

1-1-1983

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Recommended Citation

Tomain, Joseph P., "Lawyering in First-Year Property" (1983). *Faculty Articles and Other Publications*. Paper 204.
http://scholarship.law.uc.edu/fac_pubs/204

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Lawyering in First-Year Property

Joseph P. Tomain

This essay discusses the use of a role-playing exercise in a large (70–100 students), first-year Property II course. The central focus of the course is land use, and I use a Board of Adjustment hypothetical, with students in the roles of lawyer, client, expert, and member of the Board of Adjustment. I first used the problem to encourage fact analysis. Even second-semester first-year students too easily ignore facts and focus on the “rules of law” seemingly to the exclusion of all else. After using this method, however, it became apparent that many more learning opportunities present themselves. In addition to fact analysis, the exercise presents students with an opportunity to apply and interpret an enabling statute and ordinance, become involved in the art of persuasion in an advocacy setting, apply facts to a substantive area of the law, see how the law interrelates with another discipline, namely planning, and begin to learn what it means to become a lawyer. It is this latter item that most surprised and excited me, and it is the one that is the central focus of this essay. The exercise not only proved to be a way for students to become actively involved in learning about lawyering processes in a very deep and fundamental way but it also gave me the chance to become part of that experience. I will describe the exercise and then discuss what flowed from it in terms of student reactions and my reflections on their work.

Students are given handouts containing one of four fact settings, a description of a township, selected sections of a zoning ordinance, and a zoning enabling statute. Research is limited to the casebook in use at the time, because the problems are designed to familiarize the students with the process of applying facts to law, with the emphasis on factual analysis.¹ Students are not restricted in their use of other legal materials to educate themselves on the law of zoning, but they may not refer to materials other than the casebook during their presentation. The aim is to promote competitive equality without stifling initiative. The students are not restricted in their use of demonstrative exhibits or other types of factual evidence; on the contrary, they are encouraged to exercise creativity in presentation and persuasion. In preparation, students are requested but not required to attend local planning-board or zoning-board hearings held in the area.

Teams of nine or ten students work together. Each problem involves teams of three or four students each: the applicant's team (the applicant, his attorney, and his expert); the objector's team (the objector, his attorney, and his expert); and the Board of Adjustment (the board's attorney, its expert,

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and one or more board members). Students are given the following instructions about the roles of the participants:

Attorneys: You must assume the role of advocate in presenting your case. You may present any evidence you wish, call any witnesses you wish, and elicit from them all relevant testimony. I suggest that you call an expert and the party in interest, e.g., applicant or objector. You have the right to object. [After some experience with the exercise, I limited cross-examination to two questions, then eliminated it altogether. Although it was great fun watching the students cross-examine, it is too time consuming.] You do not have any right to discovery other than what is of public record. Even though this is a lay board I urge you to protect your record and make sure that only relevant evidence is admitted and that irrelevant or otherwise objectionable evidence does not creep into the record unprotected by an objection. (I fully realize that you have not had Evidence, but use your common sense. Never abandon this most vital tool of the lawyer.)

Experts: Assume a field of expertise that you feel is most relevant to the problem before you. It may be that more than one expert is required. Limit yourself, however, to one expert who may be qualified in one or more related fields, e.g., the civil engineer may also have expertise in planning and traffic control but not in real-estate evaluation. A real-estate appraiser may be an expert in appraising and planning but not traffic. An architect may be an expert in planning and design but not in traffic or appraising. Therefore, pick an expert who will be most effective in helping your client in overall testimony. Do not pick an expert whose knowledge is so restricted that he will be of limited value, e.g., a supermarket architect when you are designing a hospital.

Objectors: Your role is almost inevitably that of a neighboring or adjoining property owner or owners. Generally, your opposition is based upon one thing—the use is too close to you. You will be required to make your reasons known to the board. Since you are neither an expert nor an attorney your reasons can border on the absurd. Thus, legal relevance is of no bar to your testimony.

Applicants: Your role is primarily that of a landowner who wants to do something not permitted under the ordinance and you must petition the Board of Adjustment. You are not bound by considerations of legal relevance either; that is a matter for the attorneys and the board.

