GREATER THAN THE SUM OF ITS PARTS:
INTEGRATING TRIAL EVIDENCE
& ADVOCACY

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I. INTRODUCTION

The recent past has seen a spate of curricular experiments in legal education,1 perhaps as a response to the MacCrate Report,2 but more likely merely accelerated by its concern with the inadequacy of the standard curriculum,3 especially with respect to the inculcation of "skills and values."4 In the first year curriculum, these innovations often take the form of introducing the skills of legal writing and research into traditional doctrinal courses.5 More recently, curricular

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We are grateful to the students of the first Trial Evidence & Advocacy course offered at the University of Maryland — as bright, conscientious and spirited a group of students as we have had the opportunity to teach and learn from. We owe special appreciation to Beth N. Beam, Esq., class of 1999, Miles & Stockbridge, P.C., Frederick, Maryland and Kristen N. Keiser, Esq., class of 1999, Goodell, DeVries, Leech and Gray, L.L.P., Baltimore, Maryland, for their dedicated assistance in helping us to discover what we wished to say and for helping us to say it better. Finally, we thank Dennis Mitchell, class of 2000, Piper & Marbury, L.L.P., Baltimore, Maryland and Erin Hahn, class of 2002, for their invaluable research assistance.


4 MacCrate Report, supra note 2.

5 See, e.g., Joseph W. Glannon et al., Coordinating Civil Procedure with Legal Re-
reform has included the introduction of "lawyering" materials in courses in the first year and beyond.

The University of Maryland School of Law has been one of the pioneers in these efforts to reform the traditional curriculum. As early as the early '70s we integrated the typical first year course in Legal Method/Legal Writing with the standard first year courses, the integrated course taught by full time tenure track faculty. More recently, we added to the curriculum a series of courses, including standard first year courses incorporating live client clinical experiences. Thus, Maryland has been hospitable to efforts at curricular reform, especially those designed to integrate legal theory and the study of doctrine with their application in the world of law practice.

This article reports on another such experiment, a course in Trial Evidence and Advocacy, which combines the basic Evidence course with the basic course in Trial Advocacy. The remainder of Part I provides, by way of introduction, our reasons for undertaking this project. Part II provides an overview of the theory around which we designed

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7 See generally Paul Barron, Can Anything Be Done To Make the Upper-Level Law School Courses More Interesting?, 70 TUL. L. REV. 1881 (1996); Burns, supra note 3; Merritt & Cihon, supra note 1; James E. Moliterno, The Legal Skills Program at the College of William and Mary: An Early Report, 40 J. LEGAL EDUC. 535 (1990); Eleanor W. Myers, Teaching Good and Teaching Well: Integrating Values with Theory and Practice, 47 J. LEGAL EDUC. 401 (1997); John Sonsteng et al., Learning by Doing: Preparing Law Students for the Practice of Law, 21 WM. MITCHELL L. REV. 111 (1995).


9 Cf. Robert B. Burns, Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism, 58 LAW & CONTEMP. PROBS. 37, 42 (1995) (discussing a similar course, using some of the same materials, that has been offered at Northwestern University School of Law); Edward Imwinkelried, On Achieving Synergy in the Law School Curriculum, 66 NOTRE DAME L. REV. 739, 740-41 (1991) (discussing an integration program); Steven Lubet, What We Should Teach (But Don't) When We Teach Trial Advocacy, 37 J. LEGAL EDUC. 123, 125 (1987) (setting forth a similar, but more ambitious, proposal).
the course, the goals we hoped to achieve and the limitations of simulated advocacy courses. Part III outlines the design of the course, and explains how we attempted to integrate theory and practice. Part IV includes our reflections on our experiences teaching the course. Part V offers a brief conclusion.

Much has been written about the decline in advocacy skills among lawyers. In 1973, Chief Justice Warren Burger, during his now famous, John F. Sonnet Lecture at Fordham University, stated, "[t]oo many lawyers come into our courts today with only a diploma to justify their claims to be advocates. They are untrained and unadvised in the immensely practical work of litigation."10 The following year, Chief Judge Irving R. Kaufman, and the members of the Judicial Council of the Second Circuit set about to examine this problem.11 They concluded that there was a need for improvement in the quality of trial advocacy; that the deficiencies in trial advocacy were due, in part, to lack of knowledge of the basic fundamentals of trial advocacy,12 and that "there were certain courses without which the probability of competence in advocacy was extremely remote. These are: 1. Evidence; 2. Civil Procedure, Including Federal Jurisdiction Practice and Procedure; 3. Criminal Law and Procedure; 4. Professional Responsibility; and 5. Trial Advocacy."13

In 1979, The Final Report of the Committee to Consider Standards for the Admission to Practice in the Federal Courts to The Judicial Conference of the United States was published.14 That Committee recommended to the American Bar Association that it consider amending its law school accreditation standards to require that all law schools provide courses in trial advocacy and that the bench and bar be encouraged to support law schools in achieving the goal of providing quality trial advocacy training to all students who want it.15

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12 See 1975 Report, supra note 11 at 166-67.

13 Id. at 168 (emphasis added). Interestingly, the list includes only the relatively traditional fare of the standard law school curriculum. What is missing from this list (as well as from our course) is student experience with real clients troubled by real problems. See Part II B, infra.


15 Id. at 230 ("survey showed that 15 of 19 chief judges . . . are in favor of requiring law schools as a condition of accreditation, to provide trial practice courses to their students who want them").
Trial advocacy existed in the apprentice system long before it became part of any law school curriculum; however, it was criticized because of its emphasis on practical skills and disregard of scholarship. When legal training left the apprentice system to join the academy, emphasis shifted dramatically from the practical to the theoretical. Since then critics, like Justice Robert Jackson, have noted that "if the weakness of the apprentice system was to produce advocates without scholarship, the weakness of the law school system is to turn out scholars with no skill at advocacy." The American Bar Association told law schools that they should prepare their students to be better advocates, but they didn’t tell them how to do it. Today, many law schools offer courses in trial advocacy. A new body of jurisprudential study — reflecting opinions among legal scholars about what trial advocacy is, why it is important as a law school offering and how it should be taught — continues to develop. Some commentators stress the importance of technical skill and techniques, while others stress analysis and theory.

In the midst of the continuing debate and tension as to which is preferable, we share the view of others, a growing group, that both are equally necessary to produce thoughtful and skilled practitioners. We postulate that theory and practice are both interdependent and co-dependent. This view, we believe, further enhances understanding of both legal theory and practice.

We were of the belief that Evidence and Trial Advocacy were essential to advocacy competence. As a result we began with two

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18 See Ohlbaum, supra note 17, at 9 (lamenting that “for many, the case method and skills training were considered mutually exclusive in a law school curriculum”).


20 See Ohlbaum, supra note 17, at 12-16 (discussing models and proposals for teaching trial advocacy including integration of topics ranging from legal ethics to systemic reform).


22 See Ohlbaum, supra note 17, at 10 (“[p]rinicples of law . . . become potent tools when the advocate supports them with a factual foundation and propounds them with a persuasive argument.”). See also Lubet, supra note 7, at 126 (contending that forensic skills must be learned together with procedure, evidence and general litigation strategy).

23 1975 Report, supra note 11, at 168. Though essential, this background is hardly suffi-
separate courses, Evidence and Trial Advocacy; we ended, however, with one course, one concept and one understanding. The whole proved to be greater than the sum of its parts.

II. THEORY OF THE COURSE

A. Goals

The course was designed to assist students in acquiring a mastery of evidence doctrine, not merely as verbal knowledge, but as it is used operationally,24 and to understand the connections between mastering the law of evidence and skill as a trial lawyer.25 Indeed, one of the satisfactions of teaching the course was observing students’ abilities begin to evolve from saying what the law is to using what they had learned. We hoped to develop in the students a switch from an attitude of “what do we know” to one of “what can we do with this” — what has been called “knowledge for action.”26 In this model, “legal knowledge takes shape in the context of its application and evaluation; law only has shape in its application and usage.”27 Donald Schön makes a strikingly similar point, characterizing much of professional practice as a process of “knowing-in-action,” in which thinking and doing are not divisible — “the knowing is in the action.”28

In this course, we aspired to go beyond

[t]he limited focus of most law school classes on derivation of rules and policy considerations from appellate decisions[, which] cannot begin to approximate the thinking process of the competent attorney. Teaching students to think like lawyers loses much of its meaning if that thinking is not placed in the context of what lawyers actually do.

If we are attempting to teach judgment as part of a good legal education, we must recognize that students cannot develop that skill

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24 Cf. Sonsteng et al., supra note 7, at 135 (describing “[a] teaching style where lecture is not emphasized and students are allowed to talk, move, experiment and debate”).

25 Cf. Burns, supra note 3, at 330 (describing a similar approach to the teaching of professional responsibility); Frank Maher, Ivory Towers and Concrete Castles: A Hundred Years War, 15 MELB. U. L. REV. 637, 644 (1986) (“Acting and thinking must go together — or both are futile.”); Nancy L. Schultz, How Do Lawyers Really Think, 42 J. LEGAL EDUC. 57, 64 (1992) (“Teaching students to think like lawyers loses much of its meaning if that thinking is not placed in the context of what lawyers actually do.”).

26 Julie MacFarlane, Assessing the “Reflective Practitioner”: Pedagogic Principles and Certification Needs, 5 INT’L J. LEGAL PROF. 63, 73 (1998). See also Burns, supra note 9, at 38 (“Meaning is use: Knowing that and knowing how are deeply intertwined.”).

27 MacFarlane, supra note 26, at 73. See also Burns, supra note 3, at 342 (“Meaning is use.”).

if we teach content without placing an equal emphasis on context. Thus, one of our principal goals for the course was to offer the students an integrated experience. The course was not designed as three credits of Evidence and three credits of Trial Advocacy, but as a single unified whole. Our hope was to weaken, if not obliterate, “the false dichotomy” between the academic and the professional that has stood in the way of curricular reform.

Additionally, we wanted students to begin to appreciate the skills of trial advocacy, such as opening statements and closing arguments, direct and cross examination, laying foundations, and making objections. We emphasized the importance of understanding doctrine as much as the importance of what students might think of as developing skills. We wanted students to appreciate both as equally important components of lawyer competence, not readily separable. Thus, both of us attended and participated in each class of the semester. We tried to avoid compartmentalizing our roles or the students’ work. The “evidence teacher” (Hornstein) acted as judge for most of the exercises, and the “trial advocacy teacher” (Deise) commented extensively on evidence issues. It was helpful that, although one of us has been principally a classroom evidence teacher and the other principally a clinical teacher, we have each taught both classroom and clinical offerings.

Although we usually agreed in our analyses of evidence law and in our approaches to trial advocacy, there were occasions when we took different positions. We feared that students might be confused by the lack of certainty, but hoped that they would realize that there are matters about which reasonable lawyers might differ. For most of the students on most of these occasions, that was indeed the lesson that they seemed to draw. Indeed, this turned out to be an important aspect of the students’ learning. Because we sometimes disagreed, it became clear to the students that a search for a single “right answer” was futile. They were forced to make their own judgments, and this in turn encouraged them to take greater responsibility for their own learning. They reported all this to us with some pride in their response

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29 Schultz, supra note 25, at 64. See also Boldt & Feldman, supra note 8, at 1142 (discussing the importance of offering courses that combine “law-on-the-books” and “law-in-operation”).
30 See MacFarlane, supra note 26, at 76; see also Schön, supra note 5, at 37.
32 See Schultz, supra note 25, at 57 (“At least one dichotomy still prevalent in legal academic circles — ‘skills’ versus ‘substance’ — ought to be banished from our thinking.”).
33 See Burns, supra note 3, at 353 (encouraging “teaching teams” that pair more academic teachers with clinical or practicing teachers).
to what they thought at the beginning of the course might be a troublesome lack of consistency. It was important, when we disagreed, for each of us to recognize explicitly the value of the other’s viewpoint. Indeed, the projection of our genuine mutual respect for each other as colleagues was, we believe, a critical component of the success of this sort of team teaching effort.

