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Toward the Effective Teaching of Trial Advocacy

James W. McElhaney

TOWARD THE EFFECTIVE TEACHING OF TRIAL ADVOCACY

JAMES W. MCELHANEY*

I. INTRODUCTION

Law professors, like other lawyers and laymen as well, tend to think of trial lawyers as a special breed. The popular concept is that trial advocacy is an art form, not thoroughly founded in learning or reason, in which the gift of persuasion is of paramount importance, the clever manipulation of the law obscures relevant material from the jury, and the jury is subtly influenced by factors other than those prescribed by the rules of evidence. That notion is unfortunate. It may have been fostered in part by litigators in an effort to establish themselves as special people—lawyers possessed of skills which others, irrespective of their analytical abilities, were incapable of mastering. It is also partly a product of man's limited understanding of the elements of persuasion, and hence his willingness to attribute effective advocacy to the possession of an indefinable aptitude. But whether its origins lie in relatively harmless puffing, or in the attempt to explain away the apparently inexplicable, the idea that good trial lawyers are born and not made has had some untoward side effects on the nature and quality of legal education.

For many years law schools took a rather indifferent view toward training trial lawyers. Until recently, many schools did not offer trial advocacy courses, or had limited programs of scant educational value. Much of that heritage is still with us in direct or residual form. This situation reflects the thought that trial advocacy, as an art form, cannot really be taught, and courses in which the attempt is made are to be regarded as harmless so long as they do not occupy a large portion of the curriculum and students are not permitted to devote

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more than a few semester hours to learning the skills of the trial lawyer. The result has been law school training with an overwhelming appellate bias which is not only a product of the emphasis implicit in the case method, but which also stems from a lack of faith in the teaching of trial advocacy.

Accordingly, the development of legal education in training trial lawyers has been slow indeed. This is partly related to the uneven quality of the nation's trial bar.[1] The need to train more trial lawyers of higher quality, a need more keenly recognized now than in the recent past,[2] confronts law professors with a challenge greater than that posed by most other subjects in the law school curriculum.

This challenge comes at a time when experimental courses and new teaching methods in trial advocacy have added a measure of excitement to legal education in a number of law schools. Nevertheless, it is fair to say that legal educators are further from a working consensus in the teaching of trial advocacy than in most other courses, especially in comparison with traditional subjects such as torts, contracts, evidence, procedure, corporations and commercial transactions.[3] This is because a trial advocacy course not only presents the problem of how it should be taught, but to a greater degree than most other courses, what is to be taught. The focus of recent developments in trial advocacy has been on teaching methodology—how to teach the course, rather than on its contents. The object of this paper is to suggest that a functional analysis of the subject matter not only helps clarify what is to be taught, but also suggests an organization for the materials. In addition it leads to some thoughts on where trial advo-

1. See Chief Justice Burger's now famous Sonnett Lecture delivered at Fordham Law School, New York, New York on November 26, 1973, reprinted as Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORD. L. REV. 227 (1973). "It would be safer to pick a middle ground and accept as a working hypothesis that from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation." *Id.* at 234.

2. The Chief Justice has served to focus considerable public attention on the problem. See note 1 *supra*. Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit, among others, has been extremely active in working for an improvement in the level of representation by trial lawyers. Judge Kaufman was instrumental in establishing a special committee to propose standards of admission to practice in Federal District Courts in the Second Circuit. The work of this committee is currently in progress, and at the writing of this article, the committee is about to hold hearings on the sixth draft of proposed rules.

Judge Kaufman has also made a thoughtful proposal to restructure the traditional law school curriculum in order to train trial lawyers more effectively at the J.D. level. See Kaufman, *Advocacy as Craft: There is More to Law School than a "Paper Chase"*, delivered as the keynote address to a symposium on *The Role of Law Schools in Certifying Trial Lawyers*, at Southern Methodist University School of Law on April 25, 1974, reprinted in three parts at 5 ALI-ABA CLE Review, no. 28, at 4, no. 29, at 4, and no. 30 at 4 and *in toto* at 28 SW. L.J. 495 (1974).

3. This is *not* a suggestion that there is a general agreement on how these courses should be taught, how many semester hours should be accorded them or where they belong in the curriculum. There is ferment and change in the first year curriculum in many law schools. However, it is fair to say that those who advocate change as well as those who oppose it are working from a common starting point, the still generally accepted traditional approach to these courses. Even with the widespread experimentation in these subjects, in relation to trial advocacy, they still represent a nearly monolithic consensus.

cacy fits in the evolving law school curriculum, and on some curriculum developments which seem justified by the state to which contemporary education in trial advocacy has progressed.

II. THE ART OF ADVOCACY

The very titles of some of the literature in the field proclaim the message that trial advocacy is an art: *The Art of Cross-Examination;*[4] *The Art of Advocacy;*[5] *Closing Argument, The Art and the Law;*[6] *The Art of Summation;*[7] *Art of the Advocate;*[8] and *The Art of Persuasion in Litigation.*[9] The idea is not entirely without justification since some people excel at advocacy, not necessarily in relationship to their skills in other areas. But trial advocacy is hardly unique as a discipline where talent or aptitude aids the learning process and enhances the final result. Natural talent can be nurtured, tutored, improved upon; the less gifted can, by diligent application, become adequate, indeed excellent. The notion that trial advocacy cannot be taught is a noncritical, educationally nihilistic attitude; yet it is widespread.

