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Objections Overruled: The Trial Advocacy Course Should Be Mandatory

Hon. Malachy E. Mannion*

Introduction

It has long been lore among members of the bar in Scranton, Pennsylvania, that in 1903, iconic trial lawyer Clarence Darrow, while representing downtrodden anthracite miners said “justice has nothing to do with what goes on in a courtroom; justice is what comes out of a courtroom.” It is often thought that a courtroom, the ultimate dispute resolution setting, is the place where justice takes place, through the deliberation of a jury after relentless advocacy by lawyers for their clients. With respect to the lawyers’ role in the search for justice, we tend to envision overly prepared lawyers that make powerful opening statements, followed by clear and focused direct examinations, sharp and revealing cross-examinations of the witnesses, and impassioned closing arguments. Thus, the belief is that after each lawyer has advocated to the best of his or her ability on behalf of his or her client, the jury (or judge) will reach a proper verdict or decision, thereby giving rise to justice.

The thesis of this article is that every lawyer should be required to complete a trial advocacy course, prior to graduation from law school, so that he or she is capable of understanding and performing the basic advocacy skills that allow for the achievement of justice in the ultimate dispute resolution setting, the courtroom. This recommendation that the trial advocacy course be mandatory is *not* meant to disparage those who are already trial lawyers, but to ensure that all future lawyers, prior to graduation from law school, possess basic trial advocacy skills.¹ In addition, as the number of trials has decreased in recent years, it is essential that law students learn basic advocacy skills, so that we ensure the quality of our system of justice, anchored in the trial advocacy

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1. For purposes of this article, basic trial advocacy skills, at a minimum, include opening statements, closing arguments, direct and cross-examination of witnesses, admitting exhibits into evidence and making proper objections during the course of a trial.

system, will remain intact.

The first part of this article will describe how the formal teaching of trial advocacy began, the predominant methodology that is used to teach advocacy skills, how teaching advocacy skills in law school came about, and the current emphasis, or lack thereof, that law school curricula place on the trial advocacy course. The second part of this article will discuss why the completion of a trial advocacy course should be a mandatory requirement prior to graduation from law school.

I. Formal Teaching of Trial Advocacy

A. *The National Institute for Trial Advocacy*

The National Institute for Trial Advocacy (“NITA”) is a not-for-profit organization that is nationally recognized for having “pioneered the legal skills learning-by-doing methodology” for the teaching of trial advocacy.² NITA was founded in 1971, almost forty years ago, as a result of the encouragement of the American Bar Association (“ABA”) task force and other interested groups, and as a result of funding from three professional groups, namely the Section of Judicial Administration of the ABA, the American College of Trial Lawyers, and the Association of Trial Lawyers of America.³ The founding of NITA is of great importance because it began the formal teaching of legal advocacy skills, has remained the gold standard in continuing legal education with respect to advocacy instruction, and is presently the nation’s highest profile provider of advocacy skills training.⁴

NITA’s success is largely based on the three-step method they use for teaching advocacy skills.⁵ The first step entails students hearing a lecture about the advocacy skill being taught from a lawyer who is familiar and experienced at performing that skill.⁶ The second step involves the student actually performing the skill, which is followed by the student receiving feedback on his or her performance, from a lawyer

2. National Institute for Trial Advocacy (NITA), NITA – The Founding and the People, <http://www.nita.org/page.asp?id=25&name=NITA%20--%20The%20Founding%20and%20the%20People> (last visited Aug. 17, 2010).

