



6-1-1999

Teaching Trial Advocacy in the 90s and Beyond

Thomas F. Geraghty

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Thomas F. Geraghty, *Teaching Trial Advocacy in the 90s and Beyond*, 66 Notre Dame L. Rev. 687 (1991).

Available at: <http://scholarship.law.nd.edu/ndlr/vol66/iss3/3>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

COLLOQUIUM

FOREWORD: TEACHING TRIAL ADVOCACY IN THE 90S AND BEYOND

*Thomas F. Geraghty**

I. INTRODUCTION

Before the National Institute of Trial Advocacy (NITA) held its first session in Boulder, Colorado in 1972, there was no nationally recognized, coherent methodology for teaching trial advocacy. Trial advocacy teaching before NITA was often anecdotal. There was no conceptualization of the form or content of trial advocacy teaching. NITA changed this; it mastered the art of conceptualizing and communicating trial advocacy skills. While no organization that desires to remain on the cutting edge can afford to be satisfied that it has fully achieved its goals, if the only goal of NITA and of trial advocacy teaching was to make trial advocacy teachers better technical practitioners, then NITA could be content in the "90s and Beyond" to engage in only minor tinkering with its product.

But the tradition of NITA and of trial advocacy teaching has been, and should continue to be, characterized by reexamination and innovation. It is in this spirit that NITA and the ABA Section of Litigation sponsored the conference "Teaching Trial Advocacy in the 90s and Beyond: A Critical Evaluation of Trial Advocacy Teaching Methodologies and Designs for the Future."¹ In the same spirit, seven conference presenters contribute their papers to this Colloquium.

The reason for holding the conference was to ask where this process of reexamination and innovation should lead us during the next decade and beyond. The consensus among the partici-

* Professor of Law, Associate Dean, and Director, Legal Clinic, Northwestern University.

¹ The conference was cosponsored by the Northwestern University School of Law and was held on October 26-27, 1990, at the Northwestern University School of Law.

pants at the conference was that trial advocacy curricula should continue to train law students and lawyers to be effective practitioners. The contributors to this Colloquium reflect that consensus. The contributors go farther, however, and argue that trial advocacy teachers, in addition to providing effective skills training, should teach students to be critical of accepted wisdom concerning the efficacy and desirability of various trial advocacy techniques. Trial advocacy teaching in the 90s and beyond should provide students with perspectives from which they can evaluate the efficacy and values of the litigation and trial process.

The contributors bring this critical approach to their work in this Colloquium as they analyze the status quo and the future of trial advocacy teaching. Ronald Allen examines the trial advocacy teaching from the perspective of the University's teaching and scholarly mission. Steven Lubet defines the place of thoughtful and comprehensive trial advocacy teaching within the University. Edward Imwinkelried describes the need for the integration of trial advocacy and traditional teaching methodologies. Jonathan Hyman tells us how he uses trial advocacy teaching techniques in his contracts class. Stephan Landsman argues that the underlying values of our adversary system can most effectively be taught through the use of history. Michael Saks demonstrates that psychology could add an important research agenda to trial advocacy teaching and scholarship. Abraham Ordover gives us an example of a trial advocacy curriculum that places emphasis on factual analysis and the development of case theory.

In this Foreword to the Colloquium, I will briefly describe the genesis and the nature of modern trial advocacy teaching. I will then discuss the dominant criticisms of prevailing trial advocacy teaching methodology, followed by some observations concerning the place of trial advocacy teaching in law schools and within the profession. Finally, I will identify the themes developed in this Colloquium for future trial advocacy training and scholarship.

II. THE NITA MODEL

The title and theme of this Colloquium, "Teaching Trial Advocacy in the 90s and Beyond," implies a critique of existing trial advocacy teaching methodology as well as prescriptions for change. Because NITA teaching methodology is dominant in law school and CLE trial advocacy courses, the Colloquium's focus is on constructive criticism of the "NITA model." By "NITA model,"

I mean that form of instruction in trial skills which relies upon student² performance in simulated trial situations (direct and cross-examination, opening statements, and closing argument). The student performance is then critiqued by trial advocacy teachers and/or by experienced trial lawyers.

