

2018

Teaching the Art of Effective Advocacy in the 21st Century: A Paradigm Shift

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Recommended Citation

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Available at: <https://open.mitchellhamline.edu/mhlr/vol44/iss1/5>

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**TEACHING THE ART OF EFFECTIVE ADVOCACY IN THE
21ST CENTURY: A PARADIGM SHIFT[†]**

John Sonsteng with Samuel Heacox, Hannah Holloran, and
Cara Moulton^{††}

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[†] Teaching and learning theory applies to more subjects than advocacy; however, this narrow approach to advocacy skills is to avoid a kerfuffle with professors and lawyers who do not teach advocacy skills.

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I. INTRODUCTION

When discussing Effective Advocate Training, this Article is talking about one particular kind of advocacy: oral advocacy. It is the advocate who “assists, defends, pleads, or prosecutes for another.”¹ The Article addresses one who understands rhetoric, “the art of

1. *Advocate*, BLACK’S LAW DICTIONARY (10th ed. 2014).

speaking . . . effectively”;² that is, one who is “skill[ed] in the effective use of speech.”³

Effective oral advocacy skills are of paramount importance to advocates.⁴ The lessons of effective rhetoric are as powerful now as they were in ancient times. Perhaps the simplest, yet highly effective, lesson is repetition. The repetition of a theme is powerful and persuasive. One cannot forget Dr. King’s repetition of a theme in his “I Have a Dream” speech.⁵ Professor Irving Younger inspired a generation of attorneys with his lecture on the Ten Commandments for cross-examination.⁶ Paul Simon understood this in his 1975 song

2. *Rhetoric*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/rhetoric> (last visited Oct. 8, 2017).

3. *Id.*

4. Oral arguments are necessary components of every court proceeding. As described in *Black’s Law Dictionary*, oral argument is “[a]n advocate’s spoken presentation before a court (esp. an appellate court) supporting or opposing the legal relief at issue.” *Oral argument*, BLACK’S LAW DICTIONARY (10th ed. 2014). The definition further provides,

Oral argument is the one chance for *you* (not for some chance-assigned mere judge) to answer any questions you can stir any member of the court into being bothered about and into bothering with, and the one chance to sew up each such question into a remembered point in favor . . . In any but freak situations, oral argument is a must.

Id. (citing KARL N. LEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 240 (1960)).

5. Dr. King used many effective rhetorical strategies, not the least of which is repetition. Sarah Lloyd-Hughes, *The Anatomy of an Inspiring Speaker: Martin Luther King Jr.—“I Have a Dream” Speech*, GINGER PUB. SPEAKING (Aug. 1, 2012), <https://www.gingerpublicspeaking.com/article/i-have-a-dream-speech-martin-luther-king-jr-the-anatomy-of-an-inspiring-speaker>. The phrase “I have a dream” is used eight times in the seventeen-minute-long speech. *Id.* Other phrases, including “we can never be satisfied,” “go back,” “with this faith,” and “let freedom ring,” are also repeated in the short oration. *Id.*

6. Stephen D. Easton, *Irving Younger’s Ten Commandments of Cross-Examination: A Refresher Course, with Additional Suggestions*, 26 AM. J. TRIAL ADVOC. 277, 278 (2002) (“Even today, some fifteen years later, Irving Younger remains the most influential educator of lawyers. In addition to the thousands of attorneys who were fortunate enough to attend his seminars before his death, thousands more have watched videotapes of these presentations. Indeed, the Professional Education Group, the agency that grew out of its work with Professor Younger into the nation’s leading provider of continuing legal education speakers, still sells more tapes of Professor Younger’s presentations than of its many other popular speakers. Furthermore, because Professor Younger was the first to articulate the essential principles of trials in a mass media format, those principles have shaped the presentations of later educators of trial attorneys. Therefore, many (if not all) of those who educate

“Fifty Ways to Leave Your Lover.”⁷ An advocate can also learn from the parallel 2016 presidential campaigns of Bernie Sanders and Donald Trump.⁸ That is, repetition of a theme, even with little evidence, can be very persuasive.

Rhetoric is not dead, but alive and well. For that reason, teaching and learning advocacy skills is as important now as ever. One can apply the lessons from history to address the needs of today’s advocates. Both teachers and students can now utilize effective technology, modern research about teaching, and learning theory to craft the most effective teaching and learning programs to meet the needs of each individual student.

The Effective Advocate Training Program (“EATP”) is *not* a distance-learning program.⁹ It is connected learning at its very best. It is a program that combines the best of time-tested, face-to-face advocacy training with the current technological tools to build on, enhance, and improve advocacy training programs. The EATP method effectively raises advocacy skills training to a higher level and brings the art of effective advocacy into the twenty-first century.

Part II of this Article begins by briefly examining the history of rhetoric as an art of persuasion with a focus on how this art continues to evolve into the twenty-first century.¹⁰ Part III discusses digital distraction and why new technology has changed the most effective method to teach oral advocacy.¹¹ Part IV describes the EATP method

today’s trial attorneys at continuing legal education lectures, including this author, are the latter day disciples of Professor Younger, often without even realizing it.”).

7. TIMOTHY WHITE, *ROCK LIVES: PROFILES AND INTERVIEWS* 373 (1991). White notes that Paul Simon’s iconic “50 Ways to Leave Your Lover” is essentially an exercise in simple end rhyme. *Id.* The tune remains catchy because of its simplicity. *Id.* Simon’s brother explained that the song was born of Simon’s attempt to teach his young son how to rhyme simply and effectively. *Id.*

8. See *What Trial Lawyers Can Learn from Donald Trump and Bernie Sanders*, VINSON & COMPANY (2016), <http://vinsoncompany.com/wp-content/uploads/2015/09/What-Trial-Lawyers-Can-Learn-from-Donald-Trump-Bernie-Sanders.pdf> (analyzing the effect of “simple messaging” in the parallel campaigns of Bernie Sanders and Donald Trump).

9. See *Distance learning*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/distance%20learning> (last visited Oct. 8, 2017) (defining “distance learning” as “a method of study where teachers and students do not meet in a classroom but use the Internet, e-mail, mail, etc., to have classes”). In traditional educational settings, the student attends lectures and demonstrations, and then the student studies away from the classroom, alone and disconnected from the teacher.

10. See *infra* Part II.

11. See *infra* Part III.

and how it incorporates proven teaching and learning theories with new technology to provide an effective advocacy training program where students and teachers communicate digitally and in person.¹²

II. HISTORY OF RHETORIC: A BRIEF REVIEW

Effective rhetoric is vitally integral to the successful advocate. Rhetoric as an art is implicitly unique. In the words of Aristotle, rhetoric “may be defined as the faculty of observing in any given case the available means of persuasion. This is not a function of any other art.”¹³ The art of rhetoric may be traced back to the Greeks; however, it can properly be understood as a function of communication that surely predates even the earliest records.¹⁴

The *Iliad*, circa 1200 BCE, displays an interest through oration in rhetoric as an art.¹⁵ In *Classical Rhetoric and Its Christian and Secular Tradition from Ancient to Modern Times*, Professor George A. Kennedy argues that the *Iliad* provides a wealth of information on classic rhetorical tradition even prior to its naming and standardized use in oratorical practice.¹⁶ Kennedy maintains that enthymematic device in rhetoric is readily employed by Homer.¹⁷ The word *enthymeme* is of Greek origin.¹⁸ It is a product of the Greek words *en-* (within) and *thymos* (mind); the modern rhetorical designation is given to arguments that do not explicitly state, but rather imply, one’s premise.¹⁹

This idea, of an implied and unspoken premise, was understood years later and associated with persuasion in works by Aristotle.²⁰ It

12. See *infra* Part IV.

13. Gerard A. Hauser, *The Most Significant Passage in Aristotle’s Rhetoric, or How Function May Make Moral Philosophers of Us All*, 12 RHETORIC SOC’Y Q. 13 (1982).

14. Andrew R. Cline, *A Brief History of Ancient Greek Rhetoric*, RHETORICA, <http://rhetorica.net/textbook/greek.htm> (last visited Oct. 8, 2017). Cline explains that rhetoric was initially studied as a noble pursuit in the fifth century by the Sophists. *Id.*

15. See GEORGE A. KENNEDY, *CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITIONS FROM ANCIENT TO MODERN TIMES* 11 (2d ed. 1999).

16. *Id.*

17. *Id.*

18. *Enthymeme*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/enthymeme> (last visited Oct. 8, 2017) (defining “enthymeme” as “a syllogism in which one of the premises is implicit”).

19. *Id.*; *En*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/en> (last visited Oct. 8, 2017).

20. Arthur B. Miller & John D. Bee, *Enthymemes: Body and Soul*, 5 PHIL. &

was during this time that the word “rhetoric” arose.²¹ Concurrently, bodies of work were authored on this subject by not only Aristotle but also Plato and many others.²²

Socrates proffered that by saying a thought aloud, there is a much greater degree of believability.²³ He explained, “only in principles of justice and goodness and nobility taught and communicated orally for the sake of instruction and graven in the soul . . . is there clearness and perfection and seriousness.”²⁴ Figures such as Empedocles and Gorgias of Leontinun, recognized as the fathers of the rhetorical tradition, were praised by Aristotle and others for their ability to orate.²⁵

Rhetoric is among the many arts that came to Rome from Greece.²⁶ Arguably, it is the Roman contributions to rhetoric that have most influenced the modern approach and that modern approaches best reflect.²⁷ Thomas Cahill, a prominent scholar of rhetoric, describes the influence of one man of Rome:²⁸

RHETORIC 201, 207 (1972).

21. See PETER THOMPSON, *PERSUADING ARISTOTLE: THE TIMELESS ART OF PERSUASION IN BUSINESS, NEGOTIATION AND THE MEDIA* 3 (1998) (noting the word “rhetoric” is from the time of Socrates).

22. See, e.g., MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (Vintage Books 1994) (1966); PLATO, *THE DIALOGUES OF PLATO: PHAEDRUS* 115 (Robert Maynard Hutchins et al. eds., Benjamin Jowett trans., Encyc. Britannica 1952) (360 BCE); Steven Mailloux, *Rhetorical Hermeneutics*, in *INTERPRETING LAW AND LITERATURE* 345 (Sanford Levinson & Steven Mailloux eds., 1988).

23. See PLATO, *supra* note 22, at 140.

24. *Id.*

25. ROBERT WARDY, *THE BIRTH OF RHETORIC: GORGIAS, PLATO, AND THEIR SUCCESSORS* 7 (1996).

26. See D.A. Russell, *Rhetoric and Criticism*, 14 *GREECE & ROME* 130, 131–39 (1967) (discussing the historical Greek roots of Roman rhetoric).

27. See Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 *S. CAL. INTERDISC. L.J.* 613, 631 (1999) [hereinafter Frost, *Introduction to Classical Legal Rhetoric*]; Brett & Kate McKay, *Classical Rhetoric 101: A Brief History*, *THE ART OF MANLINESS*, <http://www.artofmanliness.com/2010/11/30/history-of-rhetoric/> (last visited Oct. 8, 2017).