Board Members: Primary responsibility for the conduct of the meeting will rest with the board member. The board member must rule on objections and matters of procedure and see to it that the meeting is conducted in an orderly fashion. The board member may and is encouraged to ask questions of any participant. You may ask your attorney for legal advice, but the ultimate decision is yours to make.

The students invariably perform well in terms of assuming their roles. They are enthusiastic, become quite involved as advocates, and accurately reflect, in my opinion, what goes on at a Board of Adjustment. The students more than meet my expectations in terms of preparation and analysis. Occasionally there are some brilliant theatrical performances as students attempt

to perceive and understand their roles while trying to convince and persuade a board that relief should or should not be granted.

The first two times I used this simulation I was thrilled at how easily and readily students adapted to their roles. The exercises were invariably lively. At the same time, I was frustrated by the fact that they played very loosely with the statute and ordinance. I was afraid they were having a good time but they were not learning "the law." This seemed to be an odd incongruity. So I added a required paper.

As part of the exercise students are now asked to write a short (three- to five-page) essay entitled "Reflections, Legal and Otherwise, on My Role." Student reactions are rich and varied and the papers are indicative of the fact that this experience went beyond learning "hard" law. Many of the papers reflect the tensions students experience as they come to grips with the process of becoming a lawyer. The papers are most compelling when the students speak in a personal or subjective voice. As a teacher I am challenged by the very real and delicate issues that surface in this role-playing simulation.

The essays reveal that this exercise produces an embarrassment of riches. So much goes on that it is difficult to focus student attention on the key factors. Indeed, I have not resolved in my own mind whether attention should be focused and, if so, whether I should do the focusing. How do I adequately discuss the rules of law, the legal issues, the strategies and tactics, the personal motivation, the interpersonal relationships, the effect all of this has on law and legal institutions, and the broader ethical, societal, political, and philosophical aspects? It truly is an embarrassment because it overloads me. Have I been giving them so much that all I do is confuse them? Or have I not given them enough guidance? Can these issues be developed systematically? Is an impressionistic development better? Will I run from the challenge by letting all of the ideas hang in the air so that students may take what they want? Or will I retreat further and stop this type of exercise?

One year I wrote down my reactions to the exercise and read them to the class. The substance of the remarks follows in the hope that readers may respond with their own reactions to simulated classroom experiences. These remarks are introduced by excerpts from the student papers.

The Quest for Legal Certainty

It was hard for me, in my role as a law student, to realize that the law was not necessarily first and foremost in this forum. . . .

[My first conclusion] was the insignificance of the law to nonlawyer, decision-making bodies. The second was the decisive effort that can be achieved through proper manipulation of factual uncertainties. The last was the importance of properly evaluating the roles of each participant and then tailoring a case to meet the needs of those roles.

I soon became frustrated because the preparation seemed inadequate. My legal analysis was correct, but for one reason or another I could not make the board understand. I felt I was not communicating, as if I was impotent.

There is a clear reluctance on the part of students to give up the security they find in talking about concrete rules of law. They become frustrated when they are confronted with a situation that requires them to let go of the "rules of law," which are assumed to hold all of the answers, and to engage

themselves as persons in a legal dispute. They must become familiar with facts, roles, and their own abilities. This lesson has a parallel for learning in the classroom. The quest for the answer or the hornbook statement is so much easier than confronting oneself and one's responsibility for learning. The burden of legal education is a heavy one. It is easy to fall back on the rules. It is much more difficult to try to superimpose those rules on a socio-economic-political order and, at the same time, assess where, as persons, we fit into that order. Law school would be much easier—but a lot more boring—if we were mechanical jurisprudes whose correct responses depended only on correct programming.

Confidence and Skill

I questioned my ability to make a point. Weren't my ideas clear, or was no one listening? Didn't they hear what I had suggested, or didn't they want to? For a half hour this continued and finally the board came to the conclusion I had been trying to make. Now I wonder if it is better to say something directly, or is it better to imply several ideas and let time take its course? What is the proper technique, and will this come naturally with time?