3. *Id.*

4. NITA, About Us, <http://www.nita.org/page.asp?id=2> (last visited Aug. 17, 2010).

5. Terence F. MacCarthy, *The History of the Teaching of Trial Advocacy*, 38 STETSON L. REV. 115, 122 (2008).

6. *Id.*

familiar with the skill.⁷ Finally, the third step requires students to watch a demonstration of the skill by a trial lawyer or judge who is experienced at performing that skill.⁸ It is these three steps that have resulted in NITA becoming renowned for their “learning by doing” philosophy for the teaching of advocacy.⁹

The second step is of utmost importance because this step emphasizes learning by doing.¹⁰ This hands-on approach is precisely how many of our earliest lawyers learned how to try cases, by watching other lawyers and then mimicking the skills they had observed in their own trials. In fact, in the early 1800s, the preferred way to learn the law was by working as an apprentice to an established lawyer, which was an “informal, rural adaptation of the English Inns of Court system.”¹¹ As such, the adequacy of the advocacy skills a student acquired was primarily due to whom the student apprenticed.¹² What NITA’s method for teaching advocacy skills has accomplished is to revive the theory of applied learning thereby ensuring that the students will execute their advocacy skills correctly.

In the summer of 1972, NITA officially conducted its first trial advocacy program marking the birth of formal advocacy skills teaching in the United States.¹³ At that time, NITA’s programs were restricted to practicing attorneys.¹⁴ However, the success of NITA led to scholarly discussion as to whether law schools should be teaching advocacy skills to students.¹⁵

7. *Id.*

8. *Id.*

9. NITA, *supra* note 4.

10. *See* MacCarthy, *supra* note 5, at 122.

11. Thomas A. Mauet & Dominic J. Gianna, *Litigation Training for the Next Century*, 26 LITIG. 10, 10 (2000).

12. *Id.*

13. NITA, Milestones, <http://www.nita.org/milestones> (last visited Aug. 17, 2010). Moreover, in 1977, a NITA teacher training program was held at Harvard University, and in 1978, for the first time, NITA case files were made available to law schools. *Id.*

14. *See id.*

15. For example, in 1990, Northwestern School of Law hosted an ABA Section of Litigation sponsored conference—“Teaching Trial Advocacy in the 90s and Beyond: A Critical Evaluation of Trial Advocacy Teaching Methodologies and Designs for the Future.” Thomas F. Geraghty, *Foreword: Teaching Trial Advocacy in the 90s and Beyond*, 66 NOTRE DAME L. REV. 687, 687 (1991). For a summary of scholarly work critiquing the NITA program, see *id.* at 694-702.

B. *The Push for Formal Teaching of Trial Advocacy Within Law Schools*

Shortly after NITA was founded, two driving forces began to push for the teaching of advocacy in law schools. One driving force was criticism from the bench, primarily by Chief Justice Warren E. Burger, and the second driving force was the American Bar Association.¹⁶

1. Criticism from the Bench

In the fall of 1973, after NITA had conducted two summer programs, Chief Justice Warren E. Burger gave the John F. Sonnett Memorial Lecture at Fordham Law School.¹⁷ The focus of his lecture was to express his anxieties concerning the quality of advocacy in United States courts.¹⁸ He asserted that how our lawyers are trained, during and after law school, will determine their skills as advocates and more importantly the quality of our justice.¹⁹ The Chief Justice had observed that, “we are more casual about qualifying the people we allow to act as advocates in the courtrooms than we are about licensing our electricians. . . . This is a curious aspect of a system that prides itself on the high place it accords to the judicial process in vindicating peoples’ rights.”²⁰ As such, this lecture had been recognized for highlighting the inadequacy of our trial advocacy.²¹

After stressing the seriousness of the competency issue, the Chief Justice shifted gears to discussing how this issue came about in the first

16. See Ronald L. Carlson, *Competency and Professionalism in Modern Litigation: The Role of Law Schools*, 23 GA. L. REV. 689, 691-92 (1989).

17. MacCarthy, *supra* note 5, at 120.

18. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973). With respect to his concern, the Chief Justice placed a special emphasis on the administration of criminal justice. *Id.* Furthermore, Chief Judge Irving R. Kaufman, of the United States Court of Appeals for the Second Circuit, shared the same concerns as Chief Justice Burger. See Carlson, *supra* note 16, at 692. In 1973, Chief Judge Kaufman stated: “Chief Justice Burger and I began questioning the quality of trial advocacy in our courts. Since then we have not been alone. The Federal Judicial Center in a survey of federal judges found that 41 percent of those responding regarding lawyer’s performances as a ‘serious problem.’” *Id.* (quoting Irving R. Kaufman, *Continuing the Call for Courtroom Competence*, 64 A.B.A. J. 1626).

