4-1-1989

Competency and Professionalism in Modern Litigation: The Role of Law Schools

Ronald L. Carlson
University of Georgia School of Law, leecar@uga.edu

COMPETENCY AND PROFESSIONALISM IN MODERN LITIGATION: THE ROLE OF THE LAW SCHOOLS

*Ronald L. Carlson**

> 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.[1]

In an article which appears in earlier pages of this issue of the *Georgia Law Review*, Professor Edward Imwinkelried suggests a prescription for ensuring mainstream acceptance of trial practice courses within the law school curriculum.[2] Imwinkelried's concern is not that advocacy skills will go untaught; rather, his focus is on the status accorded this particular course offering, a course offering which forms a universal aspect of every law school curriculum.

A less universal aspect has been the method of staffing the trial practice curriculum. Imwinkelried observes that most law schools place primary responsibility for the courses in the hands of full-time faculty.[3] Giving full-time faculty members this responsibility was not always the case. The shift in emphasis came after lawyers making up the trial bar made strident calls for enhanced competency. An excellent place to start the "war on incompetency" seemed to be the law schools. The temperature of the conflict between bar and academics became hot, then cooled as law schools

---

* John Byrd Martin Professor of Law, University of Georgia. B.A. 1956, Augustana College; J.D. 1959, Northwestern University (Clarion DeWitt Hardy Scholar); LL.M. 1961, Georgetown University (E. Barrett Prettyman Fellow in Trial Advocacy). In 1987 Professor Carlson was the recipient of the Richard S. Jacobson Award from the Roscoe Pound Foundation. The Jacobson Award was established to recognize excellence in teaching principles of trial advocacy.

[1] Jackson, *Training the Trial Lawyer: A Neglected Area of Legal Education*, 3 STAN. L. REV. 48, 57 (1950).

[2] Imwinkelried, *The Educational Philosophy of the Trial Practice Course: Reweaving the Seamless Web*, 23 GA. L. REV. 663, 667 (1989).

[3] *Id.* at 666.

responded.[4] An increase in the number of trial practice courses available to law students was one result.

This Article opens with an historical analysis of the forces that stimulated the growth of trial practice training.[5] It then shifts the focus to the current concern of the bar with raising the level of professionalism among lawyers.[6] Part III discusses the role of law schools in helping their students meet both competency and professionalism challenges. To this end, Part III addresses (1) the need of any trial practice course to incorporate litigation ethics in a meaningful way, perhaps within the context of creative and challenging problem materials;[7] and (2) the need for instructors in the field to add quality writings to the literature of trial jurisprudence. The thesis of this Article is that the targeting of litigation ethics and the continuing development of qualitative literature form companion needs. In addition to the components identified by Imwinkelried in his call for a unifying philosophy, these are components which will ensure continued curriculum acceptance of courses in litigative skills.

First, this Article will reveal how the evolution of the modern course pattern is greatly responsible for the current concentration on forensic techniques.[8] Perceptive analysis of the components of today's trial practice offerings must be done against the backdrop of this historical matrix.

I. THE COMPETENCY FUROR

In the 1970s, a remarkable dialogue occurred among judges, lawyers, and legal educators. Occasionally, acrimony marked the dis-

---

[4] Today, related but distinct issues dominate the dialogue about what law schools teach. Disputes over competency of the bar have not been completely replaced but have been overshadowed by concerns relating to the bar's "professionalism." *See infra* note 43.

[5] Many law schools had well-conceived lawyering skills programs in place when bench and bar criticisms were launched in the early and mid 1970s. Thus, it is by no means universally the case that such criticisms were solely responsible for current courses in lawyering skills. It is undeniable, however, that much activity in the way of course establishment and expansion occurred in the wake of the controversy stirred by bench and bar critics of law school curricula.

[6] *See infra* note 43 and accompanying text.

[7] *See infra* notes 83-87 and accompanying text.

[8] Leveling criticism that "the current approach to teaching trial practice in law school is educationally sterile," see Imwinkelried, *supra* note 2, at 668.

cussions.[9] At issue was the question of lawyer competency and the responsibility for alleged deficiencies in the trial performance of practicing attorneys. No other contemporary controversy over curriculum has generated such attention outside of the law school world. One source observed:

> For much of the past decade the key point of contention in legal education has been whether law schools are doing all they can or should to produce competent lawyers. Critics ranging from Chief Justice Warren E. Burger to the man on the street have complained loudly that, whatever else the schools may be teaching their students, they aren't providing adequate training in practical legal skills.[10]

A. *The Sonnet Lecture and its Aftermath*

The most visible critic of trial lawyer competency during the peak of the controversy was Chief Justice Warren E. Burger.[11] Many are of the view that Justice Burger's Sonnet Lecture at Fordham University was the shot across the bow that precipitated

---

[9] Jacobson, *The Great Debate Over Legal Education: Who's to Blame for Incompetent Lawyers?*, Chronicle of Higher Educ., Sept. 9, 1981, at 5, col. 1. On the criticism of lawyer proficiency, see *infra* notes 12 & 16 and accompanying text.

Jacobson noted that when legal educators, lawyers, and judges got together to talk about law schools they tended to behave like courtroom adversaries. "They challenge each other's arguments at almost every turn and they rarely agree on a verdict." Jacobson, *supra*, at 5, col. 1.

[10] Jacobson, *supra* note 9, at 5, col. 1. Former Chief Justice Burger was cited in Alsop, *Future Perry Masons Find Little Madness in Master's Methods*, Wall St. J., May 30, 1980, at 1, col. 2, as a persistent critic of lackluster courtroom performance. The former Chief Justice commented that "[t]he painful fact is that the courtrooms of America all too often have 'Piper Cub' advocates trying to handle the controls of 'Boeing 747' litigation." Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 231-32 (1973) (delivered as fourth annual John F. Sonnett Memorial Lecture at Fordham Law School). *But see* Brink, *Legal Education for Competence—A Shared Responsibility*, 59 WASH. U.L.Q. 591 (1981) (pointing out that trial lawyers in 1980s have faced unprecedented, and often unwarranted, criticism of their ethics and competence).

[11] Cramton & Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies*, 30 J. LEGAL EDUC. 253, 253-54 (1979). Another commentator observed: "The principal concern of lawyers and judges with legal education today is whether law students receive adequate training in lawyering skills. Chief Justice Burger can take credit for bringing the issue of competency of the trial bar to the national level of concern." Martineau, *Moot Court: Too Much Moot and Not Enough Court*, 67 A.B.A. J. 1294 (1981).

major popular and scholarly reaction to the issue.[12] As a measure of trial lawyer competency, the Chief Justice estimated that from one-third to one-half of the lawyers who appeared in serious cases were not really qualified.[13] Others disputed these figures,[14] but there was general agreement on the point that decisive steps were needed to address the quality of legal representation in the courts.[15]

The Burger position gathered adherents. Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit sounded the alarm: "[In 1973] Chief Justice Burger and I began questioning the quality of trial advocacy in our courts. Since then we have not been alone. The Federal Judicial Center in a survey of federal judges found that 41 per cent of those responding regarded lawyer's performances as a 'serious problem.' "[16]

The Chief Judge then issued a call for improvement in advocacy offerings and asked for innovation in instructional methodology: "Langdell's theory of legal education was a brilliant innovation for its time, an era when far fewer demands were made on lawyers and on the law . . . . This concept of legal education, even if valid in 1871, is certainly now fundamentally flawed."[17]

---

[12] Cramton & Jensen, *supra* note 11, at 253-54 (noting that while Chief Justice Burger's 1973 lecture set off chain reaction, his record of criticism was longstanding one which predated his elevation to Supreme Court).

[13] *Id.* at 254.

[14] *Id.* at 258.

[15] *See* Brink, *supra* note 10.

[16] Kaufman, *Continuing the Call for Courtroom Competence*, 64 A.B.A. J. 1626, 1626 (1978). Judge Kaufman cited a comprehensive survey of 1600 lawyers wherein four out of five reported that their formal legal education played little role in the development of basic litigating skills such as interviewing witnesses. *Id.* This, however, was in 1978. Given current curriculum developments, such results should be less likely if an accurate survey were done today. *See infra* notes 27-34 and accompanying text (discussing law schools' success at adding trial practice and advocacy courses to curricula). Roger C. Cramton points out that much of the finger pointing between the bar and legal educators has passed and that attention has shifted from the current trends in legal education to other pressing problems. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321 (1982).

This portion of the Article dealing with the competency debates—the historical development—was first noted by the author in Carlson, *Role of the Litigator in the '80s*, 31 FED. B. NEWS & J. 20, 20-24 (1984) (assessing attorney's need for preparation, creativity, credibility, competency, and knowledge of federal law). The earlier remarks appear here with updating and expansion.

[17] Kaufman, *supra* note 16, at 1626. Taking aim from a different perspective at the case method of teaching law is Teich, *Research on American Law Teaching: Is There a Case Against the Case System?*, 36 J. LEGAL EDUC. 167, 173-84 (1986). James Boyd White ad-

What was the relevance of law school training to the trial competency problem and what role did the law schools have in remedying lawyer deficiencies? Those who viewed the law school as a prime locus for attacking incompetency suggested various approaches to achieve the goal. By 1981 at least seven major studies had taken aim at the subject, and recommendations proliferated.[18] Some urged curriculum proposals containing intense concentrations of pretrial practice, trial advocacy, procedure, evidence, ethics, and legal drafting.[19] Others suggested the development of Master of Laws programs in litigation science.[20]

Bar and court rules were recommended mandating that applicants demonstrate completion of courses of study in practice-related subjects. Some courts adopted access procedures whereby the aspiring litigator was required to complete specified trial experiences as the condition precedent to handling cases as lead counsel before that court.[21] In certain federal districts the access process

---

vances some imaginative proposals in White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (And Ought Not) to Be*, 36 J. LEGAL EDUC. 155, 156 (1986). Professor White summarizes attitudes about instructional methodology, and points to one view of the study of appellate cases as the exclusive method of instruction after the first year of law school:

> [O]ne common explanation for what happens in the last two years of law school is that we are all, students and teachers alike, the victims of our success. On this view, what we call the 'case method' of law teaching works very well when it is new and transforming, but by the time it has been adequately mastered by the students, its use becomes repetitive, boring, and routine.

Id. Tracing the history of the Langdell method, see McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U.L.Q. 597 (1981). For other views, see Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 J. LEGAL EDUC. 189 (1986); Holmes, *Education for Competent Lawyering—Case Method in a Functional Context*, 76 COLUM. L. REV. 535 (1976).

[18] Carlson, *supra* note 16, at 21. *See* Devitt, *Required Skills Training—Yes*, 12 Syllabus, Nov. 1981, at 1, col. 1 (noting that few law students are able to obtain trial advocacy training while in school). *See also* Note, *Evaluating "Competency" Criteria: Toward a Uniform Standard of Lawyer Performance*, 59 WASH. U.L.Q. 1019 (1981) (analyzing data from the Cramton and Clare Committee reports). The findings of the Clare committee are reported in Qualifications for Practice Before the United States Courts in the Second Circuit, 67 F.R.D. 159 (1975). Note, *supra*, at 1019 n.1, effectively lines up jurist and commentator complaints that too many lawyers were incompetent, citing one critique that many lawyers were "walking violations of the Sixth Amendment."

[19] *See* Carlson, *supra* note 16, at 21.

