for the role-players to be resilient.

No one finds it pleasant to have his shortcomings subjected to the bright glare of classroom discussion, even in a good pedagogical cause; and students are notoriously slow to criticize the performance of their fellows, at least in upper-class courses. But thin-skinned role-players or overly tender classmates can impede the educational benefits that are the objective of the exercise. With the proper encouragement, all the students turn out to be pretty good-natured about the whole enterprise, although the instructors are well advised to keep in mind the sensibilities of the students throughout a course of this kind.

As an anchor to windward in keeping the enterprise on an even psychological keel (a mixed nautical metaphor if ever there was one), we do try to limit the focus of the classroom discussion to the major issues presented by a role-play, with respect to both the substantive knowledge evinced and the lawyering skill displayed, rather than attempt a detailed, line-by-line review of what transpired. Time pressure alone would dictate that approach: the weekly class sessions run about 140 minutes, of which 30 are consumed by the two role-plays and 10 by a mid-class break, leaving only a little more than an hour and a half, which goes by all too quickly (at least from the instructors' point of view). But we do not eschew entirely the notion of comprehensive feedback for the role-players; instead, we reserve an hour after the end of the regular class session for that purpose, during which time Don and I try to provide the role-players with a complete review of their performance. When one of us is not involved in the role-play as a client, he takes detailed notes on who said what, or reacted how, and on the few occasions when both of us are role-playing we borrow notes from students. (In the early years, we used to videotape each role-play for playback during these post-class sessions; this is a useful practice but also quite expensive, and we finally concluded that it was not really necessary.) We invite the other students to sit in on these feedback sessions, and a few do so regularly. At these sessions we can go over virtually everything that happened and be quite candid in our appraisal (balanced, of course, with praise for the strengths that were exhibited).

I believe that these post-class sessions represent an important addition to the total enterprise, contributing significantly to the learning experience for the students involved. The role-players certainly appreciate the extensive feedback, particularly since it comes promptly enough so that the performance is still fresh in their minds, that is, when the pedagogical value of the review is greatest.

After the first role-play interview of Gold and the ensuing discussion, another student volunteer takes over to "continue" the meeting with Gold. The term "continue" is used advisedly: one of our operating guidelines is that the second role-play always follows on wherever the first left off, just as if there had been no break (or change in lawyers). This continuity is necessary to make reasonable progress over the course of the two role-plays, whether they involve interviewing, counseling, or negotiation. It is really part of a broader ground rule that we describe as "real time": the role-players are always instructed to proceed as though they were under no time

constraints and simply to cover as much as they can at a normal pace in the approximately fifteen minutes available to them. The fact that whatever they are working on cannot be completed in fifteen minutes, or thirty either, is immaterial, and we try not to let that inherent limitation affect the performance in the time allotted. (After the earliest sessions, however, we do urge the role-players to drop the opening amenities that would be customary between fellow professionals, in the interests of using their time as effectively as possible.)

For the second and following classes the student role-players are assigned in advance, so that they know in which week they are scheduled to perform. We prepare a schedule of the topics to be covered in the successive weeks, and invite the students to sign up for the one in which they are most interested. Typically, they will be working in teams of two, although they do the actual role-plays individually. One of the important responsibilities of the role-players is to prepare a memorandum in advance of the class in which they perform, detailing their plans for the interviewing, advising, or negotiating involved and including an analysis of any relevant legal doctrine and the pertinent facts already discovered or to be sought in the forthcoming session. These memos take the form of a report by junior lawyers working on the case in response to a note from the senior in charge of the matter, which is included in the mimeographed assignment materials, along with some 20–30 pages of relevant commentary on the issues likely to arise, culled from a variety of sources such as law reviews and CLE publications. We assume the parties are in Massachusetts, to provide the reality of dealing with the corporation statute and other authorities in a particular jurisdiction, although we rarely dwell at length on any peculiar nicety of Massachusetts law. The student memos are due two days before the class so that they can be duplicated and distributed to the other students in time to be read in preparation for the class.

