

## Law Schools Should Teach Students to Think Strategically – That's What it Really Means to Think Like a Lawyer

Theory-of-Change Symposium

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John Lande argues that law schools should teach law students to think strategically when representing clients. He recommends that law schools offer courses in strategic case evaluation and management that integrate elements of interviewing, counseling, pretrial litigation, negotiation, and mediation in a coherent practical framework. He is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

Randy Kiser's and Deb Eisenberg's excellent pieces in this symposium reminded me that I had proposed a course on strategic case evaluation and management (SCEM) based on insights from my study, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*. Some law schools may offer courses like this, though I suspect that most don't. The proposal wasn't adopted at my school but I invite you to propose it at yours.

In my study, I interviewed respected lawyers about how they handled the cases they settled most recently and I noted common themes in their accounts. Since most litigated cases are settled, good litigators prepare for negotiation at least as much as for trial. The lawyers described how they prepare for both possibilities. They recommended taking charge of their cases from the outset, which includes getting a clear understanding of clients and their interests, developing good relationships with counterpart lawyers, carefully investigating the cases, making strategic decisions about timing, and enlisting mediators and courts when needed. They overwhelmingly suggested starting negotiation at the earliest appropriate time.

An SCEM course might cover the following topics:

- conducting initial client interviews
- developing and refining a legal theory of the case
- developing an investigative strategy including a discovery plan
- developing a good working relationship with counterpart lawyers
- using experts as consultants and/or witnesses
- estimating likely court outcomes
- estimating tangible and intangible costs of litigation
- developing a goal and strategy for possible negotiation
- using mediators, arbitrators, or other neutrals
- communicating effectively with clients

It might seem odd to teach students to develop good working relationships with their counterparts, but lawyers in the study repeatedly emphasized how much this affects the handling of cases. Having a bad relationship can cause problems for lawyers and the parties, possibly making a case one's "own private hell." On the other hand, having a good relationship can prompt both lawyers to take actions leading to better results for their clients.

Although there might be some overlap between SCEM and pretrial litigation courses, the focus of this course would be on strategic planning whereas pretrial litigation courses often focus on using procedures in the execution of such a plan (such as conducting discovery and litigating summary judgment motions). Indeed, an SCEM course would be an excellent introduction to pretrial litigation. Ideally, students might take SCEM before pretrial litigation, though that would not always be possible given the challenges of student enrollment constraints.

An SCEM course also would overlap somewhat with courses on interviewing, counseling, negotiation, and mediation. All of these courses focus on important elements of representation. An SCEM course would integrate them and pretrial litigation into a coherent practical framework.

The activities listed above are in the litigation context. An SECM course might include transactional matters, either as part of a single course or as a separate course. To address transactional matters, there would be counterparts or variations for many of these topics and some topics without counterparts in litigation.

Ideally, the course would involve a lot of documents that lawyers use in their case files. Indeed, instructors might edit documents from actual case files to remove names, other identifying information, and extraneous detail. This would give students the chance to have hands-on experiences with the kinds of documents that they will regularly encounter in practice. Indeed, many of the reading assignments might involve documents from case files.

Classes might involve some combination of lecture, discussion, analysis of case documents, and simulations. Students might complete a take-home exam in which they are given documents from a case file and asked to address issues relevant to the course.

It probably makes sense for this course to be taught by adjunct faculty, perhaps by two adjuncts or co-taught with a regular faculty member.

Most of legal education is like teaching someone to drive a car by parsing an operation manual for the car. An SCEM course would give students a chance to practice driving, integrating various maneuvers needed to get from Point A to Point B.