During the last twenty years, NITA has played the central role in developing state-of-the-art teaching methodologies for students of trial advocacy. Perhaps the most important contribution that NITA has made in this respect is to introduce methodologies for case analysis and for the different aspects of trial preparation. When one analyzes the traditional NITA critique of student performances it is clear that the critique rests on the need for thorough and systematic preparation.³ Because of NITA, most trial lawyers no longer believe that successful trial lawyers are "born not made." NITA training gives its students tools which can be utilized for an advertant process of self-improvement.

The contributors to this Colloquium focus on the NITA model, and equate it with the teaching of trial advocacy generally, because it is utilized in almost every law school and CLE trial advocacy course throughout the country.⁴ In some of these courses, only simulation and critique occur. In other courses, the basic NITA methodology is supplemented by other forms of instruction, and the substance of the course goes beyond the teaching of trial skills and includes instruction in evidence, ethics and the lawyer's role in the adversary system. The latter phenomenon occurs primarily in law school courses.⁵ But whatever is added to the basic NITA model, students, both in law school and in CLE courses, consider the "doing" and "critique" portions of trial advo-

2 When I use the word "student," I mean participants in law school and CLE NITA-style trial advocacy courses.

3 See NATIONAL INSTITUTE FOR TRIAL ADVOCACY, *TEACHER'S MANUAL FOR PROBLEMS AND CASES IN TRIAL ADVOCACY* (5th ed. 1988).

4 Since 1972, 16,464 lawyers have participated in NITA-conducted CLE trial advocacy courses. An additional 6,649 lawyers have participated in NITA-run in-house programs in law firms and government agencies. NITA materials are used in 150 of the 157 AALS accredited law schools. NITA sponsors 35 CLE courses per year throughout the country which enroll approximately 3,000 students per year. Telephone interview with John R. Kouris, Chief Operating Officer, NITA (Jan. 1991). There is general recognition in the scholarly writing concerning trial advocacy teaching that the status quo is NITA. See, e.g., Imwinkelried, *The Educational Philosophy of The Trial Practice Course: Reweaving the Seamless Web*, 23 GA. L. REV. 663 (1989); Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123 (1987).

5 See, e.g., Imwinkelried, *supra* note 4, and Lubet, *supra* note 4, for descriptions of how some law school trial advocacy courses go beyond training in technical skills.

cacy courses the most demanding and the most valuable portions of their learning experience.

III. EMERGING CRITICISMS OF THE NITA MODEL: THE NEED FOR REASSESSMENT

The NITA method has made trial lawyers think more systematically about preparation and performance. Teachers of trial advocacy have not done as much, however, to assess the impact of what they teach on the litigation process; nor have most trial advocacy teachers gone beyond generally perceived notions of what is, and what is not, effective advocacy. These perceived notions are typically intuitive judgments, which are generally accepted by the practicing trial bar. They include accepted wisdom about how the material of trial should be organized to maximize persuasiveness, and about how students' personal characteristics can be modified to improve communication with the finder of fact. The articles in this Colloquium suggest that it is now time to test these perceived notions, both with respect to the implicit messages they send about the priorities and objectives of trial advocacy teaching and with regard to the limits these messages impose upon teaching and research.

There are a number of reasons why we should reassess our current methods of teaching and thinking about trial advocacy. First, it has been almost twenty years since the last major reassessment of trial advocacy teaching methodology—since the birth of NITA. The mere passage of time makes it prudent to take a closer look at how we are teaching trial advocacy. A second reason for reassessing the NITA method is that the significant criticisms of the NITA method have yet to receive a formal response.

