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Rethinking Advocacy Training

Marilyn Berger
John Mitchell

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I. Introduction

The methodology for teaching trial advocacy to law students, young attorneys, and experienced lawyers has remained unchanged for years. Modeled after the approach of groups such as the National Institute of Trial Advocacy (NITA),[1] and skills simulation programs in law schools across the country, this traditional methodology is circumscribed by a generally accepted set of characteristics. Students are presented with a lecture or demonstration of a particular trial skill. These students then attempt to accurately mimic the demonstrated skill. The student's performance is followed by a critique, a verbal dissection of the student's performance, often aided by a videotape review of that performance.[2] Less commonly recognized in discussion of this method is that training is conducted through use of written problem materials, trial-ready case files, or short problem exercises employing multiple fact patterns.

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† B.S. (1965), Cornell University; J.D. (1970), University of California at Berkeley (Boalt Hall). Marilyn J. Berger is currently a Professor of Law at University of Puget Sound School of Law.

†† B.A. (1969), University of Wisconsin (Madison); J.D. (1970), Stanford University. John B. Mitchell is a Visiting Clinical Professor of Law at University of Puget Sound School of Law. The authors are grateful to Kari A. Robinson, senior law student at University of Puget Sound School of Law, for her research assistance, and to Elizabeth Dorsett and Lori Lamb for their invaluable assistance in word processing this Commentary.

1. Before NITA, "there was no nationally recognized, coherent methodology for teaching trial advocacy." Thomas F. Geraghty, *Forward: Teaching Trial Advocacy in the 90s and Beyond*, 66 NOTRE DAME L. REV. 687 (1991) (one of several articles in the Colloquium: Teaching Trial Advocacy in the 90s and Beyond: A Critical Evaluation of Trial Advocacy Teaching Methodologies and Designs for the Future).

2. *Id.* at 689; *see also* Kenneth S. Broun, *Teaching Advocacy the N.I.T.A. Way*, 63 A.B.A. J. 1220 (1977). The NITA critique generally follows a specific set of parameters: (1) provide a few good comments and a few negative comments; the participant cannot absorb much more; (2) focus on specific examples from the performance for each comment; (3) then, provide specific examples how that particular aspect of the performance could have been improved.

The traditional teaching methodology has not been without its critics.[3] While the precise criticisms vary, they are common in their approach. The critics, generally law professors, base their critiques on the perceived differing needs of the two primary categories that implicitly define their experience: law students versus law practitioners. These critics then compare what they perceive students should be learning in law school with what NITA offers. These critics find NITA lacking because it fails to include in its critique or methodology an intellectual exploration of theories of advocacy, and questioning of the legal system and the lawyer's role.[4] Furthermore, NITA provides insufficient attention, considered by some to be even counterproductive, to ethical inquiry.[5] While to an extent the authors of this Commentary agree with this criticism, a far more fundamental and useful basis exists to evaluate skills training methodology.[6]

This examination of advocacy teaching methodology begins by looking at the underlying structure of learning. How can a course impart to law students and beginning attorneys the methods and approaches that experienced trial lawyers use?

II. Expert Versus Novice Thinking

Extensive inquiry led the authors of this Commentary to a contemporary learning theory about how experts, as compared to novices, approach problem solving. In teaching trial advocacy, we questioned how these general theories could offer insight into how experienced attorneys

3. *See, e.g.*, Ronald J. Allen, *NITA and the University*, 66 NOTRE DAME L. REV. 705 (1991); Geraghty, *supra* note 1, at 690-91; Kenney Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69 (1982).

4. Geraghty, *supra* note 1, at 690-91.

5. Hegland, *supra* note 3, at 71.

6. We do not mean to minimize the other criticisms. As we discuss later, our course conception has a strong ethical component. Moreover, since much of the course is discussion, it also offers some opportunity to discuss lawyer roles and the system. An extensive exploration of these topics, however, begins to move towards a separate course. *See, e.g.*, J. Alexander Tanford, *What We Don't Teach in Trial Advocacy: A Proposed Course in Trial Law*, 41 J. LEGAL EDUC. 251 (1991).

(experts), as compared to law students (novices), approached trials. A methodology for teaching advocacy was formulated on this basis.

A. Schema Theory and Cognition

Contrary to prior beliefs that thinking processes function in direct stimulus response chains (i.e., you see a chair in the external world and think "chair" in your brain), current theory and research posits that thinking is both active and creative.[7] An illustration is helpful in order to show how these processes operate in solving problems.

