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TWO MODELS FOR TRIAL ADVOCACY SKILLS TRAINING IN LAW SCHOOLS—A CRITIQUE

Gilda Tuoni*

I. INTRODUCTION

The prosecutor asked the ex-police officer, who was now a defendant on trial for first degree murder, to demonstrate to the jury how he had carried his off-duty weapon the day he shot the victim. The defendant stood up and put the gun, State's Exhibit No. 1, in his trouser waistband. The defendant previously had testified that, on the day in question, he had resigned from the police force, put his off-duty gun in his waistband as usual, and gone to see the victim, the woman with whom he was living. The defendant had claimed that the shooting was accidental, that he had no intent to harm the victim, that she had grabbed the gun from him and it had discharged during a struggle. He had also testified that he had kept the gun in his waistband the entire time he had driven from the police department to the victim's place of work and while he sat down and waited for her as well. The defendant said that he had never removed the gun from his waistband and that, to his surprise, the victim grabbed it at the time of the incident. The defendant stated that he even forgot that the gun was on him.

After the defendant demonstrated to the jury as requested, the prosecutor thanked him and asked him to be seated. The defendant took the gun out of his waistband and sat down. The prosecutor interrupted him: “Sir,” he said, “please keep the gun in your waistband.” The defendant responded, “Oh, it's not comfortable for me to do so. When I sit down, I take it out.”

For a moment there was a stunned silence in the courtroom. The prosecutor, with emphasis, repeated the defendant's statement in an inquisitive way. The defendant first looked startled, then stared at his counsel who buried his own glance in the notes he was taking. The defendant, looking uncomfortable and squirming in the witness chair, fi-

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nally responded: “Well, my pants are a little tight today, so today I have to take the gun out of my waistband.”

This courtroom dialogue did not result in the conviction of the defendant. Nor did it end in acquittal. Rather, the scene was played out among law students in a trial advocacy course in the simulated courtroom setting of a classroom. The student playing the role of prosecutor had, in effect, scored a solid victory by conducting a very successful—literally disarming—cross-examination of the defendant. Later, the student in the role of the defendant, feeling rather sheepish, congratulated the prosecutor—his classmate—on a job well done. The courtroom judge—the law professor—critiqued this and other student performances, scheduled a videotape review session, and dismissed the class.

Such simulated trial scenes are common on law school campuses today. A trial advocacy course is likely to be found in the curriculum of every accredited law school in the United States. Indeed, the use of simulation—putting the students in the position of advocate in the courtroom—appears to be an effective, if not the most effective, way in which students can develop advocacy skills.

Although the general content of trial advocacy courses is often similar, the manner in which such courses are conducted is not. This Article focuses on these varying structures and addresses the two different but predominant models for teaching trial advocacy skills in the law school curriculum: the semester approach and the intensive approach. The Article critiques these two methods, considering the benefits and difficulties involved in teaching each model, as well as issues attributable to teaching trial practice in either form. These views are based, in part, on a

1. For commentary on the value of simulated exercises, see Ralph S. Tyler & Robert S. Catz, The Contradictions of Clinical Legal Education, 29 CLEV. ST. L. REV. 693, 694 & n.5 (1980) (arguing that law schools should rely on simulated exercise rather than “live client” cases); see also Steven Lubet, What We Should Teach (But Don’t) When We Teach Trial Advocacy, 37 J. LEGAL EDUC. 123, 124-25 (1987) (arguing that simulated exercises are among “the most advanced teaching methods used in any law school course,” and should be part of law school curriculum).

2. See infra note 6 and accompanying text. Some schools offer both intensive and semester-long trial advocacy courses. Richard B. Collins, The University of Colorado School of Law’s Course in Intensive Trial Advocacy, Purposes, Content, and History (Jan. 1986) (on file with Loyola of Los Angeles Law Review). This approach is based on student scheduling rather than pedagogical preference. Id.