Professor Kenney Hegland's 1982 "critique"⁶ of what he perceived to be the dangers inherent in the dominant NITA teaching methodology sparked the debate about NITA teaching methodology. Hegland identified two defects of the NITA Model: The first was that the NITA method by itself

tends to communicate, first, that lawyers have no obligation to the truth; second, that law practice is simply a game, that its only meaning can come from playing the game well—from the effective use of technique; and third, that the only goal of the

6 Hegland, *Moral Dilemmas In Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69 (1982).

client is to win, even if winning means abusing one's opponents.⁷

Hegland's second criticism focused on the role of trial advocacy teaching in the law school curriculum:

The teaching of technique can never be the law school's only goal. Law schools are above all academic institutions, and the academy has two responsibilities: to teach the practices of the real world *and* to submit those practices to vigorous challenge and examination. The academy must provide more than experience and insight: it must nourish conscience. The law-school curriculum typically has maintained this tradition. The academic program is not designed as a bar cram course. Instructors do not just teach cases—they subject them to sharp analysis and critique. Is the opinion logically coherent? Upon what premise or world view does it rest? How will the rule affect society or those who use it? Is the rule just?⁸

The articles in this Colloquium suggest that the next steps for NITA, and for trial advocacy teachers generally, would be to utilize accumulated wisdom to accomplish two goals: 1) develop more comprehensive educational programs for law students and for lawyers;⁹ and 2) acknowledge and synthesize the social science research regarding the litigation process and jury decisionmaking in order to evaluate the efficacy of its teaching methodology.¹⁰

7 *Id.* at 72.

8 *Id.* at 71-72. A similar exhortation concerning the nature and content of "skills" courses has been voiced by Professor Roger Cramton:

The addition of courses focusing on lawyering skills will broaden and deepen the law curriculum only if those courses are infused with a theoretical and critical perspective. If they merely reinforce the existing vocational orientation of the traditional skills courses—those focusing on the analysis and manipulation of cases and doctrine—they will have failed. Courses in interviewing, negotiation, counseling, and advocacy will acquire a permanent place in the basic curriculum of the university law school because they are founded on insightful, theoretical explanations of why lawyers and officials behave as they do and because they produce important empirical findings that illuminate how lawyers, clients, and officials behave and interact or lead to valuable normative statements of how they should behave.

Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC., 321, 331-32 (1982).

9 See generally Lubet, *supra* note 4. There is no reason why Professor Lubet's higher aspirations for trial advocacy teaching in law schools should not motivate the teaching of continuing education courses. As a matter of fact, CLE audiences often tend to be more inclined than law students to be interested in the kind of broader knowledge that Professor Lubet describes.

10 See, e.g., Kassin, Williams & Saunders, *Dirty Tricks of Cross-Examination: The Influence of Conjectural Evidence on the Jury*, 14 LAW & HUM. BEHAV. 373 (1990), in which the

The articles in this Colloquium suggest ways in which the traditional NITA methodology might be modified and augmented in order that it do more than teach trial skills in a vacuum.

IV. IMPLEMENTING PROPOSALS FOR CHANGE: THE NEED TO UNITE THE CONSTITUENCIES OF TRIAL ADVOCACY TEACHING

When making the assessment of current models of teaching trial advocacy, the articles in this Colloquium must address three audiences: law students; law professors; and practitioners—the lawyers and judges who learn and teach in CLE courses.¹¹ These audiences are no different from any of the constituencies of other legal academic disciplines. Yet the teaching of trial advocacy and other skills courses has, over the last twenty years, been the subject of intense scrutiny from each of these constituencies. Each segment of the audience has different interests, status and demands. Teachers of lawyering skills have spent considerable time explaining and justifying their pedagogy to each segment, and the content of trial advocacy curricula is the result of the input of each of these groups.

Beginning in the late 1960s, students (and some professors) demanded more relevant courses. Included in the category of relevant courses were those that exposed students to what actually occurred in lawyer-client relationships and in courtrooms. The pressure from students, professors, and organizations such as the Council on Legal Education for Professional Responsibility

authors examine the impact of improper cross-examination questions on the credibility of witnesses. See also *Is the Jury Competent*, 52 LAW & CONTEMP. PROBS., Autumn, 1989, at 1-353, for a collection of recent works by social scientists regarding jury decision-making. Professor Michael Saks suggests that it may be possible, utilizing psychological research, to make an informed decision about whether to wait for the opponent to bring out the damaging facts on cross-examination or to "front" the prejudicial information by eliciting it on direct-examination. See Saks, *Turning Practice Into Progress: Better Lawyering Through Experimentation*, 66 NOTRE DAME L. REV. 801, 807 & n.28 (1991). Recent articles on the role and behavior of juries include Frankel, *A Trial Judge's Perspective on Providing Tools for Rational Jury Decisionmaking*, 85 NW. U.L. REV. 221 (1990); Friedland, *The Competency and Responsibility of Juries in Deciding Cases*, 85 NW. U.L. REV. 190 (1990); Heuer & Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 NW U.L. REV. 226 (1990); and *The Role of Jury in Civil Dispute Resolution*, 1990 U. CHI. LEGAL F. 1-600.