Imagine, for the moment, a simple problem that occurs in everyday life. It is lunchtime and you are looking for a place to eat. Your preference is to find a lunchtime cafe. How do you know when you have found one? You will know when you have found your desired type of restaurant because it will fit within a construct. This construct is an interpretive framework, which forms the basis of what you perceive as a lunchtime cafe. This construct consists of your past knowledge and experience that totals your current conception of what a "lunchtime cafe" looks like and how its occupants might behave. Contemporary learning theory refers to this construct as a schema or schemata.[8] Thus, your schemata for this cafe problem will contain elements of a general "restaurant" schema (e.g., how food is displayed, some form of service, an area at which to eat, a mechanism for paying, etc.), as well as subschemata—your concept of a "lunchtime cafe" (e.g., a sign in the window with the words "cafe" or "luncheonette," booths or a counter,

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7. *See* Richard C. Anderson, *The Notion of Schemata and the Educational Enterprise: General Discussion of the Conference*, *in* SCHOOLING AND THE ACQUISITION OF KNOWLEDGE 415, 419 (Richard C. Anderson et al., 1977); *see also* JEAN PIAGET, THE LANGUAGE AND THOUGHT OF THE CHILD (1932).

8. *See, e.g.*, Anderson, *supra* note 7, at 419; David E. Rumelhart, *Schemata: The Building Blocks of Cognition*, *in* THEORETICAL ISSUES IN READING COMPREHENSION 33 (Rand J. Spiro et al. eds., 1980); Robert Glaser, *Education and Thinking the Role of Knowledge*, 39 AM. PSYCHOL. 93 (1984); John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL EDUC. 275, 277-83 (1989).

The Schema theory has begun to appear in the legal literature in discussions ranging from juror decision-making processes to the role of metaphor in legal reasoning. *See* Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

waiters or waitresses, a crowd filling the seats, etc.). These schemata are simultaneously fluid and complex. The processes by which we use these schemata are both active and creative.

Other than serving food on the premises, no single set of characteristics necessarily constitutes a restaurant. Although one can recognize a restaurant, one is also able to distinguish a formal restaurant from an informal diner, or a Chinese restaurant from a pizza parlor. This illustrates the active aspect of the thinking process using schemata. Thus, if one were to look for a lunchtime cafe, one would subconsciously take his schemata for lunchtime cafes onto the street and actively use it both to locate data, and to test the hypothesis that a particular set of data constitutes a lunchtime cafe. By using the schemata for locating such a cafe, the schemata would increasingly focus on additional relevant data.[9]

For example, if one encountered a neon sign announcing "Cafe" over a doorway, this would be consistent with the hypothesis. One would assume that he had found a cafe. But sometimes the schemata will lead to a false path. For instance, suppose one were to walk into a place that had a sign over the doorway that said, "Good Eats," and the entry room was decorated with a few neon art signs, electrically lit up, glowing and blinking ("cafe," "good eating," "best buys in town," etc.). Imagine further freestanding booths and counters of every description along one wall, and some people standing and others walking around. One would begin to rethink the meaning of his schema and his originally desired conclusion. One would be correct in thinking this cafe is not an open, operating lunchtime cafe despite its cafe characteristics. "What could it be?" one might ask. One might conclude it was a restaurant supply house (the signs, booths and counters in rows, people standing and sitting, but no food). But if a further investigation of the cafe revealed customers, steaming food on the tables, waiters carrying trays, and a man behind a cash register, one would conclude that the original hypothesis—that this is a lunchtime cafe—had been confirmed. But could this scenario also be a movie set?

Again, one would need to delve further into his general restaurant schema and specific lunchtime cafe schema to decide if his latest

9. *See* Rumelhart, *supra* note 8, at 37-38, 41-45.

hypothesis, "it is a movie set," was correct. Probing additional data from one's schemata, one might find that the movie set conclusion is highly unlikely if the establishment is located on a street filled with eateries and other businesses but no cameras or special lighting can be seen. Thus, one is actively processing both information and symbols by using the general and subschemata he had about restaurants, businesses, and lunchtime cafes. Naturally, the only real confirmation that the schemata and hypothesis match is to enter the establishment, sit down, order and eat a meal and pay for it.

Thinking also may be creative. Once data is filtered through one's own schemata and a hypothesis is confirmed, things are perceived that literally do not appear from surface information received from the immediately perceived data.[10] For a moment, revisit the cafe example. Suppose you sit at a booth in the cafe. Nothing is on the surface of the table and a food menu does not appear on the walls. Nevertheless, you expect to see silverware, dishes, water brought to the booth, a waitress to appear with a menu, and a bill to be presented at the conclusion of the meal. This is what it means to have a "lunchtime cafe" schemata.

