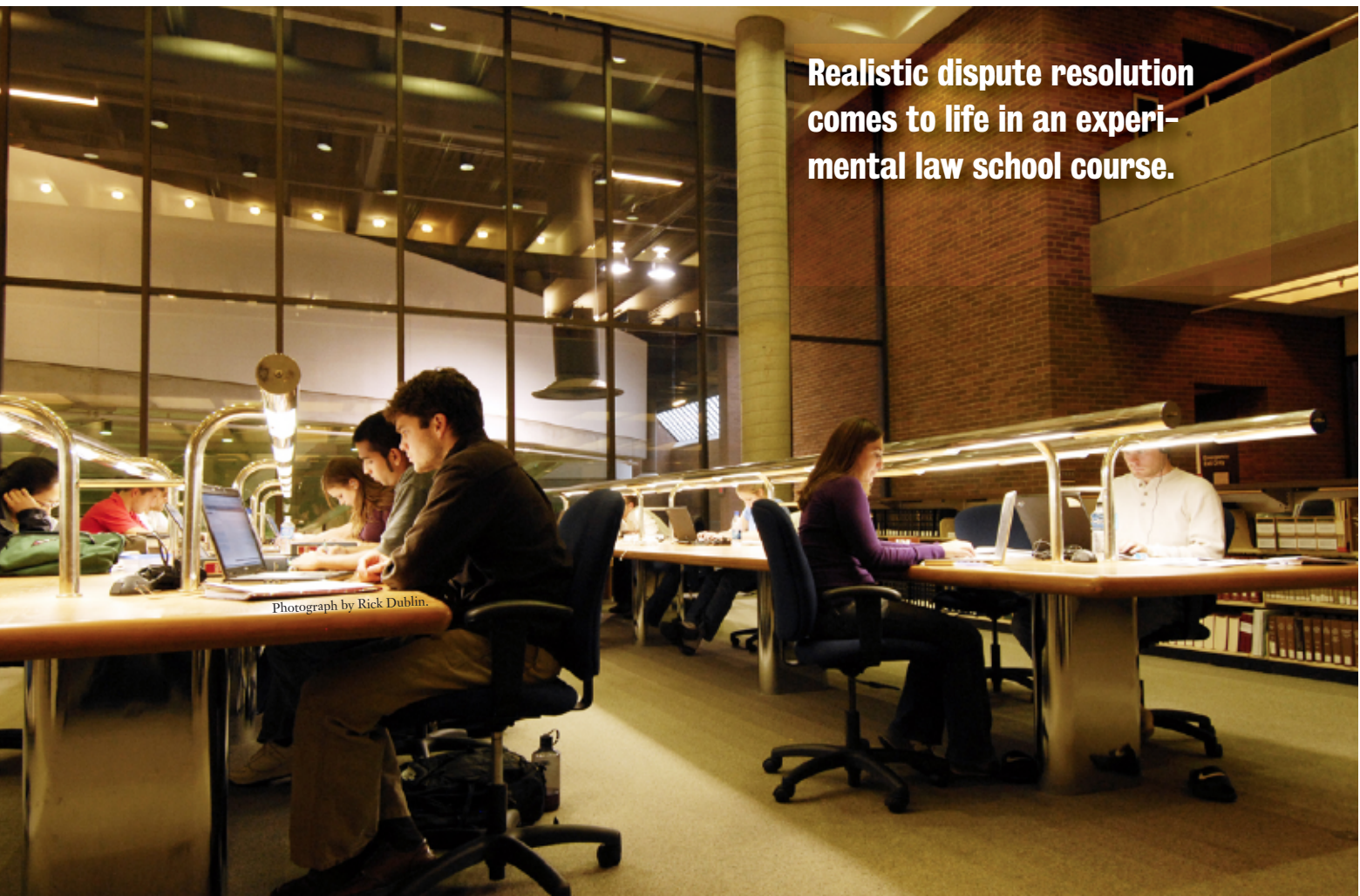


An Experiment in Legal Education: Simulating ADR Processes in the Capstone Course on Labor and Employment Law

BY LAURA J. COOPER



Realistic dispute resolution comes to life in an experimental law school course.