This left me with a feeling of inadequacy because I hadn't thought of it as actually being a maneuver. I hadn't thought far enough ahead to recognize the significance of what I was doing and the effect that it would have on the hearing. It was a rude awakening to hear others' perspectives on my behavior, especially when I thought I understood my motives.

Law school brings into question a student's competence and skill. Not all of us can be the quintessential trial attorney. Not all of us can or should work for the large paradigmatic private law firms. Maybe some of us shouldn't even be lawyers. These issues are difficult; they involve risk and they require us to make ourselves vulnerable. We must come face to face with ourselves, our choices, and the difficulties that those choices may bring. If we stay with these issues long enough, I believe, our reward comes in making difficult choices and commitments and staying with them. Role playing brings out these sensitive issues. Too often these things are ignored in law school. When and if they are addressed, they are addressed informally, unsystematically, and not rigorously. Questions of competence and confidence should be explored.

Handling Competition

A feeling of competition set in. It was important to put on the best case we possibly could against the applicant. This feeling of competition was so great that in preparing our argument we almost lost sight of our objective and that our only remedy wasn't to have the board of adjustment deny the special exception.

Manipulation of the board is most likely a talent that develops with experience and is an essential talent to be successful in this field.

The simulated exercise raises questions about winning. One team was so frustrated in its efforts to present its case that it was ready to give up certain victory in order to speak. The other side fought so zealously for a procedural point that the outcome of the case was ignored. The attorney literally lost the war in order to win one minor battle. How much of this comes from what we have learned or what we have failed to learn? How much of this is a reflection of the law school's legacy to the future? In both situations the client's desires, which are the purpose for the lawyer's presence, was forgotten. The need to win was strong, so strong that it could not be by default. It was so strong that every point had

to be decided favorably. The anomaly was that the ultimate victory did not seem important. Does the law-school experience induce this result or is it that the professionalism demanded has not yet shown itself. I would hope the latter is correct.

A simulated adversary exercise forces students to deal with how they relate to competition. Some students fear competition; others revel in it; and more are confused at how strongly they react to it.

At first I was surprised to read student comments that the exercise increased antagonism, hostility, and competition among students. I tried to reduce these elements by having the project play a relatively minor role in the course grade, by limiting the amount of legal research required, and by emphasizing creativity (fun?) rather than the solemnness attendant to playing by the rules. These reactions forced me to try to identify and then question my initial assumption that the exercise could or should be made as competition-free as possible, that the exercise was "bad" if it increased competition. Now my question is, assuming that competition is increased, what is the source of the competition? Is it inherent in the nature of the problem? the nature of the advocacy system? the process of professionalization? human nature? Having stated these questions, the answer seems obvious. Competition is engendered by all of these things, which brings out a deep learning point. If we can confront the nature of competition within ourselves, perhaps this can lead to a better understanding of the nature of competition inherent in legal institutions and within the law itself.

Embracing the Adversary Role

It was at this point, in preparing to exploit her age and poverty to the fullest degree, that I found myself not knowing what side of the fine line demarcating the ethical from unethical I was on. After grappling with this fact for a little while, I came to the conclusion that my intended approach was probably crossing over to the unethical side; so I quickly sought a rationalization to justify my strategy. This task was not very difficult to accomplish because the concept of the adversary system quickly came to mind, and I rationalized that I had the right to take the best shot at my opponent, and he at me. But my appeasement was shortlived.

I carefully followed in my mind the effect of my "go-for-the-jugular" approach on the legal process and saw its ultimate manifestation—injustice. If unchecked, exceeding the limits of ethical behavior leads to rights being denied and lost.

The first thing I learned from the zoning project was how much a mere nine months of law school has changed both my attitude and approach to controversy. The second thing I learned was, having lost my perspective nine months ago, how seemingly unfair the law can appear to a nonlawyer.