28. Thomas Cahill was educated by Jesuits and studied ancient Greek and Latin. Thomas Cahill, *About Thomas Cahill*, <http://thomascahill.com/bios/thomascahill-2> (last visited Oct. 8, 2017). He continued his study of Greek and Latin literature, as well as medieval philosophy, scripture, and theology, at Fordham University, where he completed both a B.A. in classical literature and philosophy, and a pontifical degree in philosophy. *Id.* He went on to complete his M.F.A. in film and dramatic literature at Columbia University. *Id.* He has taught at Queens

For Cicero, “to speak from the heart would be the rashest foolishness; one must always speak from calculation: What do I want to see happen here? What are the desires of my audience? How can I motivate them to do my will? How shall I disguise my weakest arguments?

The techniques of the successful politician, the methods of modern advertising—the whole panoply of persuasion is to be found in Cicero. The figure closest to him in our age might be Dale Carnegie, who advised that every single word and gesture be calculated to “win” and “influence.” However squeamish such advice may make us, to the ancients it made perfect sense.²⁹

Cahill’s depiction of the reach of Cicero’s reflections on rhetoric is not overbroad. Around 50 BCE, Cicero crafted *De Inventione*, a handbook for oration and rhetoric that is still widely used today.³⁰ *De Inventione* puts forth the five canons of rhetoric commonly associated with Cicero: (1) invention, (2) arrangement, (3) style, (4) memory, and (5) delivery.³¹ Successful applications of these strategies are as suitable today as they were in Roman times.³² Strategies of rhetoric employed by orators such as Seneca the Elder³³ were not limited to these canons but expanded to schools of rhetoric for the practice of declamatory and other exercises “through which a student could develop a judicial mind and the ability to speak

College, Fordham University, and Seton Hall University; served as the North American education correspondent for the *Times* of London; and for many years, regularly contributed to the *Los Angeles Times Book Review*. *Id.*

29. THOMAS CAHILL, HOW THE IRISH SAVED CIVILIZATION 47–48 (1995).

30. Cicero, *De Inventione*, in READINGS IN CLASSICAL RHETORIC 196 (Thomas W. Benson & Michael H. Prosser eds., H.M. Hubbell trans., Hermagoras Press 1988) (46 BCE).

31. *Id.*

32. Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319, 325 (2011). *But see* JOHN F. REYNOLDS, RHETORICAL MEMORY AND DELIVERY: CLASSICAL CONCEPTS FOR CONTEMPORARY COMPOSITION AND COMMUNICATION 2 (1993) (arguing how the canons are often oversimplified).

33. Born in Corduba (now Córdoba), Spain (c. 55 BCE–39 CE), Lucius Annaeus Seneca (“Seneca the Elder”) was a Roman rhetorician and author of the Latin work on declamation, *Oratorum sententiae divisiones colores* (Sentences, Divisions, and Colors of the Orators and Rhetoricians). *Lucius Annaeus Seneca*, ENCYCL. BRITANNICA, <https://www.britannica.com/biography/Lucius-Annaeus-Seneca-Roman-author> (last visited Oct. 8, 2017).

eloquently.”³⁴ Quintilian,³⁵ another famous Roman rhetorician, drew heavily from his predecessors, Cicero and the earlier Greeks, to create *Institutio Oratoria* in 95 CE.³⁶ Considered a seminal work of oration, the *Oratoria*’s twelve volumes delve into an orator’s education, structure and methods, appeal to comedy, arrangements, style, imitative attributes, subject matter, memory, delivery, and broader concepts of theory.³⁷ Quintilian promulgated rhetorical terms such as *narratio* and *refutatio*, derivatives of which are used still in modern rhetorical concepts.³⁸

Later, around 296 BCE, the study of rhetoric ventured into political panegyrics (speeches) with calls by some, such as Eumenius, for a revival of schools of rhetoric.³⁹ It has been argued the evolution of pre-modern literature was based in political panegyric, furthering the ever-intertwining web of rhetoric and politics.⁴⁰

Throughout the Middle Ages and into the Renaissance, the role of rhetoric became less scholarly and more of a practical art.⁴¹

34. Jennifer Kruse Hanrahan, *Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools*, 2003 BYU EDUC. & L.J. 299, 309 (2003).

35. Quintilian (c. 35 AD–97 AD) was a Roman rhetorician born in Calagurris Nassica, Hispania, who penned influential works on rhetoric. Martin Lowther Clarke, *Quintilian*, ENCYCL. BRITANNICA, <https://www.britannica.com/biography/Quintilian> (last visited Sept. 28, 2017) (noting that Quintilian’s work on *Institutio Oratoria* is considered by many to have contributed significantly to modern day educational theory).

36. Aurel M. Cazacu, *Eloquence Education in Quintilianus’ Writings*, 5 CONTEMP. READINGS IN L. & SOC. JUST. 987, 988 (2013); Quintilian, *Institutio Oratoria*, in READINGS IN CLASSICAL RHETORIC 116, 143, 196, 217 (Thomas W. Benson & Michael H. Prosser eds., H.E. Butler trans., Hermagoras Press 1988) (95 BCE).

37. Quintilian, *supra* note 36.

38. Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 96 (1994) (noting Quintilian emphasized emotion in the *narration*, which is the Statement of the Case); Michael Frost, *Greco-Roman Legal Analysis: The Topics of Invention*, 66 ST. JOHN’S L. REV. 107, 128 (1992) (discussing Quintilian’s belief that *refutatio* is the refutation that is based on the principle of proofs).

39. Giuseppe La Bua, *Patronage and Education in Third-Century Gaul: Eumenius’ Panegyric for the Restoration of the Schools*, 3 J. OF LATE ANTIQUITY 300, 300–315 (2010).

40. See generally Rebecca Ruth Gould, *The Much-Maligned Panegyric: Toward a Political Poetics of Premodern Literary Form*, 52 COMP. LITERATURE STUD. 254, 254 (2015) (arguing that literary praise from Arabo-Persian qaṣīda, the Sanskrit prabandhi, and the Chinese fu raised awareness of poetry).

41. See RITA COPELAND, RHETORIC, HERMENEUTICS, AND TRANSLATION IN THE MIDDLE AGES 9 (1991); PETER MACK, A HISTORY OF RENAISSANCE RHETORIC 1380–1620, at 131 (2011).

Emerging from these periods into the era of British colonization and early America was a rhetoric that, while steeped in artistic and scholarly tradition, manifested itself in powerful political oration.⁴²

American rhetoric can be traced back to the eighteenth century and the founding of the United States.⁴³ It was considered America's "golden age of civic rhetoric."⁴⁴ Without strict and pervasive schools of oration to follow, influences on methods of persuasion became increasingly sporadic.⁴⁵ Professor Mark G. Longaker wrote,

Thomas Jefferson's negative reaction to Patrick Henry's explosive oratory embodies bourgeois apprehension. Jefferson imagined Henry as a sublime orator whose power erupted from a preliterate connection to raw emotion, qualities that he admired in "uncivilized" Amerindian⁴⁶ orators but that he thought inappropriate and potentially dangerous to the new republic.⁴⁷

As rhetoric developed with gusto in America, it did so as an art without the rigidity in form previously seen.⁴⁸

Even in the turbulence of early American colonization, American rhetoric was not limited to an overtly political sphere. In an article titled *John Marshall's Judicial Rhetoric*, law professor Christopher Eisgruber points to the opinions of John Marshall⁴⁹ as an early interaction of rhetoric and persuasion in the courtroom.⁵⁰ New forms of rhetoric were thereafter retained and developed in courtrooms to serve interested parties and to create judicial precedent.⁵¹

42. See Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733, 734 (2011).

43. See *id.*

44. MARK GARRETT LONGAKER, *RHETORIC AND THE REPUBLIC: POLITICS, CIVIL DISCOURSE, AND EDUCATION IN EARLY AMERICA*, at xi–xiii (2007).

45. See Frost, *Introduction to Classical Legal Rhetoric*, *supra* note 27, at 631–33.

46. See *Amerindian*, OXFORD ENGLISH DICTIONARY (2d ed. 2017) (“[A] member of one of the indigenous peoples of the Americas.”).

47. LONGAKER, *supra* note 44, at 73.

48. See Frost, *Introduction to Classical Legal Rhetoric*, *supra* note 27, at 632–34.

49. See Brian P. Smentkowski, *John Marshall*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/John-Marshall> (last visited Sept. 29, 2017) (explaining that Chief Justice John Marshall (Sept. 24, 1755–July 6, 1835) was the fourth Chief Justice appointed to the United States Supreme Court and the principal founder of the United States system of constitutional law).

50. Christopher L. Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 SUP. CT. REV. 439, 441 (1996).

51. See *id.* at 458.

American rhetoric in the twenty-first century possesses new and old attributes. Rhetorical analysis has extended to “mass-mediated culture” with a multitude of persuasive facets.⁵² In spite of the fundamentally changing playing field, calls are renewed, citing Quintilian and Cicero, for “the need to start with the fundamentals.”⁵³ However, a backlash against rhetoric has arisen in political spheres: John Rawls has subscribed to Jeremy Bentham’s rejection of appeals to emotion, and others have an ever-wariness of the “rhetorician’s guileful craft.”⁵⁴ Rhetoric and classical rhetorical classroom training in the twenty-first century has yet to be defined but all indications seem to suggest that this is an audience with new forms of distraction. Aristotle’s “available means of persuasion” may have shifted, but it seems true that such persuasion remains “not a function of any other art.”⁵⁵

III. MODERN RHETORIC: THE TEACHING OF MODERN RHETORIC SKILLS SURE AIN’T WHAT IT USED TO BE

The changes that communication technology has brought to both teaching and learning have been dramatic and well-documented.⁵⁶ Soundbite rhetoric carries the day,⁵⁷ and the correct use of grammar is disappearing.⁵⁸ As a result, contemporary advocates operate in an “increasingly, and almost exclusively, digital

52. Douglas Kellner, *Social Theory and Cultural Studies*, in *SOCIOLOGY AFTER POSTMODERNISM* 138, 147 (David Owen ed., Sage Publications 1997).

53. James J. Brosnahan, *Suggestions for Enriching the Teaching of Trial Advocacy*, 16 *AM. J. TRIAL ADVOC.* 193, 194 (1992) (noting that Quintilian and Cicero stressed starting with the fundamentals).

54. Anthony T. Kronman, *Rhetoric*, 67 *U. CIN. L. REV.* 677, 686 (1999).

55. Hauser, *supra* note 13, at 13.

56. Kristen J. Hazelwood, *Technology and Client Communications: Preparing Law Students and New Lawyers to Make Choices That Comply with the Ethical Duties of Confidentiality, Competence, and Communication*, 83 *MISS. L.J.* 245, 246 (2014) (noting that it is “beyond dispute” that technology has radically changed the legal profession).

57. See *VINSON & COMPANY*, *supra* note 8, at 11. Vinson & Company describes how both Trump’s and Sanders’ campaigns illustrate “just how far one can get by focusing on simple, yet powerful messages that resonate with their intended audiences. Their campaign speeches have essentially been their opening statements. . . . They understand [policy] discussions are for a later time, and a different audience.” *Id.* (alteration in original).

