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Letters and Postcards We Wished We Had Sent to Gary Bellow and Bea Moulton

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LETTERS AND POSTCARDS WE WISHED WE HAD SENT TO GARY BELLOW AND BEA MOULTON

MARILYN J. BERGER, RONALD H. CLARK & JOHN B. MITCHELL*

To celebrate the 25th anniversary of the publication of Gary Bellow's and Bea Moulton's The Lawyering Process, our essay consists of eleven letters and postcards about how The Lawyering Process inspired the writing of our books — Pretrial Advocacy: Planning, Analysis & Strategy and Trial Advocacy: Planning, Analysis & Strategy. Alas, this correspondence is imaginary because that exchange of ideas did not take place. This method was inspired by the medieval letters of Abelard and Heloise and the modern-day fictional postcards and letters of Griffin and Sabine.

Tracing the evolution of our thoughts from first reading the Bellow and Moulton text, we describe the specific ways in which The Lawyering Process stimulated the writing of our own books. These include both the organizational structure of our books and our emphasis on narrative.

As we journey in this new, high-tech millennium, we hope that the familiar genre of letters and postcards provides both an entertaining, voyeuristic voyage into our minds and hearts as writers, and a fitting tribute to the bold, creative enterprise that was The Lawyering Process.

INTRODUCTION

THE LAWYERING PROCESS,¹ published in 1978, broke new ground in teaching the art and skill of legal advocacy. The idea that teaching about the lawyering process could be intellectually challenging and analytical was a pioneering concept. The book set out a model of the theoretical underpinnings that connected skills, substantive content, and ethical dimensions, and brought coherence to both simulated and live-client clinical teaching. The supplements to the text contained a practicum with pretrial and trial problems for students to role-play.²

THE LAWYERING PROCESS was inspirational for us as the authors

* The authors are listed in alphabetical order. Marilyn J. Berger is Professor of Law at Seattle University School of Law, Ronald H. Clark is Senior Training Counsel at the National College of District Attorneys, and John B. Mitchell is Associate Professor of Law at Seattle University School of Law. We would particularly like to thank Chris Wilen, the Associate Director of Instructional Design, as well as Nancy Ammons and Laurie Sleeper who struggled through typing seemingly endless drafts.

of two lawyering texts.³ As we thought about our contribution to this symposium, we began to realize that we wished we had engaged in a dialogue with Gary Bellow and Bea Moulton about how their work inspired the development of our books. Of course, if e-mail had been in wide use (at the time it was as faraway as the man in the moon) it would have been easier to have had such an informal conversation. We regret that such an exchange of ideas did not take place, and hope now to use the opportunity of the 25th anniversary of the publication of *THE LAWYERING PROCESS* to at last have that conversation, if only imagined.

Following the model of the medieval letters of *Abelard and Heloise*⁴ and the contemporary fictional postcards and letters of *Griffin and Sabine*,⁵ we embark on writing in the familiar genre of letters. With appropriate apologies to these masterpieces of romance, intrigue, and inspirational artwork, our article consists of letters and postcards that we wished we had exchanged with Bea and Gary. Our letters and cards trace the evolution of our thoughts, from reading the Bellow and Moulton text, to writing our own books.

This genre of letters and postcards is particularly suitable for relating our ideas. Narrative theory has a prominent place in our pedagogy, and what follows is a story in which the letters and postcards form short chapters. It is a story, moreover, in which, like a trial, the line between reality and fiction blur. This format allows the reader to climb into our minds and hearts as writers, and it is an enjoyable way to recognize the value of *THE LAWYERING PROCESS* on its 25th anniversary.

Following are the eleven letters and postcards we wished we had written. We imagine them set in the summer of 1989 when we had completed our books. In the style of *Griffin and Sabine*, the chosen locales for our letters and postcards are inspired by places we have traveled during our respective vacations and sabbaticals.

THE LAWYERING PROCESS



Portugal

Hvervellir — Hot spring ~~was~~ amidst huge glaciers in the interior of Iceland.
For information ~~write to~~
Ferðaskrifstofa ríkisins (Iceland Tourist Bureau)

Dear Bea and Gary,

Thought we'd drop you a postcard telling you how much we appreciated your book, *The Lawyering Process*. It certainly was a prodigious undertaking - 1120 pages and two problem supplements.

Your book is a pioneering work that reached two audiences. First, were what we will call the upcoming legal "Philosopher Kings," for lack of a better description. These are sophisticated students for whom your book provided a framework for thinking about the legal profession - its values, attitudes and the skills needed to pursue a career in the law.

Running out of space. Will continue on another card.

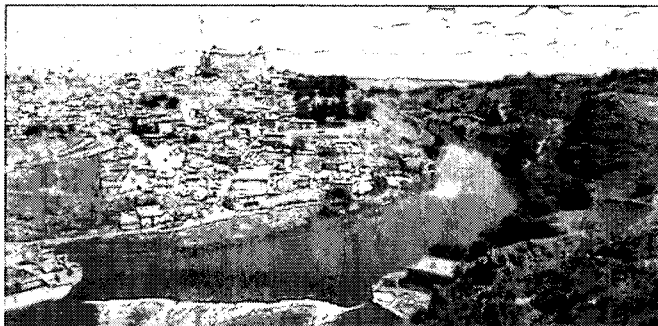
Foto: Hermann S. Eriksen



Bea and Gary

Famous Authors

U.S.A.



Portugal



Verónica e fundadores do grupo.
oficial de Verónica e fundadores do grupo.
oficial de Verónica e fundadores do grupo.
G. e fundadores do grupo.

AIRMAIL



The Lawyering Process (Cont'd)

Second were law teachers like us. You provided us with a strategically-guided model for teaching advocacy as a complex, coherent, and intellectually challenging endeavor.

As you are aware, we eventually wrote our own pretrial and trial texts. At every stage, your influence was there, and is evident in our final work. We'll explain more when we have time to write throughout our travels.