Photograph by Rick Dublin.

In a conference room in Minneapolis, an arbitration hearing is underway. On one side of the table sit the claimant, Dr. Rex Brown, and his lawyer and on the other side sit the representatives and counsel for the respondent, Willow Ridge Medical Center. Dr. Brown is seeking damages from Willow

Ridge for breach of contract and defamation. Karen Schanfield, a Minneapolis attorney from Fredrikson & Byron, is the presiding arbitrator, and the case manager is Mary Jara, from the American Arbitration Association's Dallas office, which administers arbitration proceedings in Minnesota. This proceeding seems entirely unremarkable, except for the fact that the conference room is at the University of Minnesota Law School and the parties' "attorneys" are actually second- and third-year law students.

This was a mock arbitration conducted as part of the law school's first Capstone Course in Labor and Employment Law in the Spring of 2010. The idea for this course came from a 2007 report of the Carnegie Foundation for the Advancement of Teaching called "Educating Lawyers: Preparation for the Profession of Law."

Since the early 20th century, the Carnegie Foundation has been studying and seeking to improve education of professionals, including engineers, doctors, nurses, architects, members of the clergy and teachers. More recently, it embarked on a study of legal education. It sent researchers to observe law school classes and clinics in the United States and Canada. Researchers spoke to students and faculty members and con-

ducted extensive research on legal education and professional education generally. The report produced as a result of this research concluded that legal education had much to learn from professional education in the health sciences. For example, medical students learn to practice medicine by working with patients under the supervision of skilled physicians. Medical students become acquainted with the tasks of actual physicians and develop professional judgment while experiencing in context the application of professional and ethical standards. The Carnegie Foundation report recommended that law schools adapt the medical training model to legal education. However, it recognized that, because legal education is shorter in length than medical education, law schools cannot offer the same slow accretion of professional skills over many years. Furthermore, it acknowledged that clinical courses in which law students represent real clients, though they have great value, also have limitations, including high cost, uncertain opportunities for learning

targeted skills and values, and the risk of adverse real-world consequences for clients. The report ultimately concluded that law students could develop professional judgment, advocacy skills and legal ethics through student role-playing in

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well-designed simulations accompanied by course work in which expert attorneys would model lawyering skills.

Minnesota Law School's one-semester Capstone Course on Labor and Employment Law was developed with the support of the Robina Foundation and two legal organizations that are committed to enhancing legal education in labor and employment law: the Labor Law Group, an international not-for-profit organization of labor and employment law professors, and the American Bar Association Section of Labor and Employment Law. Representatives of these legal organizations, among them law professors, labor and employment attorneys, and neutrals, served on an advisory committee formed to help design the course. This committee developed a list of critical skills and knowledge that law students should possess prior to commencing a labor and employment law practice and recommended that a hospital be used as the setting for the disputes that would be used in the mock proceedings. The hospital environment has both union and non-union employees, and disputes can involve a diversity of claims, including, for example, breach of the collective bargaining agreement, common law claims, and/or statutory claims, including violations of discrimination or labor laws. Representing the parties to these claims in simulated dispute resolution proceedings would acquaint the students with negotiation, arbitration, mediation and federal and state administrative agency and court proceedings.

To make the scenario used in the course as realistic as possible, I based it on reports of actual experiences of doctors, nurses, and attorneys who had practiced labor and employment law in the health care setting.