Thus for the second class the two assigned role-playing counsel are expected to produce a memorandum summarizing the results of the previous interview with Gold and setting up an agenda for the planned follow-up meeting with both Gold and Bright. Bright, it turns out, has something of an aversion to meetings with lawyers, due less to concern about fees than to his feeling that he could be spending his time more profitably at his place of business. That is why he did not accompany Gold on the first visit to the lawyer's office and was content to let Gold speak for both of them. Obviously, Bright's absence heightened the potential conflict of interest for the lawyer trying to represent both Bright and Gold in launching their venture. The student role-players usually blithely ignore this issue in the meeting with Gold. However, the assigned material for the second class contains some relevant commentary on this question, and so it is likely (but by no means inevitable) that the matter will be raised in counsel's memorandum and the meeting with the two clients. Needless to say, discussion of professional concerns does not exactly enthrall Bright, and Gold too is inclined to turn off this issue all too lightly. But in the course of the interview with Gold and Bright some potential differences of view are likely to

surface, such as the extent of Gold's input on major business decisions (it is already understood that Bright will run the day-to-day operations) and whether Gold might put more of his investment, expected to be somewhere around $100,000, into the new venture in the form of debt (it being pretty quickly agreed that the enterprise should be incorporated, to assure Gold of limited liability). As a result, for the next several classes it is assumed that the parties have chosen to be separately represented for the purpose of concluding the deal, a process that includes resolving issues like the foregoing, plus preparing the articles and by-laws for the new corporation (which will be styled "Bright Enterprises, Inc.").

In the third week Gold meets separately with his counsel, and in the fourth week Bright meets separately with his. As usual, the two counsel assigned for each of those sessions will prepare an advance memo to be distributed to the rest of the class. The result of this approach is that each week the students other than the role-players must master both the assigned materials from the instructors and the memo prepared by the role-players. Unlike many upper-level courses, in this one attendance and preparation have never been a problem. The fact that class participation counts significantly in the final grade is no doubt partly responsible, but the format of the course itself also seems to evoke an extra measure of interest and enthusiasm. To further heighten the sense of shared involvement in the class, all students other than the role-players for that session are required to hand in at the beginning of class a brief commentary on the memo prepared by the role-players. These commentaries are not expected to review or evaluate the entire memo (which may run ten typed pages or more); rather the students are asked to focus on what they regard as the crucial points and to offer such additions, disagreements, or support as they think appropriate. The guideline for this exercise is what advice a fellow lawyer who had just finished reading the memo would give to the role-players just before they went off to meet with the client—or the lawyer on the other side, as the case may be. The commentaries may be quite informal, handwritten if desired, and no longer than one and one-half typed pages (or the equivalent). We do treat these commentaries seriously, however, and they are returned to the students the following week with marginal comments by the instructor (plus a commendation for any particularly constructive effort). Performance on the weekly commentaries is also taken into account in the final grade.

This simple device seems to have raised the level of commitment and participation of the students by an order of magnitude. Indeed, we now tend to start each day's class with 20–30 minutes of advice to the assigned counsel prior to the start of the role-plays, in order to give them the benefit of comments by their fellow students on their projected approach. Especially if the assigned counsel are off-base on some aspect of their analysis, as happens from time to time, they at least get a chance to take advantage of this preliminary discussion and make their role-plays more effective.

By the end of the fourth class, the general framework of the deal is set firmly enough to allow the parties to turn their attention to the employment agreement for Bright, who will be working full-time as the chief executive of

the new corporation. This agreement will provide the vehicle in class five for our first negotiation exercise. To introduce the negotiation process, we use the last portion of the fourth class for an unrelated negotiation of a simple engagement agreement between an opera company and an aging soprano, in which price is essentially the only issue. The class is divided into pairs who go off and negotiate a deal for their respective clients in fifteen minutes. When the class reassembles, we compare the figures reached and analyze the steps that led to the various results, that is, who made the first offer, the concession patterns, the "principled" positions advanced, etc.. The objective of this exercise is merely to give a realistic taste of the negotiation process, to provide a springboard for the later exercises; and allowing all the students a first-hand negotiating experience right at the outset proves valuable for everyone.

For the purpose of negotiating Bright's employment agreement, and for most of the subsequent negotiation exercises as well, the class is divided in two, half to represent Bright and the other half Gold. Each side has two assigned counsel, who work as a team in preparing a memo analyzing the position of their respective clients and indicating their planned strategy for the negotiating session. These memos are distributed only to the lawyers on the same side, in order to preserve the confidentiality of counsel's work-product, and the brief commentaries from the other students are directed only to their own sides' memo. At the start of a class devoted to negotiation, the two teams meet separately in order to review the planning of the assigned counsel and to consider whatever comments and advice the other students on that side may offer. Don Glazer and I "chair" these separate meetings, but here we each play the role of a senior lawyer meeting with juniors on the eve of an upcoming negotiation (a common enough scenario, although to be sure there would typically be only one or two juniors present at such a strategy meeting rather than nearer fifteen).