Thank you so very much.

*With Warm Regards,
Marilyn, John, and Ron*

Verónica e fundadores do grupo. Oficial de Verónica e fundadores do grupo. G. e fundadores do grupo.

Reynolds Municipal Archives & Collections, Nr.

Bea and Gary
Famous Authors
USA

HOW TLP INFLUENCED OUR THINKING



LAPA PALACE
RUA DO PAU DE BANDEIRA, 4
LISBON, PORTUGAL
TEL: 351 21 393 93 93
FAX: +351 21 385 36 64

June 14, 1989

Dear Bea and Gary,

Thank you for your kind response about our books. Since a true correspondence requires candor, we must confess that while your book had an enormous influence on our own work, we never actually used it in our simulation classes. It was far too complex for our students and had too much material for us to juggle for a class. Rather, we used the book for our own background reading. Yet, but for your book, we never would have conceived of writing our own. It was an inspiration. It was so smart and thoughtful that we suddenly saw that teaching a student to be a lawyer involves transmitting a world to them that is as intellectually challenging and theoretically rich as the substance of traditional law school classes.

Maybe we already had this insight since we had all practiced law, but once we began teaching in law school, it was as if we fell under a spell and could no longer see all this theoretical richness.

Your book broke the spell and freed all who taught advocacy to explore the full dimensions of their subject. It would be fair to say that your book was the genesis of advocacy teaching as a legitimate intellectual discipline within the legal academy. Your book also influenced us in very concrete ways when writing our own books. We'll just touch on three important areas: 1) developing a model for teaching advocacy 2) organizing our books and 3) the importance of stories.

First, we agree that a coherent model and framework for teaching advocacy is essential. Our model is goal oriented. We stress "ends-means" thinking – keeping your eye on the goal and planning how you will get there. Our working advocacy model builds on a number of areas that you stress in excerpts from interdisciplinary articles: sociology, psychology, and history.⁶

Second, we built on your three-part organization of chapters into preliminary perspectives, the skills dimension, and the ethical dimension.⁷ While our structure is different, we share your belief that the teaching of advocacy encompasses three dimensions: the why (the substance of what

you are accomplishing); the skill (how you do the specific skill -- interviewing, counseling, developing case theory, direct examination); and the ethics and values.⁸

Third, our model also draws upon stories to illustrate how a lawyer thinks, acts, prepares, and represents a client. But rather than use actual, real world stories, such as those which predominate in your book (though you do intersperse some simulated transcripts), we rely on a complex hypothetical fact pattern that changes as the book progresses. We then enlist the concept of case theory to guide the development of the lawyer's story, and as the primary organizing tool for that lawyer's work as an adversary for the client. We will explain our thoughts behind using a single hypothetical (a shooting in a tavern that leads to both criminal and civil litigation), and our development of the concept of case theory, in subsequent letters and postcards.

However, our books and model differ from yours in two ways. First, we integrated a number of elements into our books: text, problems, and a mock case file.⁹ Second, we developed a model in which we attempted to replicate how a practicing lawyer thinks, prepares, and performs the range of skills in the advocate's repertoire. To do this, we presented a theory of advocacy tied to case theory which explicitly ran through every aspect of

our books. We did so in order to place our students on the trajectory towards competent practice. As such, our books are less theoretically oriented than yours are. Given that you seem to have intended your text as only "part of a program"¹⁰ in which it would serve to provide a conceptual framework for students to evaluate their experience in a live-client or simulation clinic, your heavily theoretical focus makes complete sense. In a live-client experience, working on cases provides students with plenty of opportunity to assimilate the skills needed for competent practice; while a simulation course explicitly focuses on developing these skills. As such, you could assume that the underlying live-client or simulation course which your book was intended to supplement would provide basic skills training.¹¹

Since our books constitute a self-contained advocacy simulation course, their less theoretical and more practical focus likewise made sense, particularly for our students. Most of our students will go directly into small, solo, or government practice; they will need to hit the ground running. With that in mind, we constructed our books and the accompanying course to ensure that our students will graduate with a functional level of skill and overall competence.

We will write more about your influence, and the debt of gratitude we owe you.

Best, Marilyn, John, and Ron

ORGANIZING AROUND STORIES: AN IDEA FROM TLP

PORTO PALACIO

Address : Av. Boavista, 1269 4100-130 PORTO

June 29, 1989

Dear Bea and Gary:

Just got your reply. You are wrong to minimize your influence on our books. As we said in our last letter, we were delighted with your emphasis on stories. Each section of your book contains a range of stories -- excerpts from novels, short stories and poems. In fact, you begin your introductory section on Becoming a Lawyer with references to a wide array of fiction from Charles Dickens, A Tale of Two Cities¹² to Kurt Vonnegut, God Bless You, Mr. Rosewater.¹³ Your section on direct and cross-examination includes an excellent piece by Cleanth Brooks and Robert Penn Warren about understanding fiction.¹⁴ Your selection of literary pieces is copious throughout: Agatha Christie, Witness for the Prosecution¹⁵ (interviewing); Brer Rabbit¹⁶ (negotiation); Alexander Solzhenitzyn, The Cancer Ward¹⁷ (counseling).

Of course, most lawyers value stories. Stories are the medium all of us use to discuss events and moral decision-making. Stories often reflect our individual

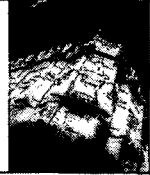
notions of how the world "is," constructed as they are from our experiences, myths, biases, and culture. Stories are simply how we conceive, perceive, and describe life, and how we make meaning out of human experiences.¹⁸ So, it was understandable that stories would appear in a book about advocacy. But you gave stories such a prominent place in your book on lawyering that it made us consider the primacy of narrative in lawyering.