[20] *Id.*

[21] *See infra* note 38 (discussing Georgia access requirements). The Chief Justice of South Carolina analyzes that state's Rule 5, which requires every admittee to the bar to have eleven trial experiences before he may try the case alone, in Littlejohn, *South Carolina's*

involved passing a written test on federal practice and procedure.[22]

At first the initiation of various steps to increase the competency of trial lawyers did little to stanch the flow of criticism. Critics continued to attack tradition-bound aspects of legal education and call for stern measures to cure lawyer deficiencies:

> [T]he belief persists in some quarters that law schools are failing in practical education. Among the "vital skills" essential to legal practice, only "the capacity to marshal facts" is being taught effectively, said Judge Malcolm R. Wilkey of the U.S. Court of Appeals for the District of Columbia.
>
> Judge Wilkey told a group of bar examiners [in 1981] that law schools needed to undertake a "thoughtful, coherent reorganization of the whole curriculum."[23]

Questions were asked about the allocation of resources. Many law schools were accustomed to the large class/single instructor

---

Rule 5 Works Well, 54 BAR EXAMINER 9, 20 (Aug. 1985).

[22] Illustrative are the Devitt committee proposals for action by individual federal districts:

> 1. As a condition of admission to practice, applicants [must] pass a bar examination, covering the Federal Rules of Civil, Criminal, and Appellate Procedure, the Federal Rules of Evidence, federal jurisdiction, and the Code of Professional Responsibility. This examination requirement will not apply to present members of the federal bar.
>
> 2. Attorneys who conduct a federal civil trial or any phase of a criminal proceeding [must] satisfy an experience requirement of four supervised trial experiences, at least two of which involve actual trials in state or federal courts. . . .

Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States, 83 F.R.D. 215, 232-33 (1979). This aspect of the Final Report was the subject of discussion in Proceedings of the Fortieth Annual Judicial Conference of the District of Columbia Circuit, 85 F.R.D. 155, 213 (1979) (examining Devitt committee proposal for examination on federal practice subjects). Federal district courts that impose special examinations on federal law are listed in A.B.A. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 42 (1986), which provides a summary of the text of the rules in the Northern District of Florida, Southern District of Florida, Southern District of Iowa, and the Western District of Texas.

Developments continue. As recently as 1988, Georgia instituted an experience requirement as a condition for trying cases as sole or lead counsel. ST. BAR OF GA., LITIGATION RULES AND REGULATIONS Rule 8-104D (1987), is applicable to attorneys admitted to practice after January 1, 1988. *See also infra* note 38 (discussing additional requirements for attorneys who appear as lead counsel in Georgia courts).

[23] Jacobson, *supra* note 9, at 5, col. 3.

model. In the face of hesitancy to adopt a different pattern, one commentator decried historic lack of support that had traditionally marked litigation studies: "Most law schools are not noted for a devotion to teaching or sponsoring research about the litigation process. Historically, adjunct professors have taught trial advocacy courses and have relied upon war stories instead of rigorous analysis."[24] This commentator identified this reason, as well as cost, as possible explanations for the perceived lack of support: "Whatever the validity of these and other more complex reasons, there is little doubt that litigation instruction and research in law school has been neglected and that this neglect has contributed to public dissatisfaction with our litigation system."[25]

It is unnecessary to trace the details of the "great debate" further because professional skills training has recently become a standard part of law school curricula.[26] Outlining the nature of the

---

[24] McGovern, *Instruction and Research on Litigation in Law Schools*, MATTHEW BENDER L. SCH. REP. 1 (Spring 1981). Imwinkelried notes that today most schools place primary responsibility in the hands of full-time instructors. Imwinkelried, *supra* note 2, at 666. Where adjuncts are used, the overall program is frequently under the supervision of a full-time faculty member. The approach at the University of Miami School of Law illustrates this point. "We contemplate that the new skills course, to be taught by adjuncts supervised by a full time faculty member, would be offered each fall and spring semester." Letter from Professor Patrick Gudridge to Ronald L. Carlson (Oct. 12, 1988) (on file at the *Georgia Law Review* office). The inclusion of adjunct instructors in the described manner can form a valid supplement to a school's program.

[25] McGovern, *supra* note 24, at 1. In Kaufman, *Advocacy as Craft*, ALI-ABA CLE Rev., July 12, 1974, at 4-5, Judge Kaufman quoted Lloyd Paul Stryker's lecture at Yale Law School: "The Art of Advocacy! It is an art indeed, but one which in these latter days has fallen into neglect, judging by the lack of enthusiasm evinced for it in many law schools. . . ." Kaufman then provided a critical opinion of his own: "It strikes me as particularly foolish to assume that following a three-year sojourn through the annals of appellate court opinions, the law student will emerge capable of performing the arduous duties of a courtroom lawyer." *Id.* at 5.

The pedagogical techniques involved in skills instruction must be creative and challenging. McGovern points out that methodologies other than traditional ones may be needed to provide meaningful trial advocacy instruction: "Litigation does not lend itself to serious treatment by either the analytical skills gained by reading appellate opinions or the unsophisticated but entertaining tales of noted trial lawyers. It can be argued that an integrated and interdisciplinary form of study may be more appropriate." McGovern, *supra* note 24, at 2. *Compare* Shreve, *Bringing the Educational Reforms of the* Cramton Report *into the Case Method Classroom—Two Models*, 59 WASH. U.L.Q. 793 (1981).

[26] Perhaps reflecting a comparative perspective, an important ABA report remarked as currently as 1987 that skills training "has only recently come into most schools and should be further strengthened." *Long Range Planning for Legal Education in the United States*, REPORT OF ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR 3, 23 (1987) [here-

controversy was essential, however, to the establishment of an important point. Advocacy offerings are constructively criticized on account of their single-minded focus on forensic technique. Historically, many of these courses must be understood in the context of what went before them. Established in response to bench and bar challenges, the content of advocacy classes reflects concentration upon skills they were designed to improve. Broader concerns—matters dealt with in Parts II and III of this Article—remain in the early stages of development.

Before departing from competency considerations, an abbreviated survey of the multi-faceted attack on skill deficiencies is appropriate. Important steps have been taken to advance lawyer excellence in the years since the Sonnet lecture; the existence of these steps should be duly recorded because they demonstrate that progress will continue in the future. Some of the arenas of progress include:

1. Law Schools. When judicial and bar criticism targeted the law schools, some institutions fell far short of affording students even a modicum of emphasis in advocacy training. Others, however, had litigative skills programs in place. Even in the latter kinds of schools, however, the tide of criticism that occurred in the 1970s stimulated growth and development and changes were made.

As these modifications unfolded, critical observers gave law schools due commendation. For example, after the modifications made by many law schools, the once-pessimistic views of Judge Kaufman brightened substantially:

> The law schools have finally begun to take corrective action. In recent years many of them have dramatically changed their curricula and forensic offerings to enhance advocacy skills. At long last law schools are discovering that although the conceptual skills traditionally stressed in their curricula are necessary, they are certainly not sufficient to turn out the litigating lawyer.[27]

Another report marked the progress of those law schools which "in recent years have made substantial advancement" in trial advocacy

---

inafter *Long Range Planning*].

[27] Kaufman, *supra* note 16, at 1626. *Cf.* Kaufman, *supra* note 25, at 5 (expressing Kaufman's earlier views).

training.[28] As law schools turned the corner in the early 1980s, Professor Albert Sacks urged critics to take a close look at what law schools had accomplished, stating that "[t]he profound reforms during the 1970s are merely a precursor."[29]

By 1987, an ABA report prepared under the direction of leading legal educators, lawyers, and judges confidently proclaimed that professional skills training had become a standard part of law school curricula.[30] In the report section entitled *The Objectives of Legal Education*, training for competence is placed as the second major objective immediately after training in analytic skills.[31]

One point seems certain: law schools have succeeded admirably in utilizing the simulation methodology for imparting litigation skills to law students.[32] Forensic technique has proved to be a

---

[28] *Judicial Conference Acts on Devitt Committee Report*, ALI-ABA CLE Rev., Nov. 2, 1979, at 1, col. 2. The Devitt committee reported strong support by the American Bar Association for increased availability of trial skills courses. "[A] reasonable estimate is that only about one in three law students who desire to take a trial skills course are able to do so." *Id.* at 2, col. 1. The report urged that trial advocacy be given top priority in curriculum development, stating that "[w]hen the profession identifies a significant deficiency in the education of lawyers, as this committee, the American Bar Association Task Force, and others have done, the logical solution is for the American Bar Association to amend its accreditation standards to establish that law schools must provide quality trial advocacy training to their students." *Id.*

By 1981 an informed observer, after noting that a widening schism had grown between the practicing bar and legal educators, detected recent signs of accommodation. One reason: The "quiet revolution taking place within the law schools." Brink, *supra* note 9, at 593.

[29] Sacks, *Versus: Pro and Con, Required Skills Training*, 12 Syllabus, Nov. 1981, at 7, col. 4. *See also* McElhaney, *Litigation*, A.B.A. J., Oct. 1988, at 90 (noting the course of law school progress).

An accurate forecast was made 10 years ago in an article analyzing the then-current state of trial practice. The writers observed that: "Better law-school training and continuing education programs seem certain to improve the quality of trial practice. Authorities realize that it is badly overdue." Footlick, Kasindorf, Gale & Boyd, *Lawyers on Trial*, NEWSWEEK, Dec. 11, 1978, at 98, 100.

[30] *Long Range Planning*, *supra* note 26, at 24.

[31] *Id.* at 11. The Report of the Council of the ABA Section of Legal Education announced:

> Professional skills training [has become] a standard, sometimes a major part of law school curricula . . . . Initial doubts about the extension of 'practical' training into the law school curriculum have been largely satisfied. While some still resist the change on principles of legal education philosophy, the principal lingering concern relates not to merit, but to cost, which is clearly greater than the traditional large class-single instructor model.

Id. The report continues to say "skills training has only recently come into most law schools and should be further strengthened." *Id.*

[32] Imwinkelried, *supra* note 2, at 667-68. Current success has all but rebutted the charge

highly teachable commodity. We may not produce totally finished and polished practitioners, but the litigative abilities of students can be raised measurably in well-organized law school courses. In view of this capacity, progressive legal education no longer accepts the notion that we should send our graduates into the world devoid of any basic proficiency in litigation arts.[33] Arthur T. Vanderbilt, law dean and New Jersey chief justice, underlined the rightness of imparting lawyering skills: "Advocacy is not a gift of the gods. In its trial as well as its appellate aspects it involves several distinct arts, each of which must be studied and mastered."[34]

How far the law schools can and should go remains for further review. Some trial advocacy supporters contend that a list of courses should be available in the litigation field comparable to those currently in place for students wishing to emphasize their training in disciplines like taxation or corporations. They inquire why the litigating lawyer should be limited to one basic trial practice course while students desiring to concentrate on other aspects of the law frequently have the opportunity to take multiple courses in their particular field of interest.[35] Attempting to remedy this

---

made by Justice Jackson in the quoted passage at the start of this Article. *See supra* note 1 and accompanying text.

[33] Thomas, *Training the Troops for the Trenches*, 21 GA. ADVOCATE 2, 3 (Spring 1986).

[34] F. KLEIN & J. LEE, SELECTED WRITINGS OF ARTHUR T. VANDERBILT (1965), *quoted in* D. KORNSTEIN, THINKING UNDER FIRE 213 (1987).

[35] It is the author's thesis that an appropriate theoretical balance must always be maintained within the curriculum. Roger Cramton has observed that legal education cannot primarily focus on the "nuts and bolts of law practice. The speculative and theoretical must be given a central place in the law school curriculum because they stimulate the intellect, provide a general framework that makes specific information useful, and establish the foundation for any effective application of law." Cramton, *Some Reflections on Lawyer Competence*, MATHEW BENDER L. SCH. REP. 1 (Fall 1981). Such an emphasis is not incompatible with appropriate kinds of litigative skills training. In Shreve, *supra* note 25, at 793, the author summarized the *Cramton Report* analysis of the function of law schools as creating in students an awareness of analysis, planning, and communication; developing in students a set of standards for judging their own abilities and the abilities of others; and promoting a desire to improve. Shreve suggests that a thoughtfully designed and taught skills course would provide the kind of three-dimensional learning experience that the *Cramton Report* advocates. *Id.* at 794. *See also infra* note 141.