58. Alison Griswold, *Your Bad Grammar at Work: What’s the Problem?*, *FORBES* (June 22, 2012, 12:16 PM), <https://www.forbes.com/sites/alisongriswold/2012/06/22/your-bad-grammar-at-work-whats-the-problem/#4c63c48430e9>.

world.”⁵⁹ This disconnect dulls the understanding of the art of effective rhetoric and the persuasive power of correct grammar.⁶⁰

A. *Impact of Digital Communication*

The advent of email, social media, text messaging, and other technologies have increased digital communication among advocates.⁶¹ Lawyers and professors have always grappled with how to hold the attention of daydreaming students, jurors and judges. They must now, however, contend with an entirely new group of individuals that some scholars refer to as the “Digital” or “On Demand” generation.⁶² This new audience is characterized by shorter attention spans,⁶³ which are dictated by smartphones, tablets,

59. Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC: J. ASS'N LEGAL WRITING DIRS. 1, 1 (2015) [hereinafter Margolis, *Is the Medium the Message?*]; see, e.g., Joe Dysart, *Catch Up with Tech or Lose Your Career, Judges Warn Lawyers*, A.B.A. J. (Apr. 2014), http://www.abajournal.com/magazine/article/catch_up_with_tech_or_lose_your_career_judges_warn_lawyers; Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 85 (2007); Ellie Margolis & Kristen E. Murray, *Say Goodbye to the Books: Information Literacy as the New Legal Research Paradigm*, 38 U. DAYTON L. REV. 117, 121–26 (2012); Deborah J. Merritt, *Why Has Law Practice Changed?*, L. SCH. CAFE (Dec. 8, 2013), <https://www.lawschoolcafe.org/2013/12/08/why-has-law-practice-changed/>; Daniel Sockwell, *Writing A Brief for the iPad Judge*, COLUM. BUS. L. REV. (Jan. 14, 2014, 11:26 AM), <https://cblr.columbia.edu/writing-a-brief-for-the-ipad-judge/>; Kristen K. Tiscione, *The Rhetoric of E-Mail in Law Practice*, 92 OR. L.R. 525, 526–28 (2013); Susan C. Wawrose, *What Do Legal Employers Want to See in New Graduates?: Using Focus Groups to Find Out*, 39 OHIO N.U. L. REV. 505, 536–37 (2013).

60. See Griswold, *supra* note 58.

61. Margolis, *Is the Medium the Message?*, *supra* note 59, at 5. (“Whether for good or for ill, experts agree that the internet and digital technology generally have changed the way that we read and process information. This is especially true for digital natives, individuals who have never lived in a world without digital technology.”).

62. See Gregory J. Morse, “*Techno-Jury: Techniques in Verbal and Visual Persuasion*” 54 N.Y.L. SCH. L. REV. 241, 242 (2010) (“Television, the Internet and cell phones have profoundly affected the way we receive, interpret, and attach importance to all types of information. We are the *On-Demand Generation*.”); Lauren Newell, “*Redefining Attention and Revamping the Legal Profession for the Digital Generation*,” 15 NEV. L.J. 754, 756 (“[Information and Communication Technology (“ICT”)] exposure may be a special concern for today’s young people—a group whom I refer to as the Digital Generation—because they have never known life without ICTs.”).

63. Morse, *supra* note 62, at 243 (“The side effect of an ‘on-demand’ society is that the same technology that is largely responsible for making jurors more

smartwatches, laptops, and other devices that keep users in a constant state of distracted multi-tasking.⁶⁴

In short, “[d]igital distraction is the new normal” and has changed how individuals both receive and process information.⁶⁵ The old adage “know your audience” has resonated across centuries and remains a staple of contemporary writing, business practice, and leadership.⁶⁶ But the meaning of that instruction has dramatically evolved. To determine precisely what this evolution means for effective communication by legal educators and students, special attention must be given to how the digital generation learns and listens.⁶⁷

For a number of years, educators have expressed that digital disruption impacts attention spans, and constant exposure to new technologies is likely detrimental to the ability to focus.⁶⁸ The detrimental effect can be seen in the physiological structure of the human brain with the elimination of neural pathways.⁶⁹ The human brain has plasticity and is not a static organ.⁷⁰ As a result, it creates new neurons throughout the lifespan.⁷¹ The formations of synapses—connections that facilitate communication between neurons—are regulated by activity.⁷² These connections are strengthened every time a specific task or experience is repeated.⁷³ If the synapses are not used (i.e., if an experience is not repeated),

intelligent and sophisticated is also causing dramatically shorter attention spans.”).

64. See Newell, *supra* note 62, at 766–71 (noting the profound detrimental costs of multi-tasking).

65. See *id.* at 794.

66. See, e.g., Lumen Learning: The Importance of Audience Analysis, <https://courses.lumenlearning.com/boundless-communications/chapter/the-importance-of-audience-analysis/> (last visited Oct. 20, 2017).

67. Margolis, *Is the Medium the Message?*, *supra* note 61, at 2 (“It is time to be more deliberate in assessing how all of these technologies have and will continue to change the fundamental nature of legal analysis and communication.”).

68. See Newell, *supra* note 62, at 778 (noting the ability to focus is influenced by the digital medium).

69. See *id.* at 780.

70. Forschungszentrum Juelich, *New Theory of Synapse Formation in the Brain*, SCIENCE DAILY (Oct. 10, 2013), <https://www.sciencedaily.com/releases/2013/10/131010205325.htm>.

71. *Id.*

72. *Id.*

73. *Id.*

the neurons may weaken and disappear.⁷⁴ Therefore, how the mind is engaged affects the way it functions.⁷⁵

When examining this phenomenon, it is apparent that while sustained attention is necessary to formulate memories, what people pay attention to is of equal importance. Researchers generally agree that what people are doing when they multi-task is shifting their attention between the stimuli, or tasks.⁷⁶ Common examples include checking cellular phones or scrolling through social media while attending a lecture. Naturally, the resulting division of attention sacrifices efficiency.⁷⁷ Additionally, the reliance on these media outlets may impair the ability to utilize deep and creative thought processes.⁷⁸ This does not bode well for the traditional oral argument of Clarence Darrow's era⁷⁹ or even the conventional lecture format widely favored in contemporary law schools and similar institutions of higher learning. Internet browsing and multi-tasking appear to strengthen lower-order cognitive skills, such as the recognition of visual stimuli, while diminishing control over what dominates our own attention.⁸⁰ The result is that deeper mental processes are left unattended and unused.⁸¹ Such changes are unlikely to be reversed given the expansive reach of the Internet and the ever-increasing onslaught of digital technology.⁸²

74. *Id.*

75. *See id.*

76. LARRY D. ROSEN, *IDISORDER: UNDERSTANDING OUR OBSESSION WITH TECHNOLOGY AND OVERCOMING ITS HOLD ON US* 106 (2012) (“[P]eople lack the ability to pay full attention to two tasks at a time.”).

77. Newell, *supra* note 62, at 768–69.

78. *Id.* at 770.

79. An American lawyer and leading member of the American Civil Liberties Union best known for defending Ossian Sweet and John T. Scopes in the Scopes “monkey trial” (1925).

80. Warren Binford, *How to Be the World's Best Law Professor*, 64 *J. OF LEGAL EDUC.* 542, 543 n.4, 549 (“Lectures are among the least effective methods for achieving almost every educational goal ever identified.”); Newell, *supra* note 62, at 781.

81. Newell, *supra* note 62, at 781, 784 n.243, 785; Patricia M. Greenfield, *Technology and Informal Education: What Is Taught, What Is Learned*, *SCIENCE* (Jan. 2, 2009), <http://science.sciencemag.org/content/323/5910/69/tab-pdf> (“Although the visual capabilities of television, video games, and the Internet may develop impressive visual intelligence, the cost seems to be deep processing: mindful knowledge acquisition, inductive analysis, critical thinking, imagination, and reflection.”).

82. MICHAEL I. POSNER, *ATTENTION IN A SOCIAL WORLD* 139 (2012) (“[I]t seems clear that the desire to carry out many tasks at the same time [using technology] will

From a legal perspective, this research appears alarming. The nature of effective legal learning and communication requires sustained attention and planning, accompanied by an emphasis on resourcefulness and originality.⁸³ Oral arguments and educational lectures rely upon a delivery that must leave a lasting impact on the audience.⁸⁴ Contemporary audiences now, however, use technology to such an extent that the digital generation (those born after 1980) often cannot go more than fifteen minutes without connecting to, or checking on, their electronic devices.⁸⁵ Even more concerning, nearly one third of the time that such persons are connected, the digital generation is entertaining itself simultaneously with different media.⁸⁶ For example, during a lecture, an individual may be reading an article or watching a sporting event while simultaneously scanning their social networking sites.

The extensive use of technology has changed how its users pay attention and perhaps even redefined the boundaries of what attentiveness is.⁸⁷ From a neurological perspective, the result has been a shift in the way the human brain processes information.⁸⁸ For example, reading comprehension and speeds are affected when reading on screens as opposed to reading on paper.⁸⁹ This is because different parts of the brain are activated for each medium.⁹⁰ When reading on a screen, a person's eyes follow an "F" pattern; however, when reading on paper, the eyes follow a more linear path across and down a whole page.⁹¹ This means that when individuals read on a screen, they have a tendency to skim the text without analyzing its complete contents.⁹² Alarming then is the question of what happens

remain a constant feature of human life.”).

83. Newell, *supra* note 62, at 774–75.

84. *Id.*

85. *Id.* at 776.

86. *Id.* at 777.

87. *Id.* at 778 (“ICT [(Information and Communication Technology)] exposure may be causing neurological changes that in turn change how—and how well—the Digital Generation pay attention. Second, ICT exposure may be altering the Digital Generation’s attentional control, decreasing their ability to pay attention. And third, ICT exposure may be redefining what it means to the Digital Generation to be ‘paying attention.’”).

88. *See id.* at 784.

89. *See id.* at 794.

90. *Id.* at 759.

91. Margolis, *Is the Medium the Message?*, *supra* note 62, at 13.

92. *Id.*

when an individual who has been exposed to an almost wholly digital realm encounters a printed legal tome. Or what the receptiveness of these individuals will be to unfamiliar forms of communication, such as an oral argument or extended questioning of a witness.

B. Traditional Legal Advocacy Programs Need to Evolve

Legal culture is not one that endorses distraction or the quick share and connect lifestyle that describes so many adults and adolescents logged onto the Internet's hallmark—social media.⁹³ Rather, the legal field, both academically and professionally, is defined by careful, analytical thinking, and attention to detail.⁹⁴ It follows then that law professors and advocates must change the way they convey information to meet the needs of the on-demand generation, which is characterized by shorter attention spans⁹⁵ and less initial capacity for deep cognitive processing.⁹⁶

Many law schools and advocacy training programs do not address these subjects and do not account for the different learning styles of their students. In the present-day teaching of advocacy skills, to remain both competitive and effective, advocacy training programs must address these issues by making use of the technology and modern research related to both teaching and learning. This will allow students to employ their own individual learning styles.