Though we immediately felt both an intuitive and experiential understanding of this link between lawyering and stories, we lacked an understanding of the precise mechanism(s) that creates this link. Then we came across a book by sociologists W. Lance Bennet and Martha Feldman, entitled *Reconstructing Reality in the Courtroom*,¹⁹ which explores the role of stories at trial. Research by the authors showed that jurors take the evidence at trial and construct stories built upon their beliefs and experiences. They then use this story framework both to weave the disparate pieces of evidence together in some coherent form and -- and this is the authors' most powerful insight -- to arrive at a verdict based on the evaluation and comparison of their stories and those of the parties.

Therefore, we decided that our advocacy books would focus on a complex story, a story that would unfold in both the criminal and the civil context, so that our students could appreciate both arenas as well as the importance of narrative in advocating a case.

All our best, John, Marilyn, and Ron

LEARNING THEORY



Bilderberg Garden Hotel Amsterdam

Dijsselhofplantsoen 7
Amsterdam

July 5th, 1989

Dear Bea and Gary:

We just received your letter where you asked if there were any non-legal influences on our work in addition to the sociology of Bennett and Feldman.²⁰ The answer is "yes." In 1986, John went to Chicago for a conference sponsored by the University of Chicago.²¹ The topic of the conference was teaching and learning theory. The conference focused on both expert versus novice thinking, and how we understand and give meaning to the world.

You both would have loved this conference. As an interdisciplinary conference, it was right up your alley, because of the brave departure in your book from staid, old, hermetically-sealed legal materials to a wide use of interdisciplinary readings. These include analogies from medicine, writing, and theater for your "orientation models" which you place at the beginning of each chapter to expose students to the dimension of each

lawyering skills.²² The specific learning theory on which the conference was centered was presented by experts in cognitive psychology, artificial intelligence, logic, learning theory, mathematics, educational psychology, and linguistics.

Of course, a theory about moving from novice to expert was particularly appealing to us since that seems to be exactly what we were trying to do: take novices in law (students) and catapult them towards being experts (professionals) in the legal profession. According to the theory, which is called "schema" theory, knowledge is organized into cognitive structures called schema or schemata. This schema has two basic properties -- it's active and it's creative. Let's start with active. Surface data in the world will trigger a search for the appropriate cognitive structure (schema), while simultaneously our repertoire of schema leads us to actively search through the data to confirm the appropriate schema. (As we re-read your book, it is plain that you anticipated the related notion that all meaning is a product of construction as evidenced by your selection of readings by Peter Berger²³ and Dr. Andrew Watson²⁴ on client counseling, and your discussion of "frames of reference."²⁵)

As to the creative, we literally see what is not there. A cube is a

simple example. You cannot literally see all the sides at the same time. Where do those sides you "see" but cannot possibly really observe come from? We know they are there (though we could be fooled by a pseudo-cube constructed in the manner of a hotel on the set of a Hollywood movie). We infer them from prior knowledge and experience.

Okay, what does this have to do with expert-novice thinking? Experts have expert schema. In other words, experts possess huge knowledge bases that are organized into highly useful, quickly retrievable schema. That's what makes them experts. Expertise, thus, is all "local," a property of the particular area of expertise. Novices in a particular field, on the other hand, lack such schema, although they may be experts, replete with their own expert schema, in a different field.

To illustrate expert-novice thinking at the conference, the results of an experiment using a problem involving Soviet grain production was discussed. The experiment divided participants into four groups: political science experts specializing in the Soviet Union, graduate students in the same field, experts from unrelated fields, and generalist undergraduates.

All of the Soviet Union experts and graduate students in the field approached the problem in the same way: (1) they developed a "problem representation" (what in law we'd call "the issue") -- which, in effect, was

the product of their sifting between data and available expert schema (2) they assembled an array of general principles (3) they identified sub-problems, qualifications, and constraints, and (4) they offered extensive lines of argumentation to support their conclusions.

However, the novice groups, i.e., the undergraduate students and experts from different fields (who were experts in their own fields but not in Soviet political science) focused on the most concrete surface features of the problems. So, instead of seeing the problems involving transportation, equipment, and communication as all part of the broader concern of "infrastructure," the novices identified "crumbling roads." They also made almost no argumentation to support their positions. Sure seemed like first semester, first year law students.

From what John told us, he certainly experienced being a novice first hand at the conference. He was the only law professor out of 300 experts in fields such as math, chemistry, French literature, political science, art history, physics, European history, and Spanish. When experts in the same field would talk their talk, he'd grasp on a word here, a phrase there. . . . Apparently, he had great fun! We found all this very exciting, although at the time, we hadn't really sorted out the implications for our books.

After returning from the Chicago conference on novice-expert

schemas, John organized a workshop for the faculty at the University of Puget Sound Law School, now Seattle University School of Law. At the workshop, he tried to replicate the Soviet grain experiment, except in his experiment, the hypothetical involved criminal law. The faculty was divided into one group of professors who taught criminal law and groups composed of those teaching in other areas. Remarkably, the results paralleled those of the grain experiment. John later wrote an article about the workshop and experiment.²⁸

All our best, Marilyn, John, and Ron

APPLYING EXPERT-NOVICE THINKING AND STORYTELLING TO
TEACH ADVOCACY



NH Hotel Doelen

Nieuwe Doelenstraat 24
Amsterdam

July 14th, 1989

Dear Bea and Gary:

Your recent postcard asks us to explain how we connected expert-novice schema theory to our teaching. Good question, and one we struggled with for quite a while. We knew that in addition to the notion of the centrality of stories, we had now added expert-novice thinking. But how did all this connect to our goals of creating pretrial and trial texts which would effectively educate students like ours to competently handle litigation after graduating? Within a few days' time, it all came together, and we had a sense of how to teach students (novices) to be experts, how to impart an expert schema. Of course, years of refinement followed, but we had the basics.

The first step is to appreciate the content of the knowledge base of the expert litigator. The schema of expert litigation is composed of a vast knowledge base, including substantive laws, evidentiary rules, common

fact patterns that are associated with particular allegations and defenses, rhetorical moves, local conventions and procedures (written and unwritten), techniques for evidentiary foundations, and so on.