Students easily embrace their roles and, as Wasserstrom states, develop role-differentiated behavior.¹ They build up the visceral and emotional elements of the cases very enthusiastically, while paying less attention to the legal issues in the problem and, at times, paying even less attention to the human element involved in the setting. Is this the path of least resistance? Is it more comfortable to hide behind roles and thus ignore the delicate psychological and moral issues involved in being a lawyer? Does being a lawyer

1. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Hum. Rts.* 1 (1975).

require this type of behavior? Or does this behavior bring with it inner conflict? Do students experience lack of congruence between their personal beliefs, feelings, and attitudes and those they hold as lawyers, and consequently suffer anxiety? Can the student as person and the student as lawyer be synchronized? I believe that congruence would make clients happier and lawyers more fulfilled. Congruence between the law and the lawyer's role will increase substantive justice. The linking of substantive justice with lawyering skills, attitudes, and beliefs and the place of all of this in law school is an expansive issue. The role-playing exercise, with its reliance on experiential learning, raises issues that law teachers have an obligation to raise.

A harder question for me is how the issue of congruity between the lawyering role and substantive law can be examined. I suggest a simple exercise which begins by asking descriptive concrete questions, such as Who? What? Why? How? The questions are posed in a way designed to elicit reflective yet fundamental responses, e.g., Who am I? Who is my client? What do I want from this relationship? What does my client want? More specifically, what legal relief, *if any*, does my client want? The client's desire often is less a legal question than a factual or emotional, practical, or intellectual one.

In one problem, for example, the landowner may or may not have violated the zoning ordinance by maintaining a number of sculptures in his front yard. Does the landowner want to keep the art? Express himself? Prevent a fine? Both? In equal measure? What ethical and moral issues are presented in the question, Why does my client want what he wants? The question and answer present open issues which deal with such things as power and control of attorneys over clients and vice versa, paternalism, coercion, conflicts of interest, and the attorney's ability to represent the client effectively in an interpersonal sense. The landowner in the hypothetical may want to keep the art in his front yard for any of a number of reasons: (1) art is important and good; (2) art is important, but he does not want to be fined or be held out for public ridicule or risk losing his job at the college; or, (3) he wants to be a pain in the townspeople's collective neck. Each alternative is essentially a moral and ethical one. Finally, once I have decided to represent the landowner, how do I handle the representation?

The exercise is a simple one and at the same time it touches on our experiences and reaches our values. It touches the common human elements of lawyering and forces us to examine fundamental issues and ask whether what is going on in the reality of the legal problem is related to the substantive law. Reflection on role playing brings to us an awareness of such issues.

Dealing with the Human Element

I enjoyed the differing strategies of the attorneys but felt myself disliking the actions of Mr. Cautious's attorney. Again, I realized that this should play no part in the hearing, but it did. To me he was arrogant and therefore I would have enjoyed to see him shot down. (I can't believe I said that). This, perhaps more than anything, disturbed me. Why should I be influenced by the personality of the attorney? I thought I was there only to give an objective opinion.

"Yes, excuse me." Damned idiot; I know he needs both. I guess if he needs both and the evidence presented supports that, we will amend their request. That really makes me mad,

when we board members know what we're talking about and the lawyer pulls his "I'm a lawyer" crap.

He did not appear to be credible but more of a lunatic. I was influenced by his behavior and I am sure this influenced the others in making their decisions.

Because of all the different occurrences in the hearing, I am sure that the board decisions are made on emotional and personal reasons as well as or maybe even more than on justifiable legal standards. Where personal reasons can be covered by legal reasons it is easy for a board to make decisions on a personal basis disguised as legal needs of the community.

The simulation also exposes students to interpersonal relationships involved in being a lawyer. Students note the clash of personalities. They are confronted with the different views of their classmates. Persons sitting next to each other, once allies in a common cause against the teacher, find themselves to be adversaries. They view their classmates differently before, during, and after the exercise. A more delicate and hard-to-explore issue deals with the relationship of men and women in the context of roles. The camaraderie among students breaks down as masculine-feminine issues are raised dramatically. Student participants of both sexes often conform to gender stereotypes applicable to their roles. They feel forced to make assumptions and act out gender characteristics. The uneasiness of roles, inadequate and confusing legal positions, and uncertain facts result in much anxiety, which students must confront.