Perhaps it is because persuasion itself is little understood. The painstaking logical analysis of argument sometimes offers only a marginal explanation as to why one presentation is superior to another. Moreover, one may feel that evaluations of technique are after-the-fact descriptions rather than real analysis. As our knowledge of human motivation increases, argumentation, which often depends upon individual motivating factors, becomes slowly but increasingly more understandable. Furthermore, pure argumentation has only a minor role in a typical law suit. Fact finders try to concentrate on the evidence and often consciously attempt to disregard the apparent skill of counsel. Also, modern persuasion techniques tend to be logical rather than emotional in appeal. All other things being equal, it is more helpful than harmful for a trial lawyer to have a natural talent for oral argument, but it is not the most important quality for him to possess.

Finally, one reason for the current notion that trial advocacy is an art form is that many good trial lawyers are self-taught. For older lawyers, the standard law school courses often did not include trial advocacy. It is fair to say that for many trial practitioners, advocacy has been an internalized, experiential learning process. Yet the value of experience tends to show that there is something to be learned; that there is a body of material which is capable of being understood, analyzed, generalized and applied to other situations. In fact there is. While some of what the trial lawyer learns in practice is a lore of

4. F. WELLMAN, THE ART OF CROSS-EXAMINATION (1936).
5. L. STRYKER, THE ART OF ADVOCACY (1954).
6. J. STEIN, CLOSING ARGUMENT, THE ART AND THE LAW (1969).
7. THE ART OF SUMMATION (M. Block ed. 1963).
8. R. DU CANN, ART OF THE ADVOCATE (1965).
9. A. COVE & V. LAWYER, THE ART OF PERSUASION IN LITIGATION (1966).

half-truths and aphorisms of uncertain value, much of it is procedural and evidentiary expertise, organizational and presentation skills as well as factual and legal analysis abilities which can be the subject matter for a course of considerable intellectual challenge.

It may seem that unnecessary pains have been taken to refute a notion which many do not accept anyway. However, the attitude that trial advocacy cannot be taught is one of those irrationalities which takes many forms and which has surreptitiously damaged the development of the curricula of most of our nation's law schools. For while it is true that some law schools have developed excellent trial advocacy programs, most have offerings which are generously described as mediocre.

III. The State of Trial Advocacy Courses in American Law Schools

In evaluating the level at which our law schools perform in teaching trial advocacy, one ought to be as factual and informative as possible. The following assertions, however, can make no such claim. They are based on inadequate data and inferences, suppositions, opinions and conclusions drawn from limited observation of what is done at a few representative law schools and from second and third hand information concerning them. At the writing of this article there was little, if any, useful data to impart aside from law school catalog information. However, the Association of American Law Schools Section on Trial Advocacy is currently conducting a survey of all law schools in an effort to find out what is actually being done in most law schools in the field. Data is being sought concerning the courses taught in trial advocacy, hours of credit awarded, materials used and teaching methods employed. Hopefully this will lead to information upon which to base conclusions more reliable than the following:

1. Most law schools now offer a course in trial advocacy. Many of these are outgrowths of what is called in some schools "practice court," a procedural walk-through, where the principal effort is to require each student taking the course to draft and file every document in a case, from summons and complaint, to appellate brief and execution of judgment. The attention paid to advocacy skills in such courses is typically scant and unstructured.

2. On the other hand, a number of schools offer courses in trial advocacy which concentrate directly on advocacy skills. Of these courses, some deal with discrete skills and never give the majority of the students the opportunity to try a whole case. In others, the students are given trials without spending any appreciable time on the discrete skills and techniques which go to make up the whole. Still others attempt to give a balanced exposure to both the components and the totality of a trial.

3. A large number of schools use adjunct teachers in their trial advocacy courses, either as principal instructors or as resource people. Often these adjuncts do not have time to train students individually and thus tend to turn their courses into "dog and pony shows" consisting largely of demonstrations and discussions.

4. Many of the schools which rely on adjunct teachers must schedule the class in the evening or sometimes on weekends.

5. Some schools relegate teaching trial advocacy to young teachers who have had very little actual trial experience.

6. A number of schools have delegated the teaching of trial advocacy to clinical teachers who are also trying to teach other lawyer skills as well as run a legal clinic, often a high volume operation. They therefore cannot concentrate on teaching trial advocacy. Because of the lack of control over the subject matter input in many such clinical courses, the fundamentals of trial advocacy are sometimes neglected.

7. Relatively few schools have substantial offerings in trial advocacy beyond the basic course.

This divergence in course offerings suggests that the community of law schools is engaged in an awkward, groping process in its efforts to teach litigation skills. This lack of unity and direction is, in part, a product of the doubts of some faculty members that there is anything to be taught, at least in the law school setting. That there is presently no unity in method or scope in the teaching of trial advocacy is not necessarily bad. Consensus can flow from narrow-mindedness or lack of imagination as well as from a shared notion that some methods are better than others. But extreme diversity does indicate greater uncertainty in law schools as to which methods and goals are desirable in teaching trial advocacy than in the more traditional courses.