Of course, a law class can only approximate this expert world and nudge students in its direction. At some point, they will have to learn by doing in the complex, three-dimensional world of practice, a world which no simulation can replicate. Nonetheless, appreciating all that is stored in the expert advocate's schema gives a sense of the initial gap between novice and expert and provides students with a perspective on the type and quantity of knowledge they will need to amass on their journey towards expertise.

The second step is to take what we know about expert advocates: They act strategically (i.e., they do everything for a reason); they are goal oriented; they maintain an ethical framework; and they spend a great deal of time planning and preparing.

The third step is to add traditional skills training because the student will need to be able to do certain things. (Again, our approach, in effect, follows your book's organization of an "orientation model," skills, and ethics).

The idea about a core hypothetical for the books (which we initially

arrived at after thinking about your focus on stories) remained a central feature of our books. Thus, our books center around a single, complex, evolving hypothetical.²⁷ This exposes students to the "real" world, where cases change, twist, and turn as new facts are discovered. Also, because the students can master a single fact pattern rather than continually having to deal with new hypotheticals, the students can appreciate more nuances (sub-problems, qualifications, constraints), bring more factors to their analyses, and develop more extensive lines of argumentation.

Our books were meant to provide the materials and specific structure and organization for a year-long pretrial and trial advocacy class. We focused a significant portion of that class on planning and preparation within strategic objectives, and on preparing the students to walk through the mental terrain an expert travels prior to trial. For example, the expert might ask herself: What am I trying to accomplish with this witness's direct exam? What does the witness add to the case? What are the risks with this testimony? How is this witness vulnerable? Can I do anything to avoid or lessen that possibility? Can my adversary use this testimony against me? Are there significant evidentiary issues? How can I organize the testimony? Why? The theoretical models about learning theory (schema theory and expert-novice problem-solving) guided our understanding of the appropriate content and structure of the materials.

Hope all is well. Best, Marilyn, John, and Ron

CASE THEORY

TAWARAYA RYOKAN
Anenokoji-agaru
Kyoto, Japan

July 25th, 1989

Dear Bea and Gary,

Great hearing from you. Your observation that stories and expert-novice theory are not enough is correct. From early on, we realized that to construct a course around the type of planning, analysis, strategy, and reflection engaged in by experts in our field, we needed a central organizing concept to hold it all together. That central concept turned out to be "case theory."

As you know, most trial skills texts available when you wrote *The Lawyering Process*, and when we wrote our books, dealt with trial as a fragmented series of performances (opening, direct, cross, and such) without the broader conceptual and theoretical concepts you explored in each of your chapters. Yet from everything we knew about trials from our experiences, that fragmented vision of trial skills did not comport with how expert advocates function.

In our view, everything a trial lawyer (the expert advocate) does fits within a coherent, though of necessity, flexible and evolving, strategic

plan. This plan is widely known as the "case theory." Other than the name and the strong feelings among advocates that the concept was crucial, however, the three of us never really heard the nature of case theory articulated by either advocates or the authors of lawyering texts (except, perhaps, the admonition to avoid conflicting case theories -- my client was misidentified as being at the bank, and, even if he was there, it was under duress). However, we believed that, as trial lawyers, we always had a case theory which guided us throughout pretrial and the trial.

We, therefore, developed a systematic approach to creating and choosing a case theory, and then used that concept to guide every phase of our trial advocacy teaching. We began with the basic vocabulary. A case theory is composed of two interrelated concepts -- the "legal theory" and the "factual theory." The legal theory reflects the doctrine underlying the charge, claim, or cause of action. The factual theory is the story without the nuances, images, and analogies of a closing argument. It is a story such that, considering applicable burdens, if the jury accepts the story, you should win under your legal theory. Plausible legal theories then guide you to seek out particular facts, while other facts suggest certain plausible legal theories (or the opportunity to put forth some novel, cutting-edge theory). Again, the concepts are interrelated, though they can be

meaningfully discussed separately.²⁸

Addressing case theory from the defense perspective, we developed a typology of possible defense legal theories which provide the means for attacking a plaintiff's legal theory, as well as counter attacks (i.e., affirmative defenses). We also developed systematic approaches to supporting and attacking the factual theory, again developing a typology of such attacks.

*This concept of case theory then served as the touchstone for each performance. As you suggested in *The Lawyering Process*, we divided our discussion of each performance (such as witness interviewing) between the conceptual, which we termed "planning for content," and the actual doing of the skill, called "planning for a performance." For each skill, we also provided a concept we called the "basic task." Since our students need to be able to perform competently after finishing law school and passing the bar, it seemed useful to provide a basic, focused sense of their objectives with each skill. Thus, the basic task for witness (non-client) interviewing is to "[o]btain information to further develop, support, modify, or alter your case theory, including information that will allow you to assess the witness's credibility."²⁹*

The "planning for content" segment, which is the most significant

part of our approach, revolves around case theory. Thus, the approach we created to plan for the content of witness interviewing consists of a seven-question sequence. These questions include: What tentative case theories are indicated by the information you are now aware of? What information could this witness possess that is relevant to the tentative case theories?²⁰

In our books, we decided to model expert performance for the students by using a hypothetical to work through a full sequence for content planning like the seven-question sequence for witness interviewing. At the time we wrote the books, we envisioned that we would reinforce this content planning aspect of preparation during in-class dialogues with the students who would be assigned various exercises from the text and case file. In fact, that is how our classes are conducted.