Likewise, experts possess highly developed schemata.[11] These schemata function precisely as the cafe illustration. An expert may face a problem-solving situation with vast amounts of specialized knowledge and experience. The expert's information is organized within an interpretive framework facilitating use of that information for purposes of solving problems within that particular expertise area.[12] With such schemata, the expert will be able to: (1) begin developing issues (which in other disciplines is called problem representations), (2) apply broad principles to the problem by referring to schemata that identifies information for use, (3) recognize sub-problems and possibilities that do not appear in the surface elements of the problem, and (4) develop lines of argumentation to support the conclusions.[13]

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10. *See* Mitchell, *supra* note 8, at 277.

11. *See* Glaser, *supra* note 8, at 98-99.

12. *Id.*

13. This is based on studies reported in James F. Voss et al., *Problem-solving Skill in the Social Sciences, in* 17 PSYCHOL. OF LEARNING & MOTIVATION 165, 191-212 (1983); *see also* Mitchell, *supra* note 8, at 279-80.

In contrast, the novice will tend to view and to respond to information as fragmented bits of facts, not through lack of intelligence but for want of the expert's schemata.[14] For instance, imagine a novice who has no general schemata for restaurants or lunchtime cafes.[15] The information and symbols encountered (a counter, booths, etc.) are therefore bits and pieces of random information. This contrast between novice and expert is also applicable in the legal world.

B. The Experienced Advocate's Schemata in Action

Experienced trial advocates are experts whose highly developed schemata enables them to use thought processes quite different from those of novices (law students and beginning attorneys). Expert problem solving in the area of trial advocacy is distinguished from novice problem solving in the same way as it is in other disciplines.[16] Again a brief illustration will elucidate this point.

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14. Voss, *supra* note 13, at 191-212; *see also* Glaser, *supra* note 8, at 98-99.

15. *Cf.* MARY M. MORRIS, A DANGEROUS WOMAN 186 (1991). The author gives a powerful fictional exploration of the painful inner life of a young woman who does not possess a set of schemata adequate to make conventional sense of the common experiences of daily life.

> On the fifth floor, she pretended to look at cosmetic bags while she tried to work up the courage to go into the beauty salon. She kept glancing at the pink doors. She didn't know what to do once she got inside, go sit in a chair or wait for someone to help her. She didn't even know what to tell them about her hair. Her father had always cut it. In the last few months, she had tried to trim it herself, but it always came out uneven.

Id.

16. The authors propose that the schemata of expert litigators will be composed of a vast knowledge base, including: substantive law; evidentiary rules; common fact patterns that are associated with particular allegations and defenses; rhetorical moves; local conventions and procedures (written and unwritten); techniques for laying evidentiary foundations; overall approaches to the various performance skills (direct examination, closing argument, etc.); effective sequences for particular examination situations (e.g., cross-examining the informant); likely reactions of (particular) judges, opposing counsel, and witnesses to various tactics; approaches to ethical issues; range of acceptable behavior in court; where particular evidence is likely to be stored/found for investigation and discovery; analogies; lines of argumentation for various specific situations (e.g., how to argue damages, burdens of proof); method for organizing information at trial; patterns for analyzing a case; and knowledge about a particular area of expertise (e.g., economics, fingerprints).

Imagine a client accused of burglary who visits an attorney's office and says, "I told you before that they've got the wrong guy. A guy that looks like me, Fred, really did it. Well, I just talked to Fred and he said he's willing to tell that to a jury. It's his first beef, so he's not facing much, while I'm facing heavy time with all my priors."

Focusing on the most salient feature of this information—that Fred will take the rap—a novice attorney will likely respond, "Great. Bring him in." At the same time, the novice attorney probably will think to himself, "If Fred says what my client indicates, the case is over."

An experienced attorney, however, will immediately realize that a myriad of possibilities and actions exist that do not appear on the surface of the dialogue. An experienced attorney might imagine several different scenarios. First, assuming that Fred will show up (the experienced attorney will tend to be skeptical that he will), serious ethical issues might exist with which the lawyer will have to deal. The experienced attorney will keep the ethical issues in mind and then think of a course of action that would make clear that she does not represent Fred.[17]

The lawyer would also recognize a potential second course of action: Should she, the attorney, also tell Fred that he should see a lawyer before talking to her?[18] This second possibility raises several additional questions and courses of action that the experienced attorney usually envisions. For instance, what if she suggests to her client that they "turn Fred over" in exchange for a deal? (Although if her client has the more serious record of the two, this strategy will be less viable). Or suppose she intends on getting a statement from Fred to be used in court in the event that he subsequently fails to appear at trial, or takes the stand and fails to incriminate himself, or gets on the stand and pleads the Fifth Amendment? What, if any, are the attorney's obligations to Fred in preparing for each of these eventualities?

