Trial advocacy training in the United States

Tell me, I'll forget.
Show me, I'll remember.
Involve me, I'll understand.
- Chinese Proverb

By Willem H Gravett and Conrad van Loggerenberg, New York State Bar

1. Introduction

It used to be said that trial lawyers are born, not made. You either have it, or you don't. To this day, popular culture in the United States portrays courtroom advocacy as an *art* that can only successfully be mastered if it is your birthright to do so. On television, successful trial lawyers can master voluminous files, converse easily with experts in every field, hold courts spellbound with the story-telling skills of a prize-winning novelist and the performance skills of a veteran actor, and have the unerring intuitive ability to ferret out lies.

In the real world of modern American law practice, we know that very few trial lawyers are born. Most are made. Although trial advocacy is both a skill and an art, it is a skill much more than it is an art. Artistry in advocacy only becomes possible after the fundamental skills have been mastered.

Social uprising and the peak of the Civil Rights Movement were the hallmarks of the 1960s in America. The prevailing dogma of rebellion inspired law students (and some professors) to demand more practical and relevant courses of instruction. The new generation of legal practitioners debunked the myth that trial lawyers can only learn through trial and error – which usually meant the *client's* trial and the *lawyer's* error. Students demanded to receive formal instruction that would equip them to handle the rigors of the courtroom and of the attorney-client relationship.[1]

The mounting pressure from students, faculty, and organisations such as the Council on Legal Education for Professional Responsibility (CLEPR), left law schools with no alternative but to offer courses that would teach students skills such as interviewing, counseling, negotiation, and trial advocacy. The early 1970's heralded the birth of the first nationally recognised, coherent methodology for teaching trial advocacy with the founding of the National Institute of Trial Advocacy (NITA) in 1972 in Boulder, Colorado.[2]

Since then, the burgeoning number of trial advocacy programs offered by law schools and other organisations has become an integral component in both the academic training of law students and the continuing legal education of practitioners. Today, there are a multitude of organisations that promote formal trial advocacy instruction in the United States. Most notably, these include the American Mock Trial Association (AMTA); the National Board of Trial Advocacy; and the American Trial Lawyers Association.

The future of trial advocacy training in America promises even more refined methods of instruction, tailored to meet the ever-increasing demands of trial practice. The efficacy of trial advocacy training techniques are re-evaluated on a continuing basis in order to adapt to new developments in social norms, trial procedure and practice, and new technological developments.

2. The relevance of trial advocacy education

At its core, trial advocacy is simply the art and skill of persuasion. But trial advocacy is more than making a grand closing argument that causes the fact-finder to adopt a radically different viewpoint. The underlying principle of good trial advocacy is the ability to develop a coherent and logical *theory* of the case. A case theory is the vehicle through which the facts of a case are conveyed as a structured and credible whole. The hallmark of trial advocacy training in the United States is a heavy emphasis on the development of a case theory, above and beyond the typical technical skills, such as asking questions and making speeches in the form of closing arguments.

Unfortunately, the concept of 'trial advocacy' in the United States is still most frequently associated with trial attorneys and courtroom practice. The prevailing perception is that trial advocacy training is an educational resource useful exclusively for the purpose of receiving instruction on how to conduct oneself in a courtroom. However, viewed in a different light – as a holistic skill – effective trial advocacy is not only useful to trial lawyers. It is an integral skill upon which any attorney can, and should, rely when acting in any representative capacity and during every interaction with clients.

'The highest compliment that can be paid a lawyer is to say, "He is a good trial lawyer." ' These words were written more than forty-five years ago by attorney Roland Boyd of McKinney, Texas, in a letter to his son offering tips on how to succeed as a lawyer.[3] As a seasoned general practitioner in a small town, Mr. Boyd recognised the funda-

Willem H Gravett BLC *cum laude* (1994) LLB *cum laude* (1996) Pret LLM *summa cum laude* (1998) Notre Dame and Conrad van Loggerenberg BCom (2006) LLB *cum laude* (2008) NMMU LLM Duke (2009) are members of the New York State Bar. Willem Gravett is a founding partner of and Conrad van Loggerenberg is an associate at Gravett & Gravett, a boutique law firm in Mount Kisco, New York, that focuses on matrimonial litigation. Willem completed trial advocacy training at the National Institute of Trial Advocacy (1998) and the American Bar Association's Family Law Trial Advocacy Institute (2003). Willem was admitted as an advocate in 1997 and Conrad in 2008. They can be reached at 100 South Bedford Road, Suite 340, Mount Kisco, New York 10549, or at wgravett@gravettesq.com and conrad@gravettesq.com respectively.