19. See Burger, *supra* note 18, at 227.

20. *Id.* at 230.

21. It was widely believed that law schools were failing at producing competent advocates, and that instead, law schools were turning out scholars with no advocacy skills. See Carlson, *supra* note 16, at 689.

place.²² He began by comparing us to the English legal profession, which he believed at that time to have more effective advocacy, because of three implicit and basic assumptions that permeated their system, and not ours:

First: lawyers, like people in other professions, cannot be equally competent for all tasks in our increasingly complex society and increasingly complex legal systems in particular; second, legal educators can and should develop some system whereby students or new graduates who have selected, even tentatively, specialization in trial work can learn its essence under the tutelage of experts, not by trial and error at clients' expense; and, third: ethics, manners and civility in the courtroom are essential ingredients and the lubricants of the inherently contentious adversary system of justice; *they must be understood and developed by law students beginning in law school.*²³

Justice Burger opined that because our legal education lacked these attributes, it contributed to bringing about a low state of American trial advocacy and a consequent diminution in the quality of our entire system of justice.²⁴

Next, the Chief Justice pointed to different causes for the inadequate advocacy that was taking place in the American courts, and, of particular relevance here, he identified certain aspects of our legal education to be one such cause.²⁵ He found that law schools were *not* sufficiently emphasizing professional ethics, manners and etiquette which are essential to the lawyer's basic function, and that law schools were failing to provide adequate and systematic programs by which students could focus on the elementary skills of advocacy.²⁶ As such, the Chief Justice suggested allowing students who wish to specialize in litigation the opportunity to concentrate on courtroom skills during their third year of law school while under the guidance of practitioners and professional teachers.²⁷ After the third year, the Chief Justice recommended that

22. See *Burger*, *supra* note 18, at 228.

23. *Id.* at 229-30. (emphasis added).

24. *Id.* at 230.

25. *Id.* at 232.

26. *Id.*

27. *Id.*

those students begin a pupillage period, directly assisting and participating in trials with experienced trial lawyers.²⁸ In addition, the Chief Justice commended the development in the growing number of law schools offering courses in trial advocacy and the proven effectiveness of NITA programs.²⁹ However, the Chief Justice's message with respect to advocacy skills was clear, and I believe still correct today—*law school is where the groundwork must be laid.*³⁰

2. Encouragement by the ABA

The judiciary critics were not the only ones encouraging the teaching of advocacy skills in law school. The American Bar Association also heavily lobbied for law school involvement.³¹ This is not all that surprising, as the American Bar Association played an active role in the formation of NITA.³²

Consequently, great pressure was placed on law schools to teach future lawyers how to advocate. Interestingly, law schools did not eagerly embrace the idea of teaching trial advocacy, and the more prestigious the law school, the less enthusiastic they appeared.³³ Apparently, some law schools feared becoming trade schools, largely teaching people to try cases.³⁴

C. *Trial Advocacy's Present Role in the Law School Curriculum*

Despite the initial resistance from law schools, by the late 1970s, the criticism from the bench and the persistence of the ABA paid off.³⁵ More law schools began teaching trial advocacy, signifying "great progress,"³⁶ and by the late 1980s, law schools began to recognize that advocacy skills must be included in the curriculum.³⁷ In 1987, "an ABA report prepared under the direction of leading legal educators, lawyers and judges . . . proclaimed that professional skills training had become a

28. *Id.*

29. *Id.* at 233.