As the potential scenarios unfold, the experienced attorney will also see that moral dimensions exist to her actions. For instance, if the attorney turns Fred over in exchange for a deal, the attorney must decide

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17. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 (1992) (dealing with unrepresented person).

18. *Cf.* "During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 cmt. (1992).

what it means for herself and her practice to turn over other people to benefit her client.

The decision to use Fred as a witness has both practical and legal dimensions to it. Anticipating that Fred may not be willing to give a written statement, the attorney will need someone other than herself or the client as a credible witness who can be called to testify if needed.[19] But what if Fred says to the defendant client, "I only want to talk to you (the defendant), no one else." Also, again, what if Fred does not show up at trial? If so, his statement can not be used as a prior inconsistent statement; it will have to qualify as a statement against penal interest.[20] Thus, the attorney will have to think about how to take Fred's statement so as to strengthen the foundation for meeting that exception to the hearsay rule. This dialogue only scratches the surface of the experienced attorney's analysis.

Not yet considered are a host of other potential scenarios, responses, and their legal and moral dimensions that might occur to the experienced attorney. These include: (1) whether Fred would be believable to the jury, (2) whether the prosecution can find information about Fred and the defendant's relationship from which a jury could infer that Fred would take the rap to protect the defendant, (3) whether counsel should try to find an attorney to represent Fred who would likely have him plead the Fifth Amendment if called to the stand, (4) whether the trial judge would let Fred take the witness stand just to plead the Fifth Amendment,[21] (5) whether a plausible motion could be made to grant Fred immunity,[22] (6) and whether Fred would have more impact pleading the Fifth Amendment than testifying with immunity.

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19. In general, an attorney cannot be a witness in the same case she is presenting. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1992) (addressing a lawyer as a witness).

20. *See, e.g.*, United States v. Satterfield, 572 F.2d 687 (9th Cir. 1978) (sifting through factual circumstances surrounding declarant's statement to determine its trustworthiness and whether declarant could have reasonably believed that making the statement would have subjected him to possible criminal liability). *But see* Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (allowing constitutional right to a fair trial to supersede a state's restrictive hearsay rule against admission of statements against penal interest).

21. *See, e.g.*, United States v. Melchor Moreno, 536 F.2d 1042, 1046 & n.4 (5th Cir. 1976) (stating that the defense had no right to put a witness on the stand "merely so that the jury could see her assert her claim of privilege").

22. *Cf.* United States v. Westerdahl, 945 F.2d 1083 (9th Cir. 1991) (holding that it was government misconduct to refuse to immunize defense witness who would contradict immunized prosecution witness).

C. Learning Theory and the Limits of the Traditional Methodology

These illustrations are instructive for showing the dimensions that are essential in applying learning theory—expert versus novice thinking—to teaching advocacy. Obviously, even a live client clinical course would have difficulty in imparting the knowledge base involved in the hypothetical case of Fred. How the professor can magically impart this type of expert knowledge base (structured and stored so as to facilitate expert problem solving) to a novice/law student, while teaching a simulation course becomes increasingly difficult. Instruction soon becomes a lengthy journey of hard work and continual study. Our focus has been on selecting a teaching methodology which best moves that journey along the appropriate path.

For an experienced attorney, the NITA-type approach is extremely efficient and useful. Already possessing a broad conceptual organization of their discipline, experienced attorneys can readily plug new bits of information into their existing schemata. Novices, however, are in a very different position. Novices do not have well developed schemata. Novices operate on the level of seeing fragmented or surface level facts, and usually those facts are dealt with haphazardly.