Perhaps it was this sort of advocacy class that the authors of the 1987 Report of the ABA Section of Legal Education had in mind when they set forth law school curriculum recommendations. In the section captioned *The Law School Curriculum*, the report contained several suggestions including those for promoting writing skills, alternative methods of dispute resolution, and legal ethics. *Long Range Planning*, *supra* note 26, at 29. However, the first recommendation in the Report stated emphatically:

shortcoming, Steven Lubet of Northwestern University School of Law proposes a suggested model advocacy curriculum.[36] Much remains for future discussion and development.

Trial advocacy can be part of a skills curriculum where policy issues and ideas for reform of the justice system are companions to skills development. Professionalism and legal ethics also deserve high standing in the instructional effort. A trial advocacy program which blends these features merits the respect of academicians as well as the approval of the bar. The program bears the potential for producing advocates who appreciate legal and ethical rules, and who are highly motivated in their application.[37]

2. Programs and Institutes. Bar organizations responded to the call for competency with enlarged continuing legal education (CLE) programs; state action made many of them mandatory.[38]

> The professional skills training and advocacy programs developed in the last two decades should be maintained, strengthened, and constantly reviewed to ensure that they meet newly developing needs of the profession. It is particularly important that "skills" training be fully integrated into the full range of the curriculum in order to ensure full student comprehension of its relevance to every aspect of the practice of law. Appropriate criteria appear in Accreditation Standard 405(e).

Id.

Reference to the issue of the nature and number of courses needed to properly teach professional skills appears in Carlson, *supra* note 16, at 22. Professor McGovern makes a plea for well-structured advocacy offerings:

> Many law school trial programs are inundated with folklore and war stories and are devoted to instruction concerning easily obtainable skills. Critics are fully justified in calling these courses unacademic. This does not have to be the case. There can be a more rigorous and articulate approach to the litigation process.

McGovern, *supra* note 24, at 1.

[36] *See* Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123 (1987). Lubet's model curriculum is comprised of four courses: Pretrial Litigation, Evidence and Advocacy, Procedure and Advocacy, and Responsiblity of the Advocate. *Id.* at 142.

Edward Devitt and Helen Roland see continuing shortcomings in advocacy training, and call for renewed efforts: "Mere encouragement that law schools provide trial advocacy training has not brought about the needed changes. . . ." Devitt & Roland, *Why Don't Law Schools Teach Law Students How to Try Lawsuits?*, 13 WM. MITCHELL L. REV. 445, 459 (1987).

[37] Carlson, *supra* note 16, at 22.

[38] Today, a large number of states impose mandatory continuing legal education requirements. In addition to a requirement that every active attorney in Georgia must annually attend 12 approved CLE hours of instruction, special trial practice CLE requirements have been imposed. Under an order issued by the Supreme Court of Georgia on October 21, 1987, any member of the State Bar who appears as sole or lead counsel in the superior or state

This outreach recognizes that American society is a legal society. Society is entitled to high standards of competence in the operation of its legal machinery, and an informed corps of lawyers is a vital part of these high standards. The educational effort endeavors to be responsive to this need.

In addition to offerings such as day-long programs on evidence, products liability, trial techniques and the like, another feature emerged. Lengthier programs involving active participation by attendees came into being. Several special institutes dedicated to instruction in advocacy skills evolved, including training programs like the Federal Practice Institute, Georgia Institute of Trial Advocacy, Tennessee College of Trial Advocacy (and similar state programs in other jurisdictions), and the conferences presented by the National Institute for Trial Advocacy (NITA).[39]

B. New Directions

When Chief Justice Burger gave his Sonnet Lecture at Fordham Law School fifteen years ago, he provoked "a storm of controversy on the subject of lawyer competency."[40] Jurists Burger and Kauf-

---

courts of Georgia in any contested civil case or in the trial of a criminal case after January 1, 1990 shall be required to have completed a minimum of three hours each year of "trial practice" continuing legal education courses. ST. BAR OF GA., LITIGATION RULES AND REGULATIONS Rule 8-104D (1987). For comments on the role of the lawyer in an adversary system, see *infra* note 80. For a discussion of law reform and improvement of the litigation system, see *infra* note 103 and accompanying text.

[39] The extended attention to advocacy skills is understandable. While the duty of attorney competency extends to all phases of practice, "the present controversy rages over competence in advocacy." Oakes, *Lawyer and Judge: The Ethical Duty of Competency*, ALI-ABA CLE Rev., June 22, 1979, at 4. One method used in many of the institute programs is to send practice problems to attendees in advance of the institute. On the basis of this material, each attendee prepares his opening statement, direct and cross-examinations, and perhaps a final argument. Over the period of time spent in the institute, the lawyer will appear and present several of these statements and arguments in simulations designed to hone skills in making objections, delivering final arguments, and other trial phases. He will then be critiqued. The learning experience is enhanced by doing, as opposed to simply hearing lectures on trial procedure. Carlson, *The Federal Practice Institute: Dynamic Lawyering in Action*, 28 FED. B. NEWS & J. 310 (1981). *See also* Alsop, *supra* note 10, at 1, col. 2 (describing Ohio Litigation Forum). Many law firms, especially larger offices, have instituted in-house training programs to augment the instruction that is publicly available through CLE programs and NITA-type institutes. Taylor, *Learning the Law—After Law School*, 11 LITIGATION 5 (1986).

This Part of the Article presents, as mentioned earlier, an abbreviated list of competency efforts. There are others, such as the Inns of Court referenced in the next Part.

[40] Oakes, *supra* note 39, at 1. *See also* Burger, *supra* note 10, at 234 (accepting as working

man believed that the graduates pouring from law schools—no matter how naturally bright—had not received needed training in advocacy skills.[41] While the controversy continues today, it presents itself in a much more muted form than the strident debates of the late 1970s and early 1980s. As indicated earlier, one factor in the defusing of the issue was the response of the law schools.[42] Modernly, concerns of the bench and bar over professionalism has largely replaced the competency dispute. The issue has not been nearly so law school directed. Nonetheless, the law schools have a distinct role to play in addressing this contemporary question.

II. PROFESSIONALISM

As observed by Wisconsin Associate Dean and Professor of Law Gerald J. Thain, lawyers today hear a good deal about professionalism.[43] Conferences have been called by state chief justices to study relations among litigators, and special codes of behavior have been promulgated in an effort to civilize the conduct of trial practice.[44] One writer describes the action taken in the Northern District of Texas: "In an unprecedented en banc order, the district court judges adopted standards of conduct to be observed in civil litigation . . . . 'Hardball' strategies spurred the court's displeasure. 'Effective advocacy does not require antagonistic or obnoxious be-

---

hypothesis that from one-third to one-half of lawyers who appear in serious cases are not really qualified to render fully adequate representation).

[41] Cramton & Jensen, *supra* note 11, at 254. Little wonder that many current law school courses, borne of controversy, bear the scars. Designed to address the competency criticism, the core philosophy of these courses is almost exclusively focused on forensic skills. Still in the infant stages of development are the inclusion of historical and professionalism considerations in these course offerings, which are ideas developed in Part III of this Article.

[42] *See supra* notes 31-38 and accompanying text.

[43] Thain, *Professionalism and the Law Professor*, 19 U. WIS. L. SCH. F. 2 (Fall 1988).

[44] Modernly, critics have charged that the adversary system is becoming increasingly uncivil. *See* Lacayo, *Whose Trial is it Anyway?*, TIME, May 25, 1987, at 62 ("Court watchers have also detected a new virulence lately in some defense attacks on prosecutors."). Verbal and other sorts of abuse are discussed in Doucette, *Advocacy and Chivalry*, 92 CASE & COMM. 43 (1987) (citing unlimited lawyer zeal, abrasive rudeness, and resorts by attorneys to personal invective). Observations of this kind have helped spawn reform efforts. *See* Funkhouser, *President's Letter*, 48 IOWA ST. B. ASSOC. NEWS BULL., Sept. 1988, at 4. ("There is a proliferation of Codes of Conduct promulgated by various Bar Associations in an effort to combat a perceived increase in lack of civility between lawyers, and between lawyers and courts and/or clients.").

havior and members of the bar will adhere to [high] standards.' "[45]

A. *Professionalism and the Bar*

Upholding the moral dimension of the law is the concern of dedicated lawyers, judges, and legal educators. In a report published on the topic of professionalism, Ben L. Weinberg, Jr., an attorney, touched upon the need for leaders of the bar to provide salutary examples:

> It [will] be difficult to instill a sense of courtesy and civility in fledgling attorneys once they have graduated from law schools and been admitted to practice, unless there are available role models with whom they can identify and from whom they can adopt a respect for their fellows and a sense of concern for the system. Particularly in the litigation field, possibly as the product of the adversary system, there may be more of an inclination to adopt the stance of their client as their own [than] in other legal fields . . . .[46]

In addition, litigation standards have been designed to prevent attorneys from identifying too closely with their clients; they provide that "[a] client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct."[47] Weinberg further

---

[45] Hyman, *Good Manners Mandated*, 14 LITIGATION 1 (1988) (citing Dondi Properties Corp. v. Commerce Savings and Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988)).

[46] T. MARSHALL, PROCEEDINGS OF A CONSULTATION ON PROFESSIONALISM AND THE PRACTICE OF LAW 57 (1988) (quoting Ben L. Weinberg, Jr.).

The level of aggressiveness in litigation was assessed by one attorney, commenting upon the approach of a colleague: "[His] attitude once you file suit is, 'It's war,' . . . 'We're out to rape and pillage.' " Safian, *James Gale: Hanging Tough in Miami*, AM. LAW., Apr. 1989, at 139.

[47] Dondi Properties Corp. v. Commerce Savings and Loan Ass'n, 121 F.R.D. 284, 288 (N.D. Tex. 1988). A balance must be struck between appropriately aggressive representation of a client on one hand, and abusive litigation tactics on the other. *See id.* Courtesy in civil actions is mandated by *Dondi*, which set forth certain standards of civility:

> A. In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.
>
> B. A lawyer owes, to the judiciary, candor, diligence and utmost respect.
>
> C. A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and respect of the public it serves.

emphasizes the responsibility of experienced attorneys to perform a preceptorial function, and provides suggestions for incorporating professionalism in continuing legal education programs:

> [T]here exists an organization of Inns of Court, designed to facilitate a newly admitted lawyer's transition into the practice and simultaneously provide him or her professional and social contact with one or more established lawyers in the field of litigation.
>
> Another possible method of improving the level of civility among practicing lawyers is to include this as a repetitive topic to be addressed at seminars for which

---

> D. A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.
> E. Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.
> F. A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.
> G. In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.
> H. A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.
> I. Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system.
> J. If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent.
> K. Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

Id. at 287-88.

One commentator raises the question of whether the attorney who emulates noble conduct renders less than zealous representation mandated by Canon 7 of the Code of Professional Responsibility. *See infra* note 85 and accompanying text. Doucette provides an answer:

> Initially, it is difficult to see how the interests of any client are advanced by indulgence in the rancorous excesses that passes for much modern advocacy. And a cursory reading of either the *Model Code of Professional Responsibility* or the newer *Model Rules of Professional Conduct*, now adopted in approximately one third of the states, should quickly convince even the most skeptical attorney that he has explicit, abiding obligations to the court and to opposing counsel as well as to his own client.