3. Many law schools, including University of California at Berkeley School of Law, Boston College Law School, Loyola Law School, Los Angeles, Northeastern School of Law, the University of Southern California Law Center and Stanford Law School, offer only semester-long courses in trial advocacy. University of California at Los Angeles School of Law offers trial advocacy courses on a year-long basis while the University of Colorado School of Law and Harvard Law School offer both intensive and semester-long trial advocacy courses.
review of the growing body of literature on the teaching of trial advocacy—both “how to” primary sources and commentaries. The thoughts expressed herein, however, have primarily evolved out of courses taught by the author at a number of law schools, continuing legal education courses, and personal experiences as a litigation lawyer.⁴

II. BACKGROUND

Trial advocacy is a course geared to enable law students to develop skills necessary to become effective trial lawyers. As discussed in greater detail infra,⁵ the scope of such a course usually is geared to the methods by which lawyers conduct trials. Teaching emphasis is placed on pre-trial preparation and, in particular, on in-trial performance.

There are two widely used approaches for teaching law school trial advocacy courses. The semester approach consists of approximately thirteen to sixteen weeks of instruction in trial practice. This is the traditional method by which trial practice has been taught. The intensive approach is conducted most often over a ten-day to three-week period. This approach, to a large extent, is modeled after the National Institute of Trial Advocacy (NITA) program of continuing trial advocacy instruction for lawyers.⁶

III. ANALYSIS

A. The Semester Approach

A semester course in trial advocacy usually consists of two- to three-hour class meetings held once or twice each week for approximately thir-
teen to sixteen weeks. The broad goal of such a course is to expose law students, usually third-year students or students who have had prerequisite training in evidence, to the component parts of a trial. In an attempt to cover all bases of student aspiration, such courses often focus on both criminal and civil cases. Enrollment in trial advocacy courses is often severely limited, ranging from desired lows of approximately ten students in each section to an almost unmanageable high of twenty to twenty-five students per section. The reasons for such limitations usually have less to do with student-faculty ratio than with giving students as much “on air” time as possible. The general ethos of most modern day trial practice courses is learning from doing; in larger classes it is extremely frustrating—for instructors as well as students—to have students watching, rather than participating. To compensate for times when students cannot perform as trial advocates, students are often assigned roles as jurors, witnesses, clerks or judges. As a result, in every course meeting most students will participate in the simulated component parts of a trial, even when not the primary student lawyers.

1. Teaching trial practice by the semester approach

The semester course approach allows trial practice instructors to lecture more than the intensive approach does, since thirteen to sixteen

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7. The number of hours of classroom meetings per week usually corresponds to the number of hours of academic credit students are given for successful completion of the course.

8. E.g., Collins, supra note 2 (course at University of Colorado School of Law “focus[es] on . . . each major jury trial event”); Letter from Peter L. Murray, Director of the Trial Advocacy Workshop, Harvard Law School, to Gilda Tuoni, Teaching Team Member (1990) (on file with Loyola of Los Angeles Law Review) (workshop exercises focus on successive events of jury trial). See also the organization of teaching texts cited infra note 9.

9. A variety of texts exist for teaching trial advocacy. Several of these provide both criminal and civil case files for students to work with during the course. See RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS (1989); THOMAS A. MAUET & WARREN D. WOLFSON, MATERIALS IN TRIAL ADVOCACY: PROBLEMS AND CASES (2d ed. 1987); 1 & 2 JAMES H. SECKINGER & KENNETH S. BROUN, PROBLEMS AND CASES IN TRIAL ADVOCACY, LAW SCHOOL EDITION (3d ed. 1986).

10. In the fall semester of 1991, Loyola Law School, Los Angeles, offered trial advocacy instruction in eight sections. Enrollment was limited to 20 students per section. Records of the Registrar of Loyola Law School (Aug. 28, 1991) (unpublished records) (available at the Office of the Registrar, Loyola Law School, Los Angeles); see also Collins, supra note 2, at 1. The University of Colorado School of Law offers 10 trial advocacy sections comprised of 12 students each. Id. Referring to the University of Colorado School of Law, Richard Collins notes that “every student at the Law School who wants [to take trial advocacy] is now able to take it.” Id.

11. “On air” time refers to the amount of time a student actually spends in front of the class.