Finally, and perhaps most important to us, we wished to begin to develop in our students habits of mind that would allow them to learn from their own experiences, both in the course and later throughout their professional lives. Thus, for most of the work students did throughout the semester, they were at least encouraged, and more often required, to undertake critical analyses of their own performances. One need not go so far as Professor Goldfarb’s view that “[w]hat is important about a student’s critique is not so much what it contains, but that a student learns critical habits in the process,” in order to recognize the value of making self-reflection on one’s own performance a habitual part of professional practice. Reflection on one’s own performance has long been an integral part of clinical pedagogy.

B. Limitations

It is important to note both what the course did and did not attempt to do. This article and the course that it describes focus exclusively on the use of simulated cases to teach evidence and trial advocacy. Simulated cases can provide an adequate context for teaching and learning about evidence and trial advocacy, but there are limitations to their use that one should consider. First, “the trial”

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35 See infra Part III.F.


37 See Kovach, supra note 3, at 239.

38 See generally Robert Condlin, Learning From Colleagues: A Case Study in the Relationship Between “Academic” and “Ecological” Clinical Education, 3 Clin. L. Rev. 337, 339 n.3 (1997), citing Abbe Smith, Carrying On In Criminal Court: When Criminal Defense Is Not So Sexy and Other Grievances, 1 Clin. L. Rev. 723, 728 (1995); Tarr, supra note 34, at 967; Zeigler, supra note 34, at 576-79. Of course, in addition to our regular planning and review sessions throughout the semester, this article represents our own reflection on our experiences of the semester.
represents only one stage of the process of representation. For many clients it is the last stage of a process that begins when the lawyer first interviews her client and continues until final disposition.\textsuperscript{39} Attorney and client work together to identify and understand the client's goals and to determine how to achieve those goals.\textsuperscript{40} Understanding and fulfilling the client's goals becomes, in turn, the attorney's primary goal.\textsuperscript{41} The relationship between attorney and client can last weeks, months or years, depending upon the nature of the case. As the relationship develops, lawyers expect their clients to be cooperative and to want to help themselves as much as possible.\textsuperscript{42} Clients expect their lawyers not merely to get results, but to get them in the least stressful, quickest, and least expensive way possible.\textsuperscript{43}

Lawyers and clients can achieve their goals in various ways, only one of which involves trial. Even when trial results in victory for the client, the victory may come at a high financial and emotional cost. Trials can move at a glacial pace, may be emotionally and financially expensive and still may not achieve the desired results. For these reasons, lawyers explore alternatives to trial.\textsuperscript{44} They attempt to settle their cases by negotiating with opposing parties and, sometimes, through the intercession of a mediator or arbitrator. When such attempts fail, trial may become necessary. Even after the trial has begun, the parties will continue to attempt to negotiate a settlement. For some clients, "going to trial" or "having their day in court," is the goal; for most clients, however, trial is a necessary evil. "Going to trial" means loss of control over the outcome of the case and, therefore, possibly, the inability to fulfill the client's goals, as well as increased emotional and financial cost to the client.\textsuperscript{45}

Because so many of the decisions lawyers make in the course of representation depend upon the client's goals, client participation is essential to having an effective attorney-client relationship and achieving a successful result.\textsuperscript{46} Every aspect of trial planning and preparation, from the development of the theory of the case to closing argument involves the client.\textsuperscript{47} Despite its importance to practition-


\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Id.

\textsuperscript{44} Gerald P. López, \textit{Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration}, 77 Geo. L.J. 1603 (1989).

\textsuperscript{45} Id.

\textsuperscript{46} Dinerstein, \textit{supra} note 40.

\textsuperscript{47} Much has been written about the importance of client involvement in the process of
ers, client participation is conspicuously absent from simulated cases. The absence of a real client with real problems or goals that may conflict with the lawyer's can lead the lawyer/student to greater dogmatism about case theories and trial strategies. This may be problematic when preparing and trying simulated cases, but it can be catastrophic when representing actual clients.

The absence of live client involvement was a substantial disadvantage when we began to discuss case preparation, investigation, trial planning and, especially, case theory development. As lawyers and clinicians, we long ago abandoned paternalistic notions of the lawyer in exclusive charge of the case, and we have come to rely upon our clients to inform decisions about goals, case theory and even trial strategy. We are not in the business of educating lawyers who are technically adept at the skills of litigation, but who fail to consider their clients' needs and goals.

Simulated advocacy courses typically ignore the critically important role of the client in the representation relationship, and we found it difficult to simulate the client's role in our simulated cases. Try as they might to be convincing witnesses, the actors playing the role of each client simply were not the real thing. They proved to be convincing witnesses because they were good actors, but they merely portrayed the role that the lawyer scripted for them as witnesses. They could not offer, as an actual client might, reasons to prefer one theory over another. None of them ever pushed the student/attorney to pursue the theory that was not the most logical in favor of one that satisfied other needs of the client. Sometimes, reasons that affect the client's goals have little to do with the specific legal issues in the case. In the simulated cases that we used, the student attorney determined (assumed) what the client's goals would likely be.

Even were we to overcome the problem of client involvement, we would remain concerned, as well, that simulated cases which focus exclusively on litigation aspect of the representation minimize or ignore altogether the importance of pre-trial considerations such as


49 Id.


52 See Miller, supra note 48.
counseling, negotiation and mediation. While we stressed the importance of this pre-trial process, the course was, after all, about lawyering at trial; related topics are the principal objects of study elsewhere in the curriculum. Not every course can teach everything a well-educated lawyer needs to know, and our course description was clear about what the course intended to accomplish and what it did not. We remain concerned, however, that our students might lack the time or opportunity to explore these critically important related matters, despite strong curricular counseling. In an effort to disabuse our students of the notion that representation is only about “going to trial” and that trial is only about litigation skills, we encouraged them to take courses which focused on counseling, negotiation and mediation, as well as other pretrial matters.53 More important, we urged them to participate in one of our many clinical law programs (whether litigation, legislative or transactional).54

Trial advocacy courses that use simulated cases, we believe, provide an important educational experience to law students, but this experience should never be confused with the experience students receive when they represent actual clients in clinical law programs. The clinical law experience differs from simulation experiences in many ways, most of which will be obvious to the reader. Clinic students represent actual “clients” (individually or as representatives of corporations, community associations and other transactional relationships), whereas students in the trial advocacy class do not. Clinic students spend a considerable portion of their clinic experience developing understanding about “the client” and the attorney-client relationship. The client is very much involved in the client-centered clinic experience and participates throughout the representation process.

Despite our stated concerns about the absence of client participation in trial planning and theory development, we believe that students should not undertake to represent actual clinic clients in a litigation setting until they have first mastered the law of evidence and successfully completed a course in trial practice. Clinical programs provide a logical sequence for students who have taken the basic courses in evidence and trial advocacy. They provide a context for the students to apply the doctrinal knowledge and litigation skills and

53 Maryland offers courses in Pre-Trial Civil Litigation and Trial Planning as well as the more “traditional” offerings in Counseling &Negotiation and Alternative Dispute Resolution. There is also a clinical offering devoted to Alternative Dispute Resolution.
54 Among the advantages of a small class that meets for many hours each week is the close relationships that develop among the students and between students and teachers. Curricular and career advice is more easily given and more seriously received than might be the case in a more typical class. Students sought our advice in these matters, and we were not reluctant to share our views.
strategies they learned in the classroom. As important, they provide an opportunity for students to understand the critical role of the client in the broader process of representation. The clinic experience builds upon the foundation of the simulated experience by stressing what is typically absent in simulated advocacy courses — the importance of the client and the broader context of litigation. For these reasons, we strongly encouraged our students to participate in a clinic program.

III. INTEGRATING EVIDENCE AND ADVOCACY

A. Course Structure

We determined that the way in which we traditionally taught our respective courses in Evidence or Trial Advocacy would not be adequate for our purpose. As we searched for ways to approach these subjects, we looked for common ground. The common ground, quite naturally, proved to be the "Theory of the Case." We imagined the trial as a spiked wagon wheel. The hub of the wheel represents the theory of the case. From this central hub extends each of the spokes of the wheel, each spoke representing a stage of the pre-trial and trial process: discovery, investigation, pre-trial motions, jury (un)selection, opening statement, etc. The rim of the wheel represents the closing argument, which binds the spokes to the hub. Each part of the wheel is interdependent and co-dependent on the other. A weakness in any part; hub, spokes or rim, and the wheel crumbles. Just as the spoke is not the wheel and the hub is not the wheel, neither is cross-examination or opening statement the trial. Like the wheel, the trial must be viewed as a whole, greater than the sum of its parts.

The attorney introduces the theory of the case to the judge and jury at the earliest possible moment, pre-trial motions or voir dire, and she repeats it through each phase of the trial until, finally, it is driven home during closing argument. In closing argument, the lawyer interprets the evidence that she developed during the course of the trial in order to convince the jury that her theory is more logical, compelling and persuasive than opposing counsel's. The theory of the case represents our best understanding of how the disputed and undisputed facts should unfold. It is the story we would like to tell the jury in closing argument.

The task of the lawyer is to traverse a path from the external world in which the facts occurred to the jury box. The facts support-

55 See generally Report on the Future of the In-House Clinic, supra note 51.
56 See Ohlbaum, supra note 17, at 25-26 (advocating the use of "case theory" in order to give students, inter alia, an avenue for framing cross-examination and other trial techniques).
ing the theory of the case must be carried along this path. But the path is studded with land mines — the exclusionary rules of evidence — that may prevent critical facts from emerging. The mines along this path do not self-detonate; rather they are detonated, or not, by opposing counsel making or failing to make proper objections. The story counsel is permitted to tell the jury at closing argument may be quite different from the story as it appeared in her original conception of her theory of the case. How much the story changes depends, in part, on how effectively counsel is able to negotiate the evidentiary minefield during trial. Mastery of evidence doctrine and the ability to apply evidence doctrine at trial may be thought of as a map through this minefield, helping the proponent of evidence avoid the mines and the opponent to know when to detonate them.

Informed by clinical education experience, we determined that theory of the case was the necessary and logical starting point for our course, just as it is the necessary and logical starting point for preparing for trial. As we began to visualize the relationship between theory of the case, the various stages of trial and the law of evidence, we began to develop a better understanding of the whole trial process. How to teach Evidence and Trial Advocacy as one became more clear.

Because we wished to demonstrate the ways in which evidence doctrine and the skills of trial advocacy need to be integrated in practice, we attempted to organize the course to reinforce that lesson. Often, this was not problematic. For example, in the same week, we taught the doctrine governing impeachment of witnesses and then required the students to impeach a witness in an in-class demonstration. Similarly, we taught the doctrine governing expert witnesses and then had the students lay the foundation for the introduction of expert testimony. In each instance, we required students representing the adverse party to offer objections to anything they regarded as improper. Students were expected to make the record throughout these exercises by proper objection, motion or offer of proof.

