ON TEACHING TRIAL ADVOCACY

At the outset, I will acknowledge that it is impossible for one person to "teach" another how to become a trial lawyer. Advocacy is an art, the performance of which is dependent upon predisposition, preparation, passion and practice. One becomes a trial lawyer through a mixture of organization, preparation, perseverance, authenticity, observation, doing it, accepting feedback from judges and great lawyers, adjusting and improving then constantly repeating the latter four, observing – doing – accepting feedback--improving.

I also acknowledge that there is not one “right way” to be a trial lawyer. The purpose of encouraging you to try different approaches and to having guest presenters throughout the term is to expose you to different successful approaches, styles, viewpoints and methods of accomplishing your objectives.

While I cannot and do not advise taking on your first trial ala Vincent La Guardia Gambini (of My Cousin Vinny fame), I do promise to expose you to the intellectual, ethical, emotional and physical demands of being a trial lawyer. In a simulated courtroom setting, you can, and will, confront situations and solve problems which all trial lawyers encounter and must learn to solve. Your skill development will be performed under the guidance of a diverse group of able judges and lawyers. I am honored to be able to preside over, critique and discuss your performances with you and the problems and strengths that attended them. I will emphasize doing it right, by organization and preparation. I will coach you, critique and discuss your performances and the problems that attend them. Other students are also expected to provide feedback in a constructive manner. This is a prepare it and "do it" course in which the demonstration-emulation competition and collaboration between participants before a presiding judge method of instruction is used.
THE FACULTY

Judge James is a trial judge, former trial attorney and law professor with trial experience. She brings a varied background, including both civil and criminal cases before state and federal courts on behalf of plaintiffs and defendants. Invited lawyers and judges will also participate during the term to provide additional perspective and insights.

TEACHING MATERIALS

Cases selected from Trial Diplomacy are People v. Burks and Cheek v. Penn Central. Excerpts from other cases may also be included. These cases should be read before the course begins. The case for the final trial will be distributed during the class.

SECTION, SIZE AND DESCRIPTION

The class is small by design. Students will be paired to conduct direct, cross and serve as witnesses. This requires that each student develop a mastery of the course materials including the cases identified, above. Students will participate in teams for the Final, a Civil Trial. Grading is individual, not team grading.

METHOD OF INSTRUCTION

It has been established through experience that strict adherence to the syllabus will result in the maximum instructive benefit. Constant work with the exercise problems produces desirable fixed habits in phrasing questions. One of the objectives is to form a fixed habit of asking questions of one's own witnesses, which do not lead the witness or suggest the answer desired and which are otherwise proper in form, and that provide the fact finder (jury) with useful and relevant information.

Another objective is to elicit facts of witnesses under cross-examination that place the examining lawyer in complete control of the cross-examination. Cross-examination questions should be specific, and to the point, almost always call for a "yes" or "no" answer, and bring forth facts from adverse witnesses in an effective manner. With proper preparation, a participant will be able to outline and phrase questions to make specific points in the examination, despite hearing some information for the first time in direct.

Judge James will direct the exercises, serve as the presiding judge during the demonstrations between participants, and provide in-the-moment critiques with each participant, as well as with the group of participants. All observing participants are
expected to raise objections to any improper questions. Participants are also expected to observe and note effective techniques and skills. Participants who raise objections should stand, to gain the Court’s attention, and make the objection succinctly in furtherance of developing a working knowledge of the tools provided to trial lawyers. If a question calls for a conclusion, is leading, assumes a fact not in evidence, is argumentative or objectionable for some other reason, it should be objected to and the grounds for the objections stated in clear, concise language.

Students may be called upon at random to begin the problem—e.g., the direct examination of Louella Wilson in the case of People v. Burks. The examining lawyer will be opposed by another member of the class. Each student must be prepared to take the role of any witness. Therefore, you must be familiar with the cases. Your role as a witness is to testify consistent with the record and to respond to a proper examination. The lawyer may complete the examination or be “paused” and another lawyer called upon to continue the examination. When a problem has been exhausted, we will move on to the next.

At any time during any presentation, another participant may be called upon to substitute for the current participant. In short, you may be called upon at any time to undertake any examination for which you are responsible.

It should be noted that your learning experience depends upon participation of every student. Because this is a practicum course, attendance is required. Requests for an absence to be excused must be submitted in advance, and may require a make-up, at the discretion of the professor.