12. See supra note 1 and accompanying text.

13. Lubet, supra note 1, at 125.
weeks arguably allows more time for instructor "intrusion" than does an intensive short course. Yet, traditional lecturing is not, and should not be, a large component of class meetings. Occasionally, lectures presented by experienced practitioners and video or audio taped performances may be used effectively.\(^\text{14}\)

When instructors do lecture, however, they often adopt the persona of a trial judge or senior trial counsel, where they instruct, advise, push and educate students who appear before "the court" in their roles as advocates.\(^\text{15}\) The preferred method for such simulated courtroom experience is for all participants to remain in their roles throughout the exercise, so that students can begin to acquire the skills needed for dealing with the contingencies of the courtroom, as opposed to the classroom.\(^\text{16}\) After student performances, instructors often step out of their judicial or advocate roles. At that time, trial practice professors resume their roles as classroom teachers whose job it is to critique student performances. Immediately thereafter, the seasoned law professor may conduct a demonstration of "the better" or "right" way to conduct a particular courtroom examination.\(^\text{17}\) As with most types of skills learning, students benefit from this example.\(^\text{18}\)

In recent years more trial practice instructors have discovered that students learn best when they watch themselves.\(^\text{19}\) Thus, most law school trial practice professors now videotape student performances.\(^\text{20}\) Students then meet individually with the instructor during the semester.

\(^\text{14}\) For example, at least two generations of law school trial advocacy students have delighted in the late Professor Irving Younger's videotaped series on trial advocacy and evidence, produced by NITA. In their trial practice courses many law professors use vignettes from, or screen entire classic motion pictures depicting trials and trial lawyers (some examples include ANATOMY OF A MURDER (Columbia 1959), TO KILL A MOCKINGBIRD (Universal 1962) and TWELVE ANGRY MEN ((UA) Orion-Nova 1957)).

\(^\text{15}\) Collins, supra note 2, at 2.

\(^\text{16}\) See Michael Meltsner & Philip G. Schrag, Report From a CLEPR Colony, 76 COLUM. L. REV. 581, 584-87 (1976).


\(^\text{18}\) See id.


\(^\text{20}\) See id. at 872-74 for a discussion of the benefits of using videotaping in the law school curriculum. Some commentators, however, suggest that videotaping student performances is not very useful. E.g., Steven Lubet, Advocacy Education: The Case for Structural Knowledge, 66 NOTRE DAME L. REV. 721, 734 n.40 (1991). Their critique focuses on two points: (1) the general lack of skills that students have (they argue that having them watch what are usually inept performances cannot lead to much "learning" or development of trial advocacy skills); and (2) the overemphasis on style which is said to result from student concentration on video review. Id. at 734.
(perhaps several times) to view and receive comments on their videotaped exercises.\textsuperscript{21} 

Hopefully, by the end of the term, the students' learning culminates in the final classroom exercise—the trial.\textsuperscript{22} From opening statement to final verdict, student advocates try simulated cases before trial judges as their final exercise in the trial advocacy course. Those recruited to act as "judges" may be actual judges or lawyers asked to sit in that role.\textsuperscript{23} Based on student evaluations, many consider this experience to be one of the most rewarding in preparing them for the realities of courtroom practice,\textsuperscript{24} although many students greatly feared the trial experience at the beginning of the term.

2. Critique of the semester approach

There are difficulties peculiar to the semester approach. Oddly enough, one substantial problem concerns the question of timing. Because so much time elapses between individual student performances—from one, two or perhaps three weeks—sharp and intensive focus, spontaneity, and possibly the sheer fright that may be necessary to assimilate the skills of a trial advocate are diminished.\textsuperscript{25} Particularly in larger sections, students may not perform in the classroom for substantial periods of time. In addition, memories of the details of case files fade from week to week. Students also tend to place a more than ideal reliance on notes to refresh failing (or never acquired) memories, even at later stages of a course.

Nevertheless, the semester trial practice approach offers many advantages. The major benefit seems to be attitudinal. Trial advocacy for law students—even third-year law students—is often their first practical or "hands on" experience in law school.\textsuperscript{26} It is also often the only course

\textsuperscript{21} See Meltser & Schrag, supra note 16, at 606-07, for a discussion of the value of providing timely feedback on students' simulated performances.

\textsuperscript{22} Lubet, supra note 1, at 125.

\textsuperscript{23} Id.