Doucette, *supra* note 44, at 45.

> mandatory continuing legal education credit for ethics is given. Most of the topics in the ethics portions of continuing legal education seminars with which I am familiar stress the "thou shalt not . . ." rules. These are of primary importance, of course, in that they relate to those things that a lawyer should not do, violation of which may lead to disciplinary action. But there might be included either as prologue or epilogue, an address on the civility issue.[48]

A number of commentators have decried abuses in the discovery process, paper wars, the filing of burdensome requests or motions for improper purposes, a "win at any cost" approach in court, lack of courtesy toward opposing counsel, and an attitude of disrespect for the trial court.[49] Some observers attribute this decline in civility to the greater profits now generated by law firms. They argue that this uncivil atmosphere will persist so long as there remains a concentration upon the commercial aspect of the law.[50] One critic

---

[48] T. MARSHALL, *supra* note 46, at 57-58 (quoting Ben L. Weinberg, Jr.).

[49] *Id.* at 12. *See also* Hyman, *Wald Cites Three-Pronged Crisis in Professionalism*, Litigation News, Feb. 1982, at 5, col. 1 (noting that lawyers often condone lack of courtesy and civility). For a discussion of statutes and court-fashioned remedies aimed at inhibiting the proliferation of groundless lawsuits and abusive litigation, see Patterson, Yost v. Torok: *Taking Legal Ethics Seriously*, 4 GA. ST. L. REV. 23 (1988) ("In Yost v. Torok, the Georgia Supreme Court created the new tort of abusive litigation to provide within the tort system the means for preventing abusive and frivolous litigation."); Comment, Yost v. Torok *and Abusive Litigation: A New Tort to Solve an Old Problem*, 21 GA. L. REV. 429 (1986). For a discussion of discovery abuse, see Patterson, *An Inquiry into the Nature of Legal Ethics: The Relevance and Role of the Client*, 1 GEO. J.L. ETHICS 43 (1987). Rule 11 of the Federal Rules of Civil Procedure attempts to discourage discovery abuse by requiring attorneys to make a reasonable inquiry into the facts and law supporting filed requests and documents, and sanctions those who fail to do so. FED. R. CIV. P. 11. The foregoing article discusses rule 11, as well as the legal force of the Canons of Professional Ethics, Code of Professional Responsibility, and Model Rules of Professional Conduct. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(d)(1983), bars a lawyer from making a frivolous discovery request or failing to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party. For a discussion of rule 11 sanctions, see Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987); *Rule 11 Standards and Guidelines*, 121 F.R.D. 101, 123-30 (1988). For another approach used by courts to curtail discovery abuse, see Holzberg, *Two Reports Note Limiting Interrogatories is Effective*, Litigation News, Feb. 1989, at 2, col. 2 (noting that local rules have been imposed to limit number of interrogatories). On the problem of overzealous advocacy, see Genson & Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is it Time to Start Prosecuting the Prosecutors?*, 19 LOY. U. CHI. L.J. 39, 50 (1987).

[50] In a speech delivered at the University of Georgia Law Day ceremonies, former ABA

of the current atmosphere contends that lawyers must recognize that a law practice is more than a mere business:

> I implore you . . . to establish that the conversion of our profession into a trade is clearly erroneous.
>
> A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.[51]

Perhaps because of such considerations, the ABA's Commission on Professionalism promulgated the recommendation that all segments of the bar should "resist the temptation to make the acquisition of wealth a principal goal of law practice."[52]

President Robert McCrate stated: "With restraints loosened on the marketing of legal services, law firms of all sizes increasingly viewed themselves as businesses to be run for the greatest profit, however, with a growing subordination of the public nature of the lawyers' calling." Address by Robert McCrate, University of Georgia Law Day Ceremony (Apr. 22, 1989). McCrate added that "the interests of justice and of society must stand ahead of the personal economic interests of lawyers if we are to be true to our heritage." *Id.*

[51] Rifkind, *Professionalism Under Seige: A Call to Combat Commercialism*, BAR LEADER, Sept.-Oct. 1985, at 13-14 (quoting Matter of Freeman, 34 N.Y.2d 1, 7, 311 N.E.2d 480, 483, 355 N.Y.S.2d 336, 339 (1974)). *See also* Laney, *Moral Authority in the Professions*, 48 IOWA ST. B. ASSOC. NEWS BULL., Oct. 1988, at 11 (remarks of Emory University President James T. Laney while delivering the Robert T. Jones, Jr. Memorial Lecture on Legal Ethics at Emory University School of Law).

Lawyer advertising is a concern of some critics who feel it gives license to "the hucksters and the self-promoters." Judge Rifkind asserts a "clamorous need . . . to condemn the behavior that falls short of professionalism" and is critical of the language of the United States Supreme Court in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Rifkind, *supra*, at 14.

Holding that the economic analysis of law undermines professionalism, see Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 755 (1988). Compare the views in Levinson, *Making Society's Legal System Accessible to Society: The Lawyer's Role and Its Implications*, 41 VAND. L. REV. 789, 791-92 (1988) (we do not resolve task of perceiving duties which lawyers owe clients by attaching the label "profession" to lawyer's work; "we must look beyond definitions").

[52] *". . . In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Pro-*

B. The ABA Commission

The foregoing recommendation was among several which came after the Commission held ten formal meetings looking into the question of how legal services are being performed, including such matters as advertising, commercialization, competence, and the duty of the lawyer to the courts before which the lawyer practices.[53] The establishment of the Commission on Professionalism was authorized by the Board of Governors of the American Bar Association.[54] The Commission membership was composed of practicing lawyers, judges, a law professor, and other professionals.[55] Professor Thomas Morgan served as its Reporter.[56] The resulting report contained suggestions and challenges which invited action at the national, state, and local level.[57]

Litigation practices were among those targeted for study by the ABA Commission. Not only lawyer performances, but also how those practices were perceived constituted mutual concerns. In the introduction to its findings, the Commission's report observes that "[l]itigation is seen to consume vast quantities of time and money . . . . A 'scorched-earth' strategy of litigation is said frequently to squander the resources of the parties to the litigation and serve primarily to benefit the lawyers."[58]

Comprehensive recommendations are offered, ranging from the suggestion that all members of the bar should abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility[59] to the view that trial judges should take a more active role in the conduct of litigation.[60] The ABA Commission's effort concludes:

> Perhaps the golden age of professionalism has always been a few years before the time that the living can remember. Legend tends to seem clearer than reality. Still,

---

fessionalism, REPORT OF ABA COMM. ON PROFESSIONALISM, 112 F.R.D. 243, 300 (1986) [hereinafter PROFESSIONALISM REPORT].

[53] *Id.* at 249.
[54] *Id.* at 248.
[55] *Id.* at 249.
[56] *Id.*
[57] *Id.* at 250.
[58] *Id.* at 253-54.
[59] *Id.* at 296.
[60] *Id.* at 290.

> it is proper—indeed it is essential—for a profession periodically to pause to assess where it is going and out of what traditions it has come.[61]

"Professionalism" is described in the report as an elastic concept, difficult of any single definition.[62] Nonetheless, a working concept was deemed essential by the Commission. It embraced Dean Roscoe Pound's definition which described the profession as the pursuit of a learned art—the practice of law—in the spirit of public service.[63]

The recommendations were designed to advance this ideal by promoting competence, fairness, and a devotion to public interest. In addition, the Commission recommended: (1) that all states require mandatory continuing education, with an examination for lawyers at the end of the instructional day or at other times during the CLE seminar;[64] (2) that training programs be instituted whereby experienced lawyers assist young attorneys during their first three years or so to help them face the practical and ethical issues which inevitably arise in practice;[65] (3) that lawyers advance the enactment of legislation that is in the public interest;[66] (4) that the bar emphasize that where the duty to the client conflicts with the lawyer's obligation to the legal system, the duty to the system of justice must transcend the duty to the client;[67] (5) that the bar associations constantly seek improvements in the system of justice;[68] and (6) that there be increased participation by lawyers in pro bono activities.[69]

Less formal recommendations from other sources also urge

---

[61] *Id.* at 304. *See also* Lehman, *When the Law Becomes Big Business*, N.Y. Times, Feb. 5, 1989, at 3-3, col. 1 ("Many lawyers today are obsessed with compensation issues [and] the stress on bottom-line profitability has sometimes led to a sacrifice in the quality of legal services."); Elliot, *Professionalism—Do We Talk a Better Game Than We Play?*, 25 GA. ST. B.J. 2 (1988) ("Increased emphasis on profitability has taken a substantial toll with respect to treating the practice of law as a calling with commensurate obligations to the public and the profession.").

[62] PROFESSIONALISM REPORT, *supra* note 52, at 261.

[63] *Id.* "The practice of law 'in the spirit of public service' can and ought to be the hallmark of the legal profession." *Id.*

[64] *Id.* at 273.

[65] *Id.* at 271-74.

[66] *Id.* at 281.

[67] *Id.* at 280.

[68] *Id.* at 288.

[69] *Id.* at 297. This is a partial list. Additional recommendations appear in the report.

professionalization of modern practice. A pledge for lawyers has been proposed, including such promises as "I will not take cheap shots" and "My word is my bond: I will scrupulously observe all mutual understandings among counsel."[70]

C. *Educators*

Even law professors are not immune from suggestions for advancing professionalism. Associate Dean Thain lists several elements of professionalism that should be practiced by law professors.[71] First, "[a] true law school professional is one who is constantly striving to achieve peak performance in the roles of teaching, research and public service."[72] Additionally, while law faculty are right to seek restructuring and reform of legal education in general or to focus on a specific institution, they must also have "a proper measure of allegiance to [the] employer."[73] Thain explains the need to work from within the schools for reform. "Those who carp about their institution but consider efforts to improve it beneath them are not conducting themselves professionally . . . ."[74]

Professionalism, according to Thain, also includes "a respect for others and for the views of others."[75] While it is entirely proper to use all of one's advocacy skills to oppose a wrong-minded view, "[i]t is a far different thing to . . . treat [others] with contempt because they indicate an unwillingness to accept every proposition forwarded by you."[76] Fourth, the true law school professional recognizes the teacher's responsibility to the larger profession. Thain writes that "[a] true professional will be involved in some of the concerns of the bar [or education generally]."[77] This responsibility may be fulfilled by service on a bar committee, pro bono involvement with a case or cause, or service on university organizations beyond that which is required.

Finally, Thain lists as an element of professionalism a sense of

---

[70] T. MARSHALL, *supra* note 46, at 23 (views of Robert Brinson).
[71] Thain, *supra* note 43, at 2.
[72] *Id.*
[73] *Id.* at 3.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

proportion or balance.[78] Thain includes the need for the great teacher to refrain from being pompous and to retain and display a sense of humor. "Pomposity detracts from the substance of a person's case or presentation and limits the effectiveness of an advocate. I believe pomposity and professionalism are incompatible."[79]

III. Role of the Law School

While digressive reference to the teaching profession might prove interesting, the analysis returns to a central theme of this Article: perceived deficiencies in the conduct of practicing attorneys, and the responsibility of the law schools to train law students in a manner that will contribute affirmatively to reduction of the problem. As noted earlier, the concerns today are less with bare competence; the larger interest is the enhancement of public-spir-

---

[78] *Id.*

[79] *Id.* Thain lists several elements for law teacher professionalism, five of which are enumerated here. Others contained in his article include a dedication to truth-telling and a recognition of one's responsibility to make the community a better place to live. *Id.* at 2-3. His discussion emphasizes the obligations of a law professor to share the benefits of scholarship. Thain also adverts to the professionalism called for in assigning grades, particularly when a low grade is merited. He believes that a student who deserves a low grade should get one. *Id.* at 2. Consistent with this tenet, adherence to accepted grading norms of an institution would seem to be an obligation of the instructor.