11 I leave out perhaps the most important group affected by the ways in which we teach trial advocacy—the justice-consuming public. Although the consuming public should have an influence in the ways in which our system of legal education trains litigators and trial lawyers, I am not aware of any significant input that the consuming public has had on the process. Perhaps this will change as professional barriers to public involvement in the regulation of the legal profession break down. An example of this is the trend toward involvement of non-lawyers in the lawyer disciplinary process.

(CLEPR), compelled law faculties to teach students skills such as interviewing, counseling, negotiation, and trial advocacy.

For the most part, academia was critical of this rush to relevance, although it could not deny that students and the legal profession would benefit from curricula which improved lawyer skills. The debate between legal academia and those who advocated skills training focused on when and where such training should take place, who should be responsible for it, and what the status of the skills teachers should be within law school faculties. Law schools resisted giving "skills training" curricula and its teachers status equal to "traditional" curricula and faculty.

One can debate the issue of whether the criticisms of "skills training" from legal academia were motivated by resistance to change or by true principle. It is very likely that both were motivating factors. But it cannot be doubted that the skepticism of academia regarding the worthiness of trial advocacy courses has had a great deal to do with the ways in which trial advocacy curricula have developed. Many law faculties have been unwilling fully to incorporate advocacy curricula and personnel into their institutions; even now, advocacy personnel and curricula are often merely tolerated. Too often, trial advocacy teachers have been denied the financial and institutional resources to develop innovative teaching or scholarly agendas.

The third constituency concerned about the teaching of trial advocacy is composed of the lawyers and judges who try cases. Before NITA, this constituency could not find a congenial home in law school faculties or curricula. As a result, they built an institution of their own—NITA—which developed its own teaching methodology, teaching materials, and faculty. The lawyers, judges, and law teachers who attended early NITA programs saw that NITA was doing a far better job of educating trial lawyers than law schools. Law teachers carried this message from the early NITA summer sessions in Boulder, Colorado, back to their law schools. As a result, NITA-style trial advocacy courses were incorporated into law school curricula; but, for the most part, trial advocacy courses were, and they continue to be, taught by adjunct faculty.

What is the significance of the fact that our current methods of teaching trial advocacy are the result of the coalescence of these disparate forces and interests? There have been both positive and negative effects. On the positive side, the development of trial advocacy teaching methodology outside of traditional legal

academia by practitioners and lawyers who had experience in the litigation and trial process ensured that trial advocacy curricula would be relevant. Moreover, practitioners conveyed their enthusiasm about the litigation process and trial work to students in a way that convinced their students that litigation and trial work was exciting and worthwhile. It is unlikely that the law school setting could have engendered this kind of enthusiasm, energy, creativity, and productivity.

The negative impact of the law schools being for the most part isolated from the development of trial advocacy teaching methodology has been that law schools have continued to ignore the subject as a serious academic discipline and seem content not to provide leadership in thinking about ways in which trial advocacy should be taught or in creating research agenda. Despite the fact that Hegland and Cramton penned their observations and criticisms in 1982, the law schools and NITA have so far failed to take the next step which they advocated—systematic and careful planning of trial advocacy curricula and the encouragement of critical thinking about the litigation and trial process. This next step could well take place through the cooperation of law schools and NITA. NITA has developed state-of-the-art teaching methodologies. Law schools have faculty who are able to examine and to test those methodologies, as well as to test and examine the underlying purposes and premises of trial advocacy teaching and its place within the law school and in continuing legal education.