In connection with the present state of trial advocacy courses described above, some trends are discernible:

1. The workshop-problem method is on the increase. Often such courses have a limited enrollment. Some use more than one teacher, and many use video tape equipment for teaching and critiqueing student performance. Much of this movement, but surely not all, has been stimulated by some excellent intensive trial advocacy courses for practising lawyers which have been given outside the law school curriculum.

2. Lecture and demonstrations courses are on the decline.

3. There is a growing agreement that the basic trial advocacy course ought to focus directly on teaching fundamental trial skills and that, in addition, every student in the class ought to take a major role in "trying" at least one entire case during the course.

4. There is a moderate trend toward tying the basic course in trial advocacy with a clinical or simulated clinical program. A more significant trend exists with respect to coupling advanced trial advo-

cacy courses with clinical education, particularly in specialized clinics dealing with subjects such as juvenile law, family law, criminal defense and prosecution, landlord-tenant and consumer protection.

5. There is some indication that more extensive courses are being given now than in the past; more hours of work and credit are involved than previously.

Law schools and trial advocacy teachers are far from universally accepting these trends as desirable goals, but it can be stated that trial advocacy is currently winning the battle for acceptance in the curriculum. It is doing so more by virtue of the teaching methods employed in the newer courses than as a result of solid analysis of what ought to be taught.

If the traditionalist's attack is, "It cannot be taught," then the response which has been made, "But look what exciting new methods we are using" is at least a partially appropriate, if not a complete answer. On the other hand, if the attack is, "It cannot be taught because there is nothing there to be taught, at least efficiently within the law school curriculum," then new methodologies, no matter how commendable in themselves, provide an inadequate response. Much, if not most of the creative thinking in the teaching of trial advocacy has been directed toward teaching methods with little thought to the problem of what is to be conveyed in the learning process. The danger in the uncritical adoption of clinical and simulated clinical education is that content is perceived as implicit in the student's performance. Apparently some feel that it is sufficient if the student makes a good effort; he experiences and therefore learns something, even if teachers have difficulty in articulating what it is.

Articulating what is learned has also been troublesome for teachers in other courses. "Thinking like a lawyer," and "making sounds like a lawyer," are terribly vague notions. Many teachers who insist that they teach policy and method have an understanding of legal method which is only slightly more sophisticated than that held by their students. On the other hand, there have been a few brilliant scholars whose grasp of the *commom law tradition*[10] was both valuable and exciting. For less gifted teachers and students in traditional substantive and procedural courses, there is a body of norms, information and skills which can be taught and learned. Surely at least that much can be expected of trial advocacy. A logical starting point would seem to be a conceptualization of the course itself.

IV. A Functional Analysis of Trial Advocacy

A trial is essentially a dialectic process. This is so pervasively true concerning not only the totality of a trial but also the individual and sometimes intricate procedures and interchanges which take place

10. K. Llewellyn, The Common Law Tradition: Deciding Appeals (1960).

during the trial, that it provides a helpful perspective from which to examine trial advocacy as a subject matter. The "back and forth" process is the unifying procedure behind pleadings, motions, jury selection, opening statements, examination of witnesses, objections, offers of proof, voir dire examination of witnesses, rebuttal witnesses, final argument, jury instructions and post trial motions as well as the more general presentation of the case by first one party and then the other.

The understanding of this overall process, the available individual procedures, the skill in their use and a judgmental sense for when and how to employ them, plus some acquired techniques for critical self-analysis of performance, must be the heart of a trial advocacy course. They cannot be taught on a theoretical level; rather, students must do them to learn. For example, it is one thing to know the rule of evidence which prohibits leading questions on direct examination of a friendly witness as to matters in dispute; it is quite another to recognize leading questions when they are being asked, because they are so natural in our conversational culture. It is even more difficult to form an objection which will be accepted by the court as legally sufficient and which will not appear to the jury as an attempt to hide the truth. It is harder still to conduct direct examination in conformity with this simple rule so that it is short, direct, well organized and interesting to the finders of fact. These skills are most efficiently learned through experience in a structured, simulated clinical setting.

Even the basic application of such apparently discrete skills requires a sophisticated understanding of a trial as a dialectic progression. Direct examination necessarily depends not only on a knowledge of the evidentiary rules governing the conduct of examination, but also on a good understanding of the entire cause of action, what potential for cross-examination and impeachment is available to the opposition, organizational skills which go beyond mere chronology, an evaluation of the impression the witness will make on the fact finder, a mastery of the process of introducing real or demonstrative evidence, and an understanding of the techniques for insuring that the transcript will reflect non-verbal communications as well as the spoken word.

The obvious interrelationship of all these matters suggests that there is no one good starting point. On the contrary, through an attempt to isolate those skills and techniques which are basic in the sense that others are built upon them, a rational progression of subject-matters emerges:

A. Direct Examination
B. Objections
C. Cross-Examination
D. Rehabilitative Devices
E. Expert Witnesses
F. Jury Selection and Opening Statements

G. Closing Arguments
H. Witness Preparation and Trial Planning
I. Investigation, Discovery and Motion Practice

Each subject and the justification for its position in the development deserves separate discussion.