While a pure NITA experience will raise novices' self-confidence, make them more comfortable on their feet, and impart various specific trial techniques, novices more than likely will still tend to see the trial process as a fragmented bundle of performance skills rather than as a coherent strategic endeavor.[23] The individual, skill-oriented NITA approach reinforces the novice's tendency to focus on the literal, concrete elements of a problem. But novices need to learn how to strategize and plan like trial lawyers, and not merely to mimic them. Students

23. Some clinicians who employ the NITA methodology would contend that we have posited a straw man and that they have long since gone beyond classic NITA methodology. While no doubt many individual teachers have moved beyond the classic NITA methodology, based on our experience and understanding, most have not. Moreover, when the time arrives when all have moved beyond such techniques, the value of this article's focus on the distinction between expert-novice thinking and the use of the metaphor "Advocate's Mind" for structuring an approach to skills training will remain. For more traditional criticism of NITA-type methodology, see sources cited *supra* note 3.

need to learn how to develop the overall conceptual structures that guide experienced litigators.[24]

Merely supplementing the existing skills teaching approach is not sufficient.[25] Rather, skills must be incorporated into a broader system of teaching that focuses on developing expert schemata. Trial skills are certainly an important part of a future litigator's training. But more important is how an advocate thinks about these skills. These skills are a function of what is termed the "Advocate's Mind."[26] The next section of this Commentary explores this concept, and shows how this interpretive framework is a guide for teaching a course in trial advocacy.

III. The "Advocate's Mind"

The Advocate's Mind is an interpretative framework for describing the thought processes and the ethical perspective of the experienced attorney. The experienced attorney is considered an advocate with a well-developed schema.

Exceptional advocates excel in a common set of characteristics: (1) preparation, (2) goal-orientation, (3) processors of information, and (4)

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24. This was borne out when the authors observed a number of jury trials conducted by clinical students. The students generally did not ask leading questions on direct examination, but correctly used leading ones on cross examination. Additionally, the students knew and executed the foundations for physical, documentary, and demonstrative evidence. Where they stumbled as effective advocates had little to do with trial techniques. Rather, the weaknesses they displayed were a function of not fully appreciating the interrelated inferences of the various pieces of information in their case as these inferences bore upon potential narratives that could have been told. Thus, the students were weakest on the broad, conceptual plane we generally call Case Theory. In this regard, it is important to keep in mind that the most fascinating and vivid direct examination is a failure if it does not contain all the information needed to present the jury with the strongest story an advocate can put forth for her position. *See* sources cited *infra* note 38.

25. In contrast, as Professor Geraghty notes, "[f]or the most part these critiques [in the Colloquium] recommend supplementation, and not an overhaul of the NITA method." Geraghty, *supra* note 1, at 703.

26. The entire focus of our course is underlain by a constant attempt to faithfully replicate the thought processes of the competent attorney. *See* MARILYN J. BERGER ET AL., PRETRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY (1988) [hereinafter PRETRIAL ADVOCACY]; MARILYN J. BERGER ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS AND STRATEGY (1989) [hereinafter TRIAL ADVOCACY].

strategic planners.[27] These characteristics form the optimal conception of the lawyer's approach to advocacy while providing the underlying framework for our methodology in teaching a course on advocacy.[28]

First, experienced lawyers often win cases before they walk into the courtroom by virtue of thorough preparation. The perception that lawyers are commonly viewed as individuals who are remarkably adroit at the spontaneous skill of "thinking on your feet" is mistaken. Undoubtedly, the courtroom performances of good advocates offer some tangible demonstration of this skill. Yet, the absolute key to the success of every lawyer is extensive planning and preparation. Often, this extensive preparation is characterized by the attorney's bold disclosure that she knows her opponent's argument better than her own.

Second, experienced lawyers are very goal-oriented, ends-means thinkers. They are unlikely to look at a potential piece of information in a case and ask in the abstract, as a law student might, "Is it admissible?" Instead, experienced trial lawyers will frame their inquiry as, "Given the interest of my client in getting in or keeping out this piece of evidence, what plausible arguments can I make to accomplish that objective?"

Third, experienced lawyers tend not to think in terms of "facts." Rather, lawyers think about facts as information that supports, harms, or is neutral to their case. Thus, facts represent supportive information, or a lack of information, or create inferences.[29] Using a combination of substantive evidence and rhetoric, experienced lawyers try to keep out information harmful to their case, gain admission of that which is helpful, draw and actively place a favorable gloss on the resulting inferences, and wrap it up in a narrative that convinces the judge or jury of their position. Thus, to trial lawyers, there is no such thing as

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27. To literally describe the mental processes of the skilled advocate is obviously far beyond our abilities. The nearly endless variety, complexity, and nuance of such minds dooms such an enterprise from its inception.

28. These characteristics of mind would seem to constitute what Professor Lubet would consider structural knowledge of the sort "from which other understandings, inquiries, and theories will develop." Steven Lubet, *Advocacy Education: The Case for Structural Knowledge*, 66 NOTRE DAME L. REV. 721, 727 (1991).

