

Pericles Should Learn to Fix a Leaky Pipe – Why Trial Advocacy Should Become Part of the LLB Curriculum (Part 2)



WH Gravett*

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Date of submission

9 June 2017

Date published

23 January 2018

Editor Dr A Gildenhuys

How to cite this article

Gravett WH "Pericles Should Learn to Fix a Leaky Pipe – Why Trial Advocacy Should Become Part of the LLB Curriculum (Part 2)" *PER / PELJ* 2018(21) - DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2635>

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DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2635>

Abstract

The inescapable reality is that most law school graduates are headed for professional life. This means that law schools have some accountability for the competence of their graduates, and thus an educational responsibility to offer their students instruction in the basic skills of legal representation. The most obvious and direct gain from the university law school offering more training in the generally neglected applied legal skills of trial advocacy, interviewing, counselling, drafting and negotiation, is the benefit to students in helping them bridge the gap between traditional basic legal education and practice. Although I strongly believe that the LLB curriculum should also include courses in legal writing, negotiation, client counselling, and witness interviewing, I emphasise adding a clinical course in trial advocacy to the LLB curriculum for a number of specific reasons. Trial advocacy consists of a set of skills that transcends the walls of the courtroom. It is difficult to conceive of a practising lawyer who does not, in some way and at some time, utilise the skills of advocacy - fact analysis, legal integration and persuasive speech. Even the technical "forensic skills" of trial advocacy, such as courtroom etiquette and demeanour, learning how to phrase a question to elicit a favourable response, and making an effective oral presentation, transfer readily to a wide range of applications within both the legal and business worlds. In addition to learning how to prepare and present a trial from the opening speech through to the closing argument, in a trial advocacy course students would also learn to apply procedural, substantive and ethical rules of law to prove or defend a cause of action. Moreover, if university law schools fail to contribute to establishing a substantial body of competent trial lawyers, our failure will ultimately take its toll on our system of justice. The quality of courtroom advocacy directly affects the rights of litigants, the costs of litigation, the proper functioning of the justice system, and, ultimately, the quality of justice. Also, traditional law school teaching in legal ethics is necessarily abstract and a-contextual. It can be effective at providing instruction in the law of lawyering, but it is seldom as productive when it comes to examining more subtle questions. The university trial advocacy course is the ideal forum in which to raise ambiguous and textured ethical issues. Ethics problems cannot be avoided or rationalised, because the student trial lawyer must always make a personal decision. In the ethics classroom, it is all too easy to say what lawyers should do. In the simulated courtroom, students have to show what they have chosen to do. I argue that a university trial advocacy course should not be antithetical to the university mission. Thus, students should be given the opportunity to learn not only "how" to conduct a trial, but also "why" their newly acquired skills should be used in a certain way, and "what" effect the use of that skill could have. Through properly constructed case files, assignments and class discussions, students should be able to reflect on issues that go beyond the mere mastery of forensic skills. A university course in trial advocacy must be infused with instruction in evidence, legal ethics, procedure, litigation planning, the encouragement of critical thinking about the litigation and trial process, and the lawyer's role in the adversary system. I also suggest, in concrete terms and by way of example, the outlines of both the theoretical and practical components of a university trial advocacy course that would result in a highly practical course of solid academic content.

Keywords

Trial advocacy; legal skills; legal education; LLB curriculum.

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1 Introduction

The legal profession has increasingly questioned whether law students emerge from South African university law schools equipped with those skills needed by the great majority of them who intend to practice law. Certain legal academics have responded that the role of the law school is to educate law students in the theories and substance of the law, and "how to think like lawyers"; it is not to function as a trade school.¹ While practitioners and legal academics argue about whose responsibility it is to teach practical skills, young lawyers are floundering and wishing somebody would help them before they damage their clients' interests or destroy their professional reputations.

The inescapable reality is that most law school graduates are headed for professional life. This means that law schools have some accountability for the competence of their graduates.² I believe that university law schools have an educational responsibility to offer their students instruction in the basic skills of legal representation. An educational experience in a protected academic setting - far from being tangential to or in conflict with preparation for a career in practice - is indeed the ideal basic preparation for a professional career in law.³

The most obvious and direct gain from the university law school's offering more training in the generally neglected applied legal skills of trial advocacy, interviewing, counselling, drafting and negotiation, is the benefit to students in helping them bridge the gap between traditional basic legal education and practice. In fact, helping neophytes to bridge this gap is essentially an instructional problem.

The practical is an inseparable aspect of proper cognitive learning. It is axiomatic in learning theory that when cognitive studies are accompanied by active engagement in their application to concrete problems, the likely result is more complete comprehension, better retention and more apt recall of the cognitive material.⁴

Moreover, a critical aspect of basic professional education is learning what it truly means to bring doctrinal and theoretical knowledge, analytical methods, investigation, communication and persuasion to the actual treatment of complex

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¹ Cramton 1982 *J Leg Ed* 321.

² Spiegel 1986 *UCLA L Rev* 600.

³ Keeton 1981 *Md L Rev* 221.

⁴ Michelman 1982 *J Leg Ed* 353-354.

problems in a manner meeting professional standards.⁵ We should offer our students at least enough experience in the learning of skills to give them some basis of confidence in their ability to execute basic professional competencies in a lawyerlike manner.

Obviously, law school alone cannot create effective trial lawyers.⁶ At the inception of the process, however, law schools must help *prepare* students to become trial lawyers. The law schools have performed reasonably well in preparing students in legal analysis, but they have not performed well at all in teaching students how to translate those intellectual skills into practice.⁷

It is possible to offer an effective university trial advocacy course which, without pretending to turn out skilled trial lawyers, can be expected to result in certain minimum achievements.⁸ Our students would graduate with greatly enhanced knowledge of trial advocacy, and with increased and well-founded confidence in their own abilities to act as trial lawyers. More significantly, our students would leave university with at least enough knowledge of effective advocacy to assess their own future performances, and to grow towards consistent competence in the courtroom.⁹

Professional courses in trial advocacy - limited as they are in South Africa¹⁰ - have a constrained, tightly-focused form. They tend to be outer-directed in the sense that their goal is to enhance the skills of participants, rather than to examine the assumptions underlying the adversary system. It is fair to say that the primary trial skills emphasised in professional trial advocacy courses are (i) question formation; (ii) witness control; and (iii) persuasive presentation.¹¹

These courses cannot but have limited aims, because practising lawyers have limited time. There is only so much that could be accomplished in a two or three day (or even a seven or ten day) workshop. Also, frankly, there is only so much that practising lawyers are interested in learning. In professional education, it is

⁵ Michelman 1982 *J Leg Ed* 354.

⁶ No-one is advocating that university law schools should graduate polished trial-court performers. See, for example, Tauro 1970 *ABA J* 461. There is, after all, a limit on what can be achieved in the relatively cloistered surroundings of the law school. Just as the medical student cannot, in the end, fully develop her bedside manner at the side of a desk, or her surgical technique from a textbook, so too must the law student eventually depart from the classroom to refine her practical skills. Kaufman 1974 *Sw L J* 500.

⁷ Burger 1980-1981 *Fordham L Rev* 21.

⁸ Levin 1965 *Buff L Rev* 390.

⁹ Broun 1977 *ABA J* 1220.

¹⁰ As far as I am aware, the only professional courses in trial advocacy specifically for neophyte lawyers are offered by the various Societies of Advocates to pupils (a weekend seminar) and by Legal Aid of South Africa to candidate attorneys (a two-day seminar).

¹¹ Lubet 1990-1991 *Notre Dame L Rev* 724.

simply commonplace for individuals to target their skills and work to enhance them.¹² That is why professional courses must centre on skills that can be demonstrated, acquired, used and refined in rapid succession. There is little space, nor need there be, for reflection and introspection.¹³

I do not point out these limitations to criticise professional courses in trial advocacy. Rather, I offer them as part of the explanation of why we should teach trial advocacy in law school. Advocacy education cannot simply be picked up in practice. There are far more layers of thought to advocacy education than can reasonably be explored in even the best professional course.¹⁴ The pedagogical advantage of the university course in trial advocacy is that it can be much more broadly paced than any practice course ever could. A university course in trial advocacy offers us the opportunity to merge substance, ethics, and persuasion in a unified instructional setting. Since good teaching motivates continuous thought and reflection, both on the subject of the course and the larger normative issues, time for such reflection can be built into a university course. If students are truly to explore alternative trial theories, they need days, not hours, in which to think and prepare.¹⁵

Law schools are generally in a better position than practice to offer clinical education.¹⁶ We have more time to teach skills in context, to discuss the application of theory to particular practical situations, and to reflect on the approaches that work and the reasons why they work. Allowing students to integrate skills and doctrine while at university, with time to think about the "hows" and "whys", will make them better, more responsible lawyers. Trial by fire, in the hustle and bustle of practice, is not the optimal way of acquiring a fundamental understanding of why some approaches, tactics and methods are more effective than others, especially considering that mistakes in practice occur at the expense of clients, and perhaps to one's own professional reputation.