A. *Direct Examination*

In a functional breakdown of the trial (at this point "trial" is used to mean any contested hearing as distinguished from the preparatory and procedural steps which go before), direct examination represents one of the most justifiable starting points, even though in the chronology of events it comes after jury selection and opening statements. There are at least three good reasons. First, direct examination is probably more important in the course of a trial than objections, cross-examination, argument or procedural devices used to rehabilitate one's position (provided, of course, there is no dispositive motion which can successfully be made). Presenting evidence is at the heart of the litigation process, and the skills most directly related to it naturally have a high claim to importance. Although it can be argued that for the criminal defense lawyer cross-examination is of greater importance, for the criminal trial in general this is usually not so. Second, direct examination embodies the use of skills, rules and techniques common to the entire trial. Third, direct and cross-examination together present the concept of the trial in microcosm. While thinking of each witness as a mini-trial may pose the danger to a litigator of losing sight of the overall objectives of the trial, an appreciation for the totality of the examination of a witness leads the student more easily to grasp the development of an entire case. Accordingly, the skills and techniques of direct examination and the introduction of demonstrative evidence constitute the first building blocks in learning trial advocacy.

B. *Objections*

Since the dialectic progression of a trial can be nearly simultaneous as well as sequential, objections should be the second subject matter covered in the course. The argument advanced now is that objections need to be singled out for separate treatment rather than presented throughout the course for haphazard, osmotic absorption. Well stated objections can preserve error in a record, keep improper material from the jury and even be presented so that the jurors do not form the adverse reaction that a lawyer is, by legalistic manipulation, keeping them from hearing the whole truth.

Objections can also be used for less worthy purposes, such as coaching witnesses or giving them a breather, throwing opposing counsel off stride, confusing the jury, suggesting inadmissible material and even conducting a political trial. And because trial practitioners live in a world where such things are done, it is important to give the

students experience in meeting both improper and proper activities as well as in gaining a sense for the tactical alternatives open to the lawyer who suddenly finds himself confronted by such activities.

In addition, it is important at this early stage to fight against overzealous issue spotting. Throughout the rest of law school, issue identification is rewarded in the extreme. Complex analysis of marginal arguments is taught in nearly every course. The explicit lesson is to spot every issue. The often unintended implicit lesson is that every issue is important. But good litigators cannot treat a trial as an evidence emamination, making every possible objection. Students need to gain a selectivity which is usually structured out of most other subjects. One of the best ways to do this is through the use of a trial problem to demonstrate that making proper objections just because they can be made may prove distinctly detrimental.

Moreover, most lawyers are really not very good at stating objections. The requirement of legal specificity to preserve the record causes many lawyers to state objections in a form which is utterly confusing to the jury. This is needless. Good, specific objections can be stated in terms which make the fairness of exclusion evident to laymen. However, it is not easily done. Even the most articulate have trouble formulating instant verbalizations which meet this objective. If students establish a goal of learning to state a legally sufficient objection in a short period of time (five or ten seconds so that they cannot be accused of making an unnecessary speech to the jury) in terms that make the objection understandable and appealing to the jury as well as to the judge, they begin the process of self-training and evaluation which will bring continuing improvement to their development as trial lawyers.

Objections also serve to introduce directly the concept of alternative responses in the dialectic process. Instead of objecting at trial, one might make a motion *in limine,* or as it is termed in criminal practice, a motion to suppress. This pre-trial motion disposes of prejudicial matter before the jury ever hears a damaging question. It avoids the near impossibility of "rebagging the cat." On the other hand, a realization that such a motion may unnecessarily educate the opposition is also important, and helps develop an appreciation for the basis on which difficult tactical choices are made.

Another example of this sort of tactical decision is presented by the voir dire of a witness, a preliminary cross-examination used to challenge some apparently valid foundation to which the witness has testified. The danger becomes evident only on close scrutiny. If the voir dire examination is made in the presense of the jury, an adverse ruling may result in greater damage than if the examination had not been conducted. If the court rules that the material brought out on voir dire goes to the weight rather than the admissibility of the evidence sought to be excluded, the jury is not likely to understand the

judge's ruling. Rather, they may well conclude that the court has given the evidence the judicial seal of approval when the judge really means, "Because it is not bad enough to exclude entirely, I will let you hear this even though I do not think much of it." Under such circumstances, the attack would have been more effective had it been made on cross-examination.

The dialectic give and take of a trial is obviously presented by objections, which are part of the give and take. Similarly, the give and take exists within the making of objections. The point is demonstrated by the offer of proof which becomes an essential procedural step in the event that argument fails and evidence is excluded.

These considerations, which justify the separate treatment of objections, also tend to show why the unstructured content provided by the walk-in clientele of a legal clinic will probably not present a well balanced exposure to the subject. But it is the place of the objection as the first counter to the initiating force of direct examination in the dialectic sequence, and as an introduction to tactical complexities which justify its position as the second subject for courtroom problems in a trial advocacy course.