The difficulty of organizing larger units of material to emphasize the integration of evidence and trial advocacy proved more problematic, however. In keeping with our view of the centrality of the theory of the case to an understanding of both evidence and trial advocacy, our starting point on the evidence side was relevance and on the trial advocacy side theory of the case. These two topics naturally complement each other. But after that point, structure becomes more complicated. Ordinarily, the trial advocacy course would have introduced the topic of closing argument immediately after theory of the case as a vehicle for testing alternative theories; students would have been assigned to prepare and present a brief closing argument incorporating
their theories of the case. Such an exercise would have required students to identify evidentiary issues they would have to overcome to present their theory of the case. It would have required them to attend the filtering of facts through the rules of evidence to discover what facts would survive for jury consideration. Should the rules of evidence preclude the admissibility of certain facts essential to a student’s initial theory of the case, the student would need to identify an alternative persuasive theory more congruent with the admissible evidence.

But, unlike students in a typical Trial Advocacy course, who have already completed a basic course in Evidence, at this early point in the course our students lacked the knowledge of evidence law to understand its effect on their initial theory of the case. Instead, students returned to the theory of the case any number of times throughout the semester as new evidentiary impediments to their theories became apparent from their study of evidence doctrine. For example, many of the students’ initial stories depended on the character of one or more parties or witnesses. As they learned of the restrictions on the use of character evidence, they were forced to revise their theories. So, following the development of theory of the case immediately with closing argument was both inappropriate and unproductive: inappropriate because of the students’ lack of knowledge, and unproductive because it would have diluted the lesson that case theory must be influenced by the evidence admissible before the finder of fact.

Further, in the context of this course, we felt it important that students gain some early experience in witness examination. We thought that taking up direct and cross examination following theory of the case would provide a vehicle for students to test their theory while reinforcing their understanding of the relevance concept. Consequently, the trial advocacy assignments following theory of the case focused on direct and cross examination. Our expectation was that students would learn to identify which facts, elicited on direct or cross examination, were relevant to their theories of the case and would learn as well to object to the introduction of irrelevant evidence. Our hope was that students would be encouraged early in the semester to overcome their anxiety at making objections. As important, we wanted the students to understand the distinction between knowing when one may object under the rules and when one should object in order to advance one’s theory of the case. We sought to encourage a simultaneous understanding of doctrine and its effects on trial strategy.

On the evidence side, the topics of character, habit, and the other
Article IV rules\textsuperscript{57} seemed the natural continuation of the relevance principles with which the course began. Thus, the second unit of the course combined trial advocacy and evidence in the examination of witnesses with respect to character, habit, etc. Although this presented no apparent problems at the time, it left us with serious discontinuities toward the end of the semester. By mid-semester, students had been exposed to relevance/theory of the case, character, habit, standardized relevancy rulings, expert and scientific testimony/direct and cross examination. After the mid-semester trials, however, we were left with hearsay and privilege as the major doctrinal evidentiary matters to be covered and opening statements and closing statements as the major trial advocacy matters to be covered, with no apparent way to connect them.

Were we to offer the course again, we might opt to cover opening and closing earlier, in connection with relevance and theory of the case, perhaps adding a trial advocacy unit on objections (a matter that in hindsight we believe may have been slighted). Character, habit, etc. could have been covered in connection with these trial advocacy issues, perhaps including some motion in limine practice. We then could have reviewed this material later in the course when we introduced the direct and cross examination skills, reinforcing the doctrinal lessons. Alternatively, we might have divided direct and cross examination (or at least one of them) into two parts: a kind of preliminary look early in the semester, in connection with the character and expert witness material, with more advanced coverage of witness examination postponed until later. In any event, coverage of the hearsay rule and its exceptions without a corresponding trial advocacy segment on witness examination proved quite problematic. Essentially, it required us to abandon attempts at integrating the material during the last third of the course.

\textbf{B. Scheduling and Class Size}

The course was designed for students who had taken neither of its components, and students taking the course would not be permitted to enroll in either Evidence or any of the various Trial Advocacy courses offered at the law school. Registration favored second year day students, who were given a preference over other students wishing to enroll in the course.\textsuperscript{58} Thus, the course was designed as students' ini-

\textsuperscript{57} \textit{Fed. R. Evid. Art. IV}.

\textsuperscript{58} One of the important though largely neglected issues in modern legal education is the incoherence of the curriculum beyond the first year. Generally, first year courses are thought of as the "building blocks" or "foundation" of a student's education, but this is surely meant in doctrinal terms. As the nature of legal education has changed to encom-
tial exposure to the law of evidence and the craft of trial advocacy. We hoped that the course would also serve for a number of the students as a first step of a curricular track that would include placement in our Clinical Law Program and other such activities. As we expected, the course filled with second year day students.

The course ran for a single semester for six credits. It met over three days each week: on Tuesdays and Thursdays for seventy-five minutes each; and on Wednesdays for one hour in the morning and two hours in the afternoon, separated by a two-hour period during which no classes are scheduled at the law school. Our original notion was that we could do something with the class during the Wednesday morning session, require the students to prepare an exercise during the intervening two hours, and have them perform that exercise during the two-hour afternoon session. For one reason or another (reasons which remain unclear to us), the schedule rarely worked out that way. As a consequence, students sometimes felt that the Wednesday session was either too long or too fragmented or both. The five-hour block of time did come in handy, however, when we needed to schedule full trials; it enabled us to use Wednesdays as well as Saturdays and Sundays for these exercises.

One of the choices that confronted us as we planned the course was whether to offer it as a single semester six unit course or a full-year course with three units in each semester (but requiring students to take both semesters). We saw the advantages of the full-year op-

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59 See infra Part IV (discussing the positive effect this course had on some students who went on to participate in clinical courses and the law school's Trial Team).

60 Indeed, there was a considerable waiting list of students who could not be accommodated because of the size limitations we imposed on the course. Although we are both well-regarded teachers — Deise was voted teacher of the year for 1997-98 — we suspect the demand reflected student dissatisfaction with traditional teaching methods beyond the first year, especially in courses like Evidence, which are most salient in performative settings.

tion as providing students with more time for reflection on the materials and hence the opportunity for maturing judgments. On the other hand, the single semester option provided the benefits of immersion. Scheduling the class meetings for three consecutive days further heightened that sense of concentration. Moreover, because many of the students were involved in law journal or other co-curricular activities, they were taking only one or two other classroom courses during the semester. We believed all this allowed us to be more demanding of their time and energy than we might have been had we chosen the two-semester alternative.

We limited the class to twenty students, the standard enrollment in the Trial Practice course at the law school. Having a small number of students allowed us effectively to use in-class demonstrations as part of our teaching method.62 Having an even number of students allowed us to pair the students for the purposes of conducting mock trials.63 Among the benefits of small class size was the opportunity to develop closer professional relationships between students and teachers.64 Another benefit of keeping the course enrollment small was that it fostered a good deal of collegiality among the students. In order for the course to be most effective, it was imperative that the students not only get along well with one another, but also that they work together cooperatively, both in learning the evidence doctrine and in putting their doctrinal knowledge and advocacy skills into practice.

Because students learn new material and develop skills at different paces and in different modalities,65 we were concerned that we might encounter what is sometimes seen among law students — a competitive spirit so pronounced that it has the potential to inhibit effective learning. Such competition among some students often makes it difficult to meet the needs and/or demands of all the students — those eager to move ahead at a rapid pace and those that lag be-

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62 See infra Part III.C.1.
63 See infra Part III.F.
64 Cf. Robert S. Redmount, Law-Learning, Teacher-Student Relations and the Legal Profession, 59 WASH. U. L.Q. 853 (1981) (discussing the importance of teacher-student relations). Among the advantages of this close student-teacher relationship was the ability to influence students' curricular choices an to offer longer range career counseling. See supra note 54.
65 See David W. Champagne, Improving Your Teaching: How Do Students Learn?, 83 LAW LIBR. J. 85 (1991) (discussing different learning modalities and ways to approach them); Sonsteng et al., supra note 7, at 137-38 (noting that some students learn verbally while others learn orally, physically, or visually); Robert H. Thomas, "Hey, Did You Get My E-Mail?" Reflections of a Retro-Grouch in the Computer Age of Legal Education, 44 J. LEGAL Educ. 233, 241 (1994) (explaining that e-mail "permits students with a wide range of learning styles to express opinions and level criticisms more freely").
hind and struggle to keep up. Because we had decided to divide the class in half for the trials, pitting half the class against the other, as well as individual teams against each other, we were genuinely concerned that the competitiveness among the students might impede their learning.

We were pleasantly surprised, however, to find that the students deliberately engaged themselves in assisting their classmates with learning the doctrine at a more even or balanced pace. When some students had difficulty grasping a particular concept, other students would jump into the discussion with questions or attempt to restate a principle in a different way so as to facilitate learning by all. While some students were reluctant to admit their confusion or their struggle to grasp some of the more difficult material, other students were quite willing to speak up and confess their ignorance, to admit they just didn’t get it, or even to feign confusion on behalf of their fellow classmates whom they intuitively discerned were struggling to keep up.

As might be expected, nowhere was the students’ anxiety more pronounced than with the classroom demonstrations. Pushing the envelope of the dreaded and feared Socratic method, we required the students, from the first week of the course and throughout the remainder of the semester, to stand up before their peers and practice the various advocacy skills being taught. We required them to conduct opening statements, direct and cross examinations, and closing arguments. Students were expected to volunteer to do class demonstrations for the benefit of themselves and for the benefit of the others.

After a student completed her or his demonstration, the other students offered their critiques of the performance. To encourage a sense of comradery among the students we insisted that they begin their critiques by identifying those aspects of the performance they found positive or effective, and then to offer suggestions for how the student might improve. At first the students were a bit reluctant to offer their criticisms for fear of offending their classmates, but within a couple of weeks the students relaxed, and their intimidation seemed to subside in the interest of obtaining feedback, both positive and negative, about their performances.

This cooperative milieu was on display, for example, when students presented their initial theories of the case. What began as a series of presentations rapidly were converted by the students (with our enthusiastic support) into a series of brainstorming sessions that refined students’ initial notions. Students who disagreed about whether one theory was superior to another nevertheless contributed to the improvement of theories with which they disagreed. Indeed, students contributed to this process even in favor of those who were on the
other side of the cases they would be trying. And this brainstorming process continued through the semester as theories of the case had to be modified and refined to take account of newly learned restrictive evidentiary rules.

We encouraged them to be creative, to try new themes, new approaches or strategies, new techniques — to take chances. It was therefore important to sustain and create a classroom atmosphere that was demanding without being threatening. Many of the students did attempt to stretch their wings and often found themselves flattered by their colleagues and by us for their creativity and willingness to be innovative.66

One of the most memorable experiences of the semester involved a student asked to present an early version of her closing argument for one of the trials. The student had been reluctant to volunteer throughout the semester, not from any lack of preparedness or ability, but from a basic fear of speaking in front of an audience. We had been encouraging students not to rely on notes, but we had permitted them to do so. When it came her turn to perform, she relied on her notes, reading the words on the page haltingly and stumblingly rather than engaging her audience with her argument. One of us reached over and quite literally yanked away her notes. There was an audible collective intake of breath from the rest of the class as she was forced to go forward relying only on what was in her head. Although she stumbled a bit initially and became somewhat embarrassed and upset, she soon recovered and presented a quite creditable closing argument.