29. *See* Albert J. Moore, *Inferential Streams: The Articulation and Illustration of the Trial Advocate's Evidentiary Intuitions*, 34 UCLA L. REV. 611 (1987) (correlating the analysis of evidentiary inferences in a particular case with actual case planning and preparation).

the "fact" of an eyewitness identification. Instead, they see a set of information: A particular person (a witness), with particular perceptual abilities and biases, who can put forth particular words from the witness stand, about a particular event he or she claims to have perceived, under particular circumstances.[30]

In approaching this witness, opposing expert lawyers will attempt to add, subtract, recombine, and recharacterize this information to support the story they want the judge or jury to accept. For example, the prosecution might attempt to create the tale of a vigilant citizen who would never accuse an innocent man of a crime. The defense, on the other hand might tell of a well-meaning citizen who was so frightened by the event that his senses temporarily failed him. By seeing the world as one in which information, lack of information, and inferences compose the universe, the advocate is constantly watching what others would call "reality" dissolve. The advocate then recreates that reality within his own rhetorical framework.[31]

Fourth, experienced lawyers possess strategic plans—a case theory and representational strategy—which guide all of their actions. They simply do not view voir dire, depositions, cross-examinations, and witness interviewing as a fragmented, unrelated series of skills performances. Rather, each performing skill is guided by, and acts in service of, an evolving case theory.[32] This evolving case theory conjoins the determinative legal standards in the suit with an interrelated and supporting factual narrative. On a broader scope, an advocate's entire client representation is guided by an overarching "representational strategy."[33]

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30. Professor Ordover makes an analogous observation: "What is the fact? It is that blend of recollection, impression and opinion that a jury distills for a finding of fact based upon its estimate of the probability of what occurred." Abraham P. Ordover, *Teaching Sensitivity to Facts*, 66 NOTRE DAME L. REV. 813, 816 (1991).

31. Professor Hyman captures much of this notion when discussing "invention." *See* Jonathan M. Hyman, *Discovery and Invention: The NITA Method in the Contracts Classroom*, 66 NOTRE DAME L. REV. 759, 773-75 (1991).

32. TRIAL ADVOCACY, *supra* note 26, at 15-31; *see, e.g.*, Edward J. Imwinkelried, *The Development of Professional Judgment in Law School Litigation Courses: The Concepts of Trial Theory and Theme*, 39 VAND. L. REV. 59 (1986); Stephan A. Landsman, *Satanic Cases: A Means of Confronting the Law's Immorality*, 66 NOTRE DAME L. REV. 785, 798 (1991); Steven Lubet, *The Trial as a Persuasive Story*, 14 AM. J. TRIAL ADVOC. 77 (1990).

33. *See* PRETRIAL ADVOCACY, *supra* note 26, at 7.

This representational strategy draws upon a range of problem-solving tools available to the lawyer—litigation, negotiation, arbitration, moral persuasion—as alternative or interrelated means for achieving the particular client's ultimate objectives.

IV. The Course

A. Class Materials: The Single Fact Pattern Approach

Putting into practice a methodology that focused on developing the four characteristics of the advocate's mind required creating class materials that supported and reinforced this approach. In constructing these materials, these authors decided that using a single, complex ongoing fact pattern (with both civil and criminal paths) was most effective for developing the processes of how an experienced attorney thinks about and develops a case. Centering the course on a single evolving narrative takes the student from an initial client interview through trial. This permitted accurate replication of the incremental access to information over time that characterizes actual cases. After all, rarely does all the information arrive at the same time. More importantly, this procedure forced law students to constantly go through the core mental process of evaluating and re-evaluating information in the context of refining their case theories.

Furthermore, because the students spend a full academic year on a single fact pattern, they are able to gain a relatively fluid command of a complex factual scenario. This in turn bears a number of benefits. Students learn in preparation for the future what really understanding a case and thoroughly preparing for it looks and feels like. As the course progresses, this method allows students to spend an increasingly larger proportion of their time concentrating on thinking very hard about the more sophisticated nuances of various aspects of the case,[34] rather than

34. Professor Lubet in fact specifically recommends in his visionary "Law School Model" that "[r]ather than rely upon short, unitary problems, it will utilize case files that are nuanced, complex, and detailed. The facts of the cases will be subject to continual reevaluation, and the students will be required to work with the same files for weeks, if not months, in succession." Lubet, *supra* note 28, at 733-34.

employing preparation time in continuously becoming familiar with new legal and factual scenarios.[35]

B. Classroom Phase I: Developing the "Advocate's Mind"

To impart the four characteristics of the "advocate's mind," classes should be conducted through the use of a somewhat different methodology than what normally characterizes traditional NITA sessions. Up to one-half of class time, however, should differ little from a typical NITA-type workshop. That is, class time should emphasize the continued teaching of technical skills, such as phrasing non-leading questions and employing the litany for marking and introducing exhibits. The instructor should also provide students with as many opportunities as possible to perform and receive subsequent critiques.