30. *Id.*

31. MacCarthy, *supra* note 5, at 123.

32. NITA, *supra* note 2.

33. MacCarthy, *supra* note 5, at 123.

34. *Id.*

35. *Id.*

36. *Id.*

37. See Carlson, *supra* note 16, at 697.

standard part of law school curricula.”³⁸ Moreover, in the section of the report titled *The Objectives of Legal Education*, “training for competence [was] placed as the second major objective immediately after training in analytical skills.”³⁹ This indicated that the Chief Justice and the ABA had been heard, and that law schools were no longer simply teaching legal theory, but now recognized the need to emphasize practical advocacy skills.

Today, there is no longer a debate over whether advocacy skills should be taught in law school⁴⁰. The basic trial advocacy course, a program “combin[ing] analytical skills with persuasive techniques,” has become an integral and permanent part of the legal curriculum.⁴¹ Furthermore, the majority of law schools have incorporated some version of NITA as the preferred method of teaching advocacy skills within their trial advocacy course.⁴²

Despite the fact that the trial advocacy course is now widely available to law students, it has largely remained an elective course, licensing individual students to determine *if* they wish to take the course. In 2006, the Association of American Law Schools conducted a survey gauging current curriculum reform efforts.⁴³ Of particular relevance, *only* nine of the ninety-six schools that responded to the survey reported that they have some form of mandatory class that incorporates advocacy training.⁴⁴ Although law schools have come a long way since the initial debate over whether advocacy training was appropriate, the question still remains—have we come far enough?

II. The Trial Advocacy Course Should Be Mandatory

The NITA method of instruction for teaching trial advocacy skills has generally been accepted as the preferred method.⁴⁵ As such, most law schools and other advocacy training organizations have incorporated NITA’s methodology or some version of it as the primary means of

38. *Id.*

39. *Id.*

40. Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMP. L. REV. 1, 2 (1993).

41. *Id.* at 2-3.

42. See MacCarthy, *supra* note 5, at 125. See also NITA, *supra* note 2.

43. AALS Committee on Curriculum, Survey of Innovation in Law School Curricula, <http://www.aals.org/documents/curriculum/Survey.pdf> (last visited Aug. 17, 2010).

44. *Id.*

45. NITA, *supra* note 2.

teaching advocacy skills.⁴⁶ For instance, the United States Department of Justice uses a very similar method at its National Advocacy Center (“NAC”) in Columbia, South Carolina.⁴⁷ The NAC, which is operated by the Department of Justice, Executive Office for United States Attorneys, trains over ten thousand “federal, state, and local prosecutors and litigators in advocacy skills” each year.⁴⁸ I have lectured, taught, and judged various trial advocacy courses at either the NAC, or the NAC’s predecessor, the Attorney General’s Advocacy Institute, over the past twenty years. The NAC’s modified NITA program contains five steps. First, students hear a lecture about a skill from an experienced litigator. Second, students watch a demonstration of that skill by an experienced litigator. Third, students perform the skill. Fourth, the student is critiqued by the class and instructors after the skill has been performed. Fifth, there is a video review by the student of his or her own performance with comments from a single skilled instructor. I personally feel this expanded NITA technique enhances the learning experience as it allows the student to self critique through video review and enjoy a one-on-one comment and question session with an experienced litigator.

For the purpose of this article, either the NITA or the NAC technique provides a more than adequate framework for success. However, many legal scholars and professors have addressed the issue of whether simply teaching the basic skills is sufficient. For example, some have argued that professionalism or case theory should have a greater emphasis within the structure of the advocacy course.⁴⁹ Because this article does not focus on the components of the course, but rather the fact that the course itself is necessary so that basic advocacy skills may be learned, the issues of what else should be present within the course will be best left for another time. Therefore, the remainder of this article will focus on why a trial advocacy course, imparting basic advocacy skills, should be mandatory for law students prior to graduation.