Some programs have attempted to ease into this paradigm shift. Since the 1970s, legal education programs have worked to cater more to individual learners and have advanced the use of technology and its incorporation into their curriculums. Examples include the National Institute for Trial Advocacy (NITA),⁹⁷ the British Inns of

93. Newell, *supra* note 62, at 774–75.

94. *See id.*

95. Morse, *supra* note 62, at 243.

96. Greenfield, *supra* note 81, at 69.

97. *About NITA*, NITA, <http://www.nita.org/About> (last visited Sept. 17, 2017).

In the late 1960s, lawyers, judges, and legal organizations recognized a need in the United States legal system to train courtroom lawyers in advocacy skills. *Id.* The American Bar Association Sub-committee on Advocacy, American Bar Foundation, and the American College of Trial Lawyers formed a task force to study the establishment of a school to teach trial advocacy. *Id.* Through this effort, the National Institute for Trial Advocacy (NITA) was founded. *Id.* NITA trains lawyers (private practice and public service) in advocacy skills through public programs, custom programs, advocacy skills publications, and most recently, online programs. *Id.* In 1972, NITA held the first “learning by doing” education program at the University of Colorado Law School in Boulder. *Id.* This program became known as

Court,⁹⁸ and the Hampel Method⁹⁹ developed by George Hampel and employed in England, Australia, Ireland, and Scotland.¹⁰⁰

the “National Session.” *Id.* As of 2017, the National Session has been staged each year for more than forty years. *Id.*

98. *What is the Bar?*, BAR COUNCIL, <http://www.barcouncil.org.uk/about-the-bar/what-is-the-bar/> (last visited Oct. 8, 2017) (“The Bar of England and Wales is a unique legal profession of specialist advocates and advisers . . . committed to excellence in advocacy.”). The Inns of Court are part of the Bar of England and Wales. *Inns of Court*, BAR COUNCIL, (last visited Sept. 17, 2017), <http://www.barcouncil.org.uk/about-the-bar/what-is-the-bar/inns-of-court/>. “The Inns provide support for barristers and students through a range of educational activities.” *Id.* There are four primary Inns: (1) the Honorable Society of Lincoln’s Inn, (2) the Honorable Society of the Inner Temple, (3) the Honorable Society of the Middle Temple, and (4) the Honorable Society of Gray’s Inn. *Id.* The “Inns alone have the power to call a student to the Bar. Only those called to the Bar are able to exercise rights of audience in the superior courts of England and Wales as barristers.” *Joining an Inn*, B. STANDARDS BD., <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/current-requirements/bar-professional-training-course/how-to-apply-for-the-bptc/joining-an-inn/> (last visited Oct. 8, 2017) (alterations in original). Each Inn runs advocacy courses with lectures on areas such as law and forensic skills. *Id.*

99. The Hampel Method, originated by George Hampel, “requires Pupil barristers and New Practitioners to perform as advocates in a simulated courtroom environment, within a strict time-frame and supported by a student/trainer ratio of at least 6:2.” *Advocacy Training - An Introduction*, INNS CT. C. ADVOC., <https://www.icca.ac.uk/advocacy-training/what-is-advocacy> (last visited Oct. 8, 2017). The underlying idea behind this method is that the “incremental and structured approach helps to address the difficulties faced by a trainee seeking to absorb constructive criticism when under stress.” *Id.* Once a trainee has performed, the advocacy trainers use the following checklist of six steps: (1) headline— “[i]dentifying one particular aspect of the performance to be addressed”; (2) playback— “[r]eproducing verbatim that identified aspect of the performance”; (3) reason— “[e]xplaining why this issue needs to be addressed”; (4) remedy— “[e]xplaining how to improve this aspect of the performance”; (5) demonstration— “[d]emonstrating how to apply the remedy to the specific problem”; and (6) replay— “[t]he pupil performs again, applying the remedy.” *What is The Hampel Method?*, INNS CT. C. ADVOC., <https://www.icca.ac.uk/advocacy-training/what-is-the-hampel-method> (last visited Oct. 8, 2017).

100. “George Hampel was formerly a Justice of the Supreme Court of Victoria from 1983 to 2000 and a barrister from 1958. He has held the positions of Vice President of the Law Council of Australia, Vice Chairman of the Victorian Bar Council, Chairman of the Leo Cussen Institute, member of the Council of Legal Education and Council of Adult Education.” *The Hon. George Hampel AM QC*, MONASH U., <https://www.monash.edu/law/about-us/meet-our-people/academic/george-hampel> (last visited Oct. 8, 2017) (“Since 1972, George has developed and continues to teach advocacy at law schools to barristers and solicitors in Australia and overseas. As Chairman and founder of the Australian Advocacy Institute (AAI),

These programs maintain the following similarities in their teaching protocols and learning methods:¹⁰¹

- practicum fact pattern exercise(s);
- reading assignments;
- demonstrations with analysis;
- individual oral performances of skills;
 - speeches,
 - arguments and motions,
 - direct examinations,
 - cross-examinations,
 - opening statements,
 - final arguments,
 - objections,
 - exhibits and foundations,
 - depositions,
 - negotiation,
 - mediation,
 - arbitration,
 - court trials,
 - jury trials,
- feedback and critique; and
- video and video review.

These programs were innovative for their time, but students were required to attend in person. While this helped engage students in the discussion of skills performance, it often required students to travel to a venue and stay for an extended period away from work and family. With new technology, students today can achieve the same benefits without the logistical inconvenience. This is one reason why existing advocacy training programs remain stagnant and locked in the twentieth century.

Arguably, traditional advocacy training courses are limited to fit the availability of faculty and facility. What these programs fail to provide, however, is the best learning environment for student advocates.¹⁰² Existing advocacy training programs rely almost

he regularly conducts short courses and workshops both locally and abroad, including training for the English Bar, the Scottish Faculty of Advocates, the Singapore Bar and International Criminal Court in The Hague.”).

101. See supra notes 98–100 and accompanying text.

102. See Marilyn Berger & John Mitchell, *Rethinking Advocacy Training*, 16 AM. J. TRIAL ADVOC. 821, 829 (1993) (discussing the difficulty a traditional advocacy course presents to novice law students).

exclusively on live, in-person activities for lectures, critique and feedback, and review of skills performance.¹⁰³ In this setting, feedback may be rushed with limited time for individual, focused learning. Technology is used only as a secondary, supplemental method of teaching. The EATP method, on the other hand, makes full use of available technology and enables faculty to teach and students to learn at a time that is most effective and efficient for both.¹⁰⁴

C. *Effective Learning Environment*

Gerald F. Hess¹⁰⁵ suggests that an effective learning environment consists of the following components: “respect, expectations, support, collaboration, inclusion, engagement, delight, and feedback.”¹⁰⁶ “The more elements present, the more likely the environment will be conducive to learning.”¹⁰⁷

In a respectful environment, teachers and students “participate in a dialogue, explore ideas, and solve problems creatively.”¹⁰⁸ Students must be willing to confront challenging tasks with no intimidation or humiliation, which may cause withdrawal from participation and learning.¹⁰⁹

103. *Id.* at 821 (“Students are presented with a lecture or demonstration of a particular trial skill. These students then attempt to accurately mimic the demonstrated skill. The student’s performance is followed by a critique, a verbal dissection of the student’s performance, often aided by a videotape review of that performance.”).

104. While the focus of this text relates specifically to the teaching and learning of effective advocacy skills, EATP methods can be applied to the teaching and learning of any academic subject.

105. Gerry Hess, GONZ. U. SCH. L., <https://www.law.gonzaga.edu/faculty/professors-emeritus/hess-gerry/> (last visited Sept. 17, 2017) (“Professor Hess has taught at Gonzaga University School of Law since 1988. He founded the Institute for Law School Teaching in 1991 and was its director until 2004. He became the co-director of the Institute for Law Teaching and Learning in 2008. He has served as a co-editor of *The Law Teacher*, as a member of the Advisory Committee for the *Journal of Legal Education*, and as an inaugural member of the editorial board of the *Canadian Legal Education Annual Review*. . . . Before attending law school, Prof. Hess taught wonderful and challenging children in grades [two, four, and five].”).

106. Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 76 (2002).

107. *Id.* at 87.

108. *Id.*

109. *Id.*

Successful educators agree that high expectations for all students can have a dramatic impact on their performance.¹¹⁰ “Teachers who expect a student to succeed act in ways that make success more likely. Students who expect themselves to succeed work harder, ask more questions, and learn more than students who do not expect success.”¹¹¹ Teachers also need to clearly communicate their expectations to students and, when possible, demonstrate their expectations by praising examples of exemplary student work.¹¹²

“Elements of a supportive environment include teachers’ attitudes, student-faculty contact, and role-model and mentor relationships.”¹¹³ A supportive environment “enhances students’ learning, willingness to take risks, and their openness to considering a variety of perspectives.”¹¹⁴

Collaboration is accomplished through the creation of cooperative learning environments, including cooperation among students and teachers in course design, delivery, and evaluation.¹¹⁵ The benefits of cooperative learning are well documented.¹¹⁶ “Research on adult learners has revealed that cooperative learning¹¹⁷—learning that takes place when peers share experiences and insights—is not only the most common type of adult learning, it is perhaps the most effective style.”¹¹⁸ “Cooperative Learning produces higher achievement, reduces student attrition, increases critical thinking, betters attitudes toward subject matter, increases social support, improves social adjustment, and increases appreciation for diversity.”¹¹⁹ In a cooperative learning environment,

110. See Joshua S. Smith & Ellen C. Wertlieb, *Do First-Year College Students’ Expectations Align with Their First-Year Experiences?*, 42 NASPAJ. 153, 155 (2005).

111. Hess, *supra* note 106, at 91.

112. *Id.*

113. *Id.* at 92.

114. *Id.*

115. *Id.* at 94.

116. Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. COOLEY L. REV. 201, 204 (2000).

117. *Id.* at 203–04 (“Cooperative Learning is a structured, systematic instructional strategy in which small groups work together toward a common goal [It] produces higher achievement, reduces student attrition, increases critical thinking, betters attitudes toward subject matter, increases social support, improves social adjustment, and increases appreciation for diversity.”).

118. Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 57 (1995).

119. Randall, *supra* note 116, at 204.

students interact with each other while the teacher, acting as a “guide on the side,” “makes the decisions, develops the lessons, monitors and intervenes, evaluates, and processes.”¹²⁰

A cooperative learning environment can improve student participation, preparation for class, and skill development.¹²¹ This method requires more sustained effort from students than the traditional classroom model because it offers no safe haven for students hoping to dodge participation.¹²² “Cooperative learning teaches students . . . to negotiate their differences and mediate each other’s conflicts.”¹²³

D. Active Learning

In 1946, educationist Edgar Dale¹²⁴ developed a learning theory known as the “Cone of Learning.”¹²⁵ In the Cone of Learning, the base of the cone represents the learner as a participant in actual or simulated experience, and the top of the cone represents the learner as a mere observer of symbols that represent an event (e.g., reading words on a page).¹²⁶ Dale theorized that learners retain more information by doing.¹²⁷ “[L]earning by doing” or “experiential learning” is the most effective method because it involves direct and

120. *Id.* at 259–60.