\textsuperscript{24} See generally Imwinkelried, supra note 6, at 684 (surveyed litigators generally ranked their legal education as more useful than did their non-litigator counterparts).

\textsuperscript{25} A similar concern has been raised by Professor Richard Collins of the University of Colorado Law School. Professor Collins comments:

Having taught trial advocacy for several years in the traditional semester-long weekly format, I knew the limitations of that arrangement. The most serious educational drawback is the long time between sessions. If a student does a witness examination, then is criticized, it is most effective for the student to attempt another examination immediately, as the intensive format allows. Otherwise, there is too much lost momentum.

Collins, supra note 2, at 2.

\textsuperscript{26} Trial advocacy is usually not a required course. At some law schools the only required
where students perform repeatedly before a large group. A semester course tends to lessen the panic students feel before a presentation and allows slow starters time to catch up. In addition, the semester approach allows both students and teachers ample time for reflection and planning.\(^{27}\)

With one- to two-week intervals between performances, the instructor's expectations may be higher under the semester approach. Instructors teaching a semester-long course expect and usually see well-planned, well-strategized and often well-performed student courtroom performances. Rather than performing several exercises in the course of a few days, as in the intensive approach, with the semester approach students have a longer preparation time of seven to fourteen days and are able more easily to assume the particular character of the lawyer roles which they must play. Additionally, students may find it infinitely easier to locate and to prepare fellow students or others to voluntarily perform witness roles for classroom exercises. Furthermore, instructors have much more time to organize, as well as think through, individual exercises than in a shorter course. Finally, law professors in such courses can better get to know the students' strengths and weaknesses and thus can more easily facilitate improvement in weak areas.

Other concerns about the semester approach to trial advocacy apply equally to the intensive short-term course. Before those concerns are addressed, however, this Article addresses general issues concerning the second model—the intensive, ten-day to three-week trial advocacy approach.

**B. The Intensive Approach**

1. Teaching trial practice by the intensive approach

The intensive ten-day to three-week course in trial practice is designed to subject students to total immersion as a means of developing

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27. But see Lubet, *supra* note 1, at 134, wherein Professor Lubet gives a not-so-subtle critique of the time period within which assimilation of trial skills is attempted in even the semester course. He writes:

> In most cases students will take only one semester . . . of trial practice. It is not unusual for a single course to cover everything from basic direct examination all the way to a full jury trial in lieu of a final exam. This is indeed a crowded agenda. Students are taken from pure innocence to the apex of advocacy in the space of fourteen or fifteen weeks.

*Id.* Professor Lubet criticizes the teaching of trial advocacy in the semester course, which he says takes place "at breakneck speed." *Id.*
There is generally a substantial amount of pre-course preparation by the instructor. Such preparation requires, of course, a great degree of organization and to some degree, structural inflexibility.

Intensive trial practice courses are designed to move quickly—forcing students to act now and ask questions later. This rapid pace is designed to eliminate student inertia by simply leaving no time or room for it.

Although there are various methods, a common intensive course model requires students to perform exercises as many as two or three times a day and to view videotapes of their performances each day as well. This accounts for approximately five to eight hours of daily classroom time. Students are allotted time to prepare for the next day's performance during the evenings (and to eat and sleep if they get the chance!). These intensive trial practice courses usually require several faculty participants because the fatigue level is exceedingly high for any one instructor who has to sit through eight straight hours of classroom time. While students only review their own videotaped exercises, a faculty member teaching such a course alone would be overwhelmed with video review responsibilities for each student.

The intensive trial practice approach now used in law schools seems largely modeled on the NITA method for training or retraining practicing trial lawyers. The approach leaves little room for lecturing, focusing instead on frequently repeated episodes of performance and critique of simulated exercises. Assigned outside materials, which are rarely discussed in class, provide most of the substantive learning. Evening demonstrations and lectures by judges, practitioners and law professors are occasionally provided or trial films are sometimes shown. The inten-

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28. See Broun, supra note 6, at 1221-22, for a review of the similar NITA approach to continuing education of lawyers in trial advocacy skills.

29. Such organization usually includes drafting and disseminating prepared materials, daily schedules and videotaping schedules. See, e.g., Workshop Materials, supra note 17, at 6-19.