We thought that if she succeeded without the notes — as she did — her confidence would take a measurable jump upward and others in the class would have a graphic demonstration of the improvement that comes with speaking without reliance on a written text. That is precisely what happened. Had she done less well, we thought, it would have been perceived as our fault for making "unreasonable" demands. Thus, the risk to the student was minimal, and we had, we thought, built up enough trust and good will with the students to overcome any sense that we were acting harshly. We were convinced that she would fare far better without the crutch of her written notes, and she too came to realize that by trusting in herself and her own knowledge of the case she would find the confidence she needed not only to finish the task at hand, but also to advance her own argument on the merits. The students, empathizing with her initial discomfort, encouraged her to continue, applauded her when she'd finished, and complimented her on how well she had handled a most difficult situa-

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66 Cf. Sonsteng et al., supra note 7, at 133-34 (referring to a "positive learning environment" where students feel comfortable asking questions and sharing opinions).
tion. We were amazed and relieved to see the students envelop her like mother hens, comforting her, encouraging her, and protecting her vulnerability.

C. Course Materials

The primary course materials comprised two case files and a book of problems in evidence and trial advocacy that accompanied the case files, both prepared for use by the National Institute for Trial Advocacy. In addition, we assigned two texts, one devoted to the substantive law of evidence and one devoted to trial advocacy skills. Finally, of course, we required that students have a current copy of the Federal Rules of Evidence.

1. Assigned and Supplementary Texts and Federal Rules

The two texts provided the background information on the law of evidence and on techniques of trial advocacy that the students needed to assimilate in order to work through the problems and cases that were the heart of the teaching materials. The Federal Rules supplied the law most directly governing the cases and problems.

For each topic in the law of evidence students were directed to the corresponding materials in the text and the Rules. Typically, the evidentiary material would be the subject of a lecture on the relevant rules, their background, purposes and policies. The doctrinal material was then illustrated by a number of problems to which the students were expected to respond. In short, this aspect of the course was not unlike a traditional evidence course taught by the problem method, although we assigned no opinions. Students were expected to have read the assigned background reading or its equivalent, but the read-

73 Although our syllabus was keyed to this book, students were told, "You may use any materials you wish (including individualized research) to supply the information necessary to respond to the assigned problems." So, the students knew they need not rely on the "assigned" text, but were free to use any material they thought appropriate to furnish the background doctrinal explanations of the relevant evidentiary principles. This was a relatively feeble effort to encourage students to take greater responsibility for their own learning. See Tarr, supra note 34, at 969. Perhaps because of the other demands the course imposed upon them, perhaps because of the inherent educational conservatism of many
ing was rarely addressed directly in class, unless of course students had questions about what they had read.

We were not entirely happy with our choice of texts. The Trial Evidence book may be perfectly fine for background reading in a trial advocacy course or for a continuing legal education offering, but it was a bit sketchy as the primary source of evidence law for a group of students for whom this was their first encounter with this complex area of adjective law. Similar kinds of texts presented the same problem. Nevertheless, a hornbook or treatise was more than we could reasonably expect students to digest in the time available to them, and a traditional casebook was inconsistent with our aims for the course. Were we to offer the course again we would seriously consider compiling our own materials for this purpose.

In addition to the readings in the assigned texts, the computer web site we had established for the course included hot links to a substantial number of journal articles and other materials relevant to the course generally or to particular topics. Students could access any of this material with a click of the mouse. Computer assisted legal instruction exercises were also available for students to drill on the evidence materials and to assess their learning of the doctrine. We might well have made better use of these materials to assure that students had mastered the evidence doctrine.

We also assigned appropriate reading in the trial advocacy text covering the material to be addressed for any particular class. Again,

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74 See, e.g., ARTHUR BEST, EVIDENCE: EXAMPLES AND ILLUSTRATIONS (2d ed. 1997); MICHAEL GRAHAM, FEDERAL RULES OF EVIDENCE IN A NUTSHELL (3d ed. 1992); GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE (3d ed. 1996).

75 E.g., JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE (5th ed. 1999); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE (2d ed. 1999).

76 See infra Part IV (discussing our reflections on the course and suggestions for change).

77 See infra Part III.D.4 (explaining our use of The West Educational Network (TWEN)).


79 See infra Part IV (suggesting that the use of computerized evidence problems might have helped students better master evidence).
the readings themselves were rarely addressed directly during class. Instead we would present our own take on the relevant topic, often followed by one or more demonstrations. The demonstrations might be conducted by one of us (typically, Deise) or by one or more of the students. Following the demonstration there would be extended discussion of the ways in which a jury might respond, alternative approaches, etc.

In short, the readings provided the necessary background to bring students to a sufficient level of understanding of basic concepts in trial evidence and advocacy to permit intelligent discussion of doctrinal and technical issues raised by the cases and problems and to use this understanding operationally in their engagement with their roles in litigation.

2. **NITA Materials**

In addition to the Mauet texts and the Federal Rules of Evidence, we wanted realistic practice materials for classroom use to help students to a deeper understanding of the law of evidence as it operates in the world of practice and to appreciate more fully the importance of the skills dimension in litigation. We chose the NITA materials primarily because of the authors' emphasis on the importance of integrating evidence and trial advocacy skills. The particular set of materials we selected is a two volume set: Volume I consists of two sample case files; Volume II consists of problems, questions, and exercises for analysis of both evidentiary and trial advocacy issues as they relate to the case files. Taken together, Volumes I and II provided the students with the material to understand fully both evidence doctrine and the trial advocacy motor skills.

Volume I contains two complete case files: *State v. Mitchell* is a non-jury criminal homicide case; *MacIntyre v. Easterfield* is a civil jury trial case for defamation. These case files include a variety of witness statements, prior sworn testimony, and exhibits that can be used for a variety of evidentiary and trial advocacy purposes. Volume II of the NITA materials (the Problems Book) is divided into two sections:

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80 *But see infra* notes 126-28 and accompanying text (discussing our conclusion that more could have been done to help students master evidence law).

81 *See Burns et al.*, *supra* note 63, at ix. The authors stated:

Our conviction that trial practice and evidence should be learned together in an integrated curriculum stemmed in large part from our experience teaching young lawyers trial practice with the National Institute for Trial Advocacy. More often than not we encountered lawyers who had, no doubt, done quite well on evidence tests, but who could not recognize evidentiary issues as they appeared at trial and could not solve the problems that those issues occasioned. We remain convinced that part of that problem stems from the way in which subjects that belong together have been separated in the traditional law school curriculum.
half of the problems relate to evidentiary issues, while the other half deals with trial advocacy issues, all of which are based on either the *Mitchell* or *MacIntyre* case.

The evidentiary portion of the Problems Book is cross-referenced to the most commonly encountered evidentiary issues, divided into several categories with a distinct set of problems dedicated to each category. We selected and assigned problems from each of these categories to match the topic areas we covered in class. Unfortunately, this section of the materials was not particularly well-organized, requiring a fair bit of cross referencing and reorganizing to achieve their best pedagogic use. Moreover, the problems tended to be too straight-forward, often lacking the complexity or subtlety that would have produced more interesting nuanced discussions. On the other hand, they were certainly adequate to alert the students to many of the likely evidentiary pitfalls in the case files. Computerized problems developed under the auspices of the Center for Computer Assisted Legal Instruction\(^{82}\) might have been better suited to our objectives if they were keyed to the case files. It was important to us, however, to use problems addressing the same trial materials as we were using for the other aspects of the course.\(^{83}\)

Similarly, the trial advocacy portion of the Problems Book is divided into categories with a distinct set of exercises dedicated to each category. Again, we selected and assigned problems that coincided with the topics we covered in class: opening statements, direct and cross examination, selection and introduction of exhibits, the use of character evidence for purposes of impeachment, expert witnesses, and closing arguments. There were far more problems than could reasonably be covered in a single semester, allowing us the freedom to select those most suitable to our purposes with respect to any particular topic.

Because the case files served as the focal point for both the trials and the evidence and trial advocacy problems, students were essentially preparing for their trials through every classroom exercise and the discussion of every evidence problem. They were able to appreciate the immediate pay-off of learning the material, both doctrinal and skill. It is hard to overstate the motivational force that this provided throughout the semester. We are convinced that it substantially enhanced students' learning. At the same time, the continuing focus on

\(^{82}\) See *infra* note 128 and accompanying text (suggesting that the use of computerized evidence problems might have helped students better master evidence).

\(^{83}\) See *infra* 90-92 and accompanying text (explaining that the classroom use of the materials that would be used in the mid-term and final trial exercises motivated the students to prepare for class and pay better attention to the discussions).
only two cases allowed the students to plan and strategize throughout the semester. As Professor Lubet has pointed out, "[m]ost traditional law school classes . . . emphasize fast thinking and quick return," rather than careful planning.\textsuperscript{84} Using one or two cases throughout the semester allowed us to include "education in strategy."\textsuperscript{85}

During the first half of the semester, we focused our attention on the criminal case, with occasional reference to the civil case as needed to explicate particular evidentiary issues not included within the criminal case file. At mid-semester, the students conducted full bench trials of the criminal case.\textsuperscript{86} The second half of the semester was devoted to the civil case, again with occasional references to the criminal case when necessary to explore certain evidentiary issues not presented by the civil case file. The semester culminated in full jury trials of the civil case.\textsuperscript{87}

Whether to use both case files or to use only a single file was (and remains) a difficult question. On the one hand, a single case file might well become boring over the course of an entire semester. Moreover, as rich as these case files were, it was difficult to generate issues of sufficient variety to pursue all of the topics one might wish to address in a basic survey course in the law of evidence. Further, and perhaps most important, using different files allowed students to transfer the knowledge they gained in one context to applications in a different context, perhaps reinforcing the learning in ways not achievable in a single context.

Yet using a single case file would have had some real advantages as well. Students would have needed to familiarize themselves with the contents of only one file, leaving more time and intellectual energy for the enhancement of their doctrinal sophistication and the development of trial skills. Had we used a single case file, we would have required the students to conduct a non-jury trial at mid semester, before study of the hearsay rule and therefore with no restrictions on the use of hearsay evidence. We would have required a second trial of the same case at semester's end, before a jury, and we would have required the students to change sides. At this second trial, after the hearsay rule and the law of privilege had been studied, all of the rules of evidence would have been applicable. This would have provided an interesting lesson in the ways in which the law of evidence affects the trial process, for certainly the second trial would have looked quite

\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{See infra} Part III.F.1 (discussing the bench trial).
\textsuperscript{87} \textit{See infra} Part III.F.2 (discussing the jury trial).
different from the first. Similarly, it would have been a valuable experience for the students to prepare both sides of the same case.

Time constraints prevented using all of the materials in the case files. For example, we only briefly discussed the indictment in the criminal case, its purpose and function and the ways in which charging documents could be used during discovery and fact investigation. Similarly, while we used the files' jury instructions in our discussion of closing arguments, we might have made more productive use of them with more time. Had we used only a single case file, we could have done a more thorough job of exploring pre-trial litigation practice skills, including pleading, discovery, negotiation and settlement.

Early in the semester, we divided the class into teams of two, with half of the teams assigned to represent one party and the other half assigned to represent the other; students who represented the defendant in the criminal trial were assigned to represent the plaintiff in the civil case and vice-versa. For each evidence or trial advocacy problem the students were to remain in their assigned roles. After giving them an opportunity to read thoroughly the case files (which were quite lengthy), we instructed the students to draft memoranda detailing their initial theory of the case. Thus, the students were able to put the information contained within the case files in a particular context from the beginning, as we used the various portions of the file either as examples or in the problems in teaching the evidence doctrine and trial advocacy skills. Equally important, because students knew they would be conducting trials of the cases for the mid-term and final projects, as we dealt with individual problems, they were able to see the relevance of the particulars to the entire case they would be charged with presenting. Thus, every class bore a direct relationship to the two major projects on which students would be graded.