The direct and cross-examinations included within the cases are not intended as a model, nor are the materials contained within the cases intended as a model. The materials contained within the assigned cases constitute the materials a trial lawyer would have on the eve of the trial. In the case of People v. Burks, you may assume that the case has been appealed, reversed and remanded for new trial. This is why we provide you with prior sworn statements. Of course, all the materials contained in the files may be used to impeach the credibility of any witness, regardless whether someone has done this in the past.

PREPARATION FOR CLASS

The syllabus is distributed to give you ample opportunity to read the text and prepare for every class. Before the second class on January 21, 2020 you should spend a considerable amount of time reading Trial Diplomacy (particularly chapters 3 and 4 on direct and cross-examination). Before the course you should review Oregon rules of
evidence on relevance, witnesses and hearsay. Due to the intensive nature of the course it is essential that you come to class on Monday January 21, 2020 prepared.

**SYLLABUS GUIDE**
for
**CIVIL TRIAL PRACTICE, Law 321**
January 13, 2020—April 13-18, 2020

By Monday, January 13, 2020

*Read the entire case of People v. Burks found in the text. Read the case of Cheek v. Penn Central found in the text.*

By Monday, January 20, 2020

*Read Morrill & Tornquist, Chapter 3 “Direct Examination” and prepare the direct examination of Louella Wilson, Herman Burks and Officer Johnson.*

Monday, January 13, 2020

Introduction to trial advocacy and to course;
General overview of civil pretrial preparation and trial strategy;
Introduction of case materials to be used during course; Description of *People v. Burks* and *Cheek v. Penn Central* and

Lecture on direct examination;

Break

Exercises in surprise witness direct examination (no preparation required)

Monday, January 20, 2020

Exercises in direct examination. Conduct direct examination of:

1. Louella Wilson in *People v. Burks*
2. Herman Burks in *People v. Burks*
3. Officer Johnson in *People v. Burks*

Break
Continued Direct Examinations

Lecture and Demonstration of Objections and Questions in Aid of Objection – Use, Strategy and Timing

Read Morrill and Tornquist, Chapter 4, Cross Examination and Impeachment, and Chapter 8, Trial Objections and Preserving the Record. Prepare for direct and cross-examination in People v. Burks, and Cheek v. Penn Central.

Monday, January 27, 2020

Exercises in direct, including objections and questions in aid of objection:

1. Louella Wilson in People v. Burks
2. Officer Johnson in People v. Burks

Break

Lecture on "The Art of Cross-Examination" (complete this next week)

Discussion and Demonstration of Impeachment and discussion of "Adverse Witnesses"

Read Morrill and Tornquist, Chapter 7, “Exhibits; Review and revise, as needed, outlines for cross examination and impeachment, and adverse witnesses

Monday, February 3, 2020

Exercises in cross-examination and impeachment:

1. Officer Johnson in People v. Burks
2. Herman Burks in People v. Burks
3. Elmer Tutt in Cheek v Penn Central

Lecture: "Laying Foundations and Introducing Exhibits; use of Demonstrative Aids"
Exercises in adverse witnesses (select two):

1. Elmer Tutt in *Cheek v. Penn Central*
2. R.C. Brown in *People v. Burks*
3. Detective Donald Masnjak in *People v. Burks*

*Read Morrill and Tornquist, Chapter 2, “Opening Statements”; Prepare to introduce letters, photos, etc. in People v Burks and in Cheek v Penn Central*

Monday, February 10, 2020

Lecture: “Persuasion through Opening Statements” (Geyer)

Discussion of incorporating damages/remedies into Opening Statements (TBD);

Exercises in Introduction of letters, photos, etc; Cross Examination and Questions in Aid of Objection on Exhibits, Reports, Demonstrative Aids

1. Examine Louella Wilson in *People v. Burks*, regarding location in question, using prepared diagrams or blackboard.
2. Introduce photos in *Cheek v Penn Central*, using witness D. Singleton.

Receive assignments in opening statements

*Each student will be required to prepare an opening statement for one plaintiff and one defendant. Pick one side in the criminal case (e.g., defendant) and the other side in the civil case (e.g., plaintiff). If you want the practice, prepare four opening statements; one for the plaintiff and one for defendant in each case.*

*In two of your opening statements, prepare and include exhibits and demonstrative aids*

Monday, February 17, 2020
Exercises in opening statements. Deliver opening statements:

1. *People v. Burks*
2. *Cheek v Penn Central*

Monday, February 24, 2020

Exercises in opening statements, continued.

Presentation of revised Opening Statements.