30. See Lubet, supra note 20, at 722 (criticizing “two dimensional” and limited nature of intensive NITA approach).

31. Id. at 1221. For example, the University of Colorado Law School intersession intensive course utilizes 30 to 40 lawyers and judges as faculty for the eight-day session. See Collins, supra note 2, at 2.

32. Collins, supra note 2, at 1.


34. Id. at 2-3.

35. In addition to simulated materials patterned on case files, students usually are given outside substantive readings to “fill in the gaps.” Examples of such texts include: ROGER S. HAYDOCK & JOHN O. SONSTENG, TRIAL: THEORIES, TACTICS, TECHNIQUES (1990); JAMES W. JEANS, TRIAL ADVOCACY (1975); THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES (2d ed. 1988).
sive approach, like the semester approach, usually ends with student trials. In a longer course such as one lasting three weeks, as opposed to ten days, a student may have time to perform at least two trials.

2. Critique of the intensive approach

When the intensive approach is used in law schools the benefits appear to accrue more to the institution than to the student because faculty resources are required for only a short period of time. This radically decreases institutional costs. Law schools can usually make daily use of one to five skilled “team” leaders, perhaps from their own faculty, but can also depend on outside practicing lawyers to critique student performances. Many practicing attorneys will provide such services without compensation. The students, of course, gain a great deal from being exposed to experienced lawyers who offer enormous insight into the realities of practice and trial work. Overall, intensive courses can handle a larger number of students than their traditional semester counterparts. Institutions can thus more easily accommodate the usually high student demand for trial practice courses.

Pedagogically, the rationale of the intensive approach is that students will learn and develop more quickly with intense and total exposure to the trial of a case. This approach, however, has serious limitations. First, while students get lots of “on air” time, the interval

36. Collins, supra note 2, at 3.
37. Broun, supra note 6, at 1222. The Harvard Law School Trial Advocacy Workshop incorporates such a two-trial approach in its intensive course. See Workshop Materials, supra note 17.
38. Team Leaders are the instructors assigned to guide a group of students through the trial exercise. See, e.g., Collins, supra note 2, at 1.
39. Professor Collins, describing the University of Colorado Law School trial advocacy intensive course, writes:

The intensive form allows us to make much more efficient arrangements for practicing trial lawyers and judges to teach as adjuncts. If a trial lawyer or judge must develop teaching materials and come to the Law School two hours every week, the imposition on trial calendars is substantial. [The] intensive schedule allows a teacher to review the standard materials we use for a few hours, then to teach in our course for as little as four hours (judging final trials) or eight hours (teaching in exercise/video sessions). These appearances readily fit into a trial and motion calendar, so they make many more trial lawyers and judges available to the course. We typically have from 30 to 40 lawyers and judges participating [in each course offering]. Also, lawyers are willing to contribute in this way for modest compensation; [some] may waive any fee altogether. This has been an essential means of keeping... our costs under control. Id. at 2-3.
40. The intensive course offers the potential to have “the masters” in the field fully available to students for the short time period of the course.
41. See Collins, supra note 2, at 1-2.
between performances is so short that it is difficult to believe that the students are learning other than superficially—perhaps only in memorization for the next class. It is likely that many law students regard the intensive trial practice experience mainly as one to be “survived” as opposed to one from which they take an enormous amount of learning into their practice years. Students have little time for reflection or planning, particularly in the ten-day course. As such, the long-term benefits that this type of skills training offers law students are questionable. The approach is arguably more suited to the continuing legal education of lawyers who have had at least some background in lawyering skills than to law students. Law students, unlike lawyers, are often literally devoid of any experience in this area before they are plunged into the intensive course. Before students are able to get their bearings straight regarding one aspect of the trial, the course has moved on to the next topic. Before all of the skills can be studied, much less mastered, the course is over.

It is troubling that not only are a growing number of law schools utilizing the intensive approach to trial advocacy skills teaching, but also that a sizable proportion of these schools offer the intensive course as the only trial advocacy course in the curriculum. Realistically, such intensive exposure to trial advocacy is, at best, only a primer on the subject. Surely there is a need for either longer term or semester courses in the same or similar subject matter to help students digest newly acquired information and to familiarize themselves with trial processes and the role of trial advocates.