A further provision could be added to Dean Thain's list—consistency of effort. This refers to the professor who, year after year, produces quality writing and inspirational teaching. Regarding the classroom, professionals who are dedicated to the goal of effective teaching must constantly bear in mind that the messages we bring to the students are new for them each season; regardless of the number of times that we have taught the course, the fresh faces before us deserve a renewed effort, laced with the latest in case developments and creative techniques to communicate and challenge them. Consistency in performance means avoiding burnout in one's research efforts as well. There is great value in sharing legal scholarship. "Law schools have been, and should continue to be, the principal initiators of research into problems relating to law and the justice system." *Long Range Planning*, *supra* note 26, at 29. *See also infra* note 105. A professor improves his branch of legal discipline by adding qualitatively to the literature of the law. This is in keeping with the tradition of scholastic giants like Wigmore and Ladd. A steady and consistent effort marked the work of such professionals. *See generally* Roalfe, *John Henry Wigmore—Scholar and Reformer*, 53 J. Cr. L., Criminology & Police Science 277, 283 (1962); McCormick, *Wigmore, Nation's Greatest Legal Scholar, Passes*, 6 Tex. B.J. 154 (1943).

Thain observes that while few are ever fully successful in attaining all of the lofty goals set forth, there is great satisfaction on the part of those who "reach for the peak of professional conduct." Thain, *supra* note 43, at 3. Perhaps the first challenge to the teaching profession is to arrive at a consensus as to the dominant elements of law teacher professionalism. The recent draft report of the Special Committee on the Ethical and Professional Responsibilities of Law Professors of the Association of American Law Schools (sometimes referred to as the Byse Report) is a worthwhile effort in this direction.

ited service (whether the lawyer is in private practice or works in another capacity)[80] which avoids narrow, selfish, and "cheap shot" modes of expression.

A. *Ethics in Litigation*

While broader survey courses in professional responsibility are valuable, there is a particular need to incorporate trial ethics in lawyering skills courses. Informed commentators have suggested that while deficiencies in professionalism are visible elsewhere, the flaws are especially observable in the litigation field.[81]

In response to the concerns of society, bench, and bar, the ABA Commission on Professionalism began its recommendations with law schools: "[w]e begin our recommendations with law schools, not because they represent the profession's greatest problems but because they constitute our greatest opportunities. We believe that law students should be viewed as members of the legal profession from the time they enter law school."[82]

The first recommendation authored by the Commission provided in pertinent part: "Law schools should give continuing attention to the form and content of their courses in ethics and professionalism. *They should weave ethical and professional issues into courses in both substantive and procedural fields.*"[83]

---

[80] The introduction to R. CARLSON & E. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE 2 (1989), observes that competent representation of a private client vindicates public purposes:

> By guiding private clients, the attorney advances a number of public interests: contributing to accurate fact-finding in the adversary system, helping maintain the public's perception of the litigation system as legitimate, and vindicating such democratic values as the individual's autonomy.
>
> The most obvious public interest is the societal stake in the operation of the adversary system. One of the assumptions underlying that system is that it is a superior method of determining the merits of factual disputes between litigants.

Carlson and Imwinkelried conclude, "counsel's participation vindicates democratic values. The vindication is evident in criminal cases. In that setting, the defendant's attorney stands between the individual client and the state to protect the individual's civil liberties." *Id.* at 79 (quoting Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123, 132 (1987)). *See also* Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 125 (1987) (ability to use counsel enables individual to control course of litigation and, consequently, his own future).

[81] T. MARSHALL, *supra* note 46, at 57.

[82] PROFESSIONALISM REPORT, *supra* note 52, at 266.

[83] *Id.* (emphasis added).

· It makes sense to particularize the infusion of litigation ethics, while retaining in the curriculum the broad survey offering in the field of professional responsibility. Canon 6 of the Code of Professional Responsibility requires that a lawyer represent a client competently.[84] Canon 7 is especially concerned with principles of trial professionalism.[85] Ethical problems may be raised relating to these provisions. Assume a case in which a question exists respecting the admissibility of a key item of evidence. The offering counsel is confident the item will ultimately be received by the court. How much can be said in opening statement about such proof? May counsel preview items of proof in his opening when he strongly feels such items are admissible but when such evidence will surely be objected to and admissibility is contested?

There are other issues during trial. What is the propriety of a cross-examiner asking potentially (but not clearly) objectionable questions which have great dramatic effect? Suppose that a witness is undergoing a scathing but generally proper cross-examination. May the party that called the witness make an objection which is marginally appropriate in order to give the witness time to collect his thoughts? The inquiry moves to the end of a trial. When do the rules allow assertion of personal belief by lawyers as they deliver closing arguments?[86] Incorporating coverage of these issues

---

[84] Canon 6 states that "[a] lawyer should exercise independent professional judgment on behalf of clients." CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1978). The lawyer's judgment must be exercised "free of compromising influences and loyalties." *Id.* EC-1.

[85] Canon 7 states that "[a] lawyer has a duty to represent his client with zeal limited only by his duty to act within the bounds of the law." CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1978). Ethical Considerations 19 through 40 define the lawyer's duty to the adversary system of justice. *See id.* EC-19 to -40.

[86] Some personalizing is permitted. It is when the lawyer's opinions impact credibility and ultimate issues that the rules are violated. There are other questions. Should personalized analogies be permitted during closing? Model Rule of Professional Conduct 3.4(e) forbids the attorney from alluding during closing to "any matter that . . . will not be supported by admissible evidence . . . ." Whenever the attorney uses a personalized analogy, the lawyer is making reference to extra-record information that in a narrow sense has not been the object of trial proof. Is the use of this effective argument technique a violation of Rule 3.4(e)? *See* Mansfield, *Jury Notice*, 74 GEO. L.J. 395 (1985).

Suppose a criminal defense attorney reads a very recent advance sheet report concerning a criminal case. While the jurisdiction previously adhered to the position that trial judges had a duty to give the jury a cautionary instruction whenever the prosecutor used eyewitness testimony to make his case, that obligation on the part of the trial court has been newly removed. The jury instruction that controlled under prior law had the effect of disparaging eyewitness testimony because the judge would tell jurors that such testimony is

into their trial setting is essential. Creative simulation or discussion problems will carry the message to the student in a manner that has the potential for leaving an indelible imprint of the concept in the student's mind.[87]

---

frequently faulty and should be reviewed with great care. The new state supreme court decision eliminates the duty to routinely give the instruction. The next day at an instructions conference, it becomes evident that neither the trial judge nor the prosecutor is aware of the decision that has just been announced. The judge lists the instructions he will give, which includes the cautionary charge on eyewitnesses. Counsel remains silent. Can he sit on his hands or does he have a duty to reveal the information? *See* ABA Model Rule 3.3(a)(3) (lawyer shall not knowingly fail to disclose to judge such legal authority directly adverse to his position and not disclosed by opposing counsel). *See also* R. CARLSON & E. IMWINKELRIED, *supra* note 80, at 2-4.

For a discussion of ethics problems in criminal case representation, see Saltzburg, *Lawyers, Clients and the Adversary System*, 37 MERCER L. REV. 647, 659-60 (1986) ("Any assertion that the goal of the adversary process in a criminal case is different from its goal in civil litigation must be rejected. . . . That incidents of trial may differ somewhat in civil and criminal cases does not mean that the goals of the process also differ."); Project, *A Survey of Recent Case Law on Professional Responsibility and Criminal Procedure*, 31 How. L.J. 285, 285-366 (1988) (discussing recent case law concerning professional responsibility).

[87] Carefully crafted problem materials may be an effective methodology for instruction in litigation ethics. One difficulty facing those instructors who are interested in raising the ethical awareness of law students has been the sparseness of recently published advocacy coursebooks specifically integrating the two disciplines, litigation and ethics, in substantial fashion. Many current books do an excellent job of explaining forensic technique. However, a random survey of leading coursebooks published in the last six years reveals a lack of uniformity respecting inclusion of distinct major text sections on litigation ethics in each of the book chapters on opening statement, cross-examination, expert witnesses, final argument, and the like. Some texts contain such materials, others do not. *See* Lubet, *supra* note 36, at 140-41 (ethical problems are hard to convey in abstract, but trial practice instructors should be capable of simulating ethical dilemmas).

A worthwhile development has been the Newsletter of the ABA Section of Litigation Committee on Training the Advocate. Selections therein address issues raised in the text of this Article. *See, e.g.*, Dzienkowski, *Teaching Professional Responsibility in the Litigation Context*, Training the Advoc., Fall 1988, at 1, 2 ("Instead of teaching or lecturing about professional responsibility 'in the air,' one would present discrete and focused problems in a concrete area of law."); Simon, *Teaching Legal Ethics to Potential Litigators*, Training The Advoc., Fall 1988, at 3 ("After countless hours of Socratic neutrality, many students have no conception of client loyalty. . . . Lawyers may feel half-hearted about clients, but they cannot give half-hearted efforts.").

Balancing one's duty to the client with obligations to the legal system is a subject addressed in S. LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 179 (1988):

> Zeal and confidentiality have come to be seen as the hallmarks of the adversarial advocate's duty to his client. Yet untempered zeal would require that lawyers disregard the dictates of the legal system and limitless confidentiality would invite fraud and chicane. That some limits are necessary is beyond doubt. But what those limits should be has engendered an intense and ongoing debate.

B. Scholarship: Legal Doctrine and Legal History

While infusing ethical principles into instruction on legal rules and trial techniques, the individual who teaches advocacy has a continuing responsibility in the direction of scholarship. Perhaps the need is greater than in the case of several other fields where law school casebooks, texts, and hornbooks abound.[88] One commentator assesses the situation:

> [I]t is apparent that a complex body of trial law exists, although it has so far received only sporadic attention from legal scholars and seems underutilized by the profession. If trial law is to be more systematically thought about by scholars and more effectively used by attorneys, its basic doctrines need to be gathered, described, and analyzed in a more comprehensive way than has been

---

The subject of the lawyer as an advocate is studied in survey works on legal ethics. In L. PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY 425-37 (2d ed. 1984), the author explores the problem of the overzealous advocate as well as the problem of the underzealous one. In the area of print materials for practicing attorneys concerned with professional responsibility questions in trials, see R. UNDERWOOD & W. FORTUNE, TRIAL ETHICS (1988).

[88] The scholarly writings on the law of evidence, for example, stand in contrast to the general lack of comparable works in the advocacy field. Among other great scholars in evidence, John Henry Wigmore's contributions are immense. The first edition of Wigmore's *Treatise on Evidence* was the product of 10 years of monastic toil and consisted of four volumes. The third edition was expanded to 10 volumes when it was published in 1940. "Even stated in purely quantitative terms this was a stupendous undertaking." Roalfe, *supra* note 79, at 283. Where does Wigmore's work stand in the universe of legal scholarship? Eminent commentators have provided the answer. Qualitatively, Wigmore's work has been described as the greatest treatise ever published on any field of American law. Professor Zechariah Chafee endorsed the view that it was the most complete and exhaustive treatise on a single branch of law that has even been written. Chafee, *Book Review*, 37 HARV. L. REV. 513 (1924). Edmund M. Morgan appraised it as the best work ever produced on any comparable division of Anglo-American law. Morgan, *Book Review*, 20 B.U.L. REV. 776, 793 (1940). Dean Charles T. McCormick concluded: "It is without question the greatest of Anglo-American law treatises of all time . . . ." McCormick, *supra* note 79, at 154. Keys to Wigmore's success were his gifts for organization and concentration: "[H]e could work intensely in the midst of confusion and probable interruption." Roalfe, *supra* note 79, at 284. A list of the collected works of Wigmore appear in a special supplement to the *Northwestern Law Review*. *See Bibliography*, 75 NW. L. REV. 19-122, No. 6 Supp. (1981).