Our "planning for performance segment" eschews the notion that, even in the performance arena, one should "just do it." At some point in class, students will perform some skills, but that is the end result of both content planning and a multi-question performance planning approach. For example, this performance planning approach in witness interviewing includes questions such as: What is the range of possible practical/strategic considerations that could arise in a witness interview (e.g., establishing a rapport, deciding who to interview, organizing the interview, preserving the information, dealing with gender-related problems)? What are your objectives in this situation? How will you achieve your objectives?²¹

Well, that's it for now. Marilyn, John, and Ron

STORIES THAT ARE INCLUSIVE: RACE AND GENDER



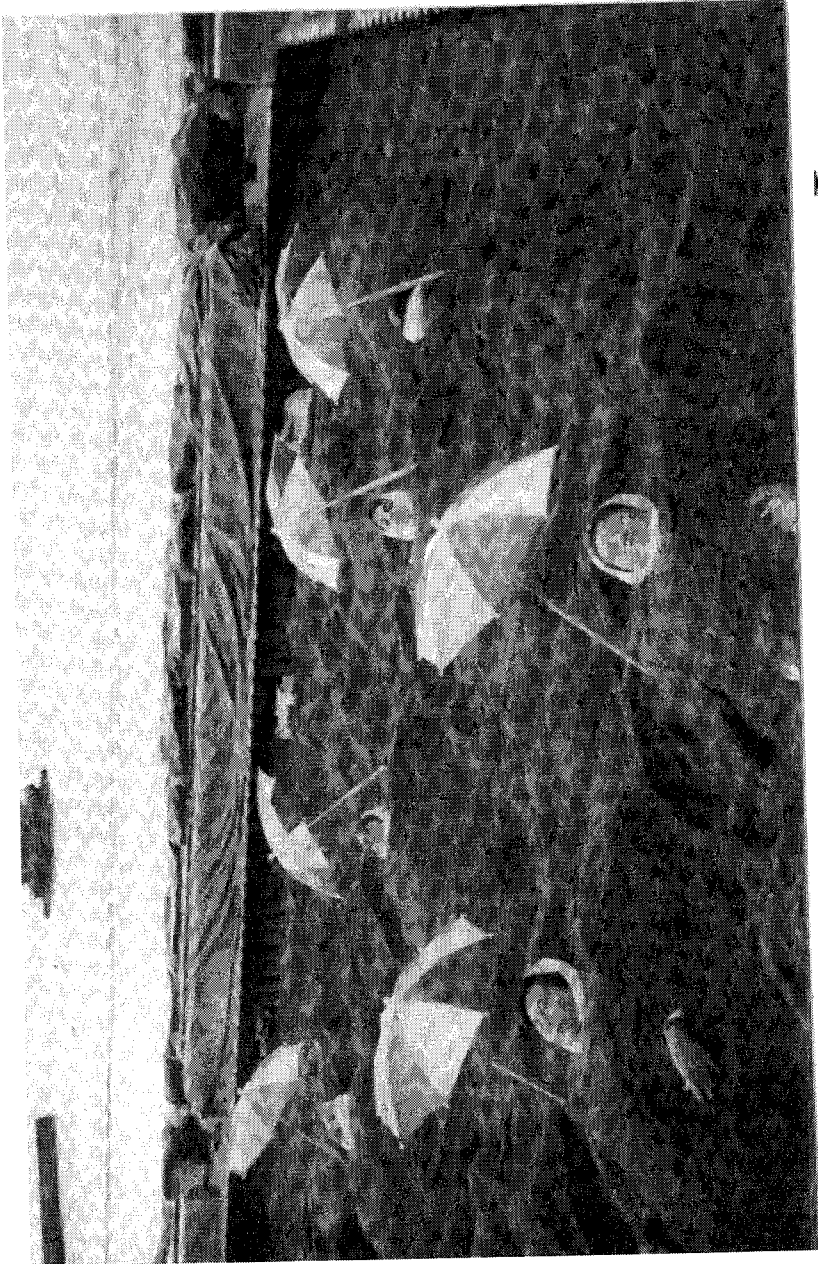
FIGURE 1 - Gallatin Address
 at the University of
 California, Berkeley
 by David M.ervin
 for Michael Servin



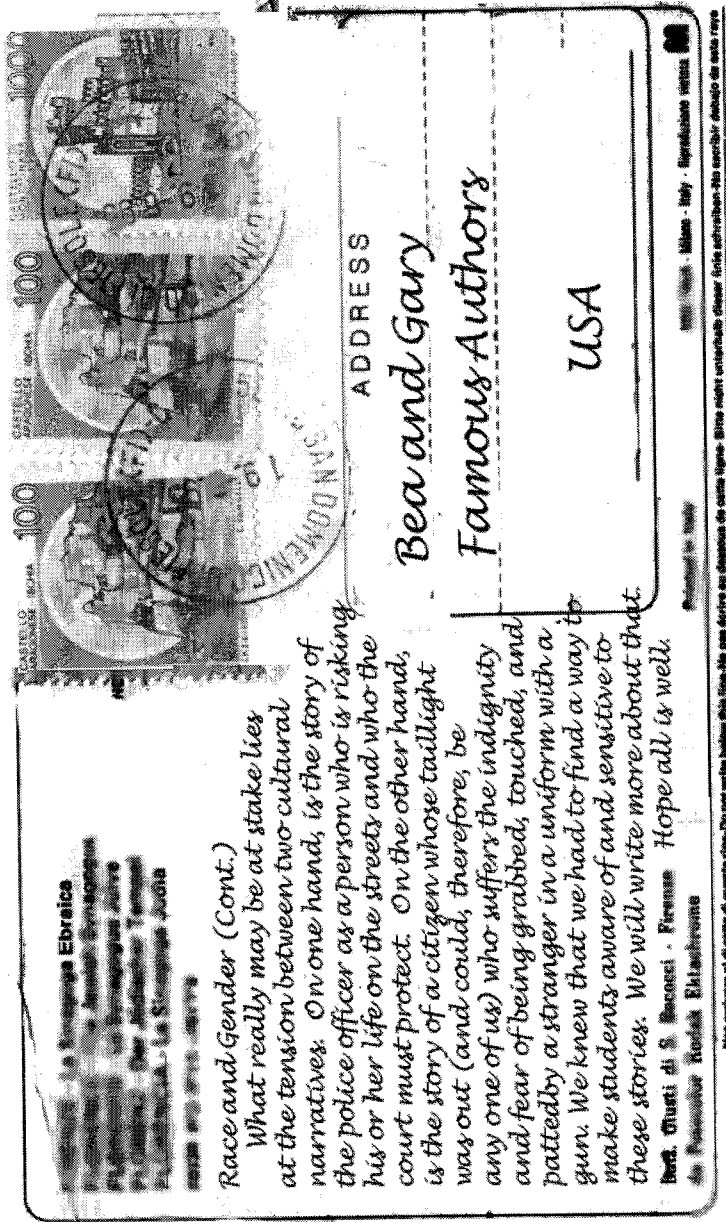
Dear Bea and Gary,
 In your last letter, you asked if critical race or feminist theory played any role in our thinking. In fact, they did. During the same period of time we were planning the texts, by coincidence, we had become interested in feminist and critical race theory.³² What we saw was that storytelling had as much to say about arguing points of legal theory to judges as it did to factual arguments to jurors who are asked to apply law to narratives. Stories are embedded in the law -- the Oreges,³³ is an archetypal story that justifies our notion³⁴ of "law" as the means of ending the cycle of blood feuds. Virtually all progressive legal decision-making is less a function of changed doctrine than changed stories, although the stories also changed the doctrine. As long as the stories of "woman as homemaker / man as breadwinner" and "woman as fragile" predominated, so would discriminatory policies about pregnancy and women in the workplace.³⁵ Until the story of "separate but equal" changed to that of "harm to black school children," *Brown v. Board of Education*³⁶ could not have happened. Even in legal cases with far less social impact - a police stop of a car and pat search revealing a hash pipe which then becomes the subject of a suppression motion in a lower court -- resolution of the case under some legal standard like "reasonableness" still may involve far deeper stories than the story reflected in the police report.