C. *Cross-Examination*

The counter-thrust to direct examination is cross-examination. Because it is such a large and potentially difficult grouping of skills and techniques, it is suggested that a functional approach to the fashioning of classroom problems is once again required. If the student focuses on the *objectives* of cross-examination, the development of techniques is facilitated greatly. Generally cross-examination is considered rather loosely as an opportunity to attack the witness. However, there are many occasions when the witness has something affirmative to yield. This recognition presents problems of organization when a witness who has something affirmative to offer must also be attacked.

Within the realm of the attack alone, there are at least five principal objectives which may be sought. They are functionally related and at times interchangeable, despite their disparate origins and treatment in the rules of evidence:

1. The witness may be impeached through an admission if he is a party to the action (although an admission is substantive evidence admitted for the truth of the matter asserted, it serves most admirably to impeach) or through a prior inconsistent statement if he is not a party.

2. The testimony may be shown to be implausible by having the witness admit facts which turn out to be inconsistent with his testimony.

3. The witness' ability to observe and recollect may be shown to be faulty.

4. The witness may be shown to be biased.

5. Finally, the witness' character for truth and veracity may be attacked.

Some of these attacks may be made with extrinsic evidence lying outside cross-examination, although this may be done only after a proper foundation has been laid on cross. Working with these questions in a simulated trial setting tends to breathe realism and a resulting understanding into what is otherwise a difficult and abstract area of evidence.

Cross-examination necessarily deals with techniques as well as objectives. For example, the requirement of *Queen Caroline's Case*,[11] to confront a witness with particularity concerning a prior inconsistent statement, presents a distinct challenge: to impeach effectively without giving the witness an opportunity to invent a dishonest explanation for the inconsistency.[12] It is also one of several occasions for students to see how the newly enacted Federal Rules of Evidence[13] would effect substantial changes in technique, since rule 613[14] would permit cross-examination of a witness concerning a prior statement without revealing the contents to the witness at the time, provided the statement is shown to the opposing counsel on request. The federal rule would still, in the discretion of the trial court, require that the witness be given an opportunity to explain or deny the statement before extrinsic evidence could be used to prove that it was made.

D. *Rehabilitative Devices*

Continuing the dialectic interchange leads not merely to redirect examination, but to a series of evidentiary and procedural techniques which are potential responses to an apparently successful attack. By employing problems which emphasize a process of selection among a number of alternative courses of action, students see the large degree of flexibility in fashioning each step in the trial of a case.

The following partial listing gives some idea of the scope of

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11. 129 Eng. Rep. 976 (1820), *discussed in* MCCORMICK, EVIDENCE, at 56, 72 and 80 (2d ed. 1972).

12. For a proposed technique of impeachment with prior *written* inconsistent statements which can sometimes accomplish this objective, see J. MCELHANEY, EFFECTIVE LITIGATION: TRIALS, PROBLEMS AND MATERIALS 25 (1974).

13. Pub. L. No. 93-595, 88 Stat. — (enacted Jan. 3, 1975; effective July 1, 1975).

PRIOR STATEMENTS OF WITNESSES

14. (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d) (2).

possible responses open to counsel when suddenly confronted with the sting of the opposition's tactics:

1. Redirect examination of a witness who has been attacked.
2. Cross-examination of an opposition witness, provided the scope of the rule of the jurisdiction permits, as a means of exposing a misleading attack on another witness.[15]
3. Corroborating the testimony of one's witness with objective data or relatively unimpeachable testimony when his character has been attacked.
4. Using a prior consistent statement to rehabilitate a witness who has been impeached with a prior inconsistent statement.
5. Using the "rule of completeness" to mitigate the prejudicial effect of the opponent's selectivity.
6. Using present recollection refreshed to rescue the witness who has a lapse on the stand, or past recollection recorded in appropriate circumstances when this attempt fails.
7. Making a "limited offer" of evidence to avoid the effect of a generalized objection where the desired evidence is admissible for one purpose but not another.
8. Reopening the case to call rebuttal or surrebuttal witnesses.

At this point students start to develop a more sophisticated tactical sense as they become aware of the factors which go into the selection of rehabilitative devices. It becomes clear that much of the "artistry" in trial tactics is a working knowledge of the intricacies of evidence and procedure, especially when it is coupled with thoughtful anticipation of the opposition's strategy. Certainly a lesson to be learned is that one must try to avoid the necessity of using rehabilitative devices by revealing damaging information rather than watching it be used against one in a setting of the opponent's choosing.

E. *Expert Witnesses*

Dealing with expert witnesses calls into play special difficulties and special rules of evidence. It also requires students to immerse

15. An example would probably be useful:

Suppose the case of an expert medical witness who testified on direct examination that the plaintiff suffered spinal damage as the result of an injury caused by a heavy display in defendant's store falling on plaintiff. On cross-examination the expert was attacked concerning his opinion on the cause of the condition. Defendant's counsel suggested in his questions that plaintiff's symptoms were similar to those of lead poisoning, and the doctor was forced to agree. Then, in agonizing detail, the doctor was made to admit that he did not conduct a series of tests and procedures which would have determined if lead poisoning were in fact the cause.