46. *See id.* NITA provides sample criminal, civil and transactional practice case files. National Institute for Trial Advocacy, NITA Case Files by Type, [http://www.nita.org/page.asp?id=34&name=NITA%20Case%20Files %20by %20Type](http://www.nita.org/page.asp?id=34&name=NITA%20Case%20Files%20by%20Type) (last visited Aug. 17, 2010). These case files afford students the opportunity to sort through information, much like a trial lawyer would do, analyze the factual information, and then use that information persuasively to perform an advocacy skill.

47. Executive Office for United States Attorneys, *Office of Legal Education*, <http://www.justice.gov/usao/eousa/ole/> (last visited Aug. 17, 2010).

48. *Id.*

49. *See* Ohlbaum, *supra* note 40, at 4-5. *See also* Carlson, *supra* note 16, at 699.

A. *Ensuring Competency*

The courtroom is a fundamental and essential part of the legal system, and consequently law students should be required to take a trial advocacy course prior to graduation from law school, so that they possess the basic skills required to advocate effectively in that forum. Undeniably, every legal issue or dispute, regardless of the area of law, has the potential to end up in the courtroom, or an alternative formal dispute resolution setting, that will require a trial or some other type of formal proceeding that may necessitate the use of advocacy skills. As briefly mentioned in the introduction to this article, once a matter reaches the courtroom, it is believed that justice will be served. However, justice does not magically appear simply by virtue of being in a court of law. Here, I respectfully part with the legendary litigator, Clarence Darrow, as I believe that the justice that comes out of the courtroom is, to a great extent, dependent upon the skill and advocacy that goes into the courtroom. Hence, the individuals in the courtroom can impact the quality of justice for the better, if they competently and professionally perform their functions.

Because our system of justice is founded on the belief that the courtroom makes for the final and proper resolution of legal disputes, it is simply unacceptable that students graduate from law school without having taken a trial advocacy course that teaches them basic advocacy skills, how lawyers make decisions in the courtroom, and the pressures trial lawyers typically face. Since every case a lawyer handles could ultimately end up in a courtroom, all lawyers should know and understand how to conduct themselves in the event they find themselves in that setting. Thus, at the very least, all lawyers must be minimally proficient, namely possessing the basic advocacy skills.

Making the trial advocacy course optional for law students has simply not ended the competency debate. From my own experience, I have observed common errors that would not likely occur if lawyers had been required to take an advocacy course in law school. For example, lawyers may understand when a question is objectionable, but not necessarily whether that objection advances their case, its strategy and their credibility before the jury. I have observed lawyers who understand when they are allowed to ask certain questions, but not necessarily whether they should ask those questions. I have observed lawyers so intent on reading their next question that they have failed to listen to the witness's answer to the previous question and understand the significance of the testimony they have elicited. I have observed lawyers

who, when confronted with any objection based upon an improper foundation merely withdraw the question, exhibit or evidence presented because they are unaware of how to lay the proper foundation. These are matters that should be addressed in a basic trial advocacy course, prior to graduation from law school.

Given how specialized lawyers have become, lawyers or law students may read this article, believing they could or would never end up in that scenario—i.e., facing a trial or court proceeding without sufficient experience. Understandably, it is logical to think that, if you are not a trial lawyer, you would not take a case that would end up in court, and as such, you would never need to use the advocacy skills taught in a trial advocacy course. Despite this basic assumption and common belief on the part of lawyers, I have seen this happen numerous times. Lawyers have appeared before me and confessed that they have been practicing law for a few years, and yet this is their first trial, and understandably they are very nervous. Certainly, these lawyers and their clients would be better served if they had completed a trial advocacy course in law school that had exposed them, at least, to basic advocacy skills.

In sum, this is not intended to say that every lawyer must be an expert in trial advocacy prior to graduation from law school. Rather, the point is that every lawyer should be able to perform the basic advocacy skills needed in the courtroom, a place that is at the very heart of our profession. As such, it is puzzling that law schools allow students to graduate without the ability to adequately perform the basic skills needed to conduct a trial. Law schools have long emphasized that one should think like a lawyer and write like a lawyer, and it is equally imperative that one know how to *act* like a lawyer in the courtroom. In this way, we all can be more confident that what comes out of a courtroom is, indeed, justice.