2 Why trial advocacy?

Although I strongly believe that the LLB curriculum should also include courses in legal writing, negotiation, client counselling, and witness interviewing, I

¹² Lubet 1990-1991 *Notre Dame L Rev* 723.

¹³ Lubet 1990-1991 *Notre Dame L Rev* 725. Law schools, of course, are not constrained in similar fashion, and also partake of a broader mission. Modern legal education differs from apprenticeship precisely because law schools have become fully integrated into the university. Membership in the university requires a closer examination of assumptions, practices and norms.

¹⁴ Lubet 1990-1991 *Notre Dame L Rev* 724.

¹⁵ Lubet 1990-1991 *Notre Dame L Rev* 734-735.

¹⁶ See Devitt and Roland 1987 *Wm Mitchell L Rev* 446 and the sources cited there.

emphasise adding a clinical course in trial advocacy to the LLB curriculum for a number of specific reasons.

2.1 *The process or prospect of litigation touches the life of almost every lawyer*

The absence of a university trial advocacy course in South Africa has always struck me as a curious deficiency, given the centrality of the trial to our conception of justice. The litigation paradigm dominates legal discourse. Undeniably, every legal issue or dispute, regardless of the area of law, has the potential to end up in the courtroom or an alternative dispute resolution forum, requiring a trial or some other formal proceeding that would necessitate the use of advocacy skills.¹⁷ In sum, the *process* or *prospect* of litigation touches the life of almost every lawyer.¹⁸

The legal realist, Jerome Frank,¹⁹ proclaimed:

Litigation is the ultimate reference for the lawyer ... [I]n the last analysis, legal rights and duties ... are nothing more or nothing less than actual or potential successes and failures in lawsuits. A lawyer who has inadequate acquaintance with litigious processes is, relatively, an impotent lawyer ... When you come to practice, and acting for your client ... draw his will ... or organize a corporation, or negotiate the settlement of a controversy, or draft a legislative bill, you will - or should be - concerned with how the courts will act. If you are competent, you will, as best you can, try to answer this question: 'What will happen if those specific documents or transactions hereafter become a part of the drama of a trial?'

It would be a mistake to emphasize the word "trial" in trial advocacy. Although the dominant purpose of this course would be to train students in the nuts and bolts of trial, trial advocacy is not simply the skill of persuasion. Trial advocacy is:²⁰

[T]he composition of fact-extraction, legal reasoning, strategic judgment, and persuasive speech, structured by ... the rules of professional responsibility, evidence, procedure and substantive rules.

Thus, trial advocacy skills are not exclusively the skills of the courtroom, but they also live and breathe in the everyday practice of law.²¹ A skillful trial lawyer is not merely a technician trained in the mechanics of courtroom skills and etiquette, but a lawyer who is able to extract the pertinent facts from a seeming maze of information, integrate those facts with legal principles, and present a reasoned

¹⁷ Mannion 2009-2010 *Pace L Rev* 1203.

¹⁸ Tigar 1990 *Rev Litig* 185.

¹⁹ Frank 1947 *Yale L J* 1305-1306.

²⁰ Gianantonio 2012 *Duq L Rev* 495; Ohlbaum 1993 *Temp L Rev* 26; Wolfe 1980-1981 16 *Tulsa L J* 210.

²¹ Wolfe 1980-1981 *Tulsa L J* 210.

argument.²² If one conceives of an "advocate" in the broadest sense as every lawyer who advises or acts for a client in legal matters, it becomes clear that the skills taught in trial advocacy relate to nearly every conceivable aspect of the practice of law, both inside and outside the courtroom.

Courtroom skills, after all, do not exist in a vacuum. The ability to elicit facts from a witness in the witness box is dependent on the trial lawyer's ability to elicit facts during the pre-trial consultation with that witness. For example, United States Chief Justice Warren E Burger,²³ stated the following with regard to the skill of interviewing:

The shortcoming of today's law graduate lies not in deficient knowledge of the law but that he has little, if any training, in dealing with facts or people - the stuff of which cases are really made. It is a rare graduate ... who knows how to ask questions - simple, single questions, one at a time, in order to develop facts in evidence either in interviewing a witness or examining him in a courtroom. And a lawyer who cannot do that cannot perform properly - in or out of court.

It is true that the full range of a lawyer's skills is tested in the intense and demanding environment of the courtroom. These courtroom skills, however, are illuminated versions of the skills which every lawyer must possess to represent her client's interests effectively.²⁴ Put simply, trial advocacy training readily transfers to the broad spectrum of the legal fora in which lawyers practice. For whenever a lawyer negotiates, or puts a proposition to a client, or even when she discusses a difference of opinion with a partner, she is engaged in advocacy - the process of trying to convince people of something, or the technique of persuasion.²⁵

2.2 The pedagogical value of a trial advocacy course

The importance of a university course in trial advocacy to the development of the young legal mind cannot be overstated. In addition to learning how to prepare and present a trial from the opening speech through to the closing argument, students also learn (and, in some cases, re-learn) and apply the procedural, substantive and ethical rules of law.²⁶ In the law of contracts, students learn to search for consideration, and the law of delict provides instruction on the elements of negligence; however, in a trial advocacy setting students have the opportunity to *apply* the lessons from the substantive, procedural and ethical

²² Williams 1999-2000 *Stetson L Rev* 1230.

²³ As quoted in Wolfe 1980-1981 *Tulsa L J* 211.

²⁴ Wolfe 1980-1981 *Tulsa L J* 211.

²⁵ Hanrahan 2003 *BYU Educ & L J* 302.

²⁶ See, generally, Gianantonio 2012 *Duq L Rev* 486, 497.

doctrines that are traditionally dealt with in discrete subjects, in a manner necessary to actually prove or defend a cause of action.²⁷

2.3 The reputation of the legal profession

Trial lawyers, who hold the liberties and property of clients under their control, have an awesome responsibility to discharge. The public has a right to expect that trial lawyers will be competent. Most of a trial lawyer's professional performance takes place in the goldfish bowl that is the courtroom, where everything can be observed.²⁸ There is no other time during which the lawyer's conduct becomes so visibly essential to the judicial process, and is so acutely experienced by the client.²⁹ As far as the client is concerned - who has to watch her trial lawyer in court and who must stand and fall on the performance - the one incompetent lawyer with whom she deals may represent the sum total of her contact with the law.³⁰

If university law schools fail to contribute to establishing a substantial body of competent trial attorneys, our failure will ultimately take its toll on our system of justice.³¹ As with the consumers of medical services, it is the lawyer's clients who suffer the most serious consequences. The quality of courtroom advocacy directly affects the rights of litigants, the costs of litigation, the proper functioning of the justice system, and, ultimately, the quality of justice.³² A profession that enjoys a monopoly on legal services through public licence must respect the public interest and solve these problems.³³

The concept of "professional responsibility" encompasses much more than simply the ethics involved in the lawyer-client relationship. It also includes the responsibility of the legal profession to ensure that legal services are available to all members of society, and that those legal services are adequate and consistent.³⁴ It is the disadvantaged members of society whose interests are most likely to be prejudiced by a lack of competence in trial lawyers. The indigent are less able to retain qualified trial counsel and, as a consequence, are often left at the mercy of the inexperienced lawyer who learns by trial and error, too often at the client's expense.

²⁷ Gianantonio 2012 *Duq L Rev* 495-496.

²⁸ Burger 1967-1968 *Washburn L J* 16.

²⁹ Wolfe 1980-1981 *Tulsa L J* 211.

³⁰ Clare 1975-1976 *St John's L Rev* 467.

³¹ Wolfe 1980-1981 *Tulsa L J* 212.

³² Burger 1980 *Clev St L Rev* 381.

³³ Burger 1980-1981 *Fordham L Rev* 20.

³⁴ Tauro 1976 *B U L Rev* 637.

We must eliminate the injustices that necessarily arise when the outcome of a lawsuit is determined, not by the merits of the cause, but by the skill of the lawyers.³⁵ We must never lose sight of the fact that our adversary system is founded in the principle that the most direct path toward fairness and truth is one where the adversaries are as equally matched as the constraints of human frailties would permit.³⁶

2.4 Understanding the law of evidence

It is trite that knowing the rules of evidence and applying them are two very different things. In fact, one can truly learn them only by applying them, and not by studying them,³⁷ because their meaning and significance emerge only in the context of a trial.³⁸ For example, hearsay as a rule is fairly easily stated, but its proper application typically evades law students. While this rule is explored in the law of evidence course, its application in an adversarial setting brings the lessons to life, often "connecting the dots" for students who may not otherwise have fully understood the rules from studying a textbook and reading cases.