Bea and Gary Famous Authors

Will continue on another postcard



Japan



La Svinge Ebraica
 Pubblicata da Anselmo Svinge
 Pubblica da Anselmo Svinge
 Pubblica da Anselmo Svinge
 Pubblica da Anselmo Svinge

Race and Gender (Cont.)

What really may be at stake lies at the tension between two cultural narratives. On one hand, is the story of the police officer as a person who is risking his or her life on the streets and who the court must protect. On the other hand, is the story of a citizen whose taillight was out (and could, therefore, be any one of us) who suffers the indignity and fear of being grabbed, touched, and patted by a stranger in a uniform with a gun. We knew that we had to find a way to make students aware of and sensitive to these stories. We will write more about that.

Prof. Stuart S. Rosenberg
 Professor of Law
 University of California, Berkeley

ADDRESS

Bea and Gary

Famous Authors

USA

Ron, Marilyn and John



HOW STORIES WEAVE EVIDENCE TOGETHER IN A TRIAL

Hotel RIHGA ROYAL NARITA

456 Kosuge Narita; ; Tokyo; Japan
+(66) 2962 2824

July 31st, 1989

Dear Bea and Gary:

Just got your last postcard and what you intuited was right; we still hadn't fully arrived at a method to teach about stories in a way that would be useful to the students. Our basic concept of a case theory (composed of interrelated factual and legal theories) is a useful strategic guide for an advocate. It is like the steel frame of a skyscraper. Yet, just as a finished building cannot be constructed solely with steel girders, so too a trial cannot be built solely with a case theory. An appreciation of the nuances and complexity involved in assessing, constructing, supporting, defending, and attacking stories at trial required far more subtle material than the steel girders of case theory.

*We, therefore, kept looking for a way to teach sensitivity to trial "stories." Your reference to the play by Luigi Pirandello, *Six Characters in Search of an Author*, and its relevance to trials and advocacy was an interesting one.³² Trial practice as a performing art was an idea that we were thinking about as well -- i.e., that a trial is much like a play. Each witness, like a character in a play, has a history in which the context of the*

witness's testimony is meaningful and understandable to the audience.

And the techniques for witness examination -- direct and cross examination -- also resemble a performing art. Like writers creating literature, lawyers employ drama and dramatic technique as their tools. But, all this presupposes the existence of a good story which these tools can be used to tell. Again, what was the key to writing the script for that "play" we call a trial?

With all this in mind, we finally realized that the nuanced and pliable material necessary to create stories was information, lack of information, and inferences. We recognized that lack of information can be characterized as information, e.g., no gun was found at the scene, or the invoice does not indicate the boxes were shipped. We thought, however, that the phrase "lack of information" was useful because it reminded the student that what is not there can be at least as important as what is.

These inferences combine to form some portion of the story or some sub-story. For example, in addition to a story about a man with a knife in his heart, there may be a whole sub-story about betrayal, jealousy, and motives for revenge.

The key, then, is to become aware of the possible inferences, and the stories that jurors can draw from a piece of information singly, or in

combination with other pieces of information. It is the inferences which are pivotal to this analysis, and these inferences (consistent with schema theory) will be a function of interpretive structures created from bias, culture, belief, experience, and memory. (You, of course, fully understand this since you chose to begin your section on investigation with the Kemelman and Wigmore pieces dealing with the social construction of interpretation.)³³

At that point, we finally had all the pieces in mind from which to construct the books. Several short years later, we had the books. Again, so very much of what we've done we owe to you - our three-part structure (content, skills, and ethics), our focus on stories and, most importantly, our sense (legitimated by you) that teaching advocacy had intellectual content far beyond the maxim "don't ever ask a question on cross-examination to which you do not know the answer."

Well, think we'll close. We think you get the point. Your work provided the platform on which ours was constructed. We hope that someone will likewise build on our work, for that is the real reward of academic work.