V. THIS COLLOQUIUM'S WORK AND THE FUTURE OF TRIAL ADVOCACY TEACHING

The papers presented in this Colloquium are examples of the kind of work that needs to be done to harness the energies within NITA and within the law schools to produce a more purposeful and comprehensive approach to the teaching of trial advocacy. The most fundamental issue that must be addressed as we move toward a comprehensive trial advocacy curriculum is the place of trial advocacy courses within the University. The articles by Professors Allen and Lubet exemplify the kind of constructive debate that is needed concerning the nature of trial advocacy teaching, and its place within law schools. This debate is important because it focuses on the need to define the objectives of trial advocacy teaching and of trial advocacy scholarship. Professor Allen asks where trial advocacy teaching fits within the concept of the modern university. In asking this question, he identifies a tension be-

tween "traditional" trial advocacy teaching and the aspirations of the modern university. He identifies the "[a]spirations of the [u]niversity" as service, research, and teaching.¹² He suggests that the teachers of trial advocacy must develop theories to underscore and explain trial advocacy teaching in relation to those aspirations.¹³

In order to make this inquiry concrete, Allen focuses on the now proverbial Irving Younger lesson regarding cross-examination. The anecdote involves how a witness knew that the defendant had bitten off the plaintiff's nose. The intended lesson of this scenario, according to Allen, is that a trial lawyer should never ask a question to which she does not know the answer.¹⁴ If the cross-examiner does stray beyond the confines of the rule, so says Younger, the witness' damaging response will be, "I saw him spit it out." Allen criticizes the message implicit in this oft-cited trial advocacy lesson on two levels. The first criticism concerns the message that it sends regarding acceptable, even aspirational, lawyer behavior. That message, according to Allen, is that "the advice is to engage in a process that on its face may detract from truth seeking."¹⁵ In the larger context, Allen contends that the "I saw him spit it out" example confirms the fact that "traditional" trial advocacy training "purports to be premised on serving the needs of the adversary system's search for truth, but it appears to be premised on the needs of serving the client."¹⁶ Allen sees a contradiction between the university's obligation to foster honest inquiry, and the prevailing use of the Younger example. If NITA is to find its place in the university, according to Allen, it must strive to find a theory which criticizes or explains the oft-referred to Younger example. "Programs belong in the universities only if they emanate from a conceptual plane, even if a controversial one, and only if theories justifying the program can be articulated, tested, and justified."¹⁷

Professor Lubet's article, and his work in constructing a trial advocacy curriculum described in that article, reflect both a positive theory for the teaching of trial advocacy and a response to

12 Allen, *NITA and the University*, 66 NOTRE DAME L. REV. 705, 711 (1991).

13 *Id.* at 712-13.

14 *See id.* at 713.

15 *Id.*

16 *Id.* at 714.

17 *Id.* at 717.

the issues raised by Professor Allen and other critics of "traditional" trial advocacy teaching. By "response" I mean that Professor Lubet and other thoughtful teachers of trial advocacy have been developing their own "positive" programs to ensure the richness and ethical intent of trial advocacy training. They have also been working to develop the kind of conceptual underpinnings which Professor Allen demands. The need for the development of a model for the teaching of trial advocacy is underscored by Professor Lubet: "Our challenge is to build upon the simulation/critique method to develop a university model of advocacy education."¹⁸ Professor Lubet's model for trial advocacy teaching and scholarship, however, may have more modest goals than those deemed necessary by Professor Allen.

Allen would require trial advocacy curricula to justify themselves as a university taught discipline only through their search for "global conceptualizations and theories that organize the fields and give guidance to research."¹⁹ Lubet argues that "there are other, more modest, goals that nonetheless place the trial advocacy course squarely within the tradition of university-based professional schools."²⁰ Lubet categorizes the information transmitted in his trial advocacy course as "structural knowledge" and defines it as "the understanding of the basic constructs of the profession, the manner or means in which the profession functions, or the language and grammar of the professional discourse."²¹ Professor Lubet's example of the use of a particularly hard-hitting, and perhaps unethical, cross-examination of a robbery and attempted rape victim to evoke class discussion concerning the limits of cross-examination²² thus goes beyond mere "skills training" in its positing of ethical dilemmas; however, it does not necessarily include discussion of the more global inquiries that Allen argues are a prerequisite for inclusion in the mission of the university. Lubet's discussion is designed to "explore the relationship between the formal rules of ethics and the advocate's choice of theory."²³ Such discussions, and the trial advocacy course that Professor Lubet has designed, belong in the university because

18 Lubet, *Advocacy Education: The Case for Structural Knowledge*, 66 NOTRE DAME L. REV. 721, 724 (1991).

19 Allen, *supra* note 12, at 712.

20 Lubet, *supra* note 18, at 726.

21 *Id.* at 727.