A university course in trial advocacy would give our students a better grounding in the law of evidence than they would receive if they studied it as a soon-to-be-forgotten typical upper-class LLB offering. This is true, even for students who will never get near a courtroom, but who will still need to know something about the rules of evidence to protect their clients from the hazards of litigation. What they need to know is not the rule as such but precisely what goes on in a courtroom. A course in trial advocacy will give them a good sense of that.³⁹

2.5 Enhancing law students' ability to deal with facts

What do lawyers really do? If you ask this question of any handful of law students, they would likely respond that lawyers litigate, do commercial work, draft wills and contracts, advise on tax matters, and the like. They would be fundamentally incorrect. In a remarkable survey by the American Bar Foundation, practising lawyers responded that what they do, day in and day out, is investigate, gather, research, assimilate, and understand the relevance of facts.⁴⁰

³⁵ Berger and Mitchell 1992 *Am J Trial Advoc* 837.

³⁶ Kaufman 1974 *Sw L J* 497.

³⁷ Just as, states Posner, one can learn how to ride a bicycle only by doing it, and not by studying the pertinent rules of physics. Posner 2001 *LQR* 731.

³⁸ Posner 2001 *LQR* 731.

³⁹ Posner 2001 *LQR* 734.

⁴⁰ This holds true for responses across all the lines of expertise in the profession. See generally Zemans and Rosenblum *Making of a Public Profession*. It is difficult to overstate the importance of facts to the practising lawyer. The most critical section of heads of

We teach our students how to "spot issues". We generally begin with our students when the facts have been established, the factual dispute resolved.⁴¹ Our students fail to realise - because we fail to teach them - that the facts of the only case that matters - the client's - will not jump up from an appellate opinion or a professor's hypothetical in the exam. The actual facts of a lawsuit "do not walk into the courtroom", as the facts of hypotheticals do in the law school exam room.⁴²

Thus, in a real sense, we teach students to think of facts backward. At the outset of any legal conflict, little is known about the complex of data, recollection and human emotions that are referred to as the "facts" during trial.⁴³ A lawyer must find the facts of a case by searching for them. And when the lawyer has rounded up the facts, she must turn each one over in her hand to see whether or not it is arguably admissible under a rule of evidence.⁴⁴ Only after the lawyer has taken the process of searching and analysing the facts quite some distance will she be able to apply legal rules in the sense that traditional law teaching emphasises.⁴⁵

The university course in trial advocacy would stress sustained involvement with facts. Rather than rely upon short, unitary problems - as professional courses of necessity often do - it would utilise case files that are nuanced, complex and detailed. The facts of the case would be subject to continual re-evaluation, and the students would be required to work with the same file preferably for the duration of the course.

From the outset students would have to sort out a complex of factual data from a variety of sources and, through the application of the concept of relevance, submit a narrative of selected facts, the purpose of which would be to persuade the reader (the trial advocacy instructor) as to the probability of what had occurred.⁴⁶

argument or an appellate brief is not the case law cited, but the statement of facts. And the key to writing an effective statement of facts "is a question of making the facts talk. For ... it is the facts, not the advocate's expressed opinions, which must do the talking. The court is interested not in listening to any lawyer rant, but in seeing, or better, in discovering, from and in the facts, where sense and justice lie". Karl Llewellyn as cited in Imwinkelried 1988-1989 *Ga L Rev* 678.

⁴¹ Burger 1980-1981 *Fordham L Rev* 3. To be sure, we endeavour to teach our students to draw distinctions among cases and doctrines. The result is that our students have at least an appreciation for facts in the context of using them in heads of argument and legal memoranda to support legal contentions. However, this teaches sensitivity to facts from only one end of the spectrum. Ordover 1990 *Notre Dame L Rev* 815.

⁴² Frank 1947 *Yale L J* 1306.

⁴³ Ordover 1990 *Notre Dame L Rev* 815.

⁴⁴ Tigar 1990 *Rev Litig* 185.

⁴⁵ Tigar 1990 *Rev Litig* 185.

⁴⁶ Ordover 1990 *Notre Dame L Rev* 818.

This selection process itself would be the subject of intense critique. It is at this stage that students may manifest a lack of logic, or a tendency to "create" facts, or to manipulate them beyond ethical or common sense limits. Catching these problems at the outset of the trial advocacy course would do a great deal to instill in our students an understanding of the limits of proper advocacy.⁴⁷

After sifting all of the material and learning the rudiments of client interview techniques, the student trial lawyers would be required to write a comprehensive memorandum of fact and of law. This document would organise all the materials into a theory of the case from which further proceedings may go forward - that amalgam of fact, law and inference which is the strongest argument that can be mustered on behalf of the client.⁴⁸

2.6 Teaching strategy

Most traditional law school courses, and almost all law school exams, emphasise fast thinking and quick returns. A university trial advocacy course, on the other hand, would offer the opportunity to educate students in strategy. A lawyer's strategic thinking begins with the identification of a goal; the recognition of the objectives that might reasonably be achieved through the legal process. Thereafter, the lawyer must formulate a route within the law for the attainment of that goal. To do that, the lawyer needs to evaluate the consequences, favourable and unfavourable, of the various available choices, and map the alternative approaches. This, in turn, calls for risk assessment and, ultimately, for decisiveness. These aspects of the structural knowledge of the law are not covered elsewhere in the traditional LLB curriculum.⁴⁹

2.6 Teaching professionalism and ethics

Traditional law school teaching in legal ethics is necessarily abstract and a-contextual.⁵⁰ It can be effective at providing instruction in the law of lawyering, but it is seldom as productive when it comes to examining more subtle questions. The university trial advocacy course, on the other hand, is the ideal forum in which to raise ambiguous and textured ethical issues.⁵¹

In the context of trial advocacy, ethics problems cannot be avoided or rationalised, because the student trial lawyer must always make a personal decision. In the ethics classroom, it is always possible to say that the rules do not

⁴⁷ Ordover 1990 *Notre Dame L Rev* 818.

⁴⁸ Ordover 1990 *Notre Dame L Rev* 816-817, 819.

⁴⁹ Lubet 1990-1991 *Notre Dame L Rev* 730.

⁵⁰ Meyers 1997 *J Leg Ed* 403.

⁵¹ Burns 1995 *LCP* 37-50.

provide a clear answer or that there are several conceivable answers. But in the courtroom, even the simulated courtroom, the trial lawyer must make a choice and live with it. In the ethics classroom, it is all too easy to say what lawyers should do. In the simulated courtroom, students have to show what they have chosen to do. The cost of decision-making becomes real.⁵²

The simulated courtroom offers the opportunity to develop the moral fibre and proper instincts for dealing with ethical problems in a professionally responsible way. Learning about ethics comes easier, no doubt, when the student faces a moral dilemma, than when she is standing outside a problem and commenting on it.⁵³

In a university trial advocacy course, if the case files are properly structured, and if the participating witnesses are properly briefed, there is a broad scope for the infusion of ethics and professionalism.⁵⁴ This includes macro-ethical issues, such as what type of lawyers students desire to become, and how they will maintain a sense of professionalism without sacrificing competence at the client's expense.⁵⁵

The trial advocacy course would also be the ideal setting for micro-ethical issues. For example, consider the classic case of the witness who changes her story while in the witness box. The instructor can coach the student "role-playing" such a witness to give one version to the student trial lawyer prior to trial, and a completely different version during examination-in-chief. How the student trial lawyer deals with the situation could form the basis of a constructive class discussion that aims to bridge the gap between theory and practice. Consider also the question of cross-examining a truthful witness; or the extent of permissible witness preparation; or the tactical use of motions and trial objections.⁵⁶ There are no clear answers to any of these questions, but it is certain that they can most profitably be investigated in the context of preparing for and conducting a simulated trial.⁵⁷

⁵² Lubet 1994 *J Leg Ed* 87-88.

⁵³ Burger 1980 *Clev St L Rev* 392.

⁵⁴ McCrimmon 1994 *Legal Educ Rev* 18.

⁵⁵ Berger and Mitchell 1992 *Am J Trial Advoc* 822.

⁵⁶ Also see Levin 1965 *Buff L Rev* 394.

⁵⁷ Lubet 1994 *J Leg Ed* 87. Practising trial lawyers disagree on the precise limits, and on the propriety or impropriety of a particular course of conduct. There is no reason why the students should achieve agreement. What is important, however, is that they become sensitised to the existence of these problems, that they be exposed to a candid exploration of the implications of proffered alternatives, and that they be invited to seek solutions. Levin 1965 *Buff L Rev* 394.

Litigation insights deepen the meaning of lawyers' ethical and professional responsibilities.⁵⁸ The resolution of ethical problems is best studied and learned in the theatre of action.⁵⁹ Michael Tiger⁶⁰ explains:

Ethics dead and in books are artifacts. The only ethics that matter are ethics alive and in use. The only way to make ethics live is to recreate for students what lawyers do and what choices lawyers make ... Teaching ethics alive in the work of lawyers gives students a deeper sense of the adversary's system's built-in correctives.