Don and I regard these strategy sessions as among the most valuable units in the entire course. It is here that we get the chance to emphasize the critical importance of advance preparation and planning for a negotiation (or any other significant professional activity, for that matter). The assigned materials for this class include, in addition to some commentary on the negotiation process, excerpts from writings on employment agreements generally and the tax aspects of fringe benefits, plus two brief sample agreements that highlight the most important issues. If the assigned counsel have not devoted sufficient time and attention to the relevant substantive doctrine, it becomes painfully evident in a planning session of this kind, and that can be an important object lesson for everybody. The fruits of careful advance work, preferably by assigned counsel on their own but in any event as a result of the group strategy session, will be readily apparent in the actual negotiation that follows.

When the two groups get back together in the classroom, one of the assigned counsel for Bright meets with his counterpart for Gold. In this first negotiation involving the Bright employment agreement, we tend to start with the issue of compensation, including fringe benefits, although natu-

rally such questions as where to begin and whether to proceed issue by issue or try to forge a total package are among the matters considered in the separate strategy sessions. Since it is quite common for the clients to be present for the discussion of what is essentially a "pricing" term, we generally encourage the clients' attendance at the first meeting, although here too the matter is at least theoretically left to the discretion of the lead counsel. After discussion of that role-play by the class, the other assigned counsel for the two sides have their go at trying to resolve the compensation issue (and any other terms that time may allow), picking right up where the prior role-play left off, just as if they had been the lawyers who started and had simply taken a brief break. Even if the clients are present at the first role-play, they often do not attend the second one, to lay the basis for a discussion of how the presence of clients affects a negotiation.

Time is always at a particular premium in these sessions because the spirit of competition between the two groups is high, and the situation produces endless fodder for discussion. That puts added pressure on the post-class detailed review of the role-plays, which we handle by having Don review the role-play of one pair of opposing counsel while I review the other, then switching off.

In the sixth class new pairs for the respective sides take over, and the focus shifts to the other terms of the agreement, such as termination for prolonged illness (or cause), description of duties, confidentiality, and a convenant not to compete. (If the negotiations did not manage to reach closure on the matter of compensation and fringe benefits the preceding week, we stipulate some appropriate resolution in order to be able to move on to the new terrain.) Since these are essentially technical, rather than "pricing," issues, laymen are unlikely to contribute much to resolving them; therefore we do not include clients in either of these negotiation sessions. At the same time, technical provisions of this kind can afford an opportunity for more collaborative negotiation, that is, a greater degree of cooperation between the lawyers in a joint effort to work out terms that will fairly accommodate the justifiable expectations of the parties.

In this exercise we also seize the chance to introduce a modest drafting dimension, asking the assigned counsel on each side to include with their memos a draft of the important remaining provisions, to be submitted to the other side. (The accompanying memos containing the confidential strategy planning are not exchanged prior to class, however.) It is somewhat uncommon for both sides to prepare a draft, but the two drafts do serve to sharpen the differences between the parties, thus making the negotiating sessions more efficient. It also helps to have specific language to work with on some of these technical matters, such as the statement of Bright's duties, or the description of the "competition" that is prohibited for the specified period and in the described area by the proposed convenant not to compete (i.e., "similar business" vs. "related products", etc.).

We do not spend much class time on the drafting effort itself, as distinguished from the merits of the proposals presented. Usually the respective provisions come largely from one or the other of the two sample contracts in

the assigned materials (which also include excerpts from an article dealing with the substantive Massachusetts law on covenants not to compete). But there are often at least some variations in language which deserve attention, and we try to address such matters in the post-class evaluation of the role-plays. Our inability to make a greater pedagogical contribution in the classroom with respect to the drafting has long been a source of disappointment for the instructors, especially since the student drafts always need some editing, if not complete recasting, but under the pressure of time we have chosen to concentrate on the negotiation process, which we believe offers a greater educational return for the class as a whole.

For the seventh class, it is assumed that two years have passed since the organization of the new corporation, and the financial statements indicate that, although the company has done reasonably well, the Cozy Legs item that led Gold to invest in the enterprise has not taken off the way the parties had hoped. Gold thinks that is because Bright has not given enough attention to the marketing of the product and is instead spending too much in time (and resources) on trying to develop new products. In the meantime, Bright has in fact come up with a new invention, a solar heating device that has considerable promise but could be quite expensive to exploit. Gold was opposed to the corporation taking on this product, but then when Bright came up with outside backers to finance a new separate solar enterprise, Gold insisted that their original corporation was entitled to an interest in that venture. Bright disagreed, and the parties are at an impasse. However, they are both anxious to resolve the matter amicably, so that it will not adversely affect their continuing relationship. Bright's employment contract is at best ambiguous on the question of rights to new products developed by him, and the facts are unclear as to how much of Bright's normal business time and company resources he used in creating this solar device. The task confronting counsel is more than just that of resolving to what extent Bright Enterprises should share in any proceeds from this new item: since Bright's innovative flair makes it likely that this situation will recur, it would be well to establish express guidelines for dealing with such matters in the future (a need that incidentally provides another opportunity for a modest drafting exercise). Once again, the class is divided, half representing Gold and the other half Bright, and separate strategy meetings precede the negotiation role-plays.