22 *Id.* at 728.

23 *Id.* at 729.

they give to students "the structural knowledge that they will need in order to effectuate the visions instilled in the balance of their professional training."²⁴

Lubet goes on from his response to Allen's criticism of trial advocacy teaching methodology to describe an ideal law school model for advocacy training. This model focuses attention on analysis of facts through the use of rich factual scenarios and problems which require students, through problem solving, to reassess their first and most obvious solutions. Interestingly, and perhaps somewhat controversially, Lubet argues that "presentation" as an end should be deemphasized: "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."²⁵

Finally, Lubet turns to the Younger example—the model "lesson" of trial advocacy teaching which so disturbed Professor Allen. Lubet shows that the Younger lesson can be interpreted in many different ways to teach important lessons about trial advocacy. The point is that the Younger lesson can be, and in Lubet's course it is, used to promote student understanding of the adversary process—"structural knowledge." According to Lubet, if one assumes that the witness is not, or may not be telling the truth, the decision not to ask the "how do you know" question on cross-examination may stem from a desire to promote, rather than to conceal the truth.

Allen and Lubet debate the issue of whether, and under what circumstances, trial advocacy training belongs in the law school curriculum. Professor Edward Imwinkelried argues, and the evidence he cites demonstrates, that law schools have generally accepted, or at least tolerated, the teaching of trial advocacy. The challenge of the future, Imwinkelried argues, is to fashion a true partnership between those who teach substantive law courses and those who teach trial advocacy.²⁶ This partnership must be fashioned to ensure that trial advocacy curricula remain viable in the face of changing and competing demands for scarce law school resources and because the cooperation of substantive law and trial advocacy teachers in formulating curricula will enrich both the

24 *Id.* at 733.

25 *Id.* at 734.

26 See Imwinkelried, *On Achieving Synergy in the Law School Curriculum*, 66 NOTRE DAME L. REV. 739, 740-41 (1991).

substantive and the trial advocacy curricula. Imwinkelried would impose the duty to form the necessary alliances equally upon the substantive and the trial advocacy teachers. The substantive law teacher should ensure that "the students completing substantive law courses receive rigorous training in analyzing the legal significance of facts,"²⁷ and the trial advocacy teacher should do more than merely "content [herself] with the identification of the best strategies and tactics for litigating cases within the existing system."²⁸ The trial advocacy teacher must teach critical analysis of the trial process if the discipline is to grow and to prosper.

The kind of "cooperation" between trial advocacy teachers and substantive law teachers advocated by Professor Imwinkelried is found in the persona and the teaching methodology of Professor Jonathan Hyman. Professor Hyman, a clinician and a teacher of contracts, utilizes NITA teaching methodology in his contracts course at Rutgers. In Professor Hyman's contracts course, students participate in the arbitration of a contracts claim as advocates and as arbitrators. Professor Hyman includes this exercise, and others like it, in his class in order to

keep[] the students firmly grounded in thinking about what it takes to elicit a decision in favor of their client. The doctrinal rules play a part, but not for the purpose of developing a common understanding of the single best rule for choosing between the cost of completion and the diminution of value.²⁹

While the exercises that Professor Hyman utilizes do not involve every aspect of NITA or trial advocacy methodology, the use of the exercises helps students "enhance their ability to communicate persuasively . . . [and] learn to act ethically while carrying out lawyers' tasks."³⁰ Hyman notes that "[m]aking use of the particular, not only the general, is the key concept that runs throughout NITA's various techniques."³¹ Use of these simulations also forces students to think about the tension between discovery and invention:

When an accomplished litigator articulates an effective theory of the case, conducts the direct examinations with telling de-

27 *Id.* at 752.