Let us assume, in this hypothetical case, that lead poisoning really had nothing to do with plaintiff's condition. Instead, defendant has raised a clever smokescreen by his adroit cross-examination. It may be that attempting to set the matter to rest on redirect examination will only disgust a jury that is already convinced that the doctor has protested too much. If so, it may be better to ignore the subject on redirect examination and instead have *defendant's* doctor admit that tests to rule out lead poisoning would be a foolish waste of time and money. Then the defendant's tactic is exposed; the jury has seen that he "took a cheap shot" at plaintiff's doctor.

themselves in a portion of some other discipline in order to conduct examination successfully. These factors surely earn the subject a place within the course. The examination of expert witnesses provides a good opportunity to synthesize the skills and substantive learning contained in the first four subjects. It seems logical, therefore, to have it follow them directly.

In addition to having students learn the method of establishing the expertise of a witness, the proper form of questioning to lay the foundation for the admission of an opinion when hypothetical questions are required, and the available means to impeach an expert, this section should also contain a substantial dose of practice in requiring the expert to translate his opinions into terms understandable by the jury. It is the sort of skill (like making a statement for the record describing a gesture or nod of the witness) which, to be effective, should become virtually reflexive on the part of the trial lawyer.

F. *Jury Selection and Opening Statements*

With the section on expert witnesses, the aspect of the trial which relates to the examination of witnesses and introduction of exhibits has been covered. Working with jury selection and opening statements at this point seems desirable for several reasons. First, the perspective gained in selecting a jury and making an opening statement aids in the synthesizing process which began with the subject of expert witnesses. Second, the preceding subjects provide an understanding of the trial, essential to a successful start. Jury voir dire and opening statements cannot really be appreciated until students have been exposed to the testimonial skills. Distinctions between questioning jurors and witnesses and the need to provide a guide to follow the course of a trial are far more easily understood after exposure to direct examination, objections, cross-examination and rehabilitative devices.

There are special rules and techniques to be imparted at this time. Students begin to perceive the thread of argumentation as a continuum which runs throughout the trial; first blunted and organizational in form, then implicit in the form and selectivity of questioning and finally fully developed and open in the course of closing statements.

G. *Closing Arguments*

A good case can be made for making the closing argument section follow immediately after the testimonial subjects rather than placing jury voir dire and opening statements in that position. Closing arguments similarly serve a practical function in forcing students to conceive a unifying theory to explain a set of facts, especially at a point when testimony is no longer a matter of dispute, but rather one of interpretation. However, in the evolving concept of argumentation within the course of a trial, as well as the mere chronology of events, putting closing arguments here certainly seems warranted.

Argumentation is a skill, difficult to acquire. It is one of those areas where one is tempted to abandon rationality and respond that some have the gift and others do not. That is an unfortunate posture to assume. Argumentation is susceptible to analysis. It is far more fruitful to concentrate on having students develop a coherent theory of the case, marshal and review the evidence in a fashion that will convince the jury that the theory is correct than it is to dwell at length on the selection of words, the manner of speaking or the use of surprise or suspense. Not that these must be ignored. Rather it is better, as with cross-examination, to let the objectives suggest techniques than to let methodology dictate the objectives.

H. *Witness Preparation and Trial Planning*

The major portion of litigation work is in preparation for trial. Witness and client interviewing, investigation, research, pleading and motion practice add up to far more time spent than that in contested hearings. Furthermore, these are some of the most important tasks of the trial lawyer. Good preparation is essential. Why does this subject appear here instead of the beginning?

Only when one understands the separate parts of a trial and how they fit together in totality can witness preparation and trial planning be properly approached. A lawyer does a far better job of preparing a witness for direct examination if he knows something about it. Similarly, preparation for cross-examination is entirely dependent on a realization of what the opposition might ask. Besides, factual investigation depends not only on knowing the elements of the potential cause of action but also on an evaluation of what evidence is likely to be persuasive as well as what is merely admissible.

I. *Investigation, Discovery and Motion Practice*

Investigation, discovery, and motion practice logically follow a student's exposure to the testimonial and argument portions of the trial. This is particularly so if, as is suggested, this outline provides the working order for problems which are preparatory to handling an entire trial. The students are now about to do this in their own trials, and naturally have a keener interest than they otherwise might.

J. *Evaluating the Outline*

It is suggested that the foregoing outline of the substantive content of a course in trial advocacy does a reasonably complete job of covering what actually occurs at trial, from beginning to end, as well as including pre-trial materials. It is also thought that it is defensible in organization. The guiding principles in arranging the subjects are their functional relationships, the consequent development of an understanding of the whole of a trial, and the sequential arrangement of

materials so that the students draw on what they learn as they progress through the course.

On the other hand, it is open to legitimate criticism. First, it evinces a civil trial bias. While all of the subjects are equally applicable to criminal as well as civil trials, it does not contain within it separate treatment of the special problems of criminal trial procedure. Second, it surely places the greatest stress on the contested hearing, using it as the orientation for pre-trial preparation. While it is submitted that this is entirely proper, the objection can be made that pre-trial is in fact more important because more time must be devoted to it, and that it takes on a life of its own not directly related to trial. While the first part of the argument may be true, if pre-trial does take on a life of its own which is not directly connected with contemplated litigation, the process has gone awry. Third, the outline is done in fairly broad strokes. Perhaps this is as it should be, but it nevertheless is not dispositive of all the issues.

