

DESCRIPTION OF THE CRIMINAL LITIGATION COURSE:

The “Criminal Litigation” course uses a simulated criminal case to teach criminal procedure and evidence by means of a series of simulation exercises that place the students in role as either prosecutor or defense counsel to grapple with legal and evidentiary issues while giving careful consideration to the tactical benefits and risks of the available options and arguments. The students write short, weekly memoranda to analyze legal, factual and tactical issues and a lengthy memorandum on a motion to suppress that uses a hearing transcript and federal and state law to argue a variety of suppression issues. The students also conduct simulated witness examinations at a suppression hearing and at trial.

The simulated case is the prosecution of Steven Smith for one count of possession of a defaced firearm in his apartment. The case begins shortly after Smith's arrest and arraignment, moves through a suppression hearing, and culminates in a trial conducted by the students. (Actually three separate trials are held, with eight students participating in each one -- with four on the prosecution side and four on the defense side. A maximum of four witnesses are available for the trial (three prosecution witnesses and one defense witness) thereby giving each student an opportunity to conduct a direct or cross-examination.)

One of the central themes of course is the nature of working with facts at the trial level. As the students come to appreciate, working with facts at the trial level is fundamentally distinct from what goes on at the appellate level because:

- Facts emerge in dribs and drabs, over time, with the result that (a) you have to constantly keep in mind that what you know now may change radically over time and (b) you have to constantly scrutinize new facts to see how they fit in; and (c) you have to constantly revisit previously-developed theories and plans.
- There are no findings of fact that set the factual universe in which you're operating. The facts, when they emerge, are constantly colored and possibly tainted by problems of perspective, memory, and bias. A client may not know the whole story and may tell a distorted story for multiple reasons, including that they don't yet know and trust the lawyer.
- You're working with the facts for the strategic purpose of presenting a certain reality in the courtroom; you're not a historian trying to decide what really happened. In the courtroom, the lawyers construct a reality for the finder of fact (whether judge or jury). If you decide not to present certain facts and the other side also doesn't present those facts, then the finder of fact will never know that information and will see the world a certain way.

Another theme is the interrelationship between law and fact at the trial level. The course is designed to help students appreciate the following lessons about the interrelationship of facts and law at the trial level:

- The law, like the facts, is uncertain and gradually emerging. You learn the law by doing legal research, and the failure to find a certain set of cases means that they're not in the case.
- The facts guide the legal research by suggesting that legal doctrines might apply; the discovery of the doctrines tells you what facts are important and how they can be used to accomplish your ends.
- The lawyer is constantly developing interwoven legal and factual theories and then revising those theories. The students learn this lesson particularly in the portion of the course devoted to the suppression hearing, a context in which the law and facts are particularly interwoven.

Thus, the course is designed to give students the opportunity to work with fact and law in a simulated case in which their acquisition of each depends on their use of the skills of fact investigation and legal research and in which they receive facts bit by bit (as one does in a real case), have to develop a case theory based on incomplete and often imperfect information, have to use witness interviews to gather the facts (thus introducing the potential biases of witness perceptions and an imperfect question-and-answer mechanism for gathering the information), acquire the legal rules by doing legal research (using actual New York law, which is ambiguous in all of the ways that real caselaw is), and then mix together facts, law, evidentiary rules, case theory, strategic considerations, along with a considerable amount of narrative theory and storytelling.