On the other hand, at least one-half of class time should be spent in discussion and exploration of strategic planning.[36] Strategic planning includes both planning the content of the specific skills performance (the information that will be sought and presented) and planning the actual skills performance (interview, witness examination, closing argument). The sequence of questions that guides interaction with the class, moreover, should be calculated to provide students with what these authors term as "adversary patterns." These patterns are best understood as articulated approximations of the almost intuitive way experienced attorneys think about the litigation strategy of various aspects of their case. Thus, when discussing the content of a particular direct examination with the entire class or with the law student who will conduct the exam, the instructors might go through something like the following basic sequence. Note that the thought pattern in the following example is applicable to any witness examination plan:

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35. Year-end performances in mock trials based on different fact patterns convinced us that the students had little difficulty transferring their skills to new fact situations.

36. *Cf.* Lubet, *supra* note 28, at 721. Professor Lubet would "deemphasize presentation as an end. . . . Students will be more successful not because they can speak well or argue more persuasively, but rather because they can structure facts and law into a compelling and theoretically sound case." *Id.* at 734 (footnote omitted).

1. What information do you want to bring out?
2. Why, in terms of your case theory, do you want this information? (Alternatively: How do you propose to use the information in closing?)
3. What evidence (admissibility) concerns do you have about each piece of information?
   a. How do you intend to meet these concerns?
   b. What do you anticipate your adversary will do?
   c. How will you deal with such a tactic(s)?
4. If you cannot get the information into evidence through this witness, what will you do? (Alternatively: What are your "backups"?)
   a. Do you have other sources for the information?
   b. Do you have similar information which will serve as well?
   c. Will you need to modify your factual narrative?
   d. Will you need to modify/change your overall case theory?
   e. Will you need to change your representational strategy (settle instead of try the case)?
5. If you do get the information into evidence, is there any way your adversary, or a juror in deliberation, can turn the information against you?
   a. What will you do to "block" or at least mitigate this possibility?
   b. Might you be better off not bringing in the information (if you have that choice)?
6. Are there ethical issues with which you must deal?

The result of focusing on planning[37] is that, approximately two-thirds through the course, many students actually know what they are doing. Students prepare for class so that they are capable of justifying each question they plan to ask and each action they plan to take. Admittedly, student performances, though generally competent, may not be as smooth as those a more technique-oriented class might produce. More importantly, however, the majority of students appreciate the significance of the various information in their cases.

The students understand that this information will be evaluated by a jury in the form of a story.[38] The students also understand that their main task is to control the formation of this story.[39] In other words,

37. Similar patterns are also included in written problems. Spaces are provided after each question in the pattern sequence for students to write their answers prior to class.

38. *See, e.g.*, W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981); Moore, *supra* note 8, at 273-78; *see also* Michael E. Tigar, *Voices Heard in Jury Argument: Litigation and the Law School Curriculum*, 9 REV. LITIG. 177 (1990).

39. *See* Moore, *supra* note 8, at 273-78; Lubet, *supra* note 32.

the students learn how to win. In this respect, the authors are not apologetic. Sometimes it seems that many instructors teaching advocacy believe that underneath it all there is something slightly unseemly, even ethically uncomfortable, about training students to win. Yet a glaring ethical deficiency in the legal profession centers on just the opposite: a common lack of understanding of what effectively trying a case is all about. On the other hand, if the course ended at Phase I, one would be hard pressed to answer the rhetorical question: "Aren't you just training better Hessians?"[40]

V. Classroom Phase II: Appreciating the Ethical Implications of the "Advocate's Mind"

Students cannot really grasp the ethical quandaries and responsibilities that accompany advocacy until they come to understand how trial lawyers think. Students will not understand these thought processes until they understand the desire to win. In other words, students begin to understand this mental process when, during the process of acquisition, it begins to become a part of them.[41]

Through this process the students experience seeing themselves utilize this newfound ability to literally reconfigure reality through strategy, evidence law, and rhetoric. As they begin to successfully use these abilities, the students begin to appreciate the real sense of power imparted by their newly acquired skills. The seduction of that power,[42] the genuine aesthetic enjoyment, and the satisfaction that accompanies using

40. In fact, it has been suggested that the successful advocate must possess the moral intuition to appreciate the relative "justice points" within each of the opposing positions. Anthony D'Amato, *Rethinking Legal Education*, 74 MARQ. L. REV. 1, 37 (1990).