As always, Marilyn, John, and Ron

THE FUTURE: LEARNING THROUGH VISUAL STORIES
AND TECHNOLOGY

August 16th, 1989

Dear Bea and Gary,

Thanks for your kind letter. What was it like to finally finish your book? When we finally finished our books, our reactions were not joy and celebration, but relief and exhaustion. We were proud of our work and, at the same time, never wanted to see the books again. We know you understand. As we looked at the two books and the accompanying witness role guides and teaching notes -- quite an impressive stack to look at when piled on top of each other -- we all had the same unnerving feeling. In the time we'd written the books, the profession had been gradually changing. And it would continue to change. Technology was surfacing in law teaching and practice. We even made a short videotape that accompanies the books. This five-minute videotape pans through the scene of the shooting that is at the center of the case file in our books. We knew technology would continue to alter things, but how? Well, the taxi to the airport has just pulled in downstairs.

Our best as we all travel together through this new world.

As always, Marilyn, John, and Ron

AUTHOR'S NOTE: A FINAL LETTER WRITTEN MANY YEARS LATER,
BUT NEVER MAILED

A few weeks ago, we were looking through some old files when we chanced upon a letter (or more accurately, a single page from a longer letter) which we had written to Bea and Gary. It had been written ten years after our correspondence during the summer of '89, and for reasons none of us could recall, had never been sent. We nonetheless decided to include it with our other correspondence out of a desire for historical completeness.

to Istanbul.

*After our books were published, Marilyn began to explore the idea of supplementing our single, complex hypothetical with a real case. Of course, she planned to interview and videotape the attorneys, clients, judge, and jurors to probe their personal, strategic, legal, and ethical decisions and dilemmas. Through her research, Marilyn was later to find the perfect case in the form of a toxic tort lawsuit in Woburn, Massachusetts. You probably know the case better from the book and movie the case generated: *A Civil Action*.³⁴ Using technology we never envisioned in 1989, she has even placed a selection of the videotape documentaries on a website.³⁵*

Ron was drawn to computer technology. Computers were already beginning to be used by firms for office management, files of form documents, and conflict checks. Ron thought they might soon be used for document organization and retrieval, and someday for actual use in the courtroom. Ron proved prophetic. As Senior Training Counsel at the National Advocacy Center in Columbia, South Carolina, Ron teaches district attorneys how to use computers to create powerful visual presentations for closing arguments.³⁶

John, on the other hand, decided not to pursue technology, but instead is working on a book about assisted-suicide and euthanasia, and hopes to have it published before his grandchildren graduate from college.

Thinking of all we've learned, perhaps the single most important

NOTES

¹ GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978).

² GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: CIVIL PROBLEM SUPPLEMENT* (1978); GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: CRIMINAL PROBLEM SUPPLEMENT* (1978).

³ MARILYN J. BERGER, JOHN B. MITCHELL & RONALD H. CLARK, *PRETRIAL ADVOCACY: PLANNING, ANALYSIS & STRATEGY* (1988) [hereinafter BERGER ET AL., *PRETRIAL ADVOCACY*]; MARILYN J. BERGER, JOHN B. MITCHELL & RONALD H. CLARK, *TRIAL ADVOCACY: PLANNING, ANALYSIS & STRATEGY* (1989) [hereinafter BERGER ET AL., *TRIAL ADVOCACY*].

⁴ Constant J. Mews, *The Lost Love Letters of Abelard and Heloise: Perceptions of Dialogue in Twelfth-Century France* in *THE NEW MIDDLE AGES* (Neville Chiavaroli trans. 2001) (exploring the illicit love affair between Abelard, a 12th century Parisian scholar and teacher and Heloise, his talented young student, as told through their exchange of letters).

⁵ NICK BANTOK, *GRIFFIN AND SABINE: AN EXTRAORDINARY CORRESPONDENCE* (1991); NICK BANTOK, *SABINE'S NOTEBOOK: THE EXTRAORDINARY CORRESPONDENCE OF GRIFFIN AND SABINE* (1992); NICK BANTOK, *THE GOLDEN MEAN: IN WHICH THE EXTRAORDINARY CORRESPONDENCE OF GRIFFIN AND SABINE CONCLUDES* (1993). The books provide a voyeuristic journey through the gorgeous correspondence between Griffin, a London postcard illustrator and Sabine, a South Pacific postage stamp artist, whose letters and cards tell a story filled with mystery, imagination, love, and discovery. Whether Sabine and Griffin are phantoms or true soul mates, they share a keen understanding that blossoms through their correspondence. Their story continues in two subsequent books. See NICK BANTOK, *THE GRYPHON: IN WHICH THE EXTRAORDINARY CORRESPONDENCE OF GRIFFIN AND SABINE IS REDISCOVERED* (2001); NICK BANTOK, *ALEXANDRIA: IN WHICH THE EXTRAORDINARY CORRESPONDENCE OF GRIFFIN AND SABINE UNFOLDS* (2002).

⁶ BELLOW & MOULTON, *supra* note 1. The acknowledgments section, *id.* at xxviii-xi, includes forty pages of citations to materials that the authors received permission to reprint.

⁷ BELLOW & MOULTON, *supra* note 1, at xiii-iv (table of contents).

⁸ Each chapter of our texts cover a skill and is organized by content planning, performance planning, and general planning questions. See BERGER ET AL., *PRETRIAL ADVOCACY*, *supra* note 3, at ix-xxii (table of contents); BERGER ET AL., *TRIAL ADVOCACY*, *supra* note 3, at ix-xxii (table of contents). Ethical considerations are integrated within the three sections.

⁹ See BERGER ET AL., *PRETRIAL ADVOCACY*, *supra* note 3; BERGER ET AL., *TRIAL ADVOCACY*, *supra* note 3.

¹⁰ BELLOW & MOULTON, *supra* note 1, at xix (Introduction).

¹¹ *But see* David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLIN. L. REV. 191 (2003) (questioning whether live-client clinics impart sufficient skills training.)