This topic regularly proves to be one of the high points in the course. The competitive spirit is quite keen, perhaps in part fostered by the two senior lawyers in the separate strategy conferences with their respective groups. (For what it is worth, this is the unit Don Glazer and I use in our occasional one-day forays into the realm of continuing legal education.) We never come close to finishing this exercise in the scheduled class session, and it could easily sustain another class. We prefer instead to use this problem as the basis for a final project for the students to do on their own (in lieu of any final examination), which will be described below.

From this point on it should be sufficient merely to highlight the remaining topics, pausing only to note any unique features involved. The

eighth class builds upon the recognition, during the dispute over the solar device, of the need for additional management strength, particularly in the area of sales. A capable young sales person indicates interest in joining the company, but he is unwilling to leave his present post unless he can acquire some equity participation in Bright Enterprises. Gold and Bright meet with counsel to review the prospects for such an arrangement and its impact on the fifty-fifty split between the two stockholders and directors which currently obtains. Class nine presents the aftermath, with the prospective new executive meeting with one of his lawyers to prepare his position as to how much stock he should get, at what price and when. (The part of the new executive is usually played by a colleague imported for a one-shot role: on one occasion we were fortunate enough to have James C. Freund of the Skadden, Arps firm, a renowned corporate lawyer whose book, "Lawyering: A Realistic Approach to Legal Practice", is perhaps the best, and surely the most readable, examination of business law practice in print, and provides us with some valuable excerpts in our assigned materials.) In this session tax aspects play a very important role, and the assigned materials contain a heavy dose of learning on IRC Section 83. Then another lawyer for the new executive meets with counsel for the company to work out the deal; since Bright and Gold are not opposed to granting a stock interest of up to five percent and are sympathetic to their prospective new employee's tax problems, an ideal opportunity is presented for the negotiation to take on a largely collaborative rather than competitive hue. For that reason, as well as the press of time, we omit any division of the class into separate groups for this negotiation.

For the tenth class, there is another "great leap forward", this time of only a year, during which the company has continued its modest increase in sales and net income. At this point Bright is pressing for some kind of buy-sell agreement upon the death of any shareholder, funded by insurance (for which he already has some cost data). Gold is dubious about seeing the company incur more extraneous drains on cash flow but agrees to meet with the insurance agent Bright has been talking to. Counsel is asked to sit in on the meeting, in part to make sure the parties don't succumb to a sales blitz by the agent. For this class we invite to the classroom one of the most knowledgeable insurance people in the Boston area, Mr. Eugene Notkin, who simply assumes his usual role of advising businessmen about stock purchase agreements and the role of insurance. This affords a very useful experience in dealing with a thoughtful fellow professional. After the session with Mr. Notkin, another student role-player meets with the clients on their own to review the results of the earlier discussion and to make plans for implementing a buy-sell agreement in this situation. The assigned materials cover the topic extensively, and include some sample agreements.

For the eleventh class, Bright and Gold are again separately represented, and counsel for the former prepare a draft of the proposed principal operating provision for such an agreement, incorporating any understandings already reached in the prior week. We arrange for this draft to be turned in early enough to enable the assigned counsel for Gold to respond to the draft

with revisions, counter-proposals, and the like; both the original draft and the response are then distributed to all the other students before class. In the class meeting the role-players for the two sides negotiate the terms of the buy-sell agreement. This topic has never been as successful as it should be, probably because there is just too much to do, and the matter is the most complex we deal with. But we hope that that too is a lesson worth learning.

For the twelfth class, one more year has passed, and relations between Gold and Bright have seriously deteriorated, a situation due in no small measure to the fact that Bright's developing relationship with the new executive has left Gold feeling more than ever isolated from the decision process and the affairs of the corporation in general. To start this class we use a videotape of Will Sogg trying to pacify an angry Mr. Gold (while keeping a wary eye on the delicate conflict of interest issue in the process). Thereafter, Gold (or in some years, Bright) meets with counsel to review the options available for terminating the relationship, presumably by a buyout or perhaps an involuntary dissolution. In the thirteenth class the die is cast, and lawyers for the two sides attempt to negotiate a buyout of Gold, against the backdrop of the possibility that either side might attempt to compel a dissolution. Obviously, this topic presents corporate and tax questions galore, and the assigned materials offer the usual array of background on these issues.