3 Structure and content of the university trial advocacy course

Learning, especially where trial advocacy is concerned, is not a spectator sport. The skills of advocacy cannot be acquired, except by the very gifted, by listening to a lecture or reading a book.⁶¹ If students are taught only theory, they will not come to appreciate the pressures and responsibilities that arise in the trial context. Nor will they come to understand how real time strategies and decisions can have a serious impact on the outcome of a client's case.⁶²

Pedagogically, the *rationale* for teaching trial advocacy primarily through simulation is that the most powerful method to learn and understand a skill is through performance.⁶³ Trial advocacy pedagogy is thus fundamentally learning-by-doing. Our students must acquire the skills needed for dealing with the contingencies of the courtroom, as opposed to the classroom.⁶⁴ Indeed, the use of simulation - putting the student in the position of a trial lawyer in the courtroom - is the most effective way in which undergraduate law students can develop advocacy skills.⁶⁵ Such courses provide the learning experiences that help transition law students into law practitioners. While the fundamental purpose of the LLB curriculum is to teach and enforce legal reasoning and analysis, the experiential trial advocacy course takes these lessons to the next logical step - showing law students how to be lawyers.

The course material presents students with real choices: students may rely on all or part of the material, and they are not bound to some court's view of the facts. Thus, individual choice and judgment play a role in teaching that they cannot have in typical doctrinal courses, in which discussion is limited to analysis of a

⁵⁸ Carlson 1988 *Ga L Rev* 699.

⁵⁹ Tigar 1990 *Rev Litig* 196.

⁶⁰ Tigar 1990 *Rev Litig* 197.

⁶¹ Schaller 1972 *ABA J* 1280.

⁶² Mannion 2009-2010 *Pace L Rev* 1205.

⁶³ Lubet calls the simulated courtroom procedure "one of the most advanced teaching methods used in any law school course". Lubet 1987 *J Leg Ed* 125. See also McElhaney 1974 *U Miami L Rev* 204.

⁶⁴ Tuoni 1991 *Loy LA L Rev* 115.

⁶⁵ Tuoni 1991 *Loy LA L Rev* 112; McCrimmon 1994 *Legal Educ Rev* 6.

judicial opinion, for example. Moreover, as opposed to the classroom setting, the teaching of trial advocacy itself is always aimed at the individual student.⁶⁶

Trial advocacy teaching, modelled on the "simulation/critique" methodology pioneered in the early 1970s by the National Institute of Trial Advocacy (NITA) in the United States, is now utilised in almost every accredited law school in the United States.⁶⁷ It is also in use, in some form, in professional trial advocacy courses in most common law jurisdictions. NITA has mastered the art of conceptualising and communicating trial advocacy skills.⁶⁸ The NITA method has made lawyers think more systematically about preparation and performance.⁶⁹ In a nutshell, the simulation/critique or "learning-by-doing" trial advocacy pedagogy consists of students performing all the tasks of trial lawyers in a simulated courtroom environment, and generally involves the following steps:⁷⁰

- (1) The students receive a lecture about the trial advocacy skill being taught and, ideally, also watch a demonstration of the skill by two experienced instructors.
- (2) Next, the individual students each perform the skill.
- (3) Each student then receives feedback on her performance immediately thereafter from the instructor as follows:
 - (i) *Headline* — The instructor will identify one issue (usually the most glaring mistake) through the use of a headline, which is a simple statement, such as "I want to talk to you about leading on cross". This focusses the group and instructor on a specific point. The *rationale* for keeping to one teachable point per student is that, in the group setting, it keeps the information to be absorbed on a manageable level and prevents any one student from feeling singled out.
 - (ii) *Playback* — After the instructor has identified the issue with a headline, she will then engage in "playback", a process whereby the instructor will read *verbatim* three examples that highlight the issue identified in the headline. Reading back three examples from the

⁶⁶ Lubet 1987 *J Leg Ed* 126.

⁶⁷ Geraghty 1990 *Notre Dame L Rev* 689; Tuoni 1991 *Loy LA L Rev* 112; Mauet 1992 *Litigation* 22; Lubet 1990-1991 *Notre Dame L Rev* 721.

⁶⁸ Geraghty 1990 *Notre Dame L Rev* 687.

⁶⁹ Geraghty 1990 *Notre Dame L Rev* 690.

⁷⁰ See McCarthy 2008 *Stetson L Rev* 122; Mannion 2009-2010 *Pace L Rev* 1196; Thoman 2011 *Army Law* 35-37; Lubet 1990-1991 *Notre Dame L Rev* 721-722.

student's own words generally prevents defensive rationalisation by the student.

(iii) *Prescription and Rationale* — The instructor then explains the technique to be used to improve the skill, and why the change is recommended.

(iv) *Illustration* — The instructor performs the skill, illustrating to the student the corrective to her mistake. Modelling by the instructor illustrates to the students that the principle under discussion works in practice.

(4) The student again performs the skill, incorporating the feedback received from the instructor.

3.1 The university trial advocacy course and the university mission

The task for the law school is neither to abjure advocacy education, nor to approach it in the manner of a professional course. Our challenge is, of course, to build upon the simulation/critique method to develop a university model of advocacy education.⁷¹ As a first step we should engage in the systematic and careful planning of the university trial advocacy curriculum. At the most basic level, the university trial advocacy course should enhance our students' ability to communicate persuasively and to learn to act ethically while carrying out lawyers' tasks.⁷² We should teach them basic advocacy skills, how lawyers make decisions in the courtroom, and the pressures that trial lawyers typically face.⁷³

However, if the discipline is to grow and prosper, the trial advocacy teacher should also give the course more texture by going beyond the teaching of trial skills, and infuse it with instruction in evidence, legal ethics, procedure, litigation planning, the encouragement of critical thinking about the litigation and trial process, and the lawyer's role in the adversary system.⁷⁴ In short, we should also be teaching the norms and values in support of which our students' trial skills will be applied.⁷⁵

⁷¹ Lubet 1990-1991 *Notre Dame L Rev* 724.

⁷² Hyman 1990 *Notre Dame L Rev* 767.

⁷³ Mannion 2009-2010 *Pace L Rev* 1195.

⁷⁴ Geraghty 1990 *Notre Dame L Rev* 689, 694.

⁷⁵ Lubet 1987 *J Leg Ed* 126.

University education in the professions absolutely requires inquiry and investigation that goes beyond simple skills training.⁷⁶ This obligation derives from our position in the university, and the status and nature of the legal profession itself. In both contexts, law teachers strive for more than simply technical proficiency. We strive for achievements measured in terms of contributions to society.

However, clinical courses, especially those modelled on the highly successful programmes of NITA, focus almost exclusively on lawyering techniques, without adequate reflection on the philosophical and psychological underpinnings of those techniques.⁷⁷ Such skills courses "spend too much time on the firing range, too little in cool reflection".⁷⁸ For example, participants are taught "Never ask 'why?' on cross-examination", without being forced to grapple with whether these lessons are coherent with any jurisprudential or psychological theory.⁷⁹ No class discussion is evoked concerning the limits of cross-examination that goes beyond mere skills training in its positing of ethical dilemmas, or exploration of the relationship between the formal rules of ethics and the trial lawyer's choice of theory.⁸⁰ If students' only academic encounter with lawyering skills is limited to technocratic concerns, the message is obvious - in the real world nothing else matters.⁸¹

If a trial advocacy course (and other courses in lawyering skills) focusses exclusively on vocational training, it will have failed. Courses in interviewing, negotiation, counselling and advocacy deserve a permanent place in the basic LLB curriculum of the university-based professional law school only if they broaden and deepen the LLB curriculum, ie, if they are founded on insightful, theoretical explanations of why lawyers and officials behave as they do, and what effect the use of their trial skills might have.⁸²

They should also enable legal academics to produce important empirical findings that illuminate how lawyers, clients, and officials behave and interact, and lead to valuable normative statements of how they should behave.⁸³ A successful course in trial advocacy must move beyond simply learning by doing - although skills training would be the linchpin of the curriculum. It must also explore, in an

⁷⁶ Lubet 1990-1991 *Notre Dame L Rev* 733. The university trial advocacy course should expand upon the NITA model "in precisely the same way that the studies of harmonies in music school expands upon piano lessons". Lubet 1990-1991 *Notre Dame L Rev* 733.

⁷⁷ Hegland 1982 *J Leg Ed* 69.

⁷⁸ Hegland 1982 *J Leg Ed* 69.

⁷⁹ Hegland 1982 *J Leg Ed* 69.

⁸⁰ Lubet 1990-1991 *Notre Dame L Rev* 729.

⁸¹ Spiegel 1986 *UCLA L Rev* 608.

⁸² See Cramton 1982 *J Leg Ed* 331.

⁸³ See Cramton 1982 *J Leg Ed* 331-332.

interdisciplinary manner, the *rationales* underlying choices of trial tactics, the preparation for trial, and the avoidance of a trial.