B. *Preserving Competency*

In addition to the fact that it is essential for students to learn basic advocacy skills in order to ensure justice for their clients, it is also necessary for the continuation of the justice system. In an article published by the American College of Trial Lawyers, the College observed that there was a decline in civil trials and that one of the reasons for this decline was the lack of trial skills or experience in young

lawyers.⁵⁰ The College expressed their concern that “[i]f young lawyers do not have the opportunities, in the context of real time litigation, to develop trial skills and experience, then there is very real risk that this will contribute to the move away from civil trials into the future.”⁵¹ As the College explained, the problem is that as more time passes “there are fewer and fewer opportunities available for young lawyers” to get into the courtroom.⁵² The College further observed that this could lead to a “fear of trialing,” which is largely a competence issue.⁵³ This “fear of trialing” could result in young lawyers becoming reluctant to go to court because they do not possess the basic advocacy skills necessary to try a case.⁵⁴ Consequently, the judgments of these inexperienced trial lawyers could become distorted, resulting in a greater likelihood of inadequate settlements, mainly because these “trial lawyers” do not want to try cases.⁵⁵

Although “continuing legal education in the form of advocacy skills training programs is important,” the College did not think they were sufficient to rectify the problem.⁵⁶ I agree. Even though:

[w]e can train young lawyers to have the theoretical skills involved in trial advocacy, . . . without an understanding of the pressures and responsibilities that arise in the trial context and understanding how real time strategies and decisions can have a serious impact on the outcome of a client’s case, a young lawyer will not be equipped to handle a trial.⁵⁷

The College’s concern for this problem amongst law students and younger lawyers led to the College trying to assist in lessening the problem.⁵⁸ For example, the College “sponsors trial competition programs for law students,[conducts] local projects devoted to teaching

50. AM. COLL. OF TRIAL LAWYERS, THE “VANISHING TRIAL.” THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM 22 (2004), *available at* http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=57.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 22-23.

55. *Id.*

56. *Id.*

57. AM. COLL. OF TRIAL LAWYERS, *supra* note 50.

58. *See id.* at 24.

trial skills to younger lawyers,” has stressed the importance of mentoring to the fellows of the College, and has sought to “creat[e] opportunities for young lawyers to get trial experience.”⁵⁹

While it is commendable that the American College of Trial Lawyers recognized this issue, I believe we need to try to address this problem even sooner by requiring that a trial advocacy course be mandatory in law school. A well-taught trial advocacy course would allow a student to attain basic advocacy techniques by conducting actual trial activities, like opening and closing statements, and direct and cross-examination of witnesses. Moreover, a student in a trial advocacy course would learn what cannot be taught by Socratic method alone, but must be learned from doing—when to call or not call a witness, decisions on the strategy of when to object, or not to object, when one is finished questioning a witness, when to ask a question on re-direct and when not to ask, etc. By laying the groundwork in law school, as the Chief Justice had correctly proposed over thirty-seven years ago,⁶⁰ students will continue to improve upon a basic skill set obtained while later engaged in practice. This basic trial advocacy skill set, however, must be initiated during their law school years.

III. Conclusion

Completing a trial advocacy course is not just about obtaining a new skill set. For instance, some students may find out they have talent they never knew they had. Other students may learn their strengths and weaknesses when it comes to performing trial advocacy techniques. Still other students may discover that litigation is their passion. The value of this course should not be overlooked. If we improve the capabilities of our law students to competently represent their clients in court when necessary, we can be content that, more times than not, what comes out of the courtroom will be justice.

As such, I encourage all law students to complete a trial advocacy course prior to graduation from law school, and that any objection to a student completing the trial advocacy course is hereby OVERRULED.

59. *Id.* at 24.

60. *See supra* Part I.B.1.