Students were assigned sets of problems in either evidence or trial advocacy for most class periods. Each of the problems we assigned required the students to consider evidentiary and trial advocacy issues in the context of either the Mitchell or the MacIntyre case. In those areas where there was overlap between evidentiary issues and trial advocacy issues, we assigned both evidence and trial advocacy problems in order to focus on the need for integration of these

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89 The Mitchell case is 87 pages long and the MacIntyre case consists of 146 pages. See Burns et al., supra note 67.
90 See infra Part III.F.1 (discussing the bench trial).
91 See infra Part III.F.2 (discussing the jury trial).
92 See infra Part III.G (explaining our grading methods and criteria).
concepts. For example, we discussed the evidentiary problems related to entering photographs in evidence, the strategies one might use for arguing the probative value of these photographs, and the pros and cons from an advocacy perspective of presenting the photographs to the jury. On some days, we dedicated the class period to working through the problems in a group discussion format; other times we might start with a demonstration and ask the students to analyze or critique what they had observed both from a doctrinal and from a trial advocacy perspective.

Use of the problem format worked quite nicely, particularly where the evidentiary and advocacy issues overlapped. For example, when discussing problems related to whether character evidence would be admissible, we also discussed ways in which such evidence might be admissible for impeachment purposes while otherwise inadmissible as improper propensity evidence. Either one of the instructors or one or more students would then be called upon to conduct that portion of the witness examination operationalizing what had just been discussed in the abstract. Soon, students were thinking in terms of the questions to be asked of a witness rather than merely in terms of the doctrinal elements involved in the problem being addressed. At the same time, however, the files (if not the problems) presented problems of sufficient richness and complexity\(^{93}\) that it was natural for these discussions to blossom into explorations of evidentiary policy and the purposes underlying particular rules. A few examples from each file might help to flesh out these notions.

\(\text{a. The State v. Mitchell Case File}\)

It was a dark and stormy night. At about 10:00 p.m., according to the prosecution, Joe Mitchell drove up to the curb in front of his mother-in-law's house and shot and killed his estranged wife while she was standing on the front porch. \textit{State v. Mitchell} is the first degree murder case resulting from these allegations. Joe Mitchell has pleaded not guilty to the offense and claims he was at his home at the time of his wife's death. The case has already been tried once, resulting in a hung jury. According to the rules governing this trial, Mitchell's prior testimony may be used by the State only for impeachment.

The case materials include summaries of the sworn testimony from the first trial by Brooke Thompson, Leslie Mitchell's stepmother; Officer Pat Slyviak, the police officer who responded to the shooting and later arrested Joe Mitchell; Maria Pietro, a woman whose jaw was allegedly broken by Joe Mitchell some time earlier,

\(^{93}\text{See supra text preceding note 82 (criticizing the Problems book).}\)
and Joe Mitchell. Additional statements include those provided to the detectives and investigators of the case by Quinn Washington, Leslie Mitchell's best friend; Raleigh Porter, Joe Mitchell's landlord; Chris Ravenna, the clerk at the gun shop where Joe Mitchell's gun was repaired; and Joe Mitchell's voluntary statement given to the police after he waived his right to an attorney.

In addition to the witness statements, the case materials consist of fifteen potential exhibits, including correspondence to and from Joe Mitchell, maps and diagrams of Nita City and the Thompson house, crime scene photographs and reports, laboratory reports, and Mitchell's gun and jacket. Instructions provided in the case file indicate that the parties stipulated that the Coroner's report is authentic, the paraffin test on Mitchell was performed properly, and the crime scene report is admissible. The case materials also include various court proceedings and documentation, including the grand jury indictment, jury instructions, and the verdict form. Although we did not use all of the materials in the case file (in part, because of time constraints), their presence in the file helped to add a sense of verisimilitude to the materials.

Many of the Mitchell exhibits implicated the more basic evidence rules, especially relevance and the Rule 403 probativity/prejudice balance. For example, the file contained a close-up photograph of the victim's dead body, her eyes and mouth open and her face and chest covered in blood. The students representing the prosecution brainstormed to come up with ways to make the photograph admissible over a Rule 403 objection. One student suggested that the surprised expression on the victim's face was relevant to show that her attacker was probably someone that she would not expect, which made the defendant a more likely suspect; another argued that the photograph showed the placement of the victim's body, which was relevant to the direction from which she was shot. As one of the first exhibits we looked at together as a class, it was extremely useful in teaching students to make the connection between a particular piece of evidence and one's theory of the case by articulating the relevance and materiality analysis supporting the admissibility of the evidence.

The students who acted as defense attorneys made the point that the photograph would likely inflame the jury and was therefore prejudicial. This provided an opportunity to discuss the meaning behind Rule 403's requirement that to exclude evidence its probative value must be "substantially outweighed" by the danger of unfair prejudice. More important, because the stakes were so high for the students on both sides, the analysis took on more life, more reality, than would have been possible through an abstract discussion of the Rule 403 bal-
ance. Although the case was merely simulated, students were charged with the zeal of the advocate almost from the inception of their role assignments.

The Mitchell file also contained exhibits that involved more complicated evidentiary issues. For example, the file included a copy of a letter addressed to the defendant, Joe Mitchell, from the production company that had originally accepted a script he had submitted. The letter retracted the earlier acceptance and stated that the company would not make any commitment to produce the script. It was found by a police officer who searched Mitchell’s apartment at the time he was arrested, but the police department ultimately misplaced the original letter and subpoenaed a copy of it, unsigned, from the production company.

Students representing the prosecution wanted to use the letter to establish that Mitchell was frustrated or depressed over learning that his script had not been accepted. These students made the relevance argument that the letter helped to establish his state of mind, which goes to motive. The letter also helps the prosecution defeat Mitchell’s contention that he went to see the victim to share his “good news” about his script being produced.

But the exhibit also raised issues of conditional relevance under Rule 104, because it became problematic for the prosecution to establish that Mitchell had actually read the letter before the murder. The officer who originally found the letter could not remember if the envelope had been opened or if he opened it himself during the search. Joe Mitchell contends in his statement that he did not read the letter until after the shooting. Thus, the defense attorneys argued that the letter should be excluded on relevance grounds absent any evidence that Mitchell had knowledge of the letter. The prosecution teams struggled to come up with ways to establish that Mitchell had read the letter.

The exhibit also brought up best evidence issues because it was not an original and it was unsigned. The prosecution attorneys argued that the copy should be considered a “duplicate,” admissible to the same extent as an original. The defense attorneys, however, were able to argue that there was a genuine dispute over the letter’s authenticity because it lacked a signature.

Although we had not yet taught the hearsay rule at the time the students were working with this case, this exhibit and others in the Mitchell case file raised hearsay problems that allowed us to explore the difference between using an out of court statement for its substantive truth and using it for some other purpose, such as showing its effect on the listener (or in this case, the reader). This, in turn, rein-
forced the relevancy analysis we had emphasized earlier, requiring
students to identify with precision the purpose for which a particular
piece of evidence was being offered.

Even exhibits that seemed sound from an evidence standpoint
were useful in teaching strategy. For example, the file contained a
handwritten letter from Mitchell to the victim. The letter contains
some incriminating statements, including the threat that "I'm going to
make both of you regret what you did to me, if it's the last thing I do."
In his witness statement, Mitchell concedes that he wrote a letter to
the victim and that it included language about making her and her
stepmother regret what had happened. Quite obviously, the letter
would be used by the prosecution to show motive and intent; thus,
relevance was not a very complicated issue for this exhibit. Similarly,
since the letter was written by the defendant, there were no hearsay
problems. There were potential authentication problems, since the
most obvious person to authenticate the document was Joe Mitchell
himself, and he would be unlikely to do so for the prosecution. His
earlier witness statement, however, admits that he wrote the letter.

Given all of this, the defense attorneys had a difficult time devel-
op ing an argument to exclude this piece of evidence. Thus, the stu-
dents had to find ways to deal with the damaging evidence. This
couraged them to attempt to preempt the prosecution by bringing
up the letter on direct, or in the alternative, to repair some of the
damage with a strong redirect. This exhibit was useful in teaching
those advocacy skills.

b. The MacIntyre v. Easterfield Case File

The second case file in the materials, MacIntyre v. Easterfield, is a
civil case for defamation brought by Jesse MacIntyre against her for-
er employer, Ross Easterfield. MacIntyre worked as a housekeeper
in the Easterfields' home, and she claims that Easterfield falsely ac-
cused her of stealing his wife's diamond brooch. Following this accu-
sation, MacIntyre left her employment and tried to obtain
employment at the Nita City Athletic Club and through the ABC Em-
ployment Agency, but was unsuccessful. She claims that she was de-
nied employment and has suffered emotional and economic injury
because of Easterfield's defamatory statements.

The case materials include sworn statements from seven poten-
tial witnesses: For the plaintiff, witness statements were available
from Jesse MacIntyre; Kelly Emerson, a friend of MacIntyre's and a
housekeeper in the Easterfield home; Reverend MacKenzie Taylor,
MacIntyre's mentor; and Reeve Winsor, the manager of the ABC Em-
ployment Agency. For the defendant, witnesses included Ross Eas-
terfield, the defendant; Kerry Easterfield, Ross's wife; and Lee Marlow, manager of the Nita City Athletic Club. In addition to the witness statements, there are twenty-six exhibits. The materials instruct that the parties must stipulate to the admissibility and authenticity of eight of these exhibits; the remaining exhibits are considered authentic, but the parties may object to their admissibility. Students may not create their own exhibits.

Included in the case file materials is a sworn statement by the plaintiff, Jesse MacIntyre, in which she claims her innocence with respect to a prior conviction. She claims that while she was on a date with a man named Frank Holman, he stopped at a gas station and told her he was going inside to buy cigarettes. The plaintiff states that she waited in the passenger seat of the car, but had no idea he had a gun or that he intended to rob the station. She was arrested and charged with robbery, but pleaded guilty to the lesser charge of theft on the advice of counsel.

The majority of the students representing the plaintiff did not attempt to keep the prior conviction out of evidence, opting instead to use it as a ploy for sympathy. This approach necessarily required that the plaintiff's belief in her innocence be emphasized, and many attempted to elicit the underlying facts of the prior conviction to support this position. The students representing the defendant, Ross Easterfield, however, made every effort to exclude the underlying facts of her prior conviction, focusing rather on her plea of guilty and the fact of the conviction itself as evidence of her character and likelihood that she was indeed a thief.  

Assuming the authenticity of this particular statement, it could be used in several ways. The plaintiff might attempt to introduce the statement herself during her own testimony, or perhaps better, it could be introduced by another witness, Reverend Taylor, on the plaintiff's behalf. Several students sought to qualify Rev. Taylor as an expert in the rehabilitation of criminals, and were thus able to argue that the statement was considered by him and helped form the basis of his opinion that the plaintiff was a good candidate for his rehabilitation program.

The defense, of course, did not want the statement to be admitted, and many students objected to its admissibility on the grounds of relevance or hearsay. The defense argued that the underlying facts of the plaintiff's prior conviction and her belief that she was innocent were not relevant. For those students who had not qualified Rev. Tay-

94 Since the Plaintiff's character is an element of proof in a defamation case where the defense is one of truth, the rules of evidence with respect to improper character evidence were not implicated. See Mueller & Kirkpatrick, supra note 75, at 248.
lor as an expert, the relevance objection was generally sustained. If he had been qualified, those who argued that the statement was considered by him in forming his opinion were able to overcome the objection.