Few litigation law scholars will achieve the level of publishing productivity described in this note. It is worthwhile, however, to recognize a model of excellence. As observed earlier, while few may be successful in duplicating such lofty achievements, there is great satisfaction in reaching for the peak of professional conduct. *See supra* note 79.

done before.[89]

In addition to gathering and analyzing modern rules that regulate trial procedure, scholarship might take the researcher in other directions as well. Sol M. Linowitz made a recent plea for increased curriculum emphasis on legal history and instruction in principles of Anglo-Saxon justice.[90] He emphasized the importance of tracing for students the need for law in society and exposing them to the historical forces and rules that have shaped our legal system.[91] Certainly a measure of the rich history of the evolution of trial rights should be included in the study of advocacy.

Final argument to the jury provides an apt example that the history of trial rights is important. The process of concluding and summing up the case comprises an exercise of high import to attorneys. Whether a criminal case is tried before a jury or before a judge alone, the United States Supreme Court in *Herring v. New York*[92] held that it is unconstitutional to foreclose counsel's opportunity to deliver a final argument. Justice Stewart's opinion concluded that partisan advocacy on contending sides of a criminal prosecution will best promote the goal that the guilty are condemned and the innocent are acquitted: "In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment."[93]

Few have explored the landmark developments that shaped the right to orally argue a case. Argument to the jury is mentioned in connection with early American trials. When the 1735 trial of John Peter Zenger began in City Hall in New York, one of the momen-

---

[89] Tanford, *An Introduction to Trial Law*, 51 Mo. L. REV. 623, 627-28 (1986). Tanford mentions that most states have codified some of their rules of trial procedure, and a few have comprehensive sets of rules as complex as their rules of pretrial and appellate practice. *Id.* at 627. Almost every state has codified rules governing procedural matters, such as whether counsel have the right to ask questions during jury selection, whether jurors may take notes, or whether jury instructions precede or follow closing arguments. Many have rules on substantive matters such as whether counsel may comment on a party's failure to testify or may state a personal opinion about the case. *Id.*

[90] Linowitz, *Law Schools Must Help Make the Practice of Law the Learned and Humane Profession it Once Was*, Chronicle of Higher Educ., Sept. 14, 1988, at 52, col. 2.

[91] *Id.*

[92] 422 U.S. 853 (1975).

[93] *Id.* at 862.

tous legal struggles in the early history of this country began.[94] Andrew Hamilton provided a brilliant defense of Zenger.[95] His summation struck a powerful blow for freedom of the press and has been described as one of the greatest speeches ever delivered in America.[96]

Knowledge of this kind of tradition needs to be imparted to students of trial law. So does an understanding of the contributions of America's litigators to our civil liberties. One commentator asked the following questions: "How can you study law without learning about the great courtroom advocates? How can you know American history without learning about America's advocates?"[97] The author of these inquiries was puzzled by the "curious fact" that Americans have rarely dwelt on this aspect of their legal history.[98] Social and political issues customarily arrive in a courtroom for definition,[99] and the technique of using this forum to expand liberties and protect freedom is a democratic tradition. Litigants and their lawyers have sometimes performed heroic tasks, yet the important role of courtroom advocates has for the most part gone unnoticed.[100]

---

[94] F. LATHAM, THE TRIAL OF JOHN PETER ZENGER 55 (1970).

[95] *Id.*

[96] *Id.* For the history of oral argument, see Carlson, *Argument to the Jury: Passion, Persuasion, and Legal Controls*, — ST. L.U.L.J. — (forthcoming) (1988).

[97] D. KORNSTEIN, *supra* note 34, at 1.

[98] *Id.*

[99] "There is hardly a political question in the United States which does not sooner or later turn into a judicial one." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Oxford University Press 1947). De Tocqueville's book was first published in 1835. It apparently was as true then as today that the forces of history have assigned to the courts the most pressing social problems. As summarized by one author:

> From colonial times to today, our courts have dealt with issues of civil liberties. Inevitably, such cases are a barometer of American tolerance, of attitudes toward minorities, and a sense of security. Freedom of expression and religion are frequently judicial issues. The rights of criminal defendants, the death penalty, the insanity defense, are all grist for the judicial mill. The list goes on and on.

D. KORNSTEIN, *supra* note 34, at 8.

[100] D. KORNSTEIN, *supra* note 34, at 8. Kornstein argues that part of the problem "is due to law school education in America." *Id.* at 1-2. He adds:

> Such education consists almost exclusively of studying and analyzing the decisions of appellate courts. For reasons that are unclear, the role played by the advocate in the process that resulted in the court decisions goes unnoticed.
>
> At times, one even feels as if law school professors, who do most of the writing about the law, look down on practicing lawyers. The professors steep aspir-

In any critical analysis of society's institutions, former Chief Justice Burger reminds us of the countless examples of courageous lawyers. "Mr. Justice Jackson commented that in every vindication of the rights of individuals and in every advance in human liberty in history, the key figures were lawyers willing to risk their professional reputations—as [John] Adams did—and their future in pursuit of an ideal of fundamental fairness."[101]

The line of courtroom lawyers from Hamilton through Darrow and continuing up until the present day has had much to do with protecting our basic rights. Great advocates have understood the profession's responsibility to serve the community, and to stand ready to assist not only the rich and the mighty, but also the poor and powerless.[102] One pride of the legal profession must be its willingness to defend principle in the face of great odds.

C. Law Reform

Law school education affords a unique opportunity to expose gifted minds to gaps in the legal system and to the need for remedial action. The pronouncements of the Code of Professional Responsibility and other ethical themes provide worthy guidelines for new attorneys. Canon 8 commands that "a lawyer should assist in improving the legal system."[103] Ethical Consideration 8-1 suggests that changes in human affairs make it necessary to constantly improve our legal machinery: "[B]y reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein."[104]

> ing lawyers in the substance, rules, and procedures of the law. After the students graduate and pass the bar, continuing legal education programs update their substantive knowledge. Rarely, if ever, is there any effort to teach about the titans of the courtroom and their effect on American history.
>
> In any event and whatever the cause, a void exists in the legal literature about how courtroom advocates have influenced American history.

Id.

[101] Chief Justice Burger, speech from the Touche Ross Report, *Ethics in American Business* (available from American Inns of Court Foundations).

[102] Linowitz, *supra* note 90, at 52, col. 3.

[103] CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1978).

[104] CODE OF PROFESSIONAL RESPONSIBILITY EC 8-1 (1978). Note 4 to the Ethical Considerations points out that there are few great figures in the history of the bar who have not concerned themselves with the reform and improvement of the law.

The sentiments expressed by the Code are echoed in the Report of the Commission on Professionalism. For the Commission's recommendations, see *supra* notes 58-69. *See also*

A function of a responsible trial advocacy course must be to alert aspiring barristers when there are deviations between standards of professionalism and existing court customs. Questions, such as whether a particular local practice comports with ethical precepts and broadly accepted standards for trial conduct, must be asked. Examples of worthy subjects for corrective action abound.

1. Summation. In the area of final argument, local practice in a few jurisdictions permits the party with the burden of proof to waive his first speech. In such jurisdictions, the plaintiff or prosecution can waive the first argument but give the last argument.[105] According to one commentator, "[t]his maneuver is usually called 'sandbagging' the defense. It forces the defense to make its argument first, depriving the defendant of the ability to respond to anything the plaintiff says."[106]

What do professional rules and standards say about a plaintiff or prosecutor waiving the first speech? Are there professional proscriptions against sandbagging? Because of its particular concern for the improvement of litigation proceedings and the trial conduct of counsel, the American College of Trial Lawyers, presented a revised Code of Trial Conduct in 1987.[107] Standard 22 of the Code addresses the honesty, candor and fairness required of counsel, and provides in important part: "[I]n those jurisdictions in which a side has the opening and closing arguments, [a lawyer should not] mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely."[108] By waiving entirely his first speech, the prosecutor does not merely withhold some of his positions; he conceals them all, thereby engaging in conduct that would seem to be in contravention of the

---

Long Range Planning, *supra* note 26, at 29 (placing responsibility on law school teachers and law reviews to lead research and law reform because "[o]nly through constant inquiry into the factual and theoretical bases for the rules and practices of the system is it possible to revitalize and reform the justice system").

[105] Tanford, *supra* note 89, at 682-83.

[106] *Id.*

[107] AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT 2 (rev. 1987).

[108] *Id.*, Standard 22, at 11. In Dondi Properties Corp. v. Commerce Savings and Loan Association, 121 F.R.D. 284, 287 (N.D. Tex. 1988), a firm endorsement of the American College's trial standards appears. Announcing the federal court's standards for practice, the judgment added this footnote: "We also commend to counsel the American College of Trial Lawyers' Code of Trial Conduct (rev. 1987). Those portions of the Code that are applicable to our decision today are set out in the appendix [to the decision]." *Id.* at 278 n.8.

Code of Trial Conduct.

The subject was deemed to be so important that it received attention in the Federal Rules of Criminal Procedure. The order of arguments is prescribed in Rule 29.1: prosecution's argument, reply by defendant, concluding with the prosecutor's rebuttal summation.[109] Concerns about the sort of sandbagging described in this section prompted decisive pronouncements on the part of the drafters of the federal rule. While state practice may sometimes permit the prosecution to waive its initial closing argument, federal practice clearly opposes such a doctrine:

> [F]air and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply. . . . The [House Judiciary] Committee is of the view that the prosecutor, when he waives his initial closing argument, also waives his rebuttal.[110]

One commentator summarizes the status of the law regarding sandbagging by the party with the burden of proof: "In many jurisdictions this maneuver is seen as unfair, and is prohibited. The party with the right to go last has the obligation to go first, and must either make both arguments or waive argument altogether. This seems to be the modern rule."[111] In courts that follow a con-

---

[109] FED. R. CRIM. P. 29.1. There are some jurisdictional variations to the rule that the party with the burden of proof opens and closes the jury arguments. *See* GA. UNIF. SUP. CT. R. 13.3 (1987) (if defendant introduces no evidence in civil case, he shall be entitled to open and conclude arguments); W. DANIEL, GEORGIA CRIMINAL TRIAL PRACTICE § 23-2 (1988) (defense entitled to make opening and concluding argument if defendant has not introduced any evidence in criminal case other than testimony of defendant); Tanford, *supra* note 89, at 682 n.303.

On the occasionally encountered custom of allowing the party with the burden to dispense with the first speech, see MCELHANEY, TRIAL NOTEBOOK 481 (2d ed. 1987) (describing two jurisdictions wherein defendant in civil action gives first final argument); Tanford, *supra* note 89, at 682 n.303.

[110] FED. R. CRIM. P. 29.1; Notes of Committee on the Judiciary, House Report No. 94-247. AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT, Standard 22(c) (rev. 1987), supports the view of the federal rules drafters that it is improper for the party with the burden of proof and the right to open and close to withhold his positions by waiving the first speech. *See* Carlson, *supra* note 96.

[111] Tanford, *supra* note 89, at 683 (but noting that "several older cases, at least implicitly, permit this kind of partial waiver" of first argument). At this point in his article on trial law, Tanford cites Central of Georgia Railroad Co. v. Sellers, 129 Ga. App. 811, 815, 201 S.E.2d

trary pattern, attention to the issue by bench and bar would seem appropriate.