V. Putting the Course Together

Organizing the subject matter in trial advocacy is useful not only in creating a justifiable progression of material but also in shedding light on the kinds of teaching methods which are likely to be successful. But more than this must go into the fashioning of a course. At this point it seems worthwhile to state some desirable aspects of a trial advocacy course, which, taken together with the functional progression of the subject matter, helps shape the final product.

1. Student interest demands that as many students as possible be involved as much of the time as practicable. It is distressing to legal educators concerned with effective teaching that any course in law school is considered boring by a substantial number of students in the course. It would seem that considerable effort would be required to make trial advocacy lack student appeal. Too many times this difficult negative goal has been achieved. One easy way to do it is to involve only a few students in each session.

2. Students must be exposed to the basic material in a problem setting rather than by lecture or example alone, although these techniques can be valuable adjuncts to the problem method. The pedagogical theory in the first part of this article need never be stated to a class in trial advocacy. It is most effective if conveyed implicitly in the arrangement of materials and the structure of the problems selected. On the premise that we are dealing with the kinds of skills and techniques which a person can only acquire through practice, the problem method is simply required.

3. Every student must have the opportunity to be counsel in a full trial, either individually or as co-counsel in a team of two. Splitting up responsibility into more than two parts has a negative effect on learning. Synthesis of the parts of a trial is not complete until all of the

major skills and techniques have been employed in a complete trial. Understandably, this goal necessitates classes with limited enrollment and compression of the materials in the course outline.

4. The exercises which are designed to teach the basic subject matter should focus on basic points, yet be challenging enough for the brightest students. In other words, multi-level problems are required.

5. The trials should offer all of the following ingredients:
   a. a genuine factual dispute
   b. challenging substantive law problems
   c. significant evidentiary and procedural difficulties
   d. witness difficulties
   e. the potential for some ethical issue
   f. even balance
   g. the capability of being tried in approximately three hours.

The value of each of these desired aspects is largely self evident. It makes it clear how difficult fashioning an interesting, educationally sound trial is. It also shows why the luck of the draw in legal clinic is likely to produce an uneven learning experience.

6. Critiques should be directed to evaluations of student performance. Using a critique period as a jumping off point for detailed lectures causes frayed continuity with the result that either the lecture or the critique will suffer. If the teacher wants to lecture, he should schedule a separate lecture period for this purpose.

7. Video taping should be used, if possible, to assist in critiquing student work. The most effective critiques come immediately after the work. People are naturally fascinated at seeing themselves, and after the first shock of self-recognition, learn quickly from their mistakes. Interestingly, video tape critiques take much longer than those based on notes alone. They are thus quite demanding of student and teacher time, but the benefits are worth the effort. Since video equipment can be obtained for as little as $2,500 to $3,000, those schools which do not already have such equipment should consider purchasing it.

8. Team teaching should be used if at all possible. While using more than one teacher immediately increases one of the greater costs in offering the course, the return is great. Teachers are able to identify with one side or the other and devote greater attention to the difficulties encountered by the students. Demonstrations, when they are employed, become far more realistic. Team teaching is the device which has been used with significant success at the summer programs in Boulder and Denver, Colorado given by the National Institute for Trial Advocacy.

Coupling these considerations with the content organization previously discussed produces a tightly organized, fast moving three to five credit hour course meeting for one semester. By limiting enrollment to 28 students, the first seven or eight weeks can be devoted to exercises which directly track the substantive outline, while the second

half of the semester can be devoted to having each student serve as co-counsel in the trial of a complete case. This is a format which maximizes the learning of discrete trial skills and makes the synthesis of those skills quite complete, given the limitations of a single semester. It makes an exciting course.

Providing for some of the other desired characteristics of a trial advocacy course does create some difficulties. One of the chief aims is to involve as many students as possible each class. This seems inconsistent with the necessity for extensive individual preparation. The usual answer is to assign problems in advance to a limited number of students, typically four per class meeting. The very human result is that no one else fully prepares that problem, which detracts from student interest and learning. The challenge, then, is to create a system which requires universal preparation: every student prepares every problem; no one knows in advance who will be called on to perform. But how can this be done? It is an unreasonable demand on the time of a programmed witness to have to submit to 28 individual interviews, especially in the period of one or two weeks. The lack of realism in having a whole class conduct a pre-hearing interview of a witness is obvious. One solution which has worked quite well is to use the barrister-solicitor system. Student counsel prepare for the direct or cross-examination of a witness on the basis of the file only, a method employed by many American trial firms who use junior associates as "prep" men or women. Another alternative is to conduct the pre-hearing interview in class, selecting only one or two students to do the interviewing, while the rest of the class looks on. A happy side effect of the barrister-solicitor method might not be immediately obvious. The students learn implicitly, without ever being told, of the significant drawbacks to this practice. When they later have the opportunity to interview and prepare witnesses, they do so thoroughly.

Using this format, universal preparation is required for all problems during the first half of the semester. Anyone can be called on to conduct the examination of a witness, give an opening statement or make a final argument. By using short problems which can be repeated once or twice as well as employing two or three problems in a single class period rather than just one large problem, often as many as half of a class of 28 students can participate in a given meeting. The result is that student preparation and interest levels are high.