41. *Cf.* Lubet, *supra* note 28, at 729. Professor Lubet relies upon student experience gained from previous class exercises to provide a backdrop against which they are capable of evaluating ethical dimensions of exercise near the end of term.

42. Professor Landsman deals with similar notions, "[T]he allure of worldly power or acclaim often induces the sacrifice of fundamental principles. It will be my argument that the temptation to abandon essential values is particularly serious for lawyers. . . ." Landsman *supra* note 32, at 785. "[I]n order for a person to live a decent life he must recognize and master the demon that society would make of him." *Id.* at 790.

abilities well, becomes readily apparent.[43] A prime example is a skillful potter at the wheel putting his hand to wet clay. The sensation of creation that the potter must experience is likely very similar to that experienced by a skilled lawyer at various moments of preparing and molding a case.

At this Phase II point in the class, therefore, the instructor can begin to delve into sophisticated ethical issues. Here, instructors can have meaningful discussions with students concerning professionalism, such as what type of lawyer they desire to become and how they will maintain a sense of professionalism without sacrificing competence at the client's expense. The instructor can also discuss micro-ethical issues such as "coaching," and cross-examining the truthful witness. After all, these are ethical quandaries that exist almost in direct proportion to the level of skill and sophistication of the lawyer.

The instructor can also guide the students in facing and exploring larger questions or macro-ethical issues. For example, the instructor may explore the legal system implications of the existence of a relatively limited group of attorneys who have highly-developed adversary abilities. Once students experience the facility with which they can control and manipulate information and outcomes even as neophytes, they will fully appreciate the systemic significance of the reality that, in all too many cases, the relative skill of the attorneys, not the facts or law, is outcome determinative. The students can also confront issues of how their relationship with their client may be affected by the very mental processes that make them superb advocates. Students can begin to perceive how, over the course of the litigation process, the meaning of the clients' lives may become separated and abstracted from them. The instructor helps redefine the clients' lives by distilling all its aspects—loves, hopes, failures, fear, nostalgia—into information, lack of information, and inferences which are then rhetorically and legally manipulated into legal categories and stories.

As illustration, a law professor recently gave a seminar presentation on feminism and the legal academic profession. During the course of her presentation, she discussed being denied tenure that led to a subsequently filed law suit. This law professor had a talented, sympathetic attorney. She was ultimately successful in her suit and she did not even

43. Hegland, *supra* note 3, at 81.

have to go to trial. Yet, she declared that participating in the litigation process was one of the worst experiences of her life. Why? Because from the moment the papers were filed, her life could no longer be lived authentically. Literally every aspect of her behavior was reconceptualized by her attorney (who then implicitly imparted this framework to her) into the single element of whether it furthered or hindered her case. Other than this single dimension, the law professor's life during the litigation process had been drained of its meaning.

A final macro-issue that instructors usually raise with students is the effect of developing the "advocate's mind." The poignancy of this particular concern is starkly illustrated by a story from a friend and fellow practitioner of the authors. The friend was a criminal defense attorney working in an office with five other attorneys. Two of the attorneys were representing a man accused of two counts of first-degree murder. The prosecution's case turned on the testimony of the accused's seventeen-year-old former girlfriend. Several weeks before the scheduled trial, this friend was summoned for an emergency office meeting by the two attorneys representing the accused murderer. When all the partners were present and seated, one of the attorneys began by simply stating that the seventeen-year-old former girlfriend had been found dead in an open field with a bullet in the back of her head. Without hesitation, four attorneys chorused, "Do you think that might be found admissible?"

VI. Conclusion: The Clinical-Simulation Link and the Advocate's Mind

Starting and ending an examination on a strong point, and using colorful language in examinations that reinforces a theme are excellent communications techniques. But when the snowstorm rages, the novice needs much more. The novice needs the far broader interpretative framework that is reflected in the construct of the advocate's mind: a schemata that will keep her focused. Having students mimic real lawyers is fine as long as we recognize that most of what real lawyers do is to plan and prepare for trial. The extensive preparation and planning of a mock opening statement, for example, is what experienced lawyers do most often. This process is exactly what trial advocacy courses should strive to teach the students.