Another unfortunate aspect of the “short-term” intensive course is the relegation of trial advocacy courses to a “special,” and arguably, lesser status in the hierarchy of the law school curriculum. Historically, skills courses—most obviously clinical skills courses—were often treated, along with their faculty, as second-class in the law school curriculum. Generally, skills courses were taught by special faculty, usually adjunct professors. If not adjunct professors, the instructors largely came from

42. See Kenny Hegland, Moral Dilemmas in Teaching Trial Advocacy, 32 J. LEGAL EDUC. 69, 69 (1982) (arguing that in skills courses, modeled on NITA method, students “spend too much time on the firing range, too little in cool reflection”).

43. Evaluation of NITA courses for practicing lawyers suggests that such intensive training for attorneys is effective. See Broun, supra note 6, at 1223.

44. See Joseph P. Tomain & Michael E. Solimine, Skills Skepticism in the Postclinic World, 40 J. LEGAL EDUC. 307, 312 (1990) (critiquing skills curriculum in law schools); see also CARLSON & IMWINKELRIED, supra note 9, at xxiii (examining growth in trial practice education); Lubet, supra note 1, at 124 (reviewing maturation of trial practice as educational discipline).

45. James W. McElhaney, Toward the Effective Teaching of Trial Advocacy, 29 U. MIAMI L. REV. 198, 202 (1975) (referring to these courses as “dog and pony shows”).
the non-tenure track ranks of the clinical or "skills" faculty. The courses were taught at unusual, typically late hours and were, and to this day are, often ungraded courses. Now, however, many in the regular tenure track faculty teach semester-long trial practice courses. The trial advocacy course of instruction has thus achieved, in large part, an acceptance and status which is not significantly different from the rest of the curriculum. Replacement of the traditional semester course with the very different intensive approach creates real danger of catapulting the trial advocacy curriculum back to the dark ages of its less regarded, indeed, _devalued_ step-child history.

C. Common Issues

With some variation, the semester and intensive trial advocacy courses are the predominant methods for teaching trial practice in law schools today. Yet, both teaching approaches raise four concerns that are difficult to resolve. First, both approaches encounter problems in their methods of evaluation. Second, the nature of the skills these courses teach should be made more comprehensive. Third, the role models of the trial judge and trial advocate, which are being passed on to students as a norm for future conduct, should be more closely scrutinized and perhaps, redefined. Finally, effective skills training is typically more expensive than other methods of teaching but is vitally necessary to adequately train lawyers entering the legal world.

1. Evaluation

Evaluation usually takes place in trial practice courses on a non-examination model based primarily on performance. Some professors, however, use an examination or trial notebook to provide a supplementary or additional grade. Developing standards for evaluation, however, is extremely difficult. And, it is difficult for instructors _not to be_ subjec-

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46. _Id._
47. _Id._
48. See Lubet, _supra_ note 1, at 124.
49. An analogy to well-known children's fables may not be too farfetched here. Consider the reaction if Cinderella and Snow White suddenly decided that their newly-found lives in the castles of their dreams were not all that satisfactory; and, as a result, cast off their glass slippers and royal finery, and took a dangerous step back down into the valley of their previous servitude. Even my three-year-old would question the wisdom of such actions! This analogy suggests that the wholesale adoption of the intensive approach to the teaching of trial practice—a type of instruction very far removed from the traditional classroom model—be undertaken with at least the awareness of the potential danger to the newly achieved status of skills teaching in the curriculum.
50. Lubet, _supra_ note 1, at 125.
tive or influenced by students' personalities as well as their performances in trial practice courses.

Further problems develop when courses utilize outside evaluators. These problems manifest themselves in both grading and the effect that such persons' commentary can have on student morale. A number of law schools, particularly those that use the intensive approach and outside evaluators, try to resolve the grading issue through pass or fail grading. Under this scheme, students are rewarded with course credit if they simply attend the course and perform when assigned to do so. While such an approach solves some of the difficult issues of standards for evaluation, it does not encourage student excellence. Mere survival becomes the paramount idea in student minds.