Examples of uneasiness with roles and with lawyering processes abound: cutting off testimony; not listening; objecting to irrelevant questions that do not hurt you; objecting to testimony you cannot change; not objecting to testimony that can hurt you; wanting to make a point regardless of its importance and regardless of what the other person is saying;² objecting for objection's sake ("After all, I've spent two semesters trying to be a lawyer; it's time I start sounding like one. Or if I quack like a duck, I must be one."); inertia, physical and psychic, such as staying behind the desk and asking prepared questions without listening to answers and without following up.

Conforming Attitudes to Role

I became aware of an aspect of the board role I had not fully considered. The emotional or subjective reaction to the facts of the problem, while not particularly helpful in a legal analysis of the facts, would likely be presented to the board as a first line of argument. . . .

I reacted without any awareness or even caring of the rights of the parties but from either fear or anger. The threat to close the hearing and decide on the scant evidence presented and the inspector's decision regained control, but it was frightening. I could almost understand why Judge Hoffman bound and gagged the Chicago Seven, which has previously been incomprehensible to me.

As people don roles, their perspectives change, sometimes dramatically. They are forced to question and to reevaluate their assumptions about law, legal institutions, and their place within this sphere. Often a participant was uncomfortable with his assigned role.

2. An extreme example of this came with an aborted problem, when the applicant said "Okay. Enter a decision against us" and the objector said "No. We don't want to win so easily. We're frustrated and we want to be heard."

The lack of clarity on the substantive law and the difficulties of adopting a role resulted in some student dissatisfaction, partly from design and partly as the path of least resistance. I have ambivalent feelings and thoughts about the level of satisfaction/dissatisfaction with the exercise. The source of dissatisfaction, I believe, stems from a sense that the students do not feel that what they were doing was "really law." It may also stem from the novelty of the experience, unfamiliarity with law or procedure, or a perceived inability to try cases. The fact that the case method concentrates on an appellate court's application of rules of law, rather than hot malleable facts, to a cold record also contributes to this sense of dissatisfaction. Finally, an inability to link cognitively and articulately the experience (or other personal experiences) with rules of law is also a factor.

The exercise, however, has many positive results. The students do not see lawyering as mythical or magical but as a real part of our common experience. Students realize that there is no one model that all lawyers aspire to and that there is room for all of us to be the type of lawyer that we are capable of becoming. Moreover, the students recognize that lawyering can be fun and even creative.

To the extent that students experience discomfort in this exercise, should I, as a teacher, relieve their discomfort? Do I want to? How can I? I have concluded, at least tentatively, that I should try to relieve the discomfort a little, in an effort to underscore the significance of this type of learning experience. I do so in order to articulate for myself and for the students what I believe the positive aspects of this exercise are.

I see simulation as a preliminary glimpse of the clinical experience and the "real world." The learning that goes on takes place on all levels. Students read and apply concrete rules of law. They confront themselves as people and engage in interpersonal dynamics. The exercise also subjects legal processes to inspection and asks the students to evaluate them in all of their facets. Attempts to link these experiences also suggest that this exercise is one way of inquiring into values. The role play is a necessary precondition to an exploration of creativity, effectiveness, and the deeper questions surrounding personal satisfaction and a personal search for meaning and values.

Because we engage in role play either too infrequently, too unsystematically, or too uncritically, students follow the path of least resistance by looking for answers. It is easy to play the game, either because "I can get away with it" or because "I am successful at it" or because "I am comfortable doing it" or because "this mirrors the model of lawyering I have been shown." Another attitude that students and teachers adopt regarding alternative teaching methodologies is "I need not reflect on my role because that is the way it is; what *ought* to be is inconsequential." Too often teachers uncritically reward students for acting as lawyers without questioning the assumptions behind lawyering processes. We do not take the next step, analyze what we are doing and what we are becoming in this process. Because we do not bother to analyze, we do not evaluate what we have done and where we are going.

I have been pleased with the outcome of the simulation. My goal is to place it in a broader context. The lesson to be learned, I think, it is that if we take the time to question our assumptions, think about what we are doing, and observe ourselves developing as lawyers, teachers, and students, we will be better lawyers and people for having done so. In the process, we may make a substantial contribution to the search for substantive justice.