Putting this much content into a class means that laboratory periods must run for three or more hours each week. Furthermore, in order to avoid critiques which are veiled attempts at lectures as well as to handle necessary administrative matters, a separate lecture period is scheduled. This means that the class meets for a total of four or more hours a week for three hours credit. This has its roots in the traditional college credit system. A laboratory period usually is not given credit on a one to one ratio. A three-hour laboratory is usually not awarded

three hours of credit. This seems an appropriate norm to adopt here. A trial advocacy class meeting where students perform is a laboratory period. While the intensity level is high, it is not as compressed as most ordinary courses should be (and sometimes are not).

During the second half of the semester the trials are conducted weekly, lasting approximately three hours each. Immediately following each trial is a critique of student performance, involving comments from the instructor, written evaluations from other students and a video tape replay of the entire trial. By using witnesses, jurors and judges from outside the class and even the law school community, a sense of realism and excitement is engendered in cases which have been carefully structured for maximum learning content. Also during this second half of the semester the period previously used for lectures becomes the time for pre-trial conferences.

The amount of outside work required in such a course is open to substantial variation. For example, cases can be tried on summarized pleadings, or student counsel can be required to draft pleadings or even draft and file every formal document in the trial including detailed trial briefs and post trial motions. The amount of such extra work, to be sure, should be related to the amount of credit given for the course.

This description is an example of a highly practical course of solid academic content. It naturally bears the marks of compromise as to length, number of students and number of teachers. Furthermore, it is not suggested that it is the only way to assemble a valuable trial advocacy course. While it has met with substantial success at the schools where it was developed, the University of Maryland, Duke University and Southern Methodist University law schools, there are a number of other highly innovative, intellectually demanding trial advocacy courses employing substantially different methods which have been developed in the past few years. Regrettably, they are not listed here. This is not out of any disregard for the substantial contribution they have made, but rather because of the present lack of complete information concerning these courses and the desire to avoid offense through omission.

VI. Trial Advocacy in the Curriculum

The discussion so far has centered around the basic survey course in trial advocacy. In the past it has been thought of as one of those third year courses to which students might be exposed shortly before they entered practice. The proposition is advanced that trial advocacy belongs not at the end but rather in the middle, if not toward the beginning, of the law school curriculum. This is a step which a few schools have already taken, and which seems desirable for a number of reasons.

First, trial advocacy serves as an academic bridge between evi-

dence and procedure. In fact, there have been some experimental courses coupling one or more of these traditional courses to trial advocacy which have resulted, according to reports, in substantial success. Because of most law schools' pervasive appellate bias, faculties have not been concerned in the past with creating a track of litigation oriented courses which would permit a comprehensive education in the subject such as is afforded at many schools in corporations, tax, commercial law, land transactions and even poverty law. Placing trial advocacy early in the curriculum would open that possibility.

Second, at a time when an increasing number of students are engaged in legal clinic work which permits their appearance in contested hearings, it is shocking to reflect that they may do so in some states without having had the opportunity to take evidence, let alone trial advocacy. The basic litigation course is a natural building block course for clinical education, and because it can fit comfortably in the second year of law school, ought to be considered in that light.

In addition, there are a number of specialized clinical education courses which involve regular court room appearances. Many of these are, in a sense, advanced trial advocacy courses. While it perhaps would be a procrustean measure to require trial advocacy as a prerequisite for such courses, certainly students should be able to assemble a rational progression of course material during their law school experience in litigation oriented courses. They ought to be able to take trial advocacy prior to or concurrently with legal clinic.

While it is beyond the scope of this article to detail the kinds of advanced trial advocacy courses which should be developed, the argument is made that there ought to be room in the curriculum for them as well. Whether such courses ought to be clinical, partially clinical or simulated clinical will depend upon factors such as the availability of qualified faculty, the location of the law school, the nature of the local student practice rule, and the unifying subject matter. It is sufficient for present purposes to mention that the following subject matters could—and already have in some schools—provide the substantive theme for advanced litigation work: criminal defense, criminal prosecution, family law, landlord-tenant, juvenile law, products liability, and insurance defense. It should be evident that any substantive course in which actual litigation can be of a manageable size lends itself to use as the subject for advanced trial advocacy work.

Advanced courses need not be limited to special subjects. Intensive simulated courses organized around the outline suggested in this paper can qualify as advanced trial advocacy courses. Portions of the trial process such as discovery and pre-trial practice are courses at many schools. If taught in a problem method format, in effect, they are advanced trial advocacy courses. It is not beyond the realm of rational speculation to consider a short course in argumentation as such, concentrating on opening statements and final arguments. There

is a well developed body of law governing argument, and the techniques presented in one week in a basic trial advocacy course are rudimentary at best.

This is not to suggest that law schools throw off their traditional curriculum to plunge headlong into a trial centered teaching process. They have not the will, the faculty, the resources or the demand to justify it. But the development of trial advocacy courses has been stunted and slow in our law schools. We have only begun to explore our rational potential for training trial lawyers. Creating a sensible track of litigation courses will be a useful step in that direction.