The ultimate goal should be to equip students not only with a minimum set of competencies to be able to try a simple case upon graduation but to develop "new, more efficient and more just methods for trying cases in future".⁸⁴ In short, a university course in trial advocacy should, in addition to trial skills training, provide students with the "structural knowledge" that they will need in order to effectuate the lessons instilled in the balance of their professional training and in the rest of their professional lives.⁸⁵ Students have a legitimate and compelling need to learn trial techniques, but, at the same time, trial advocacy teachers should lead their students to understand that they also have another compelling need - to explore what their use of technique might do to them, their clients, and society.⁸⁶

3.2 The university trial advocacy course and professionalism and ethics

It is of supreme importance that an LLB course in trial advocacy should emphasise professional responsibility and ethics. Educating students in trial advocacy is in many ways the same as arming them. The well-trained trial lawyer is placed in a position of relative power and influence over other peoples' lives. It should go without saying that with power comes responsibility. Thus, as the purveyors of a skill that leads to power, trial advocacy teachers are obliged to teach the meaning of responsibility.⁸⁷

The potential dangers of teaching lawyering skills through simulation - a context devoid of real clients and events - are two-fold. Firstly, doing so might communicate to students that lawyers have no obligation to the truth. They cannot engage in a search for "what really happened", because in the simulated context, nothing did. The exercise runs the risk of degenerating into a game, in which the lawyer's role is to manipulate the few given facts into any theory that could prevail.⁸⁸

⁸⁴ Tauro 1976 *B U L Rev* 645.

⁸⁵ Lubet 1990-1991 *Notre Dame L Rev* 733.

⁸⁶ Hegland 1982 *J Leg Ed* 86.

⁸⁷ Lubet 1987 *J Leg Ed* 139. It is true that the trial is our means of achieving justice in cases of ultimate dispute, and that advocacy skills equip practitioners to engage in trials. Lubet 1987 *J Leg Ed* 127. But advocacy skills do more than that. They equip the lawyer to lead and to mislead; to ferret out but also to obscure, and to persuade without regard to the underlying value of the position in question. These skills, if taught in a value-free vacuum, neither advance justice nor contribute to any other discernible social goal. The fact is inescapable that the trial lawyer learns the art of deception, if not through brazen falsehood, then at least through purposeful implication. Lubet 1987 *J Leg Ed* 127.

⁸⁸ Hegland 1982 *J Leg Ed* 72.

The university course in trial advocacy should shy away from a series of short problems in favour of one comprehensive case file. One reason for this is that short problems are used to allow students to exercise a discreet skill, for example: "Given these facts, cross-examine witness X." Since the problems are all circumscribed by the text of the printed page, they allow no discussion of truth. In fact, there is no truth. All possibilities are equally valid and limited only by the imprecise concept of "inherent plausibility". And even with regard to plausibility we face a conundrum, since in real life, the truth itself may turn out to be implausible.⁸⁹ Teaching in simulation necessarily sacrifices truth. The printed problem constitutes the universe, and the students must work only with such material, true or not, as is available.⁹⁰

Secondly, because skills are taught in the moral vacuum of the hypothetical case, the lesson from a purely skills perspective seems to be that the lawyer's only goal is winning, no matter the issue and no matter the cost.⁹¹ That is why the goal with such a course can never merely be to teach "paid assassins to aim better".⁹² If we teach advocacy skills simply as a technique that students can employ to win cases, then a university trial advocacy course would be a perversion of the aspiration of the university, and would not deserve a place in the LLB curriculum.⁹³ A course in trial advocacy has the rich and unique potential to allow students to critically and thoughtfully examine the normative side of the lawyering process, beyond the mastery of forensic skills.

3.3 *The structure of the theoretical component of the university trial advocacy course*

As I envision the university trial advocacy course, approximately the first half of the first semester would be devoted to a theoretical component that I tentatively call "trial law".

It bears repeating that a curriculum that focuses exclusively on skills and tactics is pedagogically unwise. It gives students an incomplete picture of what they need to know about trials. Pure trial skills courses rarely present opportunities for

⁸⁹ Lubet 1987 *J Leg Ed* 128.

⁹⁰ Lubet 1987 *J Leg Ed* 129.

⁹¹ Hegland 1982 *J Leg Ed* 70.

⁹² Hegland 1982 *J Leg Ed* 69. Too often, trials are considered games or spectacles in which the most cunning adversary will be rewarded with success. Lost in this belief is the fact that lawyers are, first and foremost, officers of the Court. We should always reinforce with our students that a trial "is truly more than a soap opera or a sporting match. Most of all, a trial is a contest of ideas, a process in which the law is applied to the facts". Lubet *Modern Trial Advocacy* 1.

⁹³ Allen 1990 *Notre Dame L Rev* 717. Also see Ordovery 1990 *Notre Dame L Rev* 820.

students to think critically about the adversary trial system as an institution.⁹⁴ Students should not be expected to simply operate within the principles and on the assumptions of the existing system, rather than question them. This would be antithetical to the intellectual mission of the university law school.

The theoretical component of the university trial advocacy course might cover three aspects of trials.⁹⁵ Firstly, it could provide students with an overview of the long history of trials, especially old forms of adjudication, such as ordeals, the inquisition, witch trials, the trials of animals, corpses and things, and more broadly, the Moscow show trials, the war crimes trials, and the OJ Simpson trial as an exemplar of jury trials.⁹⁶ The purpose of the historical component would be to engage students in a critical appraisal of current trial practices, with questions posed such as: Was medieval divine adjudication irrational? Was eighteenth century secular justice rational? Did these trials "work"? In what sense (or, for whom)? To the extent that such trial practices were popularly accepted, why did the populace accept a system of adjudication that by our values seems profoundly flawed?⁹⁷

Secondly, students should engage in an intellectual exploration of the theories of advocacy, and of questioning the legal system and the lawyer's role.⁹⁸ Students should read selections from the substantial body of literature on the theory of trials. In this regard the classic debate between Lon Fuller and Jerome Frank, over the relative merits of zealous advocacy and truth seeking, might serve as a focus.⁹⁹ Also, students might examine the effectiveness of the methods by which the adversary system reaches its conception of justice.¹⁰⁰

The third part of the theoretical component might use the trial as a vehicle for discussing several catholic jurisprudential issues, such as, for example, the myth of rational judicial decision-making,¹⁰¹ the myth of judicial neutrality,¹⁰² the politically influenced exercise of judicial discretion,¹⁰³ the appropriate role of

⁹⁴ Tanford 1991 *J Leg Ed* 254.

⁹⁵ In this regard I rely on an excellent article by J Alexander Tanford, who has implemented a semester-long theoretical course called "Trial Law" at Indiana University at Bloomington Law School. Tanford 1991 *J Leg Ed* 251-261.

⁹⁶ See, for example, Kadri *The Trial* and the multitudinous sources cited therein.

⁹⁷ Hunter 1996 *Law Teacher* 345.

⁹⁸ Berger and Mitchell 1992 *Am J Trial Advoc* 822.

⁹⁹ Fuller and Randall 1958 *ABA J* 1159; Frank *Courts on Trial* 80-102.

¹⁰⁰ Lubet 1987 *J Leg Ed* 133.

¹⁰¹ See, for example, Gravett 2017 *SALJ* 53-79.

¹⁰² See, for example, Posner *How Judges Think*.

¹⁰³ See, for example, Posner *Reflections on Judging*.

social science in the courtroom,¹⁰⁴ and the problem of racism and sexism in the legal system.¹⁰⁵

As stated, trial advocacy taught to practitioners mainly consists of education in the basic trial skills and tactics. That will also be the focus of the entirety of the second semester of the university trial advocacy course. However, exclusive emphasis on the trial alone highlights the combative, competitive impulses that budding young lawyers are often all too willing to adopt.¹⁰⁶ Thus, the second half of the first semester should be devoted to teaching the other skills required of trial lawyers - skills in interviewing and counselling a client, preparing a witness, and negotiating a settlement.

3.3 The structure of the practical component of the university trial advocacy course

It seems worthwhile to state, in general terms, some desirable aspects of the practical component of a university trial advocacy course:¹⁰⁷

- (1) Student interest and engagement demand that as many students as possible be involved as much of the time as is practicable.
- (2) Every student must have the opportunity to be trial counsel in a full trial, either individually or as co-counsel in a team of two. Responsibility should not be divided into more than two parts, because students' synthesis of the parts of a trial cannot be thorough until they have employed all of the major skills and techniques in a complete trial. Understandably, this goal necessitates classes with limited enrolment.
- (3) The "case file" designed to teach the basic subject should be multi-levelled to include all of the following elements: (i) a realistic factual dispute; (ii) a challenging substantive law problems; (iii) significant evidentiary and procedural difficulties; (iv) witness difficulties (eg, vulnerable, forgetful, lying, and expert witnesses); (v) ethical issues; (vi) an even balance; and (vii) the ability to be tried in approximately three hours.