2. Skills

What skills are actually being taught in the trial practice courses at most law schools is an important consideration. Generally, trial practice courses utilize the adversary model of our judicial system as opposed to a model focusing on developing skills for alternative means of resolving disputes. The advocacy skills taught in the adversary model mainly consist of education in basic trial mechanics. In other words, students learn how to prepare a trial, conduct jury voir dire, make an opening statement, conduct direct and cross-examination, introduce exhibits, make and preserve objections, and make closing arguments. The trial advocacy course usually places very little emphasis on the other skills required of litigators: skills required for client interviewing and counseling, drafting pleadings, discovery and settlement negotiation.

51. Many schools provide outside evaluators with instruction on how to perform appropriate and effective critiques of student performances. For example, Professor Michele Hermann's commentary has been frequently and widely used. Michele Hermann, Before You Begin—Some Thoughts on Observation and Critique (1976) (unpublished commentary prepared for the 1976 Harvard Law School Trial Advocacy Workshop) (on file with Loyola of Los Angeles Law Review).

52. University of California Berkeley School of Law, Boston College Law School, Loyola Law School, Los Angeles and the University of Southern California Law Center offer trial advocacy on a graded basis while Stanford Law School and University of California at Los Angeles School of Law offer trial advocacy on a pass or fail basis only. Harvard University Law School offers its intensive trial advocacy course on a pass or fail basis and Northeastern School of Law utilizes written evaluations for its semester-long trial advocacy course.

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53. Lubet, supra note 1, at 125.


55. In order for students to develop competence as lawyers in general, as opposed to just in
sis on the trial alone highlights the combative, competitive impulses budding young lawyers are often all too willing to adopt.

In addition to teaching advocacy skills, many trial practice courses now incorporate moderate to heavy doses of exposure to the substantive law of evidence and professional responsibility. A lesser degree of substantive inquiry may occur into matters of civil procedure, criminal law and procedure, and constitutional law. Additionally, substantive law may arise in the prima facie elements of a claim or defense which must be made or rebutted at trial.

3. Trial judge and trial advocate “persona”

Student learning depends heavily on the roles that trial advocacy instructors project of the trial judge and the trial advocate. The definition of these roles is debatable and relates to the nature of the skills taught in trial practice. Instructors traditionally convey the image of the “average” trial judge who, although varying in judicial demeanor, usually views the courtroom as his or her domain and encourages intelligent but somewhat restrained and traditional adversarial advocacy. Arguably, the traditional trial advocacy approach sends the wrong messages to students—that judges are dominant and should only be gently challenged; student lawyers should accept the status quo and mold themselves to fit into the system as it is. Perhaps, law school instructors should be sending out a different message; one of challenge to unjustified judicial dominance rather than encouragement of lawyer complacency.

In addition, the skills imparted to law students as those necessary

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56. See id. at 442.
57. Students often gain exposure to a number of substantive areas of law that arise in the course of their simulation exercises.
58. See Hegland, supra note 42, at 72, wherein the author criticizes the NITA approach for its “almost total emphasis on skills training” with little questioning of the “premises or values” of the adversary system. See also Karl E. Klare, The Law School Curriculum in the 1980s: What’s Left?, 32 J. LEGAL EDUC. 336 (1982); Lubet, supra note 1 at 134-35.
59. In recent years, the author has spent a good deal of time teaching trial advocacy students how to challenge—within the boundaries of professional responsibility—harmful judicial rulings. The author has also given instruction regarding how to make offers of proof and requests for the grounds of rulings on unspecified objections. In general, instruction on how to deal with unfavorable judicial rulings and negative attitude seems very important in preparing students for effective lawyering. An interesting comment on this topic was made by Professor Lubet in the context of a trial advocacy instructor imposing his or her own view on the credibility of a particular theory of a case a student chooses to rely on. According to Professor Lubet, by such imposition, students may be taught “many bad lessons, among them: do not dispute authority, pretend to agree with authority.” Lubet, supra note 1, at 136 n.39.
for trial advocates give a potentially dangerous view of who trial lawyers are or must appear to be. One commentator has noted that advocacy skills, as taught in the trial practice course,

equip the lawyer to lead and to mislead, to ferret out but also to obscure, and to persuade without regard to the underlying value of the position in question. . . . Deception has no independent moral worth, nor do we offer university degrees in either sleight-of-hand or poker. The fact is inescapable, however, that the trial advocate learns the art of deception, if not through brazen falsehood, then at least through purposeful implication.60

Perhaps the better approach is to note the use of such skills in the presentation of a case and the adversary model in general, and then, to provide a full-fledged critique. The evaluator can borrow from professional responsibility as well as morality concerns, to enable the student to develop his or her own, hopefully better, approach.