121. *Id.* at 271.

122. *Id.* at 264.

123. *Id.* at 271; see also June Cicero, *Piercing the Socratic Veil: Adding an Active Learning Alternative in Legal Education*, 15 WM. MITCHELL L. REV. 1011, 1020–23 (1989) (describing a legal practicum course that provides students with an alternative to the Langdellian method that involves the students in Cooperative Learning).

124. Born in 1900 in Benson, Minnesota, Edgar Dale spent his entire life as an educator and education theorist. BIOGRAPHICAL DICTIONARY OF AMERICAN EDUCATORS 346 (John F. Ohles ed., 1978). He received his B.A. and M.A. from the University of North Dakota and his Ph.D. from the University of Chicago. *Id.* He was a teacher and superintendent in North Dakota and Illinois before becoming an education professor at Ohio State University, a position he held for over forty years. *Id.* He died in 1985 after publishing several influential papers and studies on education. See *id.* Dale’s most famous literary work is the Cone of Experience. John O. Sonsteng et al., *Legal Education: A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 472 n.505 (2007).

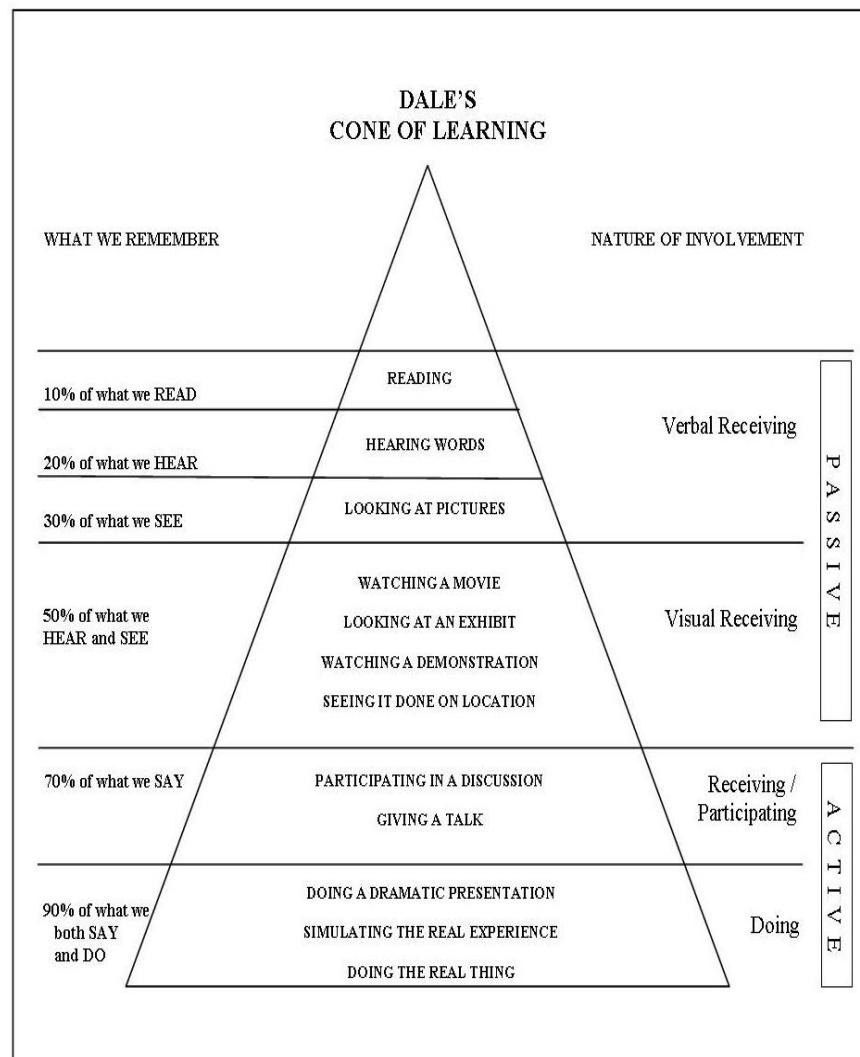
125. EDGAR DALE, AUDIO VISUAL METHODS IN TEACHING 108 (3d ed. 1969) (noting that in the literature and references to Edgar Dale and his work, the terms “Cone of Experience” and “Cone of Learning” are used interchangeably).

126. *Id.*

127. *Id.*

purposeful learning experiences designed to represent real-life situations.¹²⁸ As depicted by the Cone of Learning,¹²⁹ the least effective methods of instruction include reading text and listening to lectures.¹³⁰ The Cone of Learning is illustrated in Figure 1.

Figure 1: Cone of Learning



128. *Id.*

129. *Id.* (chart revised and recreated by Linda Thorstad).

130. *Id.*

Learning is not a spectator sport. Students do not learn much by sitting in class listening to teachers, memorizing pre-packaged assignments, and spitting out answers. They must talk about what they are learning, write about it, relate it to past experiences, and apply it to their daily lives.¹³¹ They must make what they learn part of themselves.¹³²

In addition to illustrating the effectiveness of various methods of instruction, the Cone of Learning can be used to gauge a student's retention.¹³³ According to Dale, students retain up to ninety percent when using action-learning techniques near the base of the cone, such as simulations and role-plays.¹³⁴ This is because "[t]he more sensory channels possible in interacting with a resource, the better chance that many students can learn from it."¹³⁵

Student advocates gain this benefit of retention from experiential learning that connects substantive material to skills that will be valuable for future practice.¹³⁶ It not only has an immediate benefit, but it also teaches student advocates to learn by doing throughout their careers.¹³⁷ This is important because "[t]hree years of legal education barely scratches the surface of what lawyers must learn to be competent professionals."¹³⁸

The NITA method, Hampel Methods, and Inns of Court assume a teacher-student ratio that can result in inactive, uninvolved, and passive learners. The programs assume in-person classrooms of eight to ten advocacy students with a faculty of two to three instructors.¹³⁹ In the face-to-face classroom setting, the student advocates are only given an opportunity to perform during a limited part of the class.¹⁴⁰ Although students may learn from watching others and hearing their

131. Arthur W. Chickering & Zelda F. Gamson, *Seven Principles for Good Practice*, 39 AM. ASS'N FOR HIGHER EDUC. BULL. 3, 3-7 (Mar. 1987), <https://www.aahea.org/articles/sevenprinciples1987.htm>.

132. *Id.*

133. *See* DALE, *supra* note 125.

134. *Id.*

135. *Id.*; JEROME BRUNER, *TOWARD A THEORY OF INSTRUCTION* 49 (1966).

136. *See* Ellen Dannin et al., *Creating Labor-Law School Connections*, 48 J. LEGAL EDUC. 187, 189 (1998) (discussing how law students can gain valuable experience from internships with labor unions).

137. Paul S. Ferber, *Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417, 428 (2002).

138. *Id.* at 429.

139. *See* INNS CT. C. ADVOC., *supra* note 99.

140. *Id.*

respective feedback, the advocacy students that observe are generally idle and receive limited benefit from their sidelined time.¹⁴¹

Traditional classrooms can, at times, provide appropriate learning through reviewable and linked content, but the need for a bricks-and-mortar classroom is less important as one looks at the future through the lens of technology. The EATP method used in the faculty supervised study component effectively uses technology so neither student advocates nor instructors need to travel to the classroom.¹⁴²

Performing outside the classroom allows more opportunity to practice, to hear, and to be heard.¹⁴³ The increased ability to accommodate learning styles, the rich opportunity to have access to related content, and the ability to learn at any time, from any place, demonstrates the importance of incorporating better technology.

IV. EFFECTIVE ADVOCATE TRAINING PROGRAM (“EATP”)

The EATP method incorporates the best components of advanced technologies to teach rhetorical strategies and techniques but does not deviate from proven methods of teaching effective rhetoric skills. The EATP method consists of high quality, recorded lectures, and demonstrations from a variety of expert advocates.¹⁴⁴ The innovation is in the production quality, availability of the lectures, and demonstrations. The program may be made available online with visuals that engage students and provide further flexibility for the learner.¹⁴⁵ Rather than sitting at the back of a classroom, students may access content as often as they wish, and when they are able to devote their full attention.¹⁴⁶

To be successful, students must engage in active learning.¹⁴⁷ The EATP method utilizes the proven technique of experiential learning,

141. *Id.*

142. *See Infra* Part IV.

143. *See id.*

144. John O. Sonsteng, *Advanced Advocacy* (2016) [hereinafter Appendix A], <https://mitchellhamline.edu/library/wpcontent/uploads/sites/7/2017/11/Appendix-A.pdf>.

145. *Id.*

146. *See id.*

147. *See* NAT’L RESEARCH COUNCIL ET AL., *HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL 12* (John D. Bransford et al. eds., Nat’l Acad. Press 2000), www.colorado.edu/u/MCDB/LearningBiology/readings/How-peaople-learn.pdf.

or learning-by-doing, which theorists agree is highly preferable to “passive absorption of concepts.”¹⁴⁸ Methods that provide students with opportunities for self-assessment and improvement are effective because students are given tools that empower them to take control of the learning process in accordance with their own personal learning styles.¹⁴⁹

Simulation-based courses effectively allow learning to take place in a context that gives critical meaning to the subject matter.¹⁵⁰ When students learn through the performance of actual lawyering tasks, they are able to encode learning in both distinctive and active ways.¹⁵¹ “For example, if a student learns an ethical principle in the context of reading a case and discussing the principle in class, that limited context will make it more difficult for the student to transfer that learning later.”¹⁵² But “if the student learns doctrine in the context in which [the student] will likely be called on to use the doctrine, . . . the doctrine will be more readily useable.”¹⁵³

A. *The System and Method of Teaching and Learning*

The EATP method is a tested and successful advocacy program.¹⁵⁴ It helps student advocates understand how to

148. Quigley, *supra* note 148, at 48–51.

149. *See* Ferber, *supra* note 137.

150. *Id.* at 434; *see* Quigley, *supra* note 118, at 69–70.

151. Ferber, *supra* note 137.

152. *Id.*

153. *Id.* (alteration in original).

154. John Sonsteng, with William Mitchell College of Law and Concord Law School, developed the first EATP in 2001. The program was subsequently tested in the Spring of 2002. Concord Law students attended William Mitchell College of Law’s Intensive Advanced Advocacy Program in the mid 2000s. Faculty observed Concord and William Mitchell students and concluded that the Concord students performed as well, if not better, than William Mitchell students who had attended a traditional, basic advocacy training program prior to attending the advanced program. In 2011, John Sonsteng, NITA, Minnesota Continuing Legal Education, and William Mitchell College of Law released the advanced edition of the EATP. *See* John O. Sonsteng, *Sonsteng Effective Advocate Training Program Info Video*, VIMEO, <https://vimeo.com/228409607/a25f3ab56e> (last visited Oct. 6, 2017); John O. Sonsteng, *Art of Effective Advocacy*, VIMEO, <https://vimeo.com/channels/1061794> (last visited Oct. 8, 2017). This advanced edition was first released on compact disc and in 2016 was converted to an online program used in the Advanced Advocacy Course at Mitchell Hamline School of Law. In 2015, John Sonsteng and the Practising Law Institute, NYC, released an advanced EATP that was completely digital and online.

communicate with and persuade jurors, judges, arbitrators, and other audiences. The program reimagines advocacy training for attorneys, participants, and students who do not have the resources to travel to a central location.