This practice is illustrative of the sort of issue which calls for close scrutiny. The deviation of local rules from promulgated trial standards and/or ethical guidelines may be evident in other regards as well. Post-verdict interviews of jurors provide another example.

2. Contacts with Jurors. After conclusion of a trial, there may be casual contact between one of the attorneys and a juror. On the other hand, such contact can take on more intensive character, such as systematic post-trial interviews of the jurors by the losing attorney. Are such approaches to jury members deemed appropriate and proper?

Certainly in a field as delicate as the subject of contact with a trial juror, the rules must be clear. The careful attorney wants to comport himself in an ethically proper manner. Everyone understands that talking to a juror about substantive matters is a practice fraught with danger, and it is vital that ethical guidelines and court practices be aligned to prevent abuse.

The ethical codes provide some guidance on this matter. A good

---

485, 488 (1973), on the proposition that trial should not be a game. The case addressed the propriety of reading law to the jury, and the court pointed out that counsel cannot read court decisions to the jurors to enlighten them upon the law. *Id.* For example, reading to the jury a case from the Georgia Reports is improper. It is also improper to attempt to convey the same material to them by means of reading law to the court but making sure that this is done in the presence of the jury. "The trial of a lawsuit should be as far removed as possible from the appearance of gamesmanship. The practice complained of here is condemned." *Id.*

The first sentence of the Georgia statute on order of argument is not dissimilar in its terms from the federal criminal rule heretofore discussed in this portion of the article. *See supra* note 109. However, past cases have lent a different interpretation to GA. CODE ANN. § 17-8-71 (1982). *See* Bradham v. State, 243 Ga. 638, 639, 256 S.E.2d 331, 332 (1979) (trial court may permit party having opening and concluding argument to waive opening argument). A 1988 ethics book addresses the propriety of permitting the opening party to state most or all of its positions in the reply argument:

> In most jurisdictions the party with the burden of proof makes the initial closing argument and has the option of reserving a portion of her time for rebuttal. An attorney may be tempted to inject new matter on rebuttal, knowing that the opponent will not have a chance to respond. Courts should stop such an argument sua sponte.

R. UNDERWOOD & W. FORTUNE, *supra* note 87, at 378. On the question of what occurs when the party with the right to deliver the first closing argument waives, then the adversary also waives his argument, see Harris v. State, 52 Ga. App. 110, 111 182 S.E. 421, 422 (1935). Compare with this last case the federal view which appears in the text preceding *supra* note 110.

place to start is Standard 19(f) of the Code of Trial Conduct of the American College of Trial Lawyers which provides as follows:

> Subject to any limitations imposed by law, it is the lawyer's right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge. After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer should not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.[112]

Two points are apparent from the foregoing passage. First, it is critical to understand that all contact with jurors is restricted to the post-trial stage. Second, the American College Code provides strong evidence that while some legal restrictions may be placed on interviews, they are ethically appropriate when such contacts are conducted with the proper tone.

Moreover, an encouraging spirit regarding post-trial interchange with jurors is supplied by the American Bar Association Code of Professional Responsibility, Ethical Consideration 7-30, which provides:

> After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to personal feelings of the juror.[113]

---

[112] AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT, Standard 19(c), at 10 (rev. 1987). These provisions are aspirational and therefore are not generally binding upon courts. However, in many respects they provide an outstanding guide to professional conduct and have been so recognized in judicial decisions. *See, e.g., supra* note 108.

[113] CODE OF PROFESSIONAL RESPONSIBILITY EC 7-30 (1978). Note 50 to this Ethical Consideration cites *ABA Opinion 319* (1968):

> Certainly as to states in which the testimony and affidavits of jurors may be

Post-verdict interviewing of jurors as contemplated by the Code of Professional Responsibility is one of the most direct ways for counsel to discover violations of Federal Evidence Rule 606(b).[114] In *People v. Hutchinson*,[115] California Chief Justice Traynor observed that there is little reason to believe that permitting proof by juror affidavit of overt misconduct would encourage tampering with the jury after a trial.[116] Additional support for post-verdict interviewing by counsel can be found within Federal Rule of Evidence 606(b) itself.[117] Congress certainly did not include specific grounds for impeaching a jury verdict in rule 606(b) only to bar interviews designed to discover whether those grounds are present. The legislative history of the rule does not indicate that an incongruous result of this kind was intended by the drafters of the federal evidence code.[118] An ABA ethics opinion suggests that when procedural codes such as the Federal Evidence Rules allow the testimony of jurors as to irregularities occurring during the hearing of a case, "it is not unethical for [a lawyer] to talk to and question jurors."[119]

In the face of such ethical opinions and considerations, some local rules have been enacted to prohibit lawyers from, and punish

---

> received in support of or against a motion for new trial, a lawyer, in his obligation to protect his client, must have the tools for ascertaining whether or not grounds for a new trial exist and it is not unethical for him to talk to and question jurors.

One commentator states that "[t]his is as it should be .... Nowadays, there is no legitimate basis for any ethical objection to *civilized* postverdict contact with jurors." St. John, *Let Lawyers Talk to the Jury*, 14 LITIGATION 1, 56 (1988) (emphasis added).

[114] Carlson & Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 266-67. FED. R. EVID. 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

[115] 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196, *cert. denied*, 396 U.S. 994 (1969).

[116] *Id.* at 350, 455 P.2d at 137, 78 Cal. Rptr. at 201.

[117] FED. R. EVID. 606(b). *See supra* note 114.

[118] Carlson & Sumberg, *supra* note 114, at 267. *See* H.R. Rep. No. 93-650, 93d Cong., 2d Sess. 1 (1974); S. Rep. No. 93-1277, 93d Cong., 2d Sess. 1 (1974).

[119] *ABA Opinion 319* (1968); *see supra* note 113.

them for, making contact with a juror after a trial.[120] The confusion spawned by such policies is apparent. The ethical attorney prepares himself for practice by schooling himself in principles espoused in professional responsibility standards. In some locations,

---

[120] Carlson & Sumberg, *supra* note 114, at 266 n.135. A 1988 review of interviewing rules appears in Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C.L. REV. 509, 510-11 (1988). A few courts have enacted local rules barring post-trial contact between lawyers and jurors. On the other hand, several jurisdictions have no rules prohibiting a losing litigant from interviewing jurors after trial. But even where there are no local rules, individual judges will sometimes order lawyers to refrain from contacting jurors after a trial. St. John, *supra* note 113, at 1. In still other jurisdictions courts have required a showing of specific instances of misconduct or good cause before the trial judge will allow the litigant to interview. *Id.* at 528. A map of the country in Island, *Post-Trial Interviewing of Jurors*, Research Notes, Winter 1988, at 1, col. 1, shows the several United States district courts and the few state jurisdictions which require permission from the court before there can be any post-verdict interviewing of jurors. The reason for the prohibitions may be that "some courts abhor such conversations." St. John, *supra* note 113, at 1.

Jury misconduct may come to light in a different way. Instead of the attorney initiating the contact, a juror will contact one of the lawyers in the case "to clear [his] conscience." Tanner v. United States, 483 U.S. 107 (1987). *See also* United States v. Kum Seng Seo, 300 F.2d 623 (3d Cir. 1962) (use of prohibited newspaper article in jury room, which eventually caused reversal of conviction, was called to attention of defendant's counsel by telephone call made to him by juror).

The Georgia Supreme Court recognized grounds for overturning a jury's verdict in Watkins v. State, 237 Ga. 678, 229 S.E.2d 465 (1976). Two jurors had made an unauthorized visit to the scene of a robbery to reenact part of the crime and related their findings to the full jury. The trial court denied the defendant's motion for a new trial, which was based on affidavits of three jurors that pointed to this misconduct. The trial judge relied on the strict Mansfield prohibition, "rooted deeply in Georgia law," that a juror cannot impeach his own verdict. *Id.* at 683, 229 S.E.2d at 470. In fact, the rule was so deeply embedded in Georgia law that the state legislature codified it by statute. GA. CODE ANN. §§ 9-10-9, 17-9-41 (1982), provided that "[t]he affidavits of jurors may be taken to sustain but not to impeach their verdict."

On appeal, the Georgia Supreme Court stated that "there are constitutional limitations [to the no-impeachment rule] which must be recognized to preserve the fundamental concept of a fair trial." *Watkins*, 237 Ga. at 684, 229 S.E.2d at 470. The court found that the two jurors who made the unauthorized visit to the scene of the robbery had become unsworn witnesses against the defendants in violation of the sixth amendment, and that the constitutional violation required reversal of the jury's verdict. In reaching this position, the court reasoned that "the intentional gathering of extra judicial evidence, highly prejudicial to the accused, by members of the jury and the communication of that information to the other jurors in the closed jury room is inimical to our present jury trial system." *Id.* at 685, 229 S.E.2d at 470. *See* Carlson & Sumberg, *supra* note 114, at 268-69. The *Watkins* case is commented upon in W. AGNOR, GEORGIA EVIDENCE 26 (2d ed. 1986) (noting that there are constitutional limitations on Georgia's no-impeachment rule). An excellent review of impeachment rules appears in Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920 (1978).

when the lawyer acts in complete accord with the ethical precepts heretofore detailed and talks with a juror, dire results are threatened because a local rule may bar this very practice.[121] Such disharmony between ethical standards and local trial rules is intolerable. There should be no tension between court rules and ethical standards.

Young attorneys must be alerted to these sorts of unresolved conflicts. Additionally, law reformers need to eliminate these schizophrenic inconsistencies between ethics and law which bear the potential for anomalous outcomes.[122]

3. Evidence Law Revision. In some locations, evidence codes have not been reworked since the mid 1800s. The controlling evidence rules in these jurisdictions are scattered; they originated in a mix of old statutes, common law, courthouse custom, and conflicting precedents. The problem is not unique to one or two states. Other jurisdictions, however, have made great strides. After the Federal Rules of Evidence were enacted in 1975, many jurisdictions adopted reform measures. Since 1975, at least thirty-one states and the commonwealth of Puerto Rico recodified evidence codes to provide their lawyers and judges with comprehensive, well-organized and accessible evidentiary rules. Despite these advances, numerous states lag behind.[123] Again, corrective action

---

[121] *See* Kotlowitz & James, *Trial and Error: The Courts Face a Dilemma When Jurors Renounce Decision After Verdict*, Wall St. J., Nov. 28, 1988, at 11, col. 3 (discussing 8.75 million dollar verdict against G.D. Searle Co.: "[a] Searle attorney met with each of the jurors [who renounced their votes] after the trial ended—a practice permitted in Minnesota, though illegal in some states").

[122] *See* Crump, *supra* note 120, at 510. Professor Crump reviews several justifications advanced for lawyer interviews with jurors, including the possibility of discovering juror misconduct or the notion that such browsing will substantially contribute to improving counsel's legal abilities. *Id.* at 530. For guidelines for attorney post-verdict contact with jurors, see R. UNDERWOOD & W. FORTUNE, *supra* note 87, at 307.