To facilitate strategic planning, instead of working through a number of problems of fact, each designed to highlight a particular skill, students should work with one case file for a substantial period of time, preferably the entire course. The

¹⁰⁴ See, for example, Saks and Hastie *Social Psychology in Court*; Bennett and Feldman *Reconstructing Reality in the Courtroom*.

¹⁰⁵ See, for example, Gravett (Part 1) 2017 *PELJ* 1-25; Gravett (Part 2) 2017 *PELJ* 1-25.

¹⁰⁶ Tuoni 1991 *Loy LA L Rev* 123.

¹⁰⁷ McElhaney 1974 *U Miami L Rev* 212-213.

rationale for the single case file approach is to avoid the students looking upon a trial as a "fragmented bundle of performance skills rather than as a coherent strategic endeavor".¹⁰⁸

A great part of what effective trial lawyers do is to strategise, plan and prepare. Thus, students should also learn how to strategise and plan like trial lawyers, and not merely to mimic them. Students must learn how to develop the overall conceptual structures that guide experienced trial lawyers.¹⁰⁹ The latter do not view cross-examinations and witness interviews as a fragmented, unrelated series of skills performances. Rather, each performance skill is guided by and acts in service of an evolving case theory. This evolving case theory conjoins the determinative legal standards in the lawsuit with an interrelated and supporting factual narrative.¹¹⁰

Case theory is the conceptual path to a practical destination that allows a student to understand the analytical skills of fact evaluation and integration with legal principles.¹¹¹ In addition to the importance of forensic skills - asking questions and making speeches - there is learning how to develop a theory of the case, which is "the basic, underlying and comprehensive idea that accounts for and explains all of the [facts] . . . [in] a coherent and credible whole".¹¹² Thus, we should place emphasis on a structural understanding of the adversarial system.

Also, because students spend the duration of the course on a single case file, they will be able to gain a relatively fluid command of a complex factual scenario. Students will learn the core mental process of evaluating and re-evaluating information in the context of refining their case theories; to concentrate on thinking very hard about the more sophisticated nuances of various aspects of the case. They will also experience what really understanding a case and thoroughly preparing for it will look and feel like in practice.¹¹³

¹⁰⁸ Berger and Mitchell 1992 *Am J Trial Advoc* 829-830.

¹⁰⁹ Berger and Mitchell 1992 *Am J Trial Advoc* 829-830.

¹¹⁰ Berger and Mitchell 1992 *Am J Trial Advoc* 832.

¹¹¹ Ohlbaum 1993 *Temp L Rev* 5, 17; Lubet 1994 *J Leg Ed* 81-82.

¹¹² Ohlbaum 1993 *Temp L Rev* 4.

¹¹³ Berger and Mitchell 1992 *Am J Trial Advoc* 822. In teaching trial advocacy, Kenety designs his case files so that it behooves students to actually visit the scene of the crime or accident. For example, an eye witness would claim that she was at point X when she clearly saw all that had transpired at point Y. In Kenety's experience, the more inquisitive students would visit the scene and quickly discern that there is no possibility of seeing point Y from point X. Wonderful cross-examination possibilities develop. Kenety also deliberately does not hand out complete case files to students, thereby forcing students to purposefully request certain records. For example, the complexion of an accident case changes markedly if it transpires that the driver has a string of prior convictions for speeding, drunk driving and other assorted vehicular offences. Students need only knock on his door and request to

To inject a breath of reality and relevance into the process, instructors should develop their own case files, and set factual scenarios in locations with which the students are familiar.¹¹⁴ There are three distinct advantages to instructors creating their own case files: (i) it heightens the students' interest by localising the problems, using real geographic locations and local legal developments; (ii) the instructor can tailor the problem to include aspects of trial advocacy that the instructor believes to be important; and (iii) it avoids the un-reality and monotony that are inherent in most "canned" problems.¹¹⁵

- (4) Instructors should use video review of students' performances. As James McElhaney¹¹⁶ notes, most effective critiques immediately follow students' individual performances. Video review also provides an excellent opportunity for the instructor to give personal attention to the student.¹¹⁷ Video review is effective, because people are naturally fascinated at seeing themselves, and after the initial shock of self-recognition, they learn quickly from their mistakes.¹¹⁸ Some authors maintain that "there is no other source of evaluation so effective in offering nonjudgmental feedback" as video review.¹¹⁹
- (5) In general, by limiting students to around 28 per instructor, approximately half the semester (seven or eight weeks) could be devoted to exercises that directly track the individual trial skills according to the substantive outline, while the second half could be devoted to having each student serve as co-counsel in the trial of a complete case. The goal of this format would be to maximise the learning of discrete trial skills and make the synthesis of those skills fundamentally complete, given the limitations of a single semester.
- (6) Universal preparation would be required for all exercises during the first half of the semester. Any student could be called upon to conduct the examination of a witness, give an opening speech, or make a final argument.
- (7) "Laboratory periods" in which students engage in the exercises should run for about four hours every week, preceded by a separate lecture period of

enter the "Motor Vehicle Administration" to be rewarded with such details. Those students that do not, learn the hard way. Kenety 1991 *J Leg Ed* 264-265.

¹¹⁴ McCrimmon 1994 *Legal Educ Rev* 8.

¹¹⁵ Kenety 1991 *J Leg Ed* 263.

¹¹⁶ McElhaney 1974 *U Miami L Rev* 213.

¹¹⁷ McCrimmon 1994 *Legal Educ Rev* 10.

¹¹⁸ McElhaney 1974 *U Miami L Rev* 213.

¹¹⁹ Schumacher and Brodsky 1988 *Law & Psychol Rev* 90.

about two hours for a lecture on and demonstration of the particular skill that is the subject of that week's exercise.

- (8) During the second half of the semester, the trials should be conducted weekly, lasting approximately three hours each. Each trial would immediately be followed by a critique of student performance, involving comments from the instructor as well as written evaluations from the other students. Also, during the second half of the semester the period previously used for lectures would now be set aside for witness consultation and preparation.
- (9) By utilising judges and witnesses from outside the class and even the university community, instructors can engender a sense of realism and excitement in cases that have been carefully structured for maximum learning content.
- (10) Real-world trials are all too often full of surprises. So, too, should simulated trials present a few unpleasant surprises. The instructor could craft into the problem some aspect that does not go as planned. For example, a witness gets complete memory loss in the witness box, such as an arresting police officer who suddenly has no recollection of where she was on the date of the robbery; a witness tells a tale in the witness box that is directly at odds with an earlier statement; during cross-examination, a plaintiff's witness suddenly admits prejudice against the defendant.¹²⁰
- (11) It is a challenge to develop assessment criteria. To avoid the subjective bias inherent in an assessment based exclusively on the students' performance, consideration should be given to a written component. A variety of options are available in this regard, and ultimately the course objectives would dictate the subject matter and form of the written component. This component might include, by way of example, (i) a research paper on a trial advocacy-related topic; or (ii) the preparation of a trial notebook, which includes a detailed memorandum setting out the student's theory of the case, and how that theory will be incorporated into every phase of the trial.¹²¹

This is merely my attempt to suggest, in concrete terms and by way of example, a highly practical course of solid academic content. There are, of course, many other ways to structure an innovative, intellectually demanding trial advocacy

¹²⁰ Kenety 1991 *J Leg Ed* 266. See also in general Brosnahan 1992-1993 *Am J Trial Advoc* 193-211.

¹²¹ McCrimmon 1994 *Legal Educ Rev* 12.

course. In the light of the formative state of the enterprise, emphasis in the development of a university trial advocacy programme should naturally be on flexibility and experimentation.

4 Conclusion

The famous legal realist, judge and law professor at Yale Law School, Jerome Frank, stated: "Our leading law schools are still library-law schools, book-law schools. They are not, as they should be, *lawyer-schools*".¹²² In the United States and South Africa alike, law schools have long emphasised that their graduates should be able to think like lawyers, and more recently, that they should be able to write like lawyers. It is, however, equally imperative that we teach them how to *act* like lawyers.

I do not suggest that our university law schools, in an effort to conquer the new horizon of trial advocacy, should sacrifice what only they can do well - provide the basic introduction to analytical skills and the research function that contribute new knowledge and insights about law and society. In the inevitable press for priority among competing demands, the law school can neither ignore nor subordinate its primary tasks - the development of intellectual skills and the achievement of intellectual goals.¹²³

Likewise, I do not suggest that the university law school should throw off its traditional curriculum to plunge headlong into a trial-centered teaching process that makes the teaching of trial advocacy the focal point. The teaching of plumbing is undoubtedly important in modern day Pericleans, but the practical courses that seek to develop students' skills at digging trenches and connecting pipes should not allow such tuition to be the substantive pillar of the LLB curriculum. An educational agenda that focuses on the practicalities of forensic technique but neglects the intellectual dimension of trial advocacy would be pedagogically unwise.¹²⁴

It would be a mistake for a university trial advocacy course to uncritically embrace trial advocacy training divorced from the ideological, social and historical context in which the adversary system has developed.¹²⁵ Teaching trial advocacy apart from its legal context transforms lawyers' litigation decisions into purely tactical ones. This oversimplification would deprive law students of an opportunity to think

¹²² Kaufman 1974 *ABA J* 803.