Some of the students also objected to the introduction of the statement on the grounds of hearsay arguing that the statement was an out of court statement being offered for the truth of the matter asserted. They further argued that the statement did not constitute a party admission since it was being offered by the plaintiff rather than her opponent and that it did not meet any other hearsay exception. For those students that had qualified Reverend Taylor as an expert and attempted to introduce the statement as the basis of his opinion, they might be able to overcome the hearsay objection by arguing that the statement was not being offered for its truth but as the basis of Taylor's expert opinion. Thus, this piece of evidence served as a good example of the interplay among multiple rules of evidence and the importance of articulating the purpose for which a particular piece of evidence is offered.

Another piece of evidence in the case file was subject to many of the same arguments. The Order from the Prison Review Board granting the plaintiff parole states that the plaintiff had conducted herself "in an exemplary manner, receiving only three disciplinary points while incarcerated." The Order also states that the Board's decision to grant her parole was motivated in part by the Board's belief that it was possible that the plaintiff had been wrongly convicted and that her continued incarceration constituted a "miscarriage of justice."

Obviously, the plaintiff would want this piece of evidence to get to the jury, since it is far more convincing than her own belief or statements as to her innocence. Many of the students made the same objections and arguments: that the Board's opinion and the underlying facts of her conviction were irrelevant and that the document itself constituted hearsay because it was an out of court statement being offered for its truth and the defense had no opportunity for cross examination. Again, for those students who had qualified Reverend Taylor as an expert and offered the statement as forming the basis of his opinion, the relevance objection might be overcome. For those that had not qualified the Reverend as an expert or used a different witness to introduce the statement, the relevance objection was generally sustained. The hearsay objection might be overcome on two grounds. First, the students might argue that the Board's statement is not being offered for its truth but is only offered to show the effect on the mind of Reverend Taylor in forming his expert opinion. Second,
the Board's Order satisfies the business records\textsuperscript{95} or public records\textsuperscript{96} exception to the hearsay rule and would thus be admissible, if relevant, despite its apparent hearsay classification. This piece of evidence therefore provided an opportunity for those students who had not qualified Reverend Taylor as an expert to introduce a statement, from credible authorities, indicating that the Plaintiff was quite possibly innocent with respect to the prior theft conviction.

From an advocacy perspective, these two pieces of evidence raised questions as to when and with which witness to introduce the statements. Was the plaintiff more likely to be successful in introducing the statement during her own testimony, or during Reverend Taylor's testimony? With which witness might the introduction of the statements, if successful, have more impact: the plaintiff or Reverend Taylor? Given Reverend Taylor's position not only as a clergyman but as a criminal rehabilitationist, might his belief in the plaintiff's innocence be far more credible than other witnesses?

As with the Mitchell case file, the materials encouraged students to think about the evidence issues from an advocacy perspective and to think about the advocacy issues with due regard to the limitations imposed by the law of evidence.

3. \textit{TWEN}

In addition to these print materials, we established a TWEN site for the course.\textsuperscript{97} The site included electronic versions of the course memorandum as well as hot links to a substantial number of journal articles and other materials relevant to the course generally or to particular topics to supplement the assigned reading. Computer assisted legal instruction exercises from the Center for Computer-Assisted Legal Instruction (CALI) were also available for students to drill on the evidence materials and to assess their learning of the doctrine.\textsuperscript{98} We might well have made better use of these materials to assure that stu-

\textsuperscript{95} \textit{Fed. R. Evid.} 803(6).

\textsuperscript{96} \textit{Fed. R. Evid.} 803(8).

\textsuperscript{97} The West Education Network (TWEN) provides a world wide web-type home page for law school courses. The site allows the instructor easily to provide access to materials in the Westlaw database, to CALI exercises and to material that the instructor might choose to upload to the site. It also allows for the establishment of a Discussion Forum — a threaded listserv — and for easy electronic mail communication among those registered for the course and between them and the instructor(s). \textit{Cf.} Michael A. Geist, \textit{Where Can You Go Today?: The Computerization of Legal Education from Workbooks to the Web}, 11 Harv. J.L. & Tech. 141, 169-71 (1997) (discussing the use of TWEN in law courses); Slomanson, \textit{supra} note 2, at 221 (same); Richard Warner, et al., \textit{Teaching Law with Computers}, 24 Rutgers Computer & Tech. L.J. 107, 148-50 (1998) (same).

\textsuperscript{98} See \textit{supra} note 78 and accompanying text (listing articles that discuss computer-assisted learning in law school courses).
dents had mastered the evidence doctrine.\footnote{See infra Part IV (reflecting on ways in which we could have helped the students better master evidence).}

Finally, the TWEN page included a threaded listserv permitting students to communicate with each other or with either of us.\footnote{Cf. Geist, supra note 97, at 169-71 (describing listservs that allow students to communicate with each other); I. Trotter Hardy, An Experiment with Electronic Mail and Constitutional Theory, 44 J. LEGAL EDUC. 446, 447-49 (1994) (same); Slomanson, supra note 2, at 221-22; (same); Warner, supra note 97, at 148-50 (same).} Students were encouraged to post messages to the list, either responding to a post from one of us or another student or originating a new conversation. Although it was possible for us to allow anonymous postings to the list, we wanted to encourage students to take responsibility for their own voice; so all postings to the list were identified. All students participated, and several became enthusiastic contributors. While most of the messages concerned matters directly connected to the course, several messages involved issues raised by current news events or television, motion pictures or other cultural outlets.\footnote{Cf. Thomas, supra note 65, at 240 (describing e-mail as “the new high-tech water cooler”).}

Such electronic communication offers a number of advantages when used as a supplement to the regular classroom and other face-to-face interaction.\footnote{Id. at 246 (generally discussing the advantages of electronic communication).} It provides an outlet for students who may be reluctant to engage in classroom discussion.\footnote{See Hardy, supra note 100, at 449; Thomas, supra note 65, at 240.} It provides an opportunity for additional student writing, albeit usually not in an extended or deeply analytic treatment.\footnote{See Hardy, supra note 100, at 448.} It encourages greater and more careful thought by requiring the students to instantiate that thought. Students have told us of experiences in which the necessity to think through how to formulate questions have allowed them to discover for themselves the answers they sought.

\section{D. Outside Exercises}

In addition to the assignments to be performed in class and the written exercises connected to those assignments, we required students to undertake other activities with a somewhat looser nexus to the materials of the course. For example, we required students to observe a trial or evidentiary hearing in progress and to report and analyze, in writing, what they had observed. These reports were to consist of two sections: the first a report of their observations, and the second an analysis and evaluation of what they had seen, both in terms of evidence law and attorney performance. We insisted on separate sec-
tions for their observations and analyses to assure that students would attend both aspects of what they had observed. In our experience, reports of courtroom observations that do not specify such a division are too frequently merely recounting of events: "This happened first, then this happened, and then that happened," and so on.

We also assigned a number of different writing exercises to the students. Some of these were written analyses of their own performances. Others involved strategic planning. We required them, for example, for each case to prepare a written theory of the case. These planning assignments were to include the critical facts necessary to support the theory and any underlying evidentiary concerns. Each subsequent exercise required them to refer to this theory, to tie together to this wider theory the separate parts of the case and their preparation.

Some assignments involved the preparation of planning documents, indicating what was to be accomplished by any of a number of assigned performance exercises. For example, when students were assigned to cross examine a particular witness, they might be asked to submit in advance of the actual examination a memorandum specifying what goals they hoped to accomplish with the witness, how they hoped to proceed in accomplishing those goals, and what evidentiary hurdles they expected to have to overcome in achieving their plan. Following the cross examination, the students might be asked to submit a second memorandum evaluating both their performances (involving both the skills dimension and the required knowledge of evidence law) and their plan for the activity.

In this way, we hoped to inculcate a pattern of professional practice that included the planning, execution, and review of all professional activities. Indeed, we believed (and continue to believe) that there was no more important lesson we could teach these students than the value of establishing a pattern of professional activity as a way of learning from their own experiences in this class and throughout their professional lives. We sought to provide them with a technology — plan, execute, review — that would allow them to accom-

105 Cf. Kovach, supra note 3, at 237 ("The procedure demands that the students be self-reflective, confront their own performance, and take responsibility for improvement. It provides a model for lifelong learning.").


107 Cf. Lube, supra note 84, at 730 ("Perhaps there is no greater discontinuity between the study and the practice of law than in the area of planning. . . . [A] university model of the trial advocacy course will include education in strategy.").

108 See Feinman & Feldman, supra note 34, at 894 (stressing the importance of teaching "critical self-reflectiveness"); Turr, supra note 34, at 969.
plish this.\textsuperscript{109}

E. Trials

1. Bench Trial

As a mid-term examination, we required the students to conduct a bench trial of the Mitchell case. Students were assigned to represent either the prosecution or the defense, and each student was instructed to select a partner. Thus, each trial team consisted of two students representing the prosecution and two students representing the defense. Each team was then assigned two witnesses for its side: The prosecution team was assigned Officer Slyviak and Quinn Washington; the defense team was assigned Raleigh Porter and Chris Ravenna. We decided not to use Joe Mitchell as a defense witness or Brooke Thompson as a prosecution witness.

Each student was required to prepare a direct examination of one of its witnesses, limited to fifteen minutes, as well as a cross examination of one of the opposing side’s witnesses, limited to fifteen minutes. The students were allowed to select any of the exhibits in the case file for use during the direct examination, but they were required to authenticate the exhibit, argue its admissibility, and enter the exhibit in evidence, if appropriate. Because of the time constraints, many of the students chose not to use the exhibits and used only the witness statements and prior testimony from the first trial. The opposing team was required to raise objections to the admissibility of evidence.

We wanted the students to have the opportunity to impeach a witness on a prior inconsistent statement, so to make the experience more realistic, we provided each team with a set of secret instructions that required each witness, during his or her direct examination, to change her or his testimony in some more or less significant way from the prior testimony at Joe Mitchell’s first trial, the sworn testimony the students had been working with from the case file. Thus, the students had to be on the lookout for these inconsistencies, and, with little or no advance preparation, use the prior inconsistent statement to impeach the witness during cross examination. We thought this might be a useful way of teaching them to listen carefully to the testimony of the witnesses, to think on their feet, and to anticipate, and deal with, the unanticipated.

\textsuperscript{109} Cf. Thomas F. Geraghty, Foreword: Teaching Trial Advocacy in the 90s and Beyond, 66 Notre Dame L. Rev. 687, 688 (1991) (arguing that “[T]rial advocacy teaching in the 90s and beyond should provide students with perspectives from which they can evaluate the efficacy and values of the litigation process”); Lawrence M. Grosberg, Should We Test for Interpersonal Lawyering Skills?, 2 Clin. L. Rev. 349, 350-51 (1996) (arguing for a method of testing that would connect preparation, performance, and evaluation).
Some of the students missed the inconsistency entirely. Others caught the inconsistency, but were not able to deal with it very effectively. Some, however, listened carefully, perceived the inconsistency and its importance and followed up with more or less effective impeachment. The variations in students' performances with respect to this incident in their trials turned out to be a valuable learning opportunity as we reviewed the videotapes of their trial performances.\footnote{See infra notes 111, 114 and accompanying text (discussing our use of videotapes to encourage students to reflect upon their performances).}

In keeping with our concern that students develop a pattern of planning, executing, and reviewing their performances, we required the students to prepare and submit, in advance of trial, a detailed memorandum discussing their theory of the case, their plan with respect to the direct testimony of their own witness (\textit{i.e.}, what themes they intended to develop, what their objectives were, evidence or testimony that they believed was critical to be admitted, particular issues or evidence they intended to avoid and why), and problems they anticipated having to deal with on cross examination of their own witness. We also required them to discuss in their memoranda their plans with respect to the direct and cross examination of their opponent's witness (\textit{i.e.}, testimony or evidence offered by the opponent's witness that they believed would be problematic and how they would attempt to keep such evidence from being admitted, their objectives with respect to the cross examination of their opponent's witness). Finally, we required them to describe how they would use the testimony of each of the witnesses in their closing arguments to further their theory of the case.