In the EATP method, the student advocates prepare and observe their own performances, collaborate with fellow student advocates, and assess themselves prior to submitting demonstrations of recorded oral work.¹⁵⁵ In other words, they practice. This ensures that the submissions are, from the students' perspectives, their best performances. Students learn, they self-assess, and they retain knowledge and skill.

B. *Self-Regulated Learning*

Self-regulated learning begins with helping students understand *why* they are learning what they are learning.¹⁵⁶ This is a critical first step in getting students to fully invest in the educational experience.¹⁵⁷ Once students invest in the *why*, they inevitably feel a sense of control and ownership over the *how*.¹⁵⁸ "When students choose, evaluate, and then modify their own learning strategies, they become more focused and committed to making changes."¹⁵⁹ This leads to more frequent success, which in turn leaves students feeling optimistic about their educational experience. As a result, the students are more likely to retain the skill over a lifetime.

The concept of self-regulated learning has three main beneficial components: (1) self-regulation of motivation and affect, (2) self-regulation of behavior, and (3) self-regulation of cognition.¹⁶⁰

"Self-regulation of motivation and affect involves 'controlling and changing motivational beliefs such as efficacy and goal orientation' to help adapt to the demands of the learning

155. See Appendix A, *supra* note 144.

156. Elizabeth M. Bloom, *Teaching Law Students to Teach Themselves: Using Lessons from Educational Psychology to Shape Self-Regulated Learners*, 59 WAYNE L. REV. 311, 330 (2013).

157. *Id.*

158. *Id.*

159. Elizabeth M. Bloom, *Teaching Law Students to Teach Themselves: Using Lessons from Educational Psychology to Shape Self-Regulated Learners*, 59 WAYNE L. REV. 311, 330 (2013).

160. *Id.* at 323 (citing Paul R. Pintrich, *Understanding Self-Regulated Learning*, 63 NEW DIRECTIONS FOR TEACHING & LEARNING 3, 7 (1995)).

experience.”¹⁶¹ Providing the learner with the tools to maximize strengths and overcome weaknesses internalizes motivation, strengthens basic organizational skills, improves performance, and increases the learner’s sense of competency. “Self-regulation of behavior involves the ‘active control of the various resources students have available to them [including] time, their study environment and their use of faculty members to help them.’”¹⁶² By giving students the opportunities to practice new tasks outside the classroom, they become more adept at recognizing when to ask for help. “Self-regulation of cognition involves the control of various cognitive strategies for learning.”¹⁶³ Controlling the external factors of learning, such as when, where, and how to study, allows students to use the learning methods and strategies that are most effective for each student.

The EATP method brings together self-regulated learning with support systems and advanced technology that is built on the best of traditional methods. The result is a system that

- recognizes the multiplicity of learning styles;
- tests participants frequently and provides feedback;
- applies learning to practical applications in any subject;
- provides instructors more time to work with participants;
- assures that participants have a grasp of skills and information before attending class;
- allows instructors to know if participants have prepared for class;
- includes face-to-face sessions, small group discussions, and learning modules that are designed for participants to learn through intensive learning-by-doing;
- enables participants to see and hear the information multiple times; and
- enhances the classroom face to face experience.¹⁶⁴

161. *See id.*

162. *See id.*

163. *See id.*

164. *Compare* Appendix C, *infra* note 207 (detailing an in-person week long advocacy course) *with* Appendix A, *supra* note 144 (detailing a semester long EATP method style advanced advocacy course).

C. *Teaching to the Students' Needs*

Effective teaching and learning theory suggest that the “one size fits all method” is not appropriate for students and is not an effective way of engaging participants in real learning.¹⁶⁵ The lessons of the EATP method are available to the student advocate at all times, and at a schedule where the student advocate is most ready to learn.¹⁶⁶ The EATP method is not subject to schedules dictated by the needs of brick and mortar classrooms or teachers' schedules.¹⁶⁷ In most learning environments teaching is conducted in fifty-minute blocks.¹⁶⁸ Following the in-class lectures, students must study and prepare by themselves at a distance from the teacher.¹⁶⁹ This is ineffective distance learning.¹⁷⁰ The EATP method never forces the student advocate to study alone or learn at a distance without help from teachers and fellow students. The student advocate is continually connected to faculty, mentors, and support.¹⁷¹

165. Carol A. Tomlinson, *THE DIFFERENTIATED CLASSROOM: RESPONDING TO THE NEEDS OF ALL LEARNERS 3–4* (2d ed. 2014). Google has scholarly articles about teaching to the learner's needs. See, e.g., Susan Duchesne & Anne McMaugh, *EDUCATIONAL PSYCHOLOGY FOR LEARNING AND TEACHING* (5th ed. 2015).

166. William R. Slomanson, *Blended Learning: A Flipped Classroom Experiment*, 64 J. LEGAL EDUC. 93, 96 (2014) (serving the needs of each individual student, as opposed to a few with whom an instructor in a brick and mortar classroom could interact).

167. *Id.*

168. *Managing Director's Guidance Memo: Standard 310*, A.B.A. (May 2015), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2016_standard_310_guidance_memorandum.authcheckdam.pdf (reiterating that the ABA Standard 310 states that “fifty minutes suffices for one hour of classroom or direct faculty instruction . . . [and an] ‘hour’ for out-of-class student work is sixty minutes”).

169. *Id.* (stating that ABA Standard 310 does not prescribe out-of-class work to be done apart from the instructor, but differentiates it from direct faculty instruction).

170. *Id.*

171. The online, or flipped, classroom is always available to the student to initiate peer or faculty interaction. See Leila Käätä, *From Noticing to Initiating Correction: Students' Epistemic Displays in Instructional Interaction*, 66 J. PRAGMATICS 86, 86–105 (2014). Studies have shown that students who initiate classroom interaction and displays of knowledge are more successful. *Id.* The EATP model broadens this classroom conceptually, physically, and temporally by making it digital.

D. Applying Learning Theory

The EATP method incorporates the best of adult learning theory by addressing the six essential elements of successful education:¹⁷² learning objectives,¹⁷³ planning guides and checklists,¹⁷⁴ reinforcement and feedback,¹⁷⁵ a positive learning environment, an active classroom, and a lesson cycle.

The EATP method uses cognitive domain objectives. For example, from simple to complex, learning objectives include knowledge, comprehension, application, analysis, synthesis, and evaluation.¹⁷⁶ Knowledge applies to the understanding of direct and cross-examination.¹⁷⁷ Comprehension means the necessary understanding of each principle.¹⁷⁸ Application applies to the learned knowledge to demonstrate a skill. Analysis requires understanding cause and effect and seeing complex ideas and relationships to arrive at a sophisticated understanding.¹⁷⁹ Synthesis occurs when the student develops new ideas, concepts, and

172. LEONARD H. CLARK & IRVING S. STARR, *SECONDARY AND MIDDLE SCHOOL TEACHING METHODS* 38, 54, 86, 87, 175 (5th ed. 1986); see Mark S. Caldwell, *Educational Architecture: Constructing Course to Meet Learner's Needs and Expectations*, 11 J. PROF. LEGAL EDUC. 13, 16 (1994); SHARAN B. MERRIAM & LAURA L. BIEREMA, *ADULT LEARNING: LINKING THEORY AND PRACTICE* (2014); LINDA M. HARASIM, *LEARNING THEORY AND ONLINE TECHNOLOGIES* (2d ed. 2017); MICHAEL SIMONSON, SHARON SMALDINO & SUSAN M. ZVACEK, *TEACHING AND LEARNING AT A DISTANCE: FOUNDATIONS OF DISTANCE EDUCATION* (6th ed. 2015).

173. John O. Sonsteng & Linda M. Thorstad, *Learning Materials for the Practicum Series Exercises: Planning Guide and Checklist and Learning Objectives* (2012) [hereinafter Appendix D], <https://mitchellhamline.edu/library/wp-content/uploads/sites/7/2017/11/Appendix-D.pdf>.

174. *Id.*

175. John O. Sonsteng, *Oral and Written Feedback Rubric* [hereinafter Appendix B], <https://mitchellhamline.edu/library/wp-content/uploads/sites/7/2017/11/Appendix-B.pdf>.

176. Appendix D, *supra* note 173; see Debi Lang, *The Importance of Learning Objectives in Program Design and Evaluation*, CTR. FOR HEALTH POL'Y & RES. (CHPR) PUBL'NS. (Oct. 16, 2016), http://escholarship.umassmed.edu/health-policy_pp/198; William M. Baker, Jefferson E. Holcomb & Daniel B. Baker, *An Assessment of the Relative Importance of Criminal Justice Learning Objectives*, 28 J. CRIM. JUST. EDUC., 129, 129–48 (2016).

177. See Appendix D, *supra* note 173.

178. *Id.*

179. *Id.*

methodology from previously learned materials.¹⁸⁰ Evaluation occurs based on the understanding of a principle.¹⁸¹

The EATP method uses a lesson cycle that begins with students accessing a lesson and preparing a written statement of goals, weaknesses, and strengths.¹⁸² The students then watch or read a lecture, presentation, objective, or demonstration.¹⁸³ A short-written analysis is then completed. The students collaborate with each other and then perform a specific skill through an electronic device.¹⁸⁴ The student advocates again collaborate with others to analyze and improve skills.¹⁸⁵ A recorded performance is then submitted to the program administrator who provides it to the instructor for feedback and assessment.¹⁸⁶ These steps are repeated throughout the course.¹⁸⁷ Figure 2 illustrates the process that will be described in greater detail in later parts of this Article.

180. *Id.*

181. *Id.*

182. *See* Figure 2.