4. The expense factor

Finally, the issue of cost and resource utilization must be addressed. Effective student performance skills training is expensive.61 For example, videotaping student performances in trial practice courses is now generally considered an absolute necessity.62 The cost of providing the equipment for filming and playback, operators, videotapes and space for the effective use of such aids may be prohibitive. In addition, law schools traditionally have been hesitant and conservative regarding investment in technology-based legal education.

The time is now right to expose students to the modern tools needed to operate effectively as trial lawyers in our technologically advanced legal world. The increased law school expenses generated by the purchase and use of computers, cameras, film, televisions, video recorders and multimedia equipment are essential in order to enable students to develop realistic trial and litigation skills and experience. New construction in law schools must take into account these demands when designing

60. Id. at 137. See generally Victor Gold, Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom, 65 N.C. L. REV. 481 (1987) (critiquing use of psychological techniques in courtroom and potential resulting inducement of legally improper jury decisions).

61. See Broun, supra note 6, at 1223 (such training often involves small class size and requires special materials and equipment).

62. See Gee & Jackson, supra note 19, at 872-74, for a discussion of the benefits of videotaping student performances.
IV. RECOMMENDATION

After years of involvement in both models for teaching trial advocacy, the semester approach, at least to this author, appears to be the better educational method. It seems far superior in terms of student retention and understanding of simple trial mechanics, common evidentiary issues and professional responsibility concerns. It also offers the potential for more in-depth study of some of the more complex matters facing trial lawyers today, such as the most effective means of presenting highly technical data to jurors, the use of computers in the courtroom, and courtroom reconstruction of past events. Most importantly it gives students time to develop their own persona as embryonic trial lawyers—it allows them to think beyond the moment of performance and to create a longer lasting approach to their upcoming years as trial advocates. Some of the deficits of the semester approach—lack of spontaneity, fading memories and infrequent performance—can be remedied by law professors. One potential remedy is to plan some “unplanned” performances where students are unexpectedly called on to add to another’s examination. Another method would be to make a detailed review of material covered week to week. In addition schools can implement careful “quantity” control—limiting the number of students per class. This allows more time for individual student performances and allows the professor a greater opportunity to afford students individualized attention.

As noted, however, the intensive approach does offer many advantages. As a result, this method has been adopted by many law schools. The disadvantages of the intensive course—lack of time for reflection, planning and retention—can be somewhat remedied. In order to despecialize or destigmatize intensive courses in the law school curriculum, law schools might make greater efforts to make use of “regular” law school faculty along with adjuncts. And finally, students ought to receive some notice that their exposure to trial advocacy skills, in the intensive course, has been minimal and they should be encouraged to think about further development of their skills. Students may augment their

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64. The recommendations expressed in this section are based on the author's experiences in teaching trial practice courses in a number of law schools. See supra note 4 for a synopsis of the author's trial advocacy teaching experience.
trial advocacy skills by taking other trial practice courses, seeking clinical placements, or at least exposing themselves to other resources such as books, videos or real courtroom trials—to acquire further proficiency in this area.

V. CONCLUSION

Both methods of teaching trial practice in law schools—the semester approach and the shorter, intensive approach—are here to stay. There are distinct advantages and disadvantages to each. The analysis herein has focused on the operation of the intensive and semester approaches: the choice of a proper model for the law school curriculum, and which concerns should be raised with respect to each. Hopefully this Article will equip law schools and their faculty with the information necessary to make a well-informed choice between the two approaches.

Each approach presents both benefits and drawbacks. However, the ability to choose the right approach is critical to the successful teaching of trial advocacy. The drawbacks of either approach can be lessened, however, and the approach ultimately chosen is not nearly as important as recognizing the crucial role that trial advocacy plays in a modern legal education.