Lecture on “Direct and Cross-Examination of Expert Witnesses”

*Read Morrill and Tornquist, Chapter 6, Direct and Cross Examination of Expert Witnesses; Prepare Direct Examination of Expert Wm. H. Lockart, using exhibits 122 and 128, as supplemented by Judge*

Monday, March 2, 2020

Exercise in examination of expert and skilled witnesses, to focus on opinion, basis for opinion and qualification:

1. Detective Donald Masnjak in *People v. Burks*
2. Wm H. Lockart in *Cheek v Penn Central*
3. L. D. Gross in *Cheek v. Penn Central*

Break

Lecture and discussion on Jury Selection -- Planning your voir dire: asking the right questions, practical considerations, educating your jurors, deselection.

Jury Selection Forms – each student will fill out a Jury Questionaire, assuming either your own life or that of a fictional but not completely absurd person, as you wish. Judge James will pick the forms up and copy them for all students to use in the voir dire exercises that will commence Monday, March 11.

*Read Morrill and Tornquist, Chapter 1, Voir Dire Examinations; Prepare outlines for Jury Selection Exercises in each case (Voir Dire)*
Monday, March 9, 2020

Lecture on Developing Theory and Theme as Anatomy of Trial

Exercises in Jury Selection (Voir Dire)

Monday, March 16, 2020

Exercises in Jury Selection (completion of jury selection)

Lecture: "Closing Arguments, including Damages and Use of Jury Instructions"

Discussion of Jury Instructions

Receive assignments in closing arguments. Each student will be required to prepare for one plaintiff and one defendant. Pick one side in the criminal case (e.g., defendant) and the other side in the civil case (e.g., plaintiff).and closing arguments for Tuesday exercises.

Read Morrill and Tornquist, Chapter 9, “Closing Arguments” and Chapter 10, “Jury Instructions”. Prepare closing argument

Monday, March 23

SPRING BREAK!

Monday, March 30, 2020

Closing Arguments. Each student will be required to prepare for one plaintiff and one defendant. Pick one side in the criminal case *(e.g., State or Herman Burks) and one side in the civil case (e.g. Cheek’s estate or Penn Central) and prepare your argument, incorporating at least one instruction of law.

Discussion of Addison v Peyton civil trial, and options for trial regarding witnesses, exhibits.

Trial assignments for Final Trials and Trial Rules (James) Students will be placed in trial teams. Each team will be required to get two witness volunteers for their case, who agree to prepare for and attend the final trial.
Read Morrill and Tornquist, Chapter 5, “Preparation of Witness” and read final case Addison v Peyton and begin preparation for final trial.

**Trial Preparation in individual teams.** This will include Case specific witness preparation, voir dire, openings, direct, cross, likely objections, and closing arguments including instructions of law and verdict form.

**Before trial, counsel for the plaintiff and counsel for the defendant must confer on pre-trial motions, stipulations, and jury instructions.** Preparation of, exchange and confer, and presentation of motions in limine and proposed jury instructions to Judge James mjames@willamette.edu (limit of four motions and six instructions per side) via e-mail) by Noon the day before trial. For Motions in Limine, note which motions you stipulate to and which you want to argue pretrial if any. For jury instructions, indicate which instructions you stipulate to, and which you object to, if any.

**Monday, April 6, 2020 (DATE MAY CHANGE TO APRIL 13)**

- Lecture on Motions in Limine; Preserving the Record for Appeal during the trial; Drafting Stipulations in civil and criminal cases.

- Review of Trial Checklist (Openings/closing; witness and exhibit lists, preparing argument for pretrial rulings and preparation of orders, jury selection, instructions of law); Preparation of witnesses, developing theory and theme for Final Trial

**WEDNESDAY – Saturday April 15-18**

**FINAL TRIAL- Addison v. Peyton**

Each group will select one time slot: (these will be provided)

**FINAL TRIAL- Addison v. Peyton**

**NOTE:** A full set of instructions will be handed out in class.
In advance, Participants conduct witness preparation.

Motions in limine will be heard at the commencement of the trial.

Trial may be to the Court but your preparation must anticipate a jury trial. A one-two page list of proposed voir dire questions must be submitted.

Each side is required to call two witnesses. Each attorney for a side shall conduct the direct of one witness for that side, and the cross of one witness for the opposing side. One attorney shall make the opening statement and the other attorney shall make the closing argument for each side.

The parties are prohibited from stipulating to liability. The trial will be conducted on both the issues of liability and damages.

Critiques and discussion with judge will follow the trial.

NO FINAL EXAM