¹² CHARLES DICKENS, *A TALE OF TWO CITIES* (1859), *cited in* BELLOW & MOULTON, *supra* note 1, at 2 n. 1.

¹³ KURT VONNEGUT, *GOD BLESS YOU, MR. ROSEWATER* (1965), *cited in* BELLOW & MOULTON, *supra* note 1, at 2 n.1.

¹⁴ CLEANTH BROOKS & ROBERT PENN WARREN, *UNDERSTANDING FICTION 170-73, 272-277* (2d ed. 1959), *excerpted in* BELLOW & MOULTON, *supra* note 1, at 625.

¹⁵ AGATHA CHRISTIE, *THE WITNESS FOR THE PROSECUTION AND OTHER STORIES* (1924), *excerpted in* BELLOW & MOULTON, *supra* note 1, at 124.

¹⁶ *The Tale of Brer Rabbit* (tale suggested to authors by James White and Harry Edwards), *included in* BELLOW & MOULTON, *supra* note 1, at 438. See *THE TALES OF UNCLE REMUS: JULIUS LESTER, THE ADVENTURES OF BRER RABBIT* (1987).

¹⁷ ALEKSANDR SOLZHENITSYN, *THE CANCER WARD* (1968), *excerpted in* BELLOW & MOULTON, *supra* note 1, at 969.

¹⁸ See JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* (1949) (exploring the notion that all cultures share a pattern of heroic myths (e.g., creation) which form the backbone of that culture's stories). Joseph Campbell died in 1987. In 1988, a series of television interviews with Bill Moyers introduced Campbell's views to millions of people. See *Joseph Campbell and the Power of Myth With Bill Moyers* (Mystic Fire Video in association with Parabola magazine, Oct. 1988). See also the Joseph Campbell Foundation at <http://>

www.jcf.org/.

¹⁹ W. LANCE BENNETT & MARTHA FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981).

²⁰ *See id.*

²¹ The conference took place in the Blackstone Hotel, Chicago, Illinois, April 1986.

²² BELLOW & MOULTON, *supra* note 1, at 141, 158, 164, 625, 648, 772, 845.

²³ PETER BERGER, *INVITATION TO SOCIOLOGY* 66-67, 91-94, 121(1963), *excerpted in* BELLOW & MOULTON, *supra* note 1, at 9-10.

²⁴ ANDREW WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* 11-26 (1976), *excerpted in* BELLOW & MOULTON, *supra* note 1, at 224.

²⁵ Raymond L. Gordon, *A Frame of Reference for Communication in Interviewing: STRATEGY, TECHNIQUES, AND TACTICS* 69-73, 76, 78-90, 92-94 (1969), *excerpted in* BELLOW & MOULTON, *supra* note 1, at 162.

²⁶ John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL EDUC. 275 (1989).

²⁷ *See* BERGER ET AL., *PRETRIAL ADVOCACY*, *supra* note 3, at 454-719 (case file); BERGER ET AL., *TRIAL ADVOCACY*, *supra* note 3, at 507-889 (case file).

²⁸ *See* BERGER ET AL., *PRETRIAL ADVOCACY*, *supra* note 3, at 18; BERGER ET AL., *TRIAL ADVOCACY*, *supra* note 3, at 16-17.

²⁹ *See* BERGER ET AL., *PRETRIAL ADVOCACY*, *supra* note 3, at 101.

³⁰ *Id.* at 101-04.

³¹ *Id.*, at 108-09.

³² *See, e.g.*, CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); DERRICK A. BELL, *RACE, RACISM, AND AMERICAN LAW* (2d ed. 1980).

³³ The *Oresteia* is the three-part ancient Greek saga of Orestes, who returned from the Trojan War to find his father, Agamemnon, murdered by his mother, Clytemnestra, and her lover, Aegisthus. The murder is, in part, an act of revenge for prior murders and itself spawns future murderous acts of vengeance. *See Aeschylus I: Oresteia*.

³⁴ JAMES BOYD WHITE, *HERACLES' BOW* 176 (1985).

³⁵ *Cf.* Nevada Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1982 (2003) (noting that "[t]he impact of the discrimination targeted by the FMLA is significant. Congress determined: 'Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women must be mothers first, and workers second . . .'").

³⁶ *Brown v. Bd. of Educ.*, 347 U.S. 433 (1954).

³⁷ LUIGI PIRANDELLO, *SIX CHARACTERS IN SEARCH OF AN AUTHOR* (1921), *discussed in* BELLOW & MOULTON, *supra* note 1, at 3. This focus on trial as story creation in a performance is further reflected in CLEANTH BROOKS & ROBERT PENN WARREN, *supra* note 14, at 23-27, 170-173, 272-276, *excerpted in* BELLOW & MOULTON, *supra* note 1, at 625, and FRANK M. WHITING, *AN INTRODUCTION TO THE THEATRE* 198-211 (1954), *excerpted in* BELLOW & MOULTON, *supra* note 1, at 638.

³⁸ *See* Harry Kemelman, *The Nine Mile Walk* (1947), *excerpted in* BELLOW & MOULTON, *supra* note 1, at 273; JOHN HENRY WIGMORE, *THE SCIENCE OF JUDICIAL PROOF*, 9-11, 18-21, 24-28, 29-31, 34-37, 43-46 (1937), *excerpted in* BELLOW & MOULTON, *supra* note 1, at 307.

³⁹ JONATHAN HARR, *A CIVIL ACTION* (1995)(book); *A CIVIL ACTION* (Paramount Pictures 1998).

⁴⁰ To view the videos, *see* <http://www.law.seattleu.edu/woburn/>.

⁴¹ Under Ron's leadership, Ronald E. Bowers created VISUALS FOR TODAY'S PROSECUTORS, NATIONAL COLLEGE OF DISTRICT ATTORNEYS (2003). The book includes a compact disc with templates that can be used by prosecutors to construct demonstrative evidence in a technological format.