¹²³ Levin 1965 *Buff L Rev* 391.

¹²⁴ Imwinkelried 1990 *Notre Dame L Rev* 739.

¹²⁵ Tigar 1990 *Rev Litig* 202.

critically about one of the central institutions in our legal system.¹²⁶ Michael Tigar¹²⁷ warns:

I tremble for my profession when I see it inundated by suggestions that advocacy can be reduced to a series of formulae about lawyer behaviour, divorced from the merits of one's case and the ideology of the adversary system. I tremble because such suggestions trivialize the role and social responsibility of lawyers and because the great advocates of this and every other time in recorded history have been students of society and not carnival barkers.

Thus, in a university trial advocacy course, students should be given the opportunity to learn not only "how" to conduct a trial, but also "why" their newly acquired skills should be used in a certain way, and "what" effect the use of that skill could have. Through properly constructed case files, assignments and class discussions, students should be able to reflect on issues that go beyond the mere mastery of forensic skills.¹²⁸ The challenge, therefore, is to institute, further develop and refine a trial advocacy course that suits both the educational objectives of the university and the demands of the legal profession.

As I have argued in Part 1 of this contribution, the "theory/practice" or "education/training" dichotomy is a "silly and destructive fight".¹²⁹ It reflects a fallacy that demands that things be seen in either/or terms.¹³⁰ It is advanced by "anti-practice", theoretical scholars, because it serves their myopic educational agenda. All legal academics - whether they consider themselves "theoretical", "doctrinal" or "practical" scholars - are engaged in the same endeavour. Our collective obligation is to prepare students for the "real world" by teaching them the theories, doctrines and techniques that they will need.

However, as legal academics our obligation runs much deeper: it is to challenge accepted theories, doctrines and techniques.¹³¹ While acknowledging that our students have a legitimate and compelling need to learn technique, we should nonetheless assert our belief that they have another compelling, if less visible need - "to explore what their use of technique might do to them, to their clients, and to their society".¹³² As such, a university trial advocacy course would perform a unique, necessary and irreplaceable function within the LLB curriculum.¹³³ Trial

¹²⁶ Tanford 1991 *J Leg Ed* 260.

¹²⁷ Tigar 1985 *Litigation* 62.

¹²⁸ McCrimmon 1994 *Legal Educ Rev* 19.

¹²⁹ Hegland 1982 *J Leg Ed* 86.

¹³⁰ Spiegel 1986 *UCLA L Rev* 594.

¹³¹ Hegland 1982 *J Leg Ed* 86.

¹³² Hegland 1982 *J Leg Ed* 85-86.

¹³³ Lubet 1990-1991 *Notre Dame L Rev* 731.

advocacy supplements and enriches traditional law study by giving it coherence within a practical, socially responsive framework.¹³⁴

Trial advocacy consists of a set of skills that transcends the walls of the courtroom. It is difficult to conceive of a practising lawyer who does not, in some way and at some time, utilise the skills of advocacy - fact analysis, legal integration and persuasive speech - as taught in a university trial advocacy course. Even the technical "forensic skills" of trial advocacy, such as courtroom etiquette and demeanour, learning how to phrase a question to elicit a favourable response, and making an effective oral presentation, transfer readily to a wide range of applications within both the legal and the business worlds. Not only is the teaching of trial advocacy as part of the LLB curriculum laudable in itself, but it can also be used to strengthen the comprehension and competence of students in substantive law courses. The trial advocacy teaching methodology forces students to think more about doctrine.¹³⁵

I am cognisant of the magnitude of the undertaking that I propose. Increasing pressures on university funding, and the resulting scarcity of law school resources are a reality. However, I do not subscribe to the "give-in" philosophy that simply rejects a university trial advocacy course on the basis of lack of funding. Funds can be raised if you have a good programme on offer.

Moreover, as I see it, legal academics and practitioners have a joint obligation to serve the system of justice. While the responsibility to inculcate in our students a basic level of practice competence lies with the university law school, a substantial burden also rests on the profession to support us in fulfilling our obligation. The most obvious assistance is financial. Good trial advocacy programmes do cost a lot of money. Experienced trial lawyers and judges should also be willing to give of their time and expertise as extraordinary lecturers.

An LLB course in trial advocacy is an "an idea whose time has come".¹³⁶ Its implementation is long overdue. It affords law students opportunities that would not otherwise be available until they transition to actual practice. It will give our students a real feel for what it means to be a lawyer.¹³⁷ Such a course would provide our students with a practical and immediately usable skill upon graduation - the ability to deal with facts and people.

¹³⁴ Tauro 1976 *B U L Rev* 642.

¹³⁵ Geraghty 1990 *Notre Dame L Rev* 699.

¹³⁶ Tauro 1976 *B U L Rev* 649.

¹³⁷ Geraghty 1990 *Notre Dame L Rev* 699.

The task is clear and the challenge is at hand. University law schools are not graduating even minimally functionally able practitioners. The legal system, law students and society are being shortchanged.¹³⁸ We must firmly reject any notion that the *status quo* is good enough. As a learned and *public* profession, we have a duty to set and enforce the highest standards of basic legal education, of ethical conduct, and of professional excellence.

Bibliography

Literature

Allen 1990 *Notre Dame L Rev*

Allen RJ "NITA and the University" 1990 *Notre Dame L Rev* 705-720

Bennett and Feldman *Reconstructing Reality in the Courtroom*

Bennett WL and Feldman MS *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* (Tavistock Publications London 2014)

Berger and Mitchell 1992 *Am J Trial Advoc*

Berger MJ and Mitchell JB "Rethinking Advocacy Training" 1992 *Am J Trial Advoc* 821-838

Brosnahan 1992-1993 *Am J Trial Advoc*

Brosnahan JJ "Suggestions for Enriching the Teaching of Trial Advocacy" 1992-1993 *Am J Trial Advoc* 193-211

Broun 1977 *ABA J*

Broun KS "Teaching Advocacy the NITA Way" 1977 *ABA J* 1220-1223

Burger 1967-1968 *Washburn L J*

Burger WE "Remarks on Trial Advocacy: A Proposition" 1967-1968 *Washburn L J* 15-24

Burger 1980-1981 *Fordham L Rev*

Burger WE "Some Further Reflections on the Problem of Adequacy of Trial Counsel" 1980-1981 *Fordham L Rev* 1-25

Burger 1980 *Clev St L Rev*

Burger WE "The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility" 1980 *Clev St L Rev* 377-395

Burns 1995 *LCP*

¹³⁸ Pertnoy 1994 *Mo L Rev* 186.

Burns RP "Teaching the Basic Ethics Class through Simulation: The Northwestern Program in Advocacy and Professionalism" 1995 *LCP* 37-50

Carlson 1989 *Ga L Rev*

Carlson RL "Competency and Professionalism in Modern Litigation: The Role of Law Schools" 1989 *Ga L Rev* 689-729

Clare 1975-1976 *St John's L Rev*

Clare Jr RL "Incompetency and the Responsibility of Courts and Law Schools" 1975-1976 *St John's L Rev* 463-472

Cramton 1982 *J Leg Ed*

Cramton RC "The Current State of the Law Curriculum" 1982 *J Leg Ed* 321-335

Devitt and Roland 1987 *Wm Mitchell L Rev*

Devitt EJ and Roland HP "Why don't Law Schools Teach Law Students how to Try Lawsuits" 1987 *Wm Mitchell L Rev* 443-459

Frank 1947 *Yale L J*

Frank J "A Plea for Lawyer-Schools" 1947 *Yale L J* 1303-1344

Frank *Courts on Trial*

Frank J *Courts on Trial: Myths and Reality of American Justice* (Princeton University Press Princeton 1949)

Fuller and Randall 1958 *ABA J*

Fuller LL and Randall JD "Professional Responsibility: Report of the Joint Conference" 1958 *ABA J* 1151-1162; 1216-1218

Geraghty 1990 *Notre Dame L Rev*

Geraghty TF "Teaching Trial Advocacy in the 90s and Beyond" 1990 *Notre Dame L Rev* 687-703

Gianantonio 2012 *Duq L Rev*

Gianantonio AM "The Practical Use of the Trial Advocacy Course in Today's Legal Education Curriculum" 2012 *Duq L Rev* 485-501

Gravett (Part 1) 2017 *PELJ*

Gravett WH "The Myth of Objectivity: Implicit Racial Bias and the Law (Part 1)" 2017 *PELJ* 1-25

Gravett (Part 2) 2017 *PELJ*

Gravett WH "The Myth of Objectivity: Implicit Racial Bias and the Law (Part 2)" 2017 *PELJ* 1-25