About a dozen students have participated in

the Capstone Course in each of the last two years. Each student was assigned to a "law firm" with the responsibility for representing a client. Others played the role of clients, institutional client representatives, and potential witnesses. For example, an M.D. played the role of a doctor accused of sexual harassment pursuing claims of contract breach and defamation. An actress played the role of the nurse who accused the doctor of sexual harassment and then was fired from the hospital. A retired medical center vice president of human resources played the role of the hospital's HR director. A former union steward acted the part of the union's business agent. Clients and witnesses received background facts about their characters and access to documents relating to the dispute, including letters, contracts, performance evaluations, investigative reports, e-mail messages and the like. However, the student "lawyers" were not given factual summaries. They had to learn about their clients and the disputes the old fashioned way—the way real attorneys would—by meeting with their clients and questioning potential witnesses. The students would then determine what claims, if any, to pursue and what defenses to assert.

Their next task was to select the appropriate forum for resolution of the claims. A claim arising under an employment agreement providing for AAA arbitration would be presented to an AAA arbitrator. A claim that the parties agreed to mediate would be heard by a mediator. (We have had experienced neutrals, including a retired federal district judge, serving as arbitrators and mediators in the simulated ADR proceedings.) A claim arising under a collective bargaining agreement would be heard in labor-management arbitration. Discrimination claims could be submitted to a state or federal agency, such as the Equal



Counterclockwise from right to left, Prof. Laura Cooper, Karen Schanfield, co-teachers of the Capstone Course, and three students in the class. Photo by Tony Nelson.

Employment Opportunity Commission or the Minnesota Department of Human Rights, or filed directly in state court. If an unfair labor practice has been committed, a charge could be filed with the National Labor Relations Board. These forums have treated the claims as they would handle real cases.

Practicing attorneys were brought into the classroom to make presentations and demonstrations when the student-attorneys reached a point in their representation where they needed to learn particular substantive information and practice skills. For example, in one class, Schanfield and Richard Beens, both Minnesota AAA arbitrators, taught students about the AAA employment arbitration process and rules. In another class, attorneys demonstrated how to prepare clients for depositions and how to take and defend depositions.

Most law school courses teach ethics in separate courses. One objective of the Capstone Course is to integrate ethical issues as they would normally arise in a labor and employment law practice. The scenario is intentionally designed to pose ethical dilemmas. Other issues of professional responsibility tend to arise from the students' actions and interactions.

The students developed practical skills as they interviewed and advised their clients, sought out and questioned witnesses, investigated facts, researched the law, engaged in discovery, and prepared and filed various kinds of documents, including pleadings, petitions, motions, and briefs. They also learned what it is like to negotiate, mediate and arbitrate.

Students began to see what their personal lawyering style would be as they performed the tasks of an attorney and interacted with clients, witnesses, legal team members, and opposing counsel.

Students learned to involve clients in making decisions about their case. They learned that decisions belong to the client and that their role is to advise and then carry out the client's wishes.

Because students remained in their role as

lawyers for the length of the semester, they had to learn to deal with unpredictable time demands and make decisions strategically, recognizing that current choices affect later relationships and case developments.

The course was structured to allow students to learn from their experiences. Arbitrators and mediators, as well as the professors, offered immediate feedback on observed student performance. Some lawyering tasks, such as interviewing clients and witnesses and taking depositions, were performed without a real professional present. These activities were videotaped and later reviewed with the professors. Students periodically submitted logs to the professors reflecting on their work and learning. The professors responded with follow-up questions inviting deeper self-evaluation. For written work by the students, the professors acted as senior partners commenting on drafts of demand letters, briefs and other documents.

Grades for the course were based on how well the students represented their clients' interests. At the end of the semester, students were released from their roles and could share with adversaries matters of fact and opinion that had to remain confidential while they were serving as counsel.

One student in the inaugural 2010 Capstone Course described it as "both the best and most intimidating experience of my law school career." Lawyers from the community who have participated in the process have not only enjoyed the chance to share their skills with law students, but have said that they would have liked to have had such an experience as part of their legal education.

The law school viewed the first two Capstone Courses as an experiment to see if the goals of the Carnegie Foundation report could be achieved. The experiment has been a success and has led to inquiries from other law schools. The Capstone Course materials will be available to other schools later this year. ■

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