All of the trials were videotaped.\footnote{\textit{Cf.} Kovach, \textit{supra} note 3, at 236 (encouraging the use of video in critiquing student performances).} We made several copies of the tapes and required each student to review the tape at her or his convenience over a two week period and critique his or her own performance in light of the goals and objectives discussed in the student's memorandum. We wanted the students to reflect on how their performance measured against their plan. We also required them to prepare and submit a critique of their performance based on their review of the videotape. We asked them to comment on both their advocacy skills' strengths and needs, and on evidentiary matters they felt they handled effectively or ineffectively as the case may be. We asked them to discuss what they believed was the most positive aspect of their performance, as well as what they believed was the least positive. We asked them to divide the memorandum into two sections: one that dealt with their overall performance, and one that dealt specifi-
cally with evidentiary issues.

Following their submission of these critiques, we required each team to schedule a time to meet with us in order to review the videotape together. We allowed each of them to comment on either their own, their partner’s, or their adversaries’ performance as we watched the videotape. We provided additional commentary on their performances in this group forum, and also returned their written critiques with more specific comments on their individual performance. Because the teams met with us as a group, we were able to address differences in their performances. This was especially fruitful with respect to the students’ successes or failures at impeaching an adverse witness with prior inconsistent statements. Those students who had missed the inconsistency learned an important lesson about the importance of listening carefully and staying in the moment of attention, a lesson that might have been harder to learn had we met with students individually.

2. The Jury Trial

The final exercise in the course — and the one that received most weight in terms of grading — was the jury trial at the end of the semester.\textsuperscript{112} Student pairings were the same as in the mid-term bench trial, but the teams that represented the defendant in the mid-term trial represented the plaintiff in this trial and vice versa.

It was important for us to continue to implement the plan-execute-review method that we had been using all semester. Consequently, the week before trial, students were instructed to hand in a pre-trial memorandum explaining their theory of the case and a brief plan for their approach to each witness. As in the bench trial, students were encouraged to explain how each portion of their case, from pre-trial matters to closing argument, furthered their theory of the case. We also instructed them to anticipate evidentiary problems and contemplate how to deal with those problems.

\textsuperscript{112} It was the students’ responsibility to round up jurors for their trials. In a few cases, only a few jurors showed up, and in at least one, none did. Even in those cases, however, students performed as if there were a jury present. It would have been better for us to arrange with some of our colleagues teaching in the first year for their students to serve as jurors. In addition to supplying an adequate pool of jurors, these first year students might have learned something as well — especially if their participation were used as source material for class discussion (in which we would have been happy to participate). Alternatively, students participating in our trial competitions might have learned some helpful lessons by serving as jurors, and might have been able to add their own insights to the student advocates in the class. Finally, local high school or pre-law college students might have enjoyed the opportunity to participate as mock jurors in this sort of an exercise. Indeed, such non-law-trained jurors might have provided more fruitful feedback than lawyers or law students.
The jury trial called upon other pretrial skills, as well. Because the case file contained so many possible exhibits, we encouraged the teams to meet with opposing counsel to attempt to stipulate to the admissibility of as much evidence as possible. The teams then collectively drafted a set of stipulations that they would present to the court at the pretrial conference. We also permitted each student to draft a motion in limine to suppress one item of evidence. Motions had to be served on opposing counsel two days prior to the pretrial conference.

The pretrial conference itself was held during one of our Wednesday meetings. Because we had the students for five straight hours, we were able to handle the pretrial conference of all six trials in one day. During this conference, the students presented their stipulations and argued their motions in limine. It was the students' responsibility to record the judge's rulings on the motions.¹¹³

Then came the actual trials, which were scheduled on the Wednesday, Saturday, and Sunday of the last week of classes. As in the mid-term trial, each student was responsible for finding someone (preferably someone outside of class) to play his or her witness(es). One student performed the opening statement and the other performed the closing argument. Each team had to call three witnesses, which meant that there was a total of three direct examinations and three cross examinations per side. Each student had to perform one direct and one cross, but were permitted to split up the other two directs and crosses as they saw fit. Thus, one student performed one direct and two crosses, while the other performed two directs and one cross. Opening statements were limited to ten minutes each. Direct examinations were limited to twenty minutes, and cross examinations could not exceed fifteen minutes. Closing arguments could be no longer than fifteen minutes, including rebuttal for the plaintiff.

The jury trial was the ultimate opportunity for students to use the skills they had learned all semester. In keeping with our plan-execute-review method, we repeated, with some variation, the use of videotaping: We had the jury trials videotaped so that the students could review their performances and reflect upon them after the trial. We placed the videotapes on reserve at the library and gave the students approximately two weeks to watch the video, write a brief reflection on their performance, and then meet with us to discuss it.

As with most of the assignments over the semester, the idea behind this exercise was to encourage the students to review their performance in light of what they had originally intended to accomplish.

¹¹³ Although we attempted to get real-life judges to judge the actual trials, it was not feasible to do this for the pretrial conference; thus, Hornstein acted as the judge for this purpose.
during the preparation stages. In the pre-trial memo, the students had identified their goals with each witness and with the trial as a whole. They had also tried to anticipate the potential evidentiary problems and attempted to create ways to deal with them. In their reflection memo, then, the students were asked to examine how well they met their initial goals and whether they adequately anticipated the evidentiary issues. Reviewing the videotapes allowed the students to see how well their pre-trial work prepared them for the actual trial; it also gave them the opportunity to evaluate their own performance after the fact.\footnote{See Kovach, supra note 3, at 236 (encouraging the use of video in critiquing student performances).}

After we had a chance to examine the students' reflection memos, we scheduled appointments with them to review the videotapes. Unlike the bench trial reviews (which included all four students from each trial), these appointments were with only one student at a time, in hopes that the student would feel more comfortable and that we could all be more candid. We allowed the students to choose thirty minutes of videotape to review with us, and most students chose the portion of their performance that they thought was most flawed.

In our view, these meetings were extremely beneficial to the students and to our evaluation of the success of our teaching methods. In many cases, as we reviewed the videotapes, the students pointed out their own mistakes and missed objections without any input from us. In other cases, we would identify the missed objections and the students would explain their omissions in terms of strategy. We used the meetings to brainstorm about what could have been done differently and to re-emphasize the importance of various points of doctrine and techniques taught during class.

We found this reflection process to be one of the most effective parts of the course, and there is not much that we would change about it. In some ways it seemed to work better to have the videotape review meetings one-on-one, as opposed to having all of the trial members discuss the performances at once. At the same time, the group reviews following the first trial permitted students to compare their own performances with those of their colleagues, often to good educational effect. One way to achieve both benefits might be to choose certain portions of each trial to review in class as a group; this would allow the students who were not involved in a particular trial to see the strategies of the other teams and comment on them. It would also give us an opportunity to see from the students' comments what they were getting and what was still not sinking in.
F. Grading

Evaluations were based on a number of different kinds of activities: class participation in discussions of evidence doctrine and the various evidence problems assigned from the course materials; in-class simulations of trial advocacy skills; performance during the mid-semester and final trials; and students’ comments and evaluations of their own and their colleagues’ performances. Indeed, there was no real separation between students’ learning activities and their evaluation for the purposes of assigning grades. At first, we were concerned that students would not react well to having so much of what they were doing involved in the grading process, but that turned out not to be a problem. The different kinds of activities allowed students with different strengths to perform at least reasonably well at something. Moreover, the camaraderie that developed within the group probably helped dispel some of the anxiety that might otherwise have proven destructive.

The one evaluative technique we did not employ was the standard examination designed to test the students’ knowledge of evidence doctrine. Although we now believe we may have been mistaken in this, our rationale was clear. We wished to send the message that this course was not designed to replicate the educational experiences of other more traditional law school courses. Verbal knowledge was not the coin of the realm. Knowledge had to be usable to count.

IV. Reflections and Suggestions

In addition to the suggestions regarding course structure, we have come to agree about other changes regarding use of the course materials that we would implement if we offered the course again. As noted, we were less than satisfied with the material assigned to enable the students’ learning of the doctrinal aspects of the course. To further simulate the world of law practice, students should obtain the

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115 See Grosberg, supra note 109, at 364-65 (discussing the propriety of using several methods of evaluation).

116 See Champagne, supra note 65; Sonsteng et al., supra note 7, at 137-38 (discussing the need to address students’ individual learning needs); Thomas, supra note 65, at 241 (explaining how e-mail can help students with different learning styles to communicate with each other for learning purposes).

117 See supra Part III.A.


119 Cf. Grosberg, supra note 109, at 359-60 (suggesting that “paper and pencil” exams might be appropriate for evaluating lawyering skills).

120 See supra Part III.B (setting forth the structure of the course).

121 See supra Part III.C (criticizing the course materials).
doctrinal information they require to work with the problems and case files from the traditional sources of law — cases, statutes, rules and scholarly commentary. Yet to require independent research on all of the problems and difficulties presented by the case files would require more time and energy than we could reasonably expect. A useful compromise would be for the us to prepare our own (closed universe) "law library," in which relevant materials would be distributed to the students — perhaps electronically\textsuperscript{122} — in lieu of the standard text or casebook.

Of the several missions we sought to accomplish in the course, we are least confident that students developed the level of mastery of evidence doctrine we hoped they would achieve, perhaps because of our own insecurity about the absence of a separate examination on the principles of evidence. Nevertheless, we are convinced that they learned the body of evidence law at least as well as their colleagues in more traditional evidence classes. There is some anecdotal evidence to support our conviction. Our students reported that while studying with friends who were taking or had taken the more traditional evidence course, they came to be regarded as the evidence "experts." Impressions of the level of mastery achieved by these students as compared with students in earlier years taught by more conventional methods also support this conclusion. This anecdotal and impressionistic evidence is consistent with the report from a similar offering at Northwestern.\textsuperscript{123} It is also consistent with what we know of the students' mastery of evidence law based upon their performances in the various assigned exercises.

But their preparation and performance in these exercises is less than a perfect indication of their mastery of evidence doctrine.\textsuperscript{124} First, we spent too little time on objections, and students were reluctant to make objections. Second, often students failed to object to evidence they knew to be inadmissible for tactical reasons. Sometimes this was revealed to us in their evaluative memoranda, but we suspect that there were times when this simply fell through the cracks. Finally, students simply had more fun working on the skills material of the course than they did in learning doctrine, and we suspect that at least some of them could have spent more time and energy on the doctrinal aspects of the course. This phenomenon was also true of us.

\textsuperscript{122} See supra Part III.D (discussing our use of the TWEN site).

\textsuperscript{123} See Burns, supra note 9, at 42 ("Students seemed to have a firmer grasp of the law of evidence, were more articulate about evidentiary issues in the courtroom. And were in a better position critically to assess the wisdom of contemporary evidence law.").