Gravett 2017 *SALJ*

Gravett, WH "The Myth of Rationality: Cognitive Biases and Heuristics in Judicial Decision-Making" 2017 *SALJ* 53-79

Hanrahan 2003 *BYU Educ & L J*

Hanrahan JK "Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools" 2003 *BYU Educ & L J* 299-337

Hegland 1982 *J Leg Ed*

Hegland K "Moral Dilemmas in Teaching Trial Advocacy" 1982 *J Leg Ed* 69-86

Hunter 1996 *Law Teacher*

Hunter J "Teaching Plumbing with Periclean Ideals: Should it be Done? Can it be Done? Advocacy and Courtroom Scholarship" 1996 *The Law Teacher* 330-353

Hyman 1990 *Notre Dame L Rev*

Hyman JM "Discovery and Invention: The NITA Method in the Contracts Classroom" 1990 *Notre Dame L Rev* 759-784

Imwinkelreid 1988-1989 *Ga L Rev*

Imwinkelreid EJ "The Educational Philosophy of the Trial Practice Course: Reweaving the Seamless Web" 1988-1989 *Ga L Rev* 663-687

Imwinkelreid 1990 *Notre Dame L Rev*

Imwinkelreid EJ "On Achieving Synergy in the Law School Curriculum" 1990 *Notre Dame L Rev* 739-757

Kadri *The Trial*

Kadri S *The Trial: Four Thousand Years of Courtroom Drama from Socrates to OJ Simpson* (Random House New York 2006)

Kaufman 1974 *Sw L J*

Kaufman IR "Advocacy as Craft: There is More to Law School than a Paper Chase" 1974 *Sw L J* 495-504

Kaufman 1974 *ABA J*

Kaufman IR "Advocacy as Craft: Law School is more than a 'Paper Chase'" 1974 *ABA J* 802-805

Keeton 1981 *Md L Rev*

Keeton R "Teaching and Testing for Competence in Law School" 1981 *Md L Rev* 203-222

Kenety 1991 *J Leg Ed*

Kenety WH "Observations on Teaching Trial Practice" 1991 *J Leg Ed* 263-267

Levin 1965 *Buff L Rev*

Levin AL "On the Teaching of Trial Advocacy" 1965 *Buff L Rev* 390-395

Lubet 1987 *J Leg Ed*

Lubet S "What We should Teach (but don't) when We Teach Trial Advocacy" 1987 *J Leg Ed* 123-143

Lubet 1990-1991 *Notre Dame L Rev*

Lubet S "Advocacy Education: The Case for Structural Knowledge" 1990-1991 *Notre Dame L Rev* 721-737

Lubet 1994 *J Leg Ed*

Lubet S "Ethics and Theory Choice in Advocacy Education" 1994 *J Leg Ed* 81-88

Lubet *Modern Trial Advocacy*

Lubet S *Modern Trial Advocacy: Analysis and Practice* (National Institute of Trial Advocacy South Bend 2004)

Mannion 2009-2010 *Pace L Rev*

Mannion ME "Objections Overruled: The Trial Advocacy Course should be Mandatory" 2009-2010 *Pace L Rev* 1195-1206

Mauet 1992 *Litigation*

Mauet TA "Can Trial Lawyers be Taught?" 1992 *Litigation* 20-23; 64-65

McCarthy 2008 *Stetson L Rev*

McCarthy TF "The History of Teaching Trial Advocacy" 2008 *Stetson L Rev* 115-130

McCrimmon 1994 *Legal Educ Rev*

McCrimmon LA "Trial Advocacy Training in Law School: An Australian Perspective" 1994 *Legal Educ Rev* 1-19

McElhaney 1974 *U Miami L Rev*

McElhaney JW "Toward the Effective Teaching of Trial Advocacy" 1974 *U Miami L Rev* 198-217

Meyers 1997 *J Leg Ed*

Meyers EW "Teaching Good versus Teaching Well: Integrating Values with Theory and Practice" 1997 *J Leg Ed* 401-424

Michelman 1982 *J Leg Ed*

Michelman FI "The Parts and the Whole: Non-Euclidean Curricular Geometry" 1982 *J Leg Ed* 352-356

Ohlbaum 1993 *Temp L Rev*

Ohlbaum E "Basic Instinct: Case Theory and Courtroom Performance" 1993 *Temp L Rev* 1-122

Ordover 1990 *Notre Dame L Rev*

Ordover AP "Teaching Sensitivity to Facts" 1990 *Notre Dame L Rev* 813-823

Pertnoy 1994 *Mo L Rev*

Pertnoy LD "Skills is not a Dirty Word" 1994 *Mo L Rev* 169-186

Posner 2001 *LQR*

Posner RA "Clinical and Theoretical Approaches to the Teaching of Evidence and Trial Advocacy" 2001 *LQR* 731-739

Posner *How Judges Think*

Posner RA *How Judges Think* (Harvard University Press Cambridge 2010)

Posner *Reflections on Judging*

Posner RA *Reflections on Judging* (Harvard University Press Cambridge 2013)

Saks and Hastie *Social Psychology in Court*

Saks MJ and Hastie R *Social Psychology in Court* (Van Nostrand Reinhold Oxford 1978)

Schaller 1972 *ABA J*

Schaller JP "Teaching Trial Advocacy" 1972 *ABA J* 1279-1282

Schumacher and Brodsky 1988 *Law & Psychol Rev*

Schumacher JE and Brodsky SL "The Mock Trial: An Exploration of Applications and Dynamics in Interdisciplinary Training" 1988 *Law & Psychol Rev* 79-93

Spiegel 1987 *UCLA L Rev*

Spiegel M "Theory and Practice in Legal Education: An Essay on Clinical Education" 1987 *UCLA L Rev* 577-610

Tanford 1991 *J Leg Ed*

Tanford JA "What We don't Teach in Trial Advocacy: A Proposed Course in Trial Law" 1991 *J Leg Ed* 251-261

Tauro 1970 *ABA J*

Tauro GJ "Trial Advocacy at the Crossroads" 1970 *ABA J* 460-464

Tauro 1976 *B U L Rev*

Tauro GJ "Graduate Law School Training in Trial Advocacy: A New Solution to an Old Problem" 1976 *B U L Rev* 635-649

Thoman 2011 *Army Law*

Thoman J "Advancing Advocacy" 2011 *Army Law* 35-39

Tigar 1985 *Litigation*

Tigar ME "Talk-Show Advocacy" 1985 *Litigation* 61-63

Tigar 1990 *Rev Litig*

Tigar ME "Voices Heard in Jury Argument: Litigation and the Law School Curriculum" 1990 *Rev Litig* 177-202

Tuoni 1991 *Loy LA L Rev*

Tuoni G "Two Models for Trial Advocacy Skills Training in Law School - A Critique" 1991 *Loy LA L Rev* 111-126

Williams 1999-2000 *Stetson L Rev*

Williams KA "Trial Advocacy: The Use of Trial Skills in Non-Trial Experiences" 1999-2000 *Stetson L Rev* 1229-1240

Wolfe 1980-1981 *Tulsa L J*

Wolfe JS "Exploring Trial Advocacy: Tradition, Education, and Litigation" 1980-1981 *Tulsa L J* 209-228

Zemans and Rosenblum *Making of a Public Profession*

Zemans FK and Rosenblum VG *The Making of a Public Profession* (American Bar Foundation Washington DC 1981)

List of Abbreviations

ABA J	American Bar Association Journal
Am J Trial Advoc	American Journal of Trial Advocacy
B U L Rev	Boston University Law Review
Buff L Rev	Buffalo Law Review
BYU Educ & L J	Brigham Young University Education and Law Journal
Clev St L Rev	Cleveland State Law Review
Duq L Rev	Duquesne Law Review

Fordham L Rev	Fordham Law Review
Ga L Rev	Georgia Law Review
J Leg Ed	Journal of Legal Education
Law & Psychol Rev	Law and Psychology Review
LCP	Law and Contemporary Problems
Legal Educ Rev	Legal Education Review
Loy L A L Rev	Loyola of Los Angeles Law Review
LQR	Law Quarterly Review
Md L Rev	Maryland Law Review
Mo L Rev	Missouri Law Review
Notre Dame L Rev	Notre Dame Law Review
Pace L Rev	Pace Law Review
PELJ	Potchefstroom Electronic Law Journal
Rev Litig	The Review of Litigation
SALJ	South African Law Journal
Stetson L Rev	Stetson Law Review
Sw L J	Southwestern Law Journal
Temp L Rev	Temple Law Review
Tulsa L J	Tulsa Law Journal
UCLA L Rev	University of California at Los Angeles Law Review
U Miami L Rev	University of Miami Law Review
Washburn L J	Washburn Law Journal
Wm Mitchell L Rev	William Mitchell Law Review
Yale L J	Yale Law Journal