mental truth that trial advocacy is an art and skill that transcends the four walls of the courtroom. Every legal practitioner does, in some way and at some time, use the skills of advocacy; skills such as fact analysis, legal integration and persuasive presentation; skills that form the educational core of any good trial advocacy course.

Even the technical skills of trial advocacy, such as courtroom etiquette and demeanour, phrasing questions to elicit favourable responses and making effective oral presentations, transfer readily to the daily work and skill sets required in both the legal profession and in the business world. Trial advocacy courses, especially when taught to law students, equip students with transferrable skills upon graduation that they can use and rely upon from the moment they enter the profession.

NITA, the organisation that has pioneered the concept of trial advocacy training in the United States, has created an effective method for teaching these required skill sets. Its method has been adopted and implemented by law schools and Bar Associations alike. Its method and programs are still considered highly effective, although law schools have progressively been developing their own methods and programs through which they provide trial advocacy training.

3. The NITA method

NITA pioneered a new way of teaching law. Although its teaching method seems perfectly logical to American trial lawyers today and we take the method for granted, before NITA's inception there simply was nothing like it.

By the 'NITA model' we mean a three-pronged teaching method. First, students receive a formal lecture by an attorney who is not only a seasoned practitioner, but also someone who has received formal trial advocacy training. Secondly, the participants perform the skill, for example an opening statement or a cross-examination. However, more importantly than merely practicing the skill, the students are critiqued. The third step in the method entails a demonstration of the skill by an experienced trial attorney.

The primary trial skills emphasised in NITA programs may be grouped into three distinct categories: (1) question formation; (2) witness control; and (3) persuasive presentation. Successful completion of the program requires participants to be able to ask proper questions, ensure that they receive the desired answers, and arrange their examinations and arguments for maximum persuasive value. These are by no means simple skills to master, and, as stated, it is a method of teaching that has transcended all prior notions of what trial advocacy training should consist of.

However, the NITA model is still predominantly focused on presentation-based skills and the corresponding parts of a trial. Law schools, on the other hand, enjoy more freedom in their teaching methods and are not as constrained to adhere to the (now traditional) NITA model.

4. The law school model

As the NITA method made abundantly clear, 'teaching-through-doing' is an effective method to learn any skill. It reminds of the story about the visitor to New York who asked, 'How can I get to Carnegie Hall?' The answer: 'Practice, practice, practice!' The development of a skillful advocate is premised on the same principle of practice and repetition.

American law schools take a Socratic approach to teaching. This method teaches students legal analysis by requiring them to extract legal principles from reading cases, and then to apply those principles to analogous fact patterns. Critics of the Socratic approach point out that it teaches legal principles in a way that becomes too linear, and students thereby lose sight of the larger framework within which all of the principles interact.

To avoid this pitfall in the teaching of trial advocacy, law schools have generally embraced a teaching method that emphasises what scholars have dubbed 'sustained reflection.' [4] The goal is not simply to assimilate a serious of technical skills, but rather to develop a holistic skill set which is both practical and routed in a thorough understanding of the underlying principles.

Law schools have strengthened their offering of practical skills-based training considerably by the addition of specialised courses to their trial advocacy repertoires. These additions include, among others, courses in interviewing, counseling, negotiation, pretrial practice, appellate advocacy, and a myriad of courses in alternative dispute resolution. In addition to classes, law schools offer students the opportunity to participate in 'real-life' situations through various clinics and internships, such as working with the Public Defender's Office, State Attorney's Office, county and city governmental offices, or internships with federal or state judges.