\textsuperscript{124} Of course, in the traditional evidence course this problem remains hidden. In such courses students may learn "all the grammatical rules of a language they [can] neither speak nor write." \textit{Id.}
We could have spent more class time on the doctrinal aspects of the course, and less in-class time on the performance aspects, perhaps assigning students more performance work on their own for later videotape review with us. The fact is, however, that what was fun for the students was also fun for us, and in hindsight, we may have spent more time than was optimal on these more enjoyable activities. So, for example, we might have spent more time on evidence problems in class at the expense of simulated witness examination, cross examination, or opening and closing statements.

Despite our conviction of the importance of the idea that "the knowing is in the action," were we to offer the course again, we would insist on a series of written (or perhaps oral) examinations to assure that students "got" the evidence doctrine. These examinations would be given at various points over the semester, as each unit of evidence material was completed, in order to provide greater assurance that students had mastered the material. Probably these examinations would not figure (very much) in students' final grades for the course for the same reasons that we did not include a traditional examination in the course as we taught it: We wished to disabuse students of the notion that mere verbal knowledge of doctrine of the sort tested by the traditional examination was what we were after. On the other hand, such knowledge is a necessary foundation upon which to build a more useful understanding. Examinations of the sort we would now contemplate would be designed to ensure mastery by the students and serve as a diagnostic tool for us, indicating where we needed to spend more time and energy. Students would be permitted to take and retake examinations testing their knowledge of the same material until we (and they) were satisfied that they had achieved sufficient mastery of the doctrine to warrant their going forward.

Such a strategy of mastery learning with respect to the evidence doctrine would have required us to be more explicit about precisely what we wished the students to learn and at what level of proficiency, but more to the point it would have enabled us to assure that students actually achieved that level of mastery. As we completed each unit of evidence, we might have examined the students by

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126 Cf. Feinman & Feldman, supra note 34, at 898-99 (describing a program where teachers "specify the level of learning required and design final evaluation devices to determine if students have achieved that level").
providing short problems to which written responses would have been required or by providing multiple choice problems or even by designing programmed learning sets of materials for each unit. Alternatively, the evidence exercises provided by the Center for Computer Assisted Legal Instruction (CALI) could have been used to assure the proper level of mastery of the evidence doctrine.\textsuperscript{128} What is important is that students could have been examined and re-examined until we — and they — were confident that the evidence doctrine had been satisfactorily assimilated.

We would have liked to include a component on professional responsibility.\textsuperscript{129} There are appropriate materials available using the same case files as we used for evidence and trial advocacy,\textsuperscript{130} but including them in the course would have required additional credit hours, as well as time and energy of both students and teachers. Institutional needs made such an addition to the course problematic. We inquired of the students whether they would wish to register for a follow-up course in the succeeding semester to undertake the professional responsibility materials. Every one of the students expressed a strong interest in registering for such a course. Even accounting for some level of yecophancy, that is an extraordinary response. Unfortunately institutional resources did not permit us to offer the professional responsibility course.

Closely related to issues of professional responsibility, but distinguishable from them, are issues of critique of the law of evidence and techniques of trial advocacy. It is not sufficient for the academy merely to offer instruction in legal doctrine and the skills necessary for the successful practice of law. We must also provide the opportunities for close and critical analysis of law and practice.\textsuperscript{131} For example, the rules governing the admissibility of character evidence present opportunities to consider doctrine, the purposes and policies underlying the doctrine and questions of tactics and techniques. These three levels of

\textsuperscript{128} See Entin, supra note 1, at 860; Teich, supra note 78.

\textsuperscript{129} Cf. Burns, supra note 3, at 330 (describing a similar approach to the teaching of professional responsibility).

\textsuperscript{130} See, e.g., Robert P. Burns & Steven Lubet, Exercises and Problems in Professional Responsibility (1994); Burns, supra note 9; Robert Condlin, "Tastes Great Less Filling": The Law School Clinic and Political Critique, 36 J. LEGAL EDUC. 45 (1986).

\textsuperscript{131} Cf. Ronald J. Allen, NITA and the University, 66 NOTRE DAME L. REV. 705, 714-15 (1991) (criticizing courses that teach students that winning should be the focus of lawyering); Geraghty, supra note 109, at 691 (calling for teachers of trial advocacy to assess the impact of what they teach on the litigation process); Kenney Hegland, Moral Dilemmas In Teaching Trial Advocacy, 32 J. LEGAL EDUC. 69, 71-72 (1982) (explaining that law schools have a responsibility to submit the "practices of the real world" to "vigorous challenge").
analysis are not necessarily congruent, and the incongruities can be a fruitful source of precisely the kind of critical analysis for which the academy is especially well-suited.

Perhaps we might have encouraged this sort of critical reflection through the use of student journals with assignments designed to foster such critique. It might have been useful to require some reflection on these issues in the assigned trial observation paper. But, of course, every additional goal requires additional time and energy from students and teachers. Prioritizing the many important goals the course might pursue is difficult to achieve in the abstract.

Interestingly, having undertaken a more or less significant departure from the ordinary religion of the law school classroom, it is easier for us to see many other deficiencies both in the typical design of law school classes and in our own attempts to offer a different design. We are realistic enough to understand that in the time and credit allocation available to us, we could not have accomplished all that we might have wished and that the constraints of institutional resources make it unlikely that the available time and credit allocation will increase.

Nevertheless, we are firmly of the view that the students in Trial Evidence and Advocacy had a substantially better educational experience, by virtually any measure, than students who enroll in an evidence course and a separate trial advocacy course. Student evaluations for the course were uniformly positive. That is suggestive, but hardly dispositive; the students were not in a position to compare their experience with alternatives except vicariously, through the experiences of their colleagues. We do have a basis of comparison, but something of a stake in the evaluation.

But we have also had the opportunity to observe these students in the year following the course. A number of them went on to enroll in our clinical program or to join Maryland's trial advocacy team. Without exception, they exhibited more confidence about themselves as lawyers and a deeper understanding of the law of evidence that has enabled them to represent their clients (real or simulated) more effectively. Their confidence in their understanding of evidence helped to overcome anxieties about taking cases to trial and to obtain better plea offers for clients. At trial, they were able to introduce exhibits skillfully and crisply, to make and respond to objections and to demonstrate a real understanding of whatever particular evidence point was at issue. In the process they earned credibility and respect from judges and opposing counsel. They were complimented for their skill, confidence and professionalism.

We have begun to apply some of what we learned during this experience in our clinical teaching. For example, clinicians recognize
the importance of reducing student anxiety. We have already seen how the student’s understanding of evidence doctrine, and its application during trial, have given our students much needed confidence, which, in turn, helps to reduce some of the anxiety they experience. They discover that, despite their lack of experience, they understand and apply evidence law as well, if not better, than many of their more “experienced” adversaries.

Ironically, it was the absence of live clients in our simulated exercises that helped us to appreciate better their importance during our clinic discussions about evidence. Focusing as we did on applying evidence doctrine during trial, we began to view the client’s role in the trial process differently. We had not, for example, previously considered the importance of evidence during the attorney-client negotiation process. Previously, we considered evidence to be among those areas of the trial process that belong within the exclusive purview of the attorney. Our experience has helped us to understand that the client must be involved in making decisions that affect every aspect of trial, including the evidence to be offered. Lawyers must serve a teaching function to enable the client’s more fully informed participation.

We may experience occasions, during and after trial, when our clients complains about our failure to object to the admission of certain evidence or to offer evidence which they felt was harmful to them or their case. These experiences demonstrate our failure as lawyers to communicate with our clients about the critical role evidence plays in the trial. The clinic students explain to their clients that the rules of evidence determine when and how evidence may be admitted. Equally important, they explain that even when the rules of evidence allow certain testimony, documents or other exhibits to be admitted in evidence, the client and lawyer must consider whether it is in the client’s interest to offer of seek to prevent its admission. In one case, for example, a student representing a client charged with possession of cocaine, was preparing her client for direct examination. In response to a question, the client stated that “...it (the cocaine) wasn’t mine, I never saw it and wouldn’t know what is was even if I saw it.” This sounded an alarm for the student who recalled that the client’s criminal record included a conviction for possession of cocaine three years earlier. The student had already discussed the client’s prior record with him, but now his “record,” or at least this one conviction, came up in a different context. Its relevance here was not merely for sentencing purposes. Rather, as the student explained, the prior conviction for possession may have relevance to his testimony. She began thinking about the rules of evidence, specifically Rules 404 (b), 608
and 609, whether and how they might apply.

The student explained to the client how the prosecutor could cross examine him about certain of his prior convictions for the purpose of attacking his credibility as a witness. She correctly informed the client that, in our jurisdiction, the mere possession of a small quantity of cocaine typically was not the kind of offense that, typically, would be offered to impeach credibility. She would argue that his conviction for possession of a small amount of cocaine would not make him a less believable person and believed that the judge probably would not allow the prosecutor to inquire about that prior conviction.

... And then it really got really interesting. The student then began to explain that even if the judge did not allow the prosecutor to offer evidence of his prior misdemeanor possession to impeach his credibility, the client could, nevertheless, "have a problem" if he were to testify that he has no knowledge of cocaine's appearance. Initially, the student struggled to find ways to explain the law of evidence in a way that her client could understand. Eventually, without reference to rule numbers and in plain, non-legalese, language she told him essentially that the prosecutor could not use his prior bad act, the prior conviction (to prove character to prove conduct in conformity) in his case. That is, the prosecutor could not say that because he possessed cocaine on a previous occasion, he probably possessed cocaine now. However, she continued, the prosecutor may be permitted to use the prior conviction to show, for example, his knowledge about what cocaine looks like, were he to testify that he "wouldn't know it if he saw it." With this information the client was able to make a better informed decision about his testimony. The student helped the client to understand that not only were such statements potentially harmful, they were unnecessary as well. She reminded him about his theory of the case, the story he wanted to tell—that the co-defendant had placed the cocaine in his (the co-defendant's) car without the client's knowledge. Consistent with our previous observations about the importance of the client's involvement in the process of developing the theory of the case, we discuss with them the role that the law of evidence plays in advancing that theory. The lesson in evidence law that the student gave the client helped him to avoid a needless and costly mistake. This experience, in addition, provided the opportunity for the class to consider if there were any ethical implications to the students actions.

The clinic students, themselves unfettered by our traditional paternalism, find it quite natural to consider evidence issues as part of the attorney-client negotiation process. They recognize that, by en-
hancing the client's understanding of evidence law, the client is better informed to make decisions about the evidence issues in their case and that this, in turn, enhances the attorney-client relationship. Admittedly, it was difficult for us old dogs to learn this new trick; however, having seen the results, we will continue to find more effective ways to help our students and their clients work together to understand the important role that evidence law can play in fostering effective representation.

V. Conclusion

The educational benefit to the students tells only half the story. Each of us also reaped enormous gains in our understanding of both our subjects and the teaching enterprise. We learned from each other, but we also learned from our students. Each of us "knew" that verbal knowledge of doctrine was insufficient for successful law practice, or even for full intellectual understanding. Each of us "knew" that skills training divorced from law, policy and professional responsibility was an abdication of the proper concerns of a university law school. Each of us "knew" that the contributions of students were as important a part of the educational process as those of the professors. Each of us "knew" much about teaching and much about our subject matters. Yet teaching Trial Evidence and Advocacy together made us more fully appreciate the different levels of "knowing." We each gained greater insight into our own disciplines through the perspective of the other's, and we each learned from the other to be better teachers than when we began. So, though such courses as Trial Evidence and Advocacy consume institutional resources, the institutional gain can be enormous. For we will each carry the enriched understanding we gained from this experience into our future teaching and scholarship. We now have a better understanding of both evidence and trial advocacy and the relationship of each to the other in the trial process. For us, the whole proved to be greater than the sum of its parts.