As noted earlier, in place of an examination we assign a final project, which consists of each student negotiating with another student to complete the resolution of the dispute between Gold and Bright over the rights in the new solar device and the guidelines for dealing with future inventions by Bright. This exercise is required for all students except those who did a second role-play in class; we think it is useful to be able to offer a second opportunity to a few students, particularly those who did their first role-play early in the term, before there had been much change to learn about the various lawyering skills. For this final project, each pair, after meeting together on their own, turns in a joint draft reflecting the lawyers' agreement on the allocation of the interests on the solar item and the handling of new products developed by Bright. In addition, each student individually prepares a separate memorandum detailing his advance planning and strategy on behalf of his client, his view as to how the negotiation went, and his evaluation of the outcome; these memos are expected to be quite candid and are not supposed to be shared with the student-lawyer on the other side. Reviewing these final projects has been a source of considerable satisfaction each year: virtually all of them reflect a reasonable grasp of the negotiation process and bear evidence that the instructors' continual emphasis on advance preparation, principled positions for initial offers and concessions, careful listening to the other side, and striving for creative solutions has not been in vain. The performance on the final project constitutes about one-third of the final grade in the course; the memorandum and role-play as assigned counsel in class account for another third, and the remaining third is based on the combination of class participation and the weekly commentaries on the memos of the role-players.

Two concluding observations are in order. First, and perhaps foremost, the preceding description of the format for the course makes clear how important it is to have two instructors. In addition to the two client parts to be played, it is essential to have two "seniors" as group leaders whenever the class is divided in half for the purpose of conducting strategy conferences on behalf of the respective clients. Moreover, the interplay between the two instructors in the class discussion is itself of special value. Don Glazer and I do not always agree, either on substance or procedure (although we are both struck by how often we do see things almost exactly the same way); such differences of view as do emerge between us serve as a useful reminder that these questions are often very close, requiring hard thought and careful judgment, and thus our exchanges contribute significantly to the learning experience.

There is much to be said for having an active practitioner as one of the instructors. Of course we don't indulge in war stories, but a practicing lawyer can add a valuable dimension, and the students appreciate the fact that one of their instructors is talking about things he does on a daily basis downtown. In this respect I have certainly been blessed by having two such colleagues as Will Sogg and Don Glazer, both outstanding lawyers with a real flair for teaching. Don is a full partner in the operation, and, like Will, he never misses a class and is always totally prepared on both the assigned materials and the memos prepared by the role-playing students (which we arrange to get to him prior to each class). He is justifiably spared the weekly evaluation of the commentaries submitted by the students, as well as the final projects. On the other hand, in the post-class feedback Don often takes the lead, while I am fussing around with scheduling for the following week's role-play and other housekeeping matters. I mention these aspects of the teaching arrangement not just to deliver a well-deserved encomium to my colleagues but also to emphasize the value of having a partner who is both enthusiastic and committed.

Second, as to the mix between substantive law and lawyering skills in the course, I think it is important not to let the doctrinal input get too complicated lest the substantive analysis overwhelm the process considerations that are intended to be the main focus. At the same time, I am convinced that each topic must have some significant substantive law backdrop in order to make the lawyering experience in the role-plays realistic and meaningful. While it is possible and even occasionally useful to dissect and analyze lawyering skills in the abstract, the value of such an endeavor is definitely limited. After all, interviewing, counseling, and negotiation do not arise "in gross"; they are means to some ultimate end desired by the client and are largely circumscribed by the situation presented. For example, the bottom line for a successful interview of a new client is the relevant facts, and relevance is determined by the applicable legal doctrine. A lawyer who is not versed in the substantive differences between partnerships and corporations can hardly hope to ask the right questions and uncover the information that would lead to the best choice. Similarly, counseling a client about the allocation of control in a closely-held corporation is not likely to go well if the

lawyer is unfamiliar with the interplay among the directors, stockholders, and corporate officers in the conduct of the affairs of such an enterprise. And how about negotiating the buy-out of one of two stockholders without a full understanding of the possible right of either party to compel dissolution, and the impact of such a step on each of them. In short, good lawyering requires a command of both the skill involved and the substantive law applicable to the particular transaction, and that lesson should be instilled by every exercise.

I hope these reflections on our efforts will spur others who are working, or at any rate interested, in this area to share their experiences or their views, either directly with the author or through the pages of this *Journal.*