Apart from the formal instruction that is on offer within the law school itself, law schools also offer students the unique opportunity to practice the advocacy skills that they have been taught through a variety of regional, state and national competitions. These competitions include Mock Trial, which promotes training in trial advocacy by providing students with a forum to exercise and demonstrate their skills and knowledge of evidence, trial techniques, and strategy. Each Mock Trial competition consists of a fact pattern involving either a criminal or civil issue. Based upon the given fact pattern, students prepare for and conduct a simulated trial from pretrial motions through closing arguments. Practising lawyers and judges serve as the presiding trial judge and jury, and score students' performances on such criteria as whether the student-team presented a cohesive theory of the case, developed direct examination testimony in an interesting and coherent fashion, effectively controlled the witness on cross-examination, exhibited knowledge of evidentiary rules in making or meeting objections, and expressed such knowledge in a clear and succinct manner.

American law schools also offer courses colloquially referred to as Moot Court, in which students write an appellate brief to either a United Sates Court of Appeals or the United States Supreme Court, based upon a hypothetical set of facts and a lower court decision. The Moot Court team of one law school then participates in oral argument competition against other teams before a panel of attorneys and judges. At prestigious law schools, these judges have often included presiding United States Supreme Court Justices.

Law students also have the opportunity to participate in the American Bar Association's Negotiation Skills Competition. Students are given a set of facts known to both sides, and a separate set of confidential facts and confidential instructions from their client. The participants then negotiate before a group of attorneys acting as judges in an attempt to reach a solution to the problem. The students are judged on their negotiation style, skills and strategy.

5. Training in appellate practice

Training in appellate practice advocacy skills is perhaps the weakest link in the chain of otherwise first-rate advocacy training programs in the United States. Traditionally, and specifically within the law school context, little time has been devoted to the training of advocacy skills that relate specifically to appellate practice. Trial advocacy and advocacy in an appellate setting is most often viewed as two distinct forms

of advocacy, with the required training for each as equally distinct.[5] This fragmented view is the result of the 'super specialisation' that has permeated modern American law practice. Trial advocacy and appellate advocacy have developed as two distinct practice areas. However, being a competent litigator at the trial level often necessitates competency in appellate practice. The effective trial lawyer always anticipates the likelihood of an appeal that may follow the outcome of litigation and conducts the trial accordingly. In a very real sense, the possibility of a future appeal impacts strategy at the trial level. The trial lawyer has to ensure that potentially appealable issues of law, procedure or judicial discretion are adequately preserved and reflected in the trial record. Such competency necessitates procedural knowledge of the appellate court system.

With regard to the essential components of appellate litigation skills as described above, it is clear that the traditional appellate advocacy training programs in the United States provide almost none of the specialised knowledge and skills that are essential to an appellate litigator. These programs usually treat appellate litigation as a mere two-step process – writing a brief and making an oral argument. Because traditional appellate advocacy programs lack a realistic appeal record they do not aid the participant in the development of that skill that is fundamental to appellate practice: building a case out of a trial record. The issues that are argued in appellate advocacy training programs are usually abstract legal questions without factual content. And, of course, it is factual content upon which most appeals are decided.

Traditionally, Moot Court competitions have received great deference as training vehicles for appellate practice. However, Moot Court competitions are merely extensions of the existing law school appellate practice programs and are inherently deficient. They usually do not require knowledge about the institutions or the substantive or procedural law of the appellate process, or use as the basis for the case to be argued a realistic record from which participants must construct their case. As a result of these deficiencies, Moot Court competitions are not nearly as effective in improving the competency of appellate litigators as is generally believed. The primary focus of these competitions must be shifted away from the development of legal analysis and reasoning skills and basic writing and public speaking skills, to providing the specialised knowledge and skills required for real life appellate litigation.

6. Conclusion

Trial advocacy training in the United States, whether within the law school context or in the context of external education such as Continuing Legal Education programs, is a continuing, ever evolving process. A symbiotic relationship exists between traditional legal education and the practical elements of trial advocacy training. The guiding principle of American trial advocacy training is that the technical skills of trial advocacy cannot be mastered without a thorough understanding of the underlying principles that dictate how those techniques are to be implemented. Likewise, because of the very nature of the practice of law, whether in the courtroom or the boardroom, it is generally recognised that instruction in all legal courses and programs can benefit from a substantial measure of practical implementation of the substantive knowledge learned. For trail advocacy training programs in the United States to flourish, reforms and additions to trial advocacy training must recognise and value the effective elements of traditional legal education techniques, while advancing the form and substance of trial advocacy education. This can only be achieved through a coherent effort by all the players involved in advocacy training in the United States – law school faculty, practicing lawyers, judges, governmental agencies, continuing legal education organisations, and students.