28 *Id.* at 749.

29 Hyman, *Discovery and Invention: The NITA Method in the Contracts Classroom*, 66 NOTRE DAME L. REV. 759, 767 (1991).

30 *Id.* at 771.

31 *Id.* at 772-73.

tail, and maneuvers the opposing witnesses into providing discrete and helpful facts, has she invented the case by the artfulness of her work, or has she merely discovered what was there in the facts all along?³²

Hyman notes that this question "gets to the heart of what occurs in law school classes and in NITA courses . . . [and] explains why the two can seem so different."³³ Use of the NITA method or simulation promotes the "invention" element of legal education: "The highest art taught by the NITA method is the skill of inventing discoveries."³⁴

The articles by Allen, Lubet, Imwinkelried, and Hyman suggest different ways in which trial advocacy teaching methodology can deepen our students' understanding of the adversary process. Allen's approach to stimulating us to think about how we teach trial advocacy is to assert that existing methodologies neglect serious intellectual inquiry into the nature of the adversary process. Lubet suggests that, at least in the course that he has designed, students devote substantial intellectual energy to understanding the premises and the workings of our adversary system, and that extensive work on the "critique" of the system, while laudable, need not take place in his course. Imwinkelried argues for an integration of substantive and process courses in order to give students appreciation for both the theoretical and for the marshalling of facts which support legal theories. Hyman demonstrates how this integration of teaching methodology actually works, and how the use of simulation promotes deeper understanding of legal doctrine, as well as facility in using doctrine and facts to develop theory.

Thus, in these four articles, we move from debate about the place of trial advocacy training within the university to arguments and examples which support the proposition that not only is the teaching of trial advocacy valuable in itself, it can and should be used to strengthen the comprehension and competence of students in substantive law courses. If utilized in the ways that Allen, Lubet, Imwinkelried, and Hyman suggest, trial advocacy teaching methodology forces students to think about more than doctrine; if properly utilized, trial advocacy teaching technique gives students a real feel for what it means to be a lawyer.

32 *Id.* at 773.

33 *Id.* at 774.

34 *Id.* at 775.

The focus of the Colloquium has been to criticize and to justify existing trial advocacy teaching methodology. The purpose of the endeavor is to attempt to reach a better understanding of the strengths and weaknesses of contemporary trial advocacy teaching technique. If adjustments have been required, those adjustments have been articulated as being internal to the trial advocacy teaching process. Thus Professor Lubet describes a course which responds to the call for more rigor and analysis by deemphasizing taped performances and by enriching his course with difficult ethical and strategic choices through the careful construction of factual scenarios.

These "internal" improvements may not be enough to create in students a real appreciation for the place of our adversary system in our society. Students may gain a good deal of Professor Lubet's "structural knowledge" regarding the litigation process, and they may have a better understanding of the relationship between doctrine and persuasive fact marshalling as the result of taking Professor Imwinkelried's and Professor Hyman's substantive law courses, but they still may emerge from law school as "compliant participants in injurious activities,"³⁵ or as nihilists viewing "everything from a technical perspective."³⁶ Professor Stephan Landsman asserts that existing trial advocacy curricula and live client clinics have made little headway in curbing these undesirable effects of traditional legal education. Landsman's solution to the shortcomings of traditional and clinical education is to present students with real case stories or narratives. These stories or narratives, Landsman argues, are effective in presenting students with the fact that law can do evil and that all lawyers need to be prepared to question authority. Such cases should "embody a conflict between a personal sense of justice or decency and a set of discordant social demands."³⁷ A study of the trial of Sacco and Vanzetti, for example, "may help young lawyers to focus on the conflict between what society seems to demand and the dictates of conscience."³⁸ Students who take Professor Landsman's course develop an understanding of "how fragile the system really

35 Landsman, *Satanic Cases: A Means of Confronting the Law's Inmorality*, 66 NOTRE DAME L. REV. 785, 787 (1991).

36 *Id.* at 787 (citing Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 257-58 (1978)).

37 *Id.* at 792.