183. *Id.*

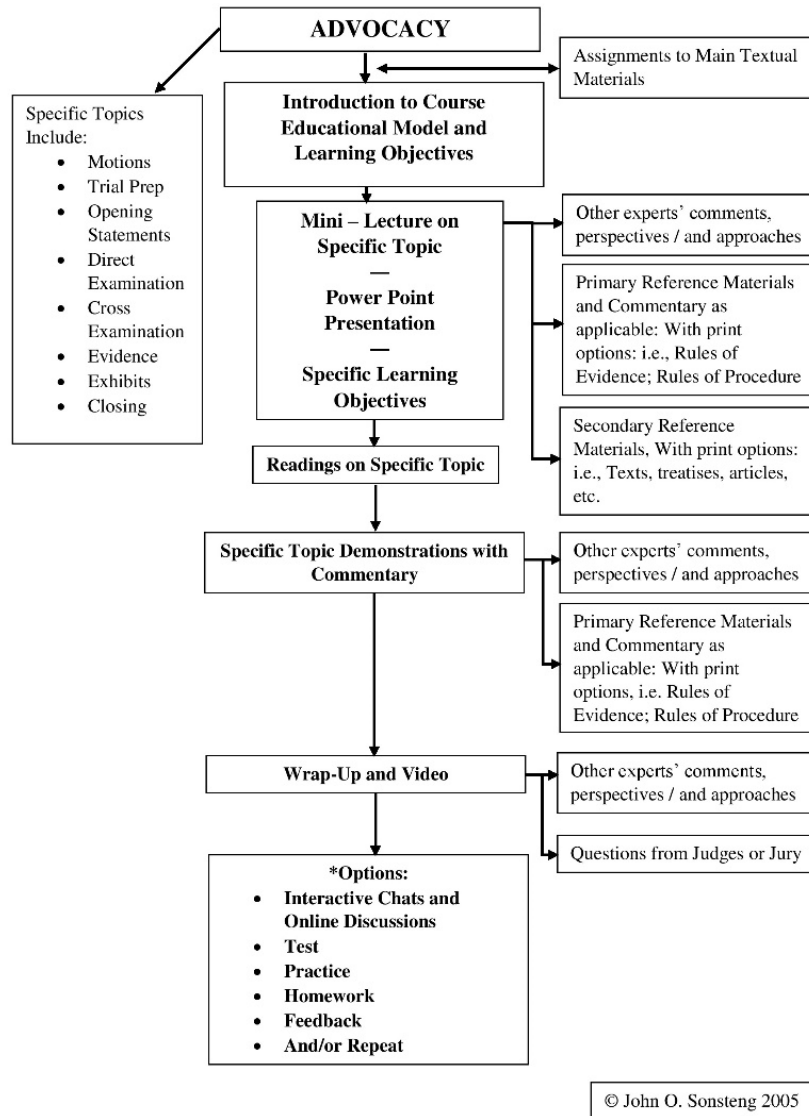
184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

Figure 2: The EATP Lesson Process



The planned lessons¹⁸⁸ of the EATP method incorporate the educational theories involving objectives, reinforcement, positive

learning environment, activity, collaboration, and learning styles. The following list includes several of the incorporated theories:

- **Anticipatory Set:** A statement or proposal which “[increases] the participant’s interest in and motivation to learn the material;”
- **Learning Objectives:** The desired learning outcome and clear communication of that objective to the participants;
- **Input:** A method of instructing or informing;
- **Modeling:** The method of demonstrating the task to accommodate different learning styles and ensure proper understanding. Modeling is not simply going through the motions, but demonstrates the task with a verbal description of what the participants should do;
- **Check for Understanding:** Question participants, provide experience, and create a positive learning environment so that participants will not refrain from participating for fear of asking a “dumb” question or giving a flawed demonstration;
- **Guided Practice:** Participants are supervised as they attempt the task;
- **Collaboration:** Participants work together to improve mastery of skills;
- **Independent Practice:** Provide opportunities for independent practice (sometimes known as homework) to assist in the evaluation of a participant’s mastery; and
- **Repeat cycle:** Give participants multiple opportunities to perform and learn.¹⁸⁹

189. See LAUREN A. SOSNIAK, BLOOM’S TAXONOMY (Lorin W. Anderson ed., 1994); LORIN W. ANDERSON ET AL., A TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING: A REVISION OF BLOOM’S TAXONOMY OF EDUCATIONAL OBJECTIVES (2001); Alice F. Artzt, & Eleanor Armour-Thomas, *Development of a Cognitive-Metacognitive Framework for Protocol Analysis of Mathematical Problem Solving in Small Groups*, 9 COGNITION & INSTRUCTION, 137, 137–175 n.2 (1992); Nilay T. Bümen, *Effects of the Original Versus Revised Bloom’s Taxonomy on Lesson Planning Skills: A Turkish Study Among Pre-service Teachers*, 53 INT’L. REV. EDUC. 439, 439–55 (2007); Peter D. John, *Lesson Planning and the Student Teacher: Re-thinking the Dominant Model*, 38 J. CURRICULUM STUD. 483, 483–98 (2006); Andrew Churches, *Bloom’s Taxonomy Blooms Digitally*, TECH & LEARNING (Apr. 1, 2008, 5:00 AM), <http://www.techlearning.com/news/0002/bloom39s-taxonomy-blooms-digitally/65603>; Mary Forehand, *Bloom’s Taxonomy*, EMERGING PERSP. ON LEARNING TEACHING AND TECH. (2010), <http://epltt.coe.uga.edu/index.php?title>

E. *Facility Supervised Study (“FSS”)*

A vital component of the EATP method is faculty supervised study (“FSS”).¹⁹⁰ It is based on interaction between student advocates and instructors at all stages.¹⁹¹ The FSS is provided using a computer-readable platform or a network communication system (such as the Internet).¹⁹² This design is intended to provide a main learning highway with links to specialized learning pathways that reinforce experiential learning.¹⁹³ Feedback and assessment may be conducted throughout the FSS in-person and through the use of a technology-based platform.¹⁹⁴ Feedback reinforces the most beneficial aspect of advocacy training: practice.¹⁹⁵ It has long been recognized that independent practice with homework that is submitted to the teacher is an efficient way of evaluating a student’s mastery of the concepts.¹⁹⁶ As faculty are always available for consultation by telephone, email, text, or video chat, the student

=Bloom%27s_Taxonomy; NORMAN SPRINTHALL & RICHARD SPRINTHALL, EDUCATIONAL PSYCHOLOGY: A DEVELOPMENTAL APPROACH 316–32 (4th ed. 1987); Marilyn E. Gist, Anna G. Bavetta, & Cynthia K. Stevens, *Transfer Training Method: Its Influence on Skill Generalization, Skill Repetition, and Performance Level*, 43 PERS. PSYCHOL. 501–23 (1990) (discussing how the repetition of skills is not only beneficial to learning, but to practical skill transfer as well); B. Hauptmann & A. Karni, *From Primed to Learn: The Saturation of Repetition Priming and the Induction of Long-Term Memory*, 13 COGNITIVE BRAIN RES. 313–22 (2002); John M. Keller, *How to Integrate Learner Motivation Planning into Lesson Planning: The ARCS Model Approach 1–13* (Feb. 2000) (unpublished manuscript), <http://apps.fischlerschool.nova.edu/toolbox/instructionalproducts/itde8005/weeklys/2000-Keller-ARCSLessonPlanning.pdf>.

190. See Appendix A, *supra* note 144, at 4.

191. See *id.* at 9.

192. See *id.* at 6.

193. See Figure 2.

194. Instructors analyze the student advocate’s written self-analysis and oral performances. The instructors then provide written and oral feedback. The instructor may assign projects in preparation for the next phase in the process.

195. See Steven R. Wininger & Antony D. Norman, *Teacher Candidates’ Exposure to Formative Assessment in Educational Psychology Textbooks: A Content Analysis*, 10 EDUC. ASSESSMENT 19, 20–24 (2005).

196. RICHARD C. SPRINTHALL & NORMAN A. SPRINTHALL, EDUCATIONAL PSYCHOLOGY: A DEVELOPMENTAL APPROACH 316–32 (4th ed. 1987).

never has to prepare and learn alone at a distance.¹⁹⁷ As a result, advocates may learn on their own schedule.¹⁹⁸

The FSS delivers a high-value, interactive experience.¹⁹⁹ This face-to-face- interactive experience is an Intensive Residential Practicum (“IRP”).²⁰⁰ Because the advocates have demonstrated competence through the FSS, the IRP is conducted at an advanced level. This is known as “flipping the classroom.”²⁰¹ The EATP method does not replace the classroom; it retains the face-to-face experience as one part of a more dynamic whole. The EATP method improves the IRP by enhancing the classroom experience and affording student advocates multiple opportunities to excel.²⁰² The following is an example of the FSS method:

197. Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N.U. L. REV. 227, 235 (2015) (discussing feedback and the value of collaboration in the student-teacher relationship).

198. Emily A. Benfer & Colleen D. Shanahan, *Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School*, 20 CLINICAL L. REV. 1, 9–10 (2013).

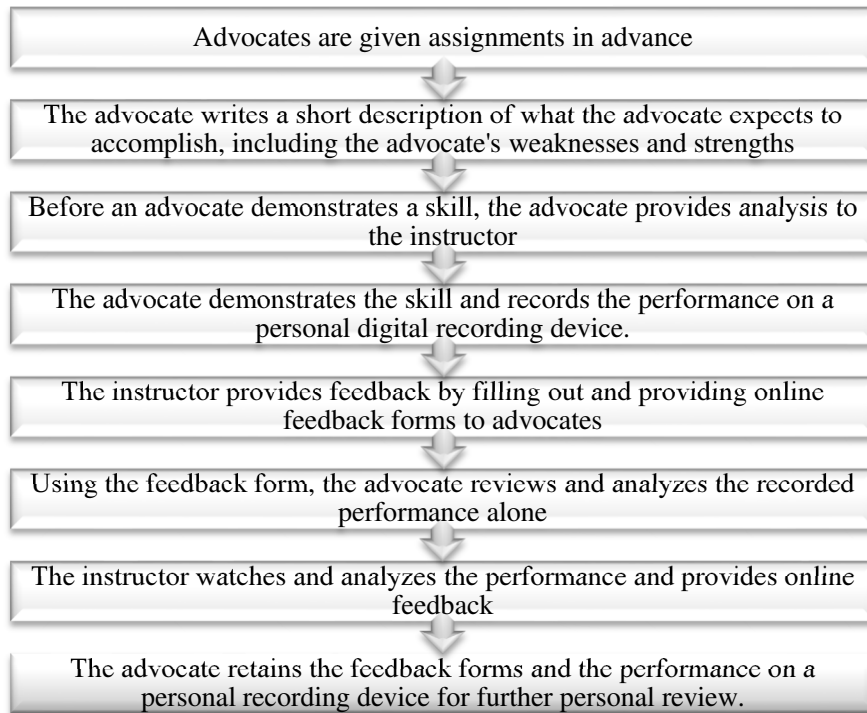
199. See Appendix A, *supra* note 144, at 31.

200. See, e.g., *id.*; Appendix E, *infra* note 216.

201. Michele Pistone, *Law Schools and Technology: Where We Are and Where We Are Heading*, 64 J. LEGAL EDUC. 586, 597 (2015) (noting that flipping the classroom “frees up face-to-face class time between professors and their students for active learning”). Classroom formats exist on a spectrum from traditional face-to-face interaction to online only virtual interaction. Slomanson, *supra* note 168, at 94–95. A flipped, or blended classroom, offers both face to face and online interaction. *Id.* A simple version of the flipped class entails a lecture given digitally at the student’s home, at his or her leisure, and the coursework performed in the physical classroom. *Id.* The proposal of EATP would fall further toward the virtual end of the spectrum. *Id.*

202. Steven I. Friedland, *Adaptive Strategies for the Future of Legal Education*, 61 LOY. L. REV. 211, 229 (2015) (“Class time is extremely valuable and should be recognized as such. It should be used judiciously, primarily to improve skill sets.”).