[123] Georgia law presents an excellent example. In 1858 the Georgia legislature began work on a condensed code of evidence. *See* EVIDENCE STUDY COMM., REPORT TO THE BOARD OF GOVERNORS, STATE BAR OF GEORGIA 1987, at 1 (1988). Publication of the Code of Practice was accomplished in 1863, and this work has been referred to since that time as the Code of 1863. *Id.* Most of Georgia's present rules of evidence are derived from that code. *Id.* The overview to the Report noted that "litigation has changed substantially over the last 125 years [and] [i]n short, despite our courts' frequent efforts at rejuvenation, Georgia's Evidence Code is showing its age." *Id.* To its credit, at its 1987 session the General Assembly of Georgia adopted a joint resolution encouraging a study of the Georgia law of evidence. *Id.* at 2. An evidence study committee of the State Bar of Georgia has prepared proposed legislation, with the assistance of the Legislative Counsel's Office. The proposed new rules for

seems appropriate.[124]

4. Treatment of Witnesses. Humanizing the treatment of witnesses in and out of court is a valid object of reform initiatives, and provides a microcosm of the kind of law revision efforts that lawyers can make. The focus here will be on two aspects of the problem, the rape victim and the imprisoned material witness to a crime.

Of the two topics, the plight of the rape victim has received wider publicity. Rape statistics in the early 1970s showed the need for reform.[125] Rape rates increased while the rate of apprehension and conviction remained low.[126] Many rapes were never reported and others were not cleared by arrest.[127] Only slightly more than half of all rape cases prosecuted resulted in conviction.[128] Of indexed crimes, prosecuted rape cases were the least likely to result in conviction.[129]

Reasons for the low conviction ratio included the reluctance of the victim-witness to be subjected to the sometimes scorching cross-examinations which were allowed under evidentiary rules and which exposed the past life of the victim to court review. Open season was often declared on aspects of victim history, and the sexual past of the witness sometimes going back many years before the litigated incident was deemed relevant.

In response to these considerations, interest groups and members of the bar urged reforms in rape trial practices.[130] For federal

---

Georgia blend the Federal Rules of Evidence and existing Georgia statutory rules in exemplary fashion.

[124] On the responsibility of lawyers and the bar to lead legislation aimed at streamlining the legal system and improving legal services, see *supra* notes 66 & 103-04.

[125] Ireland, *Reform Rape Legislation: A New Standard of Sexual Responsibility*, 49 U. COLO. L. REV. 185, 185-86 (1978).

[126] *Id.* at 185.

[127] *Id.*

[128] *Id.* at 185-86. *See also* Westen, *Reflections on Alfred Hill's "Testimonial Privilege and Fair Trial,"* 14 J.L. REFORM 371, 385 (1981).

[129] Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90 (1977).

[130] Exceptions to the rule of exclusion which are explicitly stated in rule 412 include past sexual behavior with persons other than the accused when there is a conflict as to the source of semen detected in or on the victim's body, and the alleged victim's past sexual behavior *with the accused* when relevent to the question of consent. In addition, rule 412 mandates admission of sexual history when the evidence is "constitutionally required to be admitted." *See* FED. R. EVID. 412.

courts, the revision movement resulted in the establishment of rule 412 of the Federal Rules of Evidence.[131] Subject to limited exceptions,[132] the rule provides that in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible, nor are specific acts of a victim's past sexual behavior. In addition to enactment of an important federal rule, revision legislation has been passed in many states, so that today the laws in almost every jurisdiction have been altered.[133]

For law reformers, witness laws in addition to those dealing with rape victims merit attention. The occasional abuse of the material witness processes turns the focus to vintage laws still on the books, in an area that has not received the public attention that abuse in rape trials has received. Old statutes remain in the codes of many states that allow the jailing of witnesses for inability to post bail.[134] Occasionally these dated code provisions are dusted off by the authorities and used to lock up a citizen. The witness' crime? His only "crime" is that he *saw* one committed.

The material witness confinement laws characteristically operate as an adjunct of the bail system. A person who has witnessed the commission of a public offense will usually remain free after cooperating with the authorities. Jurisdictional variations abound. His promise to appear at subsequent hearings and trials will typically

---

[131] Ireland, *supra* note 125, at 186.

[132] This rule has been suggested for Georgia as part of the overall revision of the state's evidence code, designed to replace GA. CODE ANN. § 24-2-3 (1982). Georgia's proposed rule 412 is based upon the federal rule, with changes to make application of the rule clearer and simpler. For an explanation of the proposed revision of Georgia evidence, see *supra* note 123.

[133] *See* J. Call, D. Nice & S. Talarico, An Analysis of State Rape Shield Laws 1 (1988) (unpublished manuscript) (noting that women's movement directed considerable energy to enactment of shield provisions in late 1970s and early 1980s, and remarking "there are a few states that still do not have a statutory shield provision, [but] most states have adopted some provision that contravenes the common law rule of automatic admissibility"). There are great variations in state rape shield rules, and the foregoing researchers study the differences in these laws. *See* Berger, Searles & Neuman, *The Dimensions of Rape Reform Legislation*, 22 LAW & SOC'Y REV. 329 (1988); Ordover, *supra* note 129; Searles & Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 WOMEN'S RTS L. REP. 25 (1987); Tanford & Bocchino, *Rape Victims Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980).

[134] Carlson & Voelpel, *Material Witness and Material Injustice*, 58 WASH. U.L.Q. 1 (1980) (lists all statutes).

suffice, or sometimes the witness may be released on a simple written recognizance. On a few occasions, however, the material witness confinement procedures will be brought out of cold storage by the authorities to jail a witness. These procedures sometimes result in arbitrary results. The temptation to employ the procedures is generally greatest in connection with the out-of-town witness visiting the city of the crime. The witness may be required by a judge or committing magistrate to post a sizeable bond guaranteeing he will be around to testify. And if the witness cannot produce the requisite cash or security, he can be placed in jail until trial.

To remedy such injustices, the laws of each state should be reviewed and, where necessary, revised. The law must strike a balance between the need for courtroom testimony and the individual liberty of citizens. Depositions of the witness' testimony provide one answer; the testimony can be taken, and the witness released. For those attorneys who want to ensure that the jury has an opportunity to observe the witness' demeanor, a videotape of his account of the crime offers a solution.[135]

5. Other Targets for Reform. In conclusion, humane provisions for the pretrial and trial treatment of witnesses are essential to the American legal process. The material witness to a crime, as well as the rape victim, provide examples of witness situations wherein the related law is worthy of attention, study, and reform. There are many others. Expert witness practice[136] and modern discovery practices[137] provide additional objects for remedial action. Jurisdictions with outdated codes of evidence also cry for reform.[138] Alertness to specific problem areas meriting concern and change is a key characteristic of the responsible lawyer. According to Ethical Consideration 8-9, "[t]he advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should

---

[135] Kling, *A Mandatory Right to Counsel for the Material Witness*, 19 J.L. REFORM 473 (1986).

[136] The expanding array of experts available for courtroom testimony requires that evidentiary rules be in place to ensure that the witness' specialty will assist the trier of fact, and that the expert's supporting data is reliable. *See* Proposed Rules by ABA Comm., 120 F.R.D. 299, 369-74 (1988) (proposed revisions to rule 703 of Federal Rules of Evidence).

[137] Rule 11 sanctions have been strengthened to address the problem of discovery abuse. *See supra* note 49.

[138] *See supra* note 123.

aid in making, needed changes and improvements."[139]

IV. Recommendations and Conclusions

When Professor Imwinkelried advanced the need for an educational philosophy in trial practice training, he performed a valuable service. He quotes with approval Professor Lubet, who stated that trial practice instruction has matured from a sideline into a discipline.[140] Imwinkelried calls for additional development so that trial practice courses will focus on fact evaluation skills, in a manner not dissimilar from many other law school courses.[141]

While not denigrating forensic technique,[142] this Article has agreed with the position that a trial practice course cannot deal exclusively in the tactics of opening statement, witness examination, and the like. Other matters suggested for inclusion included litigation ethics along with full and competent coverage of procedural rules and orientation of students to the need for specific re-

---

[139] Code of Professional Responsibility EC 8-9 (1978). *See supra* note 104.

[140] Imwinkelried, *supra* note 2, at 666.

[141] *Id.* at 677. Professor Imwinkelried endorses the idea that the focus of most law school courses should be to assist the student in constructing a necessary technical ladder. *Id.* at 673-76. This focus "directly impacts upon pedagogic technique." *Id.* at 676. Imwinkelried remarks upon commonalities between substantive law courses and features of the trial practice course, citing the legal doctrine and intellectual judgment involved in conducting the instructions conference or constructing a final argument. "At the [instructions] conference, the attorney must build one of the most important rungs of Llewellyn's 'technical ladder.' " *Id.* at 679. The skills of fact evaluation and predictive judgment are called upon particularly in a bench trial. *Id.* at 681. He emphasizes the need for trial practice instructors to "seize every opportunity to draw parallels between the techniques learned in their course and the analytic techniques studied in other courses." *Id.* at 677. There may be some value in running matters the other way as well. If some areas of trial practice study will benefit from the kind of pedagogic technique utilized in other courses, might not other courses profit from a measured infusion of the kinds of simulations and problems so creatively used by trial practice teachers? In L. Nizer, Reflections Without Mirrors 103 (1978) an interesting point is made: "[M]emory depends on concentration, and that concentration results from aroused interest."

Writing experience which forms a valued part of law school discipline should also be a component of advocacy training. Coursework in trial and appellate advocacy must of necessity include an element of brief or motion writing, and the motion writing should be supported by a well-crafted memorandum of law. Every great courtroom advocate understands the vital importance of the written and oral word. D. Kornstein, *supra* note 34, at 215. Persuasion depends upon mobilization of language. The training discipline—the law school advocacy courses—should stimulate an interest in clarity of expression, whether spoken or written. "The power of clear statement," said Daniel Webster, "is the great power of the bar." *Id.*

[142] *Compare* Imwinkelried, *supra* note 2, at 668-69.

forms in the system of the trial of cases.[143] Lawyers must be at the forefront of remedial action when principles of justice and fairness hang in the balance. What better person to improve the rule of law in a manner consistent with codes of ethics and principles of professionalism than the trial lawyer?

This may be a tall order for a single course to accomplish, and perhaps enhancement of offerings will be required to meet the objectives.[144] One point seems clear. The focus of the trial practice curriculum cannot be exclusively one dimensional. Professor Imwinkelried states that a trial practice course focusing on forensic technique cannot justify its place in the academy.[145] How much such a focus has contributed to that perceived lack of professionalism which is so much decried by bench and bar today is subject to conjecture. However, a singular opportunity is now present and the moment can be seized for the advancement of professionalism. The Report of the American Bar Association Commission on Professionalism concluded: "[Law schools] should weave ethical and professional issues into courses in both substantive and procedural fields."[146] Later the report remarks: "[S]ince ethical questions are found in all substantive areas of the law, we believe that these issues can and should be discussed when they inevitably arise in all courses."[147] Inasmuch as some of the most difficult ethical questions arise in trials, those inquiries form vital components of the course.

The attorney's appreciation of the need to build a sound technical ladder and to hone skills in making valid predictive judgments is clear.[148] But professionalism in trial practice training connotes more than that. For the instructor, it means imparting a sense of the role and history of trial law, and there is the added obligation to stimulate students with creative ideas for progressive improvement of the adversary system. Lawyers who seek advancements in our methodology for delivering justice are pursuing their learned

---

[143] *See supra* note 105.

[144] One informed commentator's model advocacy curriculum appears in Lubet, *supra* note 36, at 142.

[145] Imwinkelried, *supra* note 2, at 668.

[146] PROFESSIONALISM REPORT, *supra* note 52, at 266.

[147] *Id.* at 267.

[148] Imwinkelried, *supra* note 2, at 684.

art in the spirit of public service.[149] By espousing such principles of professionalism, the trial practice course implements a philosophy which positions it "squarely within the mainstream of the law school curriculum."[150]

[149] PROFESSIONALISM REPORT, *supra* note 52, at 261.
[150] *See* Imwinkelried, *supra* note 2, at 673.