Endnotes

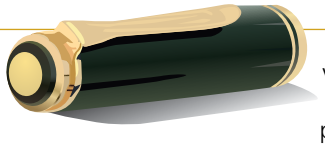
[1] Thomas F Geraghty 'Foreword: Teaching Trail Advocacy in the 90's and Beyond' (1991) 66 *Notre Dame L. Rev.* 687, 692-693.

[2] www.nita.org (last visited June 12, 2010).

[3] When Texas State Bar officials read the letter, they prevailed upon the elder Boyd to allow the *Texas Bar Journal* to print it. Boyd agreed, and his letter appeared in the November 1962 issue.

[4] Steven Lubet 'Colloqium: Advocacy Education: The Case for Structural Knowledge' (1991) 66 *Notre Dame L. Rev.* 721, 735.

[5] Committee on Appellate Skills Training 'Appellate Litigation Skills Training: The Role of the Law School: Report and Recommendations of the Committee on Appellate Skills Training Appellate Judges' Conference Judicial Administration Division American Bar Association' (1985) 54 *U. Cin. L. Rev.* 129, 137 See generally Michael Vitiello 'Symposium: Teaching Effective Oral Argument Skills: Forget About the Drama Coach' (2006) 75 *Miss. L.J.* 869.



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Invitation to write

At trial, one of the first things a prosecutor and defense attorney must do is the selection of jurors for the case. Jurors are selected to listen to the facts of the case and to determine if the defendant committed the crime. Twelve jurors are selected randomly from the jury pool (also called the â€œvenireâ€), a list of potential jurors compiled from voter registration records of people living in the Federal district. When selecting the jury, the prosecutor and defense attorney may not discriminate against any group of people.Â It is the government's responsibility to prove the defendant committed the crime as detailed in the indictment. The fact that a defendant did not testify may not be considered by the jury as proof that the defendant committed the crime. The defense may also waive his case. Trial Advocacy. A lawyering skills course, providing focused study and practical training in the overall skill of conducting a jury trial. Weekly readings, discussions, and demonstrations of the various trial skills from opening statements to summations. The heart of the course lies in the simulation exercises performed by students in small sections with professors who are themselves skilled trial advocates. The course meets twice a week, once in a large lecture/demonstration meeting, and once in a small performance section. Each week is devoted to a separate skill, which is discussed, developed, and demonstrated at the large class meeting, and then performed by students through simulation exercises in the small section meeting. For foreign citizens who want to live permanently in the United States. Read More. Visa Waiver Program. The Visa Waiver Program (VWP) allows citizens of participating countries* to travel to the United States without a visa for stays of 90 days or less, when they meet all requirements. Are You Eligible? Travel & Tourism in the U.S.Â The expert facilitators from the National Institute for Trial Advocacy (NITA) include Doris Cheng, Director, Michael and JoAnne Roake, Cynthia Goode Works and Judge Teri Jackson. Delivering remarks at the opening were Dina Abaa-Ogley, Director of INL at the U.S. Embassy; JoAnne Richardson of the NSCS; Israel Khan, S.C. Director of LAAA; Farzana Nazir-Mohammed of the Ministry of the Attorney General and Legal Affairs and Cheng. This comprehensive advocacy training approach equips students with the lawyering skills needed to be prepared advocates for every legal career. Skills Development. At Cumberland School of Law, students have opportunities for realistic jury trial training above and beyond most law schools. The entry-level trial advocacy course is basic skills in trial advocacy. In this class, students master the basics of each component of a trial. A full-time faculty member teaches students how to perform each skill. Outstanding guest attorneys provide demonstrations. Extensive hands-on student exercises in classes of eight students follow each week. Students practice and perform these skills until they are mastered through bench and jury trials. In many trial advocacy courses, students argue cases before mock judges and juries and may even compete in national or regional mock trial competitions. These are the top law schools for trial advocacy training. Each school's score reflects its average rating on a scale from 1 (marginal) to 5 (outstanding), based on a survey of academics at peer institutions.