38 *Id.* at 794.

is."³⁹

History can tell us how our justice system has performed in the past. Psychology may be able to assist us in understanding how the system works now. In his article, *Turning Practice into Progress: Better Lawyering Through Experimentation*, Professor Michael Saks proposes a plan for "marrying the art of trial advocacy with a methodology for systematically testing ideas about advocacy."⁴⁰ The reason for proposing such a plan is that "traditional" NITA style critiques of lawyer performance are based on perceived wisdom that is not tested. Professor Saks notes that some empirical studies of the trial process have been done, particularly in the area of jury behavior, but he notes very aptly that these studies have been done

more often in the service of the development of legal policy or basic learning, rather than trial tactics. Thus, we have two lines of effort that have not yet crossed: the trial practitioner's undeveloped taste for testing and the social scientist's research that has rarely been aimed at answering questions of tactics or strategy.⁴¹

Professor Saks suggests that trial advocacy teachers and NITA test the efficacy of their precepts in the classroom through the use of controlled experiments in which students would be directed to use, or not to use, certain techniques. The effect of the use or nonuse of these techniques would then be assessed utilizing mock juries. Although the idea of utilizing trial advocacy and NITA courses to gain more concrete knowledge of what is, and what is not, effective certainly has appeal, Saks warns that "[t]he growth of powerful knowledge is likely to confer a systematic advantage to some clients and some interests over others, and contribute to more exaggerated inequalities in legal services than already exist."⁴² Professor Saks concludes that this danger could be diminished if an organization like NITA took the lead in disseminating such information.

One problem that Professor Saks does not explore is just how the research and teaching agendas of law school trial advocacy courses and CLE programs could be successfully integrated. In constructing any experiments along the lines suggested by Profes-

39 *Id.* at 798.

40 Saks, *supra* note 10, at 801.

41 *Id.* at 806 (footnote omitted).

42 *Id.* at 811.

sor Saks, it will be important to integrate the teaching and the research agendas, in order to ensure that the course meets students' educational needs. But the problems inherent in such a marriage of research and teaching should not preclude experimentation like the kind proposed by Professor Saks. In a law school course for example, students might well learn more about the efficacy of certain practices from the reactions of jurors than from the anecdotal observations and criticisms of faculty. In CLE NITA courses, the same might be true, and some time might be devoted to testing NITA pedagogy utilizing mock juries who would hear portions of direct examination rather than confining their use to the full trial segments of such courses. The participation of research psychologists in the design of law school and CLE courses might well produce significant findings.

The theme that appreciation of the existence and the genesis of facts is crucial to lawyering is developed by Professor Abraham Ordover. Professor Ordover notes that various studies of the legal profession demonstrate that fact gathering and analysis were the most important skills for the practicing lawyer to possess.⁴³

Professor Ordover, in his blueprint for the 90s and beyond, suggests a course be given during the first weeks of law school that would focus on fact development and fact analysis. He also describes a course called pretrial litigation in which there are no canned facts, just a client, an opposing party, two lawyers, and witnesses. In this context students experience both the discovery and invention aspects of lawyering referred to by Professor Hyman. Professor Ordover suggests that this teaching methodology be employed in substantive law courses, particularly during the third year when students are inclined to give relatively little attention to their traditional law school courses.

VI. CONCLUSION

Those of us who have been students and teachers in NITA-style trial advocacy courses remember one of the first admonitions given to incoming students: the process of learning by doing and critique places students in a threatening position. NITA teachers exhort students to be open to constructive criticism. In this Colloquium, NITA teaching methodology is the student, and the pre-

⁴³ See Ordover, *Teaching Sensitivity To Facts*, 66 NOTRE DAME L. REV. 813, 814-15 (1991) (discussing F. ZEMANS & V. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981)).

senters are the teachers. The articles contained in this Colloquium suggest some new directions for trial advocacy teaching. We offer these suggestions in the spirit of constructive critique. For the most part these critiques recommend supplementation, and not an overhaul of the NITA method. We hope this Colloquium, and the further reflections of lawyers and scholars that undoubtedly will follow, will stimulate the kind of energy and innovation that has characterized NITA and the teaching of trial advocacy during the last twenty years.