Figure 3: The FSS Method



F. *The Intensive Residential Practicum (“IRP”)*

The IRP method enables student advocates to conduct an entire arbitration, court trial and jury trial with another team of advocates.²⁰³ With analysis and feedback, student advocates can present both sides of the case.²⁰⁴ As advocates have prepared both sides of the case during the FSS, the performances are delivered at a high level.

IRPs may be any length, depending on the learning objectives set out by the program and the instructors, and participants may receive feedback through video recording and testing by video.²⁰⁵ The IRP may be conducted through short sessions of two to five hours with small-group discussion, analysis, reporting, and

203. See Appendix A, *supra* note 144.

204. See *id.*

205. See *id.*; Appendix B, *supra* note 175.

feedback.²⁰⁶ The session can also be a week or more.²⁰⁷ A short IRP can focus on a discrete topic, such as direct examination. In a weeklong program, the focus is on several skill sets.²⁰⁸ In an advocacy course, a series of short IRPs (two- to-four-hour sessions) may focus on individual skill sets, such as direct and cross-examination, and conclude with a final trial that incorporates all the skills sets.²⁰⁹ An entire face-to-face IRP may cover all the skill sets in an intense immersion extended course.²¹⁰

The IRP produces effective results in a short period of time.²¹¹ Any location where four advocates and an instructor can gather is sufficient.²¹² A minimum of two days at a convenient location can be sufficient because the student advocates have practiced and received feedback on all aspects of the IRP session, including the opening statements, direct and cross-examination, final argument, motion practice, and use of exhibits.²¹³ If not for the mastery of skills during the FSS, the short period of time prior to the intensity of the IRP and simulated real-life advocacy experience is daunting.

206. See Appendix A, *supra* note 144.

207. For an example of a seven day IRP, see John O. Sonsteng, Summer Advanced Advocacy: Civil Litigation (May 20, 2017) [hereinafter Appendix C], <https://mitchellhamline.edu/library/wp-content/uploads/sites/7/2017/11/Appendix-C.pdf>. For an example of a semester-long IRP that meets three hours a week for thirteen weeks, see Appendix A, *supra*, note 146.

208. See Appendix C, *supra* note 207.

209. See *id.*

210. See *id.*

211. The faculty supervised study system, however, is not without cost. In addition to instructor cost, there is a cost for technology and non-instructor management. However, easy access to personalized recording devices and electronic management systems likely reduces cost. Accessible, inexpensive technology can permit recording, feedback, retention of files, and management of student advocates' performances—all at an efficient rate.

212. For example, in a court trial or arbitration, two teams of two student advocates each and a teacher are sufficient to provide an excellent learning experience. The student advocates act as each other's witnesses.

213. Sample Schedule:

- Day 1: Advocates meet with the instructor and the other advocates. Student advocates prepare with assigned partner and assigned role for the trial, hearing, or arbitration.
- Day 2 Morning: Student advocates try the matter before the teacher and receive feedback.
- Day 2 Afternoon: Student advocates switch sides and try the matter again and receive feedback.

The IRP may be used in a variety of ways to improve advocacy skills. For example, the practicum exercise may be used as part of a complete course in advocacy in which discrete skill sets are addressed (e.g., direct examination, cross-examination) leading up to an entire trial (court or jury) and which may cover both liability and damages.²¹⁴ Alternatively, each IRP could be used for discrete topics, such as damages or liability, expert witness examination, jury selection, exhibits, discovery, motion practice, or oral arguments.²¹⁵

This IPP practicum exercise may include a variety of materials, which participants may receive through an online platform.²¹⁶ The exercise is organized to allow participants to focus on learning and for instructors to focus on teaching effective advocacy skills.²¹⁷ The materials provide a rich background and give real-life qualities to the characters and situations, thus allowing the participants and instructors to become fully engaged.²¹⁸ The design and organization of the exercise demonstrates best practices in case development, management, organization, and analysis. Additionally, the material is organized to provide the student advocate with easy access to the facts of the case, freeing up the advocate and the instructor to focus on the analysis and performance of oral advocacy skills. Below is a sample of the main components of a practicum exercise:²¹⁹

- **Party and Witness Statements/Depositions**
 - The statements/depositions of the parties and witnesses are included in the exercise materials.
- **Procedural and Factual History**

214. See, e.g., Appendix A, *supra* note 144.

215. See, e.g., *id.*

216. See, e.g., John O. Sonsteng et al., A Practicum Exercise for General Practice (2016) [hereinafter Appendix E], <https://mitchellhamline.edu/library/wp-content/uploads/sites/7/2017/11/Appendix-E.pdf>. The materials provided as part of a Practicum Exercise may also include the learning highway and pathways associated with the exercise. See Figure 2.

217. The Practicum Exercise is self-contained and has all necessary information to complete the exercise. No outside research is required.

218. For example, in a Practicum Exercise for a patent trial, the exercise materials may include a description of the case (e.g., facts, procedural history, and a description of the parties), a planning guide and checklist, patents, prior art, expert witness statements, jury instructions, and the law (e.g., statutes and judicial opinions). In a patent practicum exercise, the materials may be real or fictional or a mixture of both.

219. See Appendix E, *supra* note 216, at 1.

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- The procedural and factual history provides an organized and detailed introduction to make it easier for participants to grasp the legal and factual background of the exercise.
 - **The Facts of the Case**
 - The facts are detailed and complete.
 - **Applicable Law**
 - This section provides the complete applicable law and is self-contained.
 - **The Pleadings**
 - The pleadings are complete and accurate.
 - **Case and Strategic Analysis**
 - The case and strategic analysis is a preliminary guide that allows the participant to focus on the advocacy skills of openings, closings, direct-examinations, and cross-examinations. It provides the basis for a more sophisticated analysis, preparation, and performance.

Below is a brief example of a fact pattern used in an exercise:

This exercise involves the firing of an employee at Midstate University. The employee was hired to manage a liquor store owned by the university. Under the workplace rules, the employee was prohibited from knowingly selling alcohol to an obviously intoxicated person. Midstate University claims that the employee knowingly sold alcohol to an obviously intoxicated person. At the time of the alleged sale of alcohol there was significant controversy in the community and on campus over the University's ownership of the liquor store. There had been numerous binge drinking incidents on campus, one of which involved the death of a participant. The issue is whether the employee knew that the person who bought the alcohol was intoxicated and if the employee's termination was supported by just cause.²²⁰

220. *Id.* at 3–9.

Each exercise can include an assessment rubric that can be online²²¹ to provide immediate²²² feedback²²³ and recording of the valuation criteria. A feedback form for an opening statement may, for example, allow the instructor to provide assessments of the participant's effective organization and structure; storytelling of facts; explanation of the theory of the case; use of persuasive approaches and techniques; explanation of the weaknesses in the case; effectiveness at delivery and presenting the case; and ability to avoid providing an objectionable and argumentative opening statement.²²⁴

The learning materials that accompany this exercise are unique. They include the Planning Guide and Check List.²²⁵ The Planning Guide and Check List are tools to assist the student advocate and instructor in the preparation of legal substance and presentation.²²⁶

221. Appendix B, *supra* note 175; see John Hattie & Helen Timperley, *The Power of Feedback*, 77 REV. EDUC. RES. 81, 104 (2007) ("To be effective, feedback needs to be clear, purposeful, meaningful, and compatible with students' prior knowledge and to provide logical connections."). A study conducted by Hattie (1999) to assess influences on student achievement found video, audio, or computer assisted instructional feedback to be the most effective forms of feedback. *Id.* at 84.

222. Immediacy in this context is "closely related" to the application of knowledge or skills and the timing of feedback is critical. Linda S. Anderson, *Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results*, 5 APPALACHIAN J.L. 127, 144 (2006); see also MALCOLM S. KNOWLES, ELWOOD F. HOLTON III & RICHARD A. SWANSON, *THE ADULT LEARNER: THE DEFINITIVE CLASSIC IN ADULT EDUCATION AND HUMAN RESOURCE DEVELOPMENT* 67 (5th ed. 1998) (noting that a shorter period between when an adult learns a skill and uses it is more effective for skill learning).

223. Ronald Van Houten, Sharon Hill & Madeline Parsons, *An Analysis of a Performance Feedback System: The Effects of Timing and Feedback, Public Posting, and Praise upon Academic Performance and Peer Interaction*, 8 J. APPLIED BEHAV. ANALYSIS 449–57 (1975) (explaining how performance based feedback is positively correlated to academic performance); David J. Nicol & Debra Macfarlane-Dick, *Formative Assessment and Self-regulated Learning: A Model and Seven Principles of Good Feedback Practice*, 31 STUD. HIGHER EDUC. 199–218 (2006); Robert L. Bangert-Drowns et al., *The Instructional Effect of Feedback in Test-like Events*, 61 REV. EDUC. RES. 213–38 (1991).

224. See Appendix B, *supra* note 175.

225. Appendix D, *supra* note 173; see ROGER HAYDOCK & JOHN SONSTENG, *TRIAL: ADVOCACY BEFORE JUDGES, JURORS, AND ARBITRATORS* (5th ed. 2015). The table of contents for the book is available on file with the Mitchell Hamline Law Review. There are many other good books about effective trial advocacy. See, e.g., STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS & PRACTICE* (5th ed. 2015); THOMAS A. MAUET, *TRIAL TECHNIQUES AND TRIALS* (9th ed. 2013); CHARLES H. ROSE III, *FUNDAMENTAL TRIAL ADVOCACY* (2d ed. 2011).

226. Appendix D, *supra* note 173.

These tools help guide the participants to develop their own system for detailed planning.

G. *The 21st Century Text Book*

The 21st Century Text Book is the course book of the EATP that permits participants to observe and study effective advocacy techniques through lectures, demonstrations, and panel discussions.²²⁷ It is in electronic format and includes source materials and links to commentary by faculty members.²²⁸ *The 21st Century Text Book* is an online publication that includes an introduction to the course educational model and learning objectives.²²⁹ *The 21st-Century Textbook* includes briefings by a primary instructor. Many experienced advocacy instructors (attorneys and judges) from all over the United States contributed their expertise to this innovative learning system.²³⁰ This is in the form of “mini-lectures,” which are short and focused on a specific area.

Student advocates access the context on their own time and can review lectures and demonstrations.²³¹ Along the “learning highway” there are a series of links, or paths, that the participants may access.²³² See Figure 2 for a flowchart illustrating a main learning highway and links (paths) off the learning highway that the participants may access.

The participants may use the main learning highway and the links in a variety of ways. For example, the participants may travel the entire learning highway straight through in the illustrated sequence: from the introduction to the mini-lecture, to the specific topic demonstrations with commentary, to the wrap up.²³³ The participants, if they so choose, may follow links to other paths, such as readings on the specific topic covered by the mini-lecture; multiple experts’ comments, perspectives and approaches; other primary reference materials and commentary (e.g., rules of Evidence; rules of Procedure); or secondary reference materials (e.g., textbooks, treatises and articles).²³⁴

227. See *Art of Effective Advocacy*, *supra* note 154.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*; see Figure 2.

233. See Figure 2.

234. *Id.*

The additional links or paths permit the primary instructor to have access to the best instructors who provide their perspectives on a subject. For this method, short lectures and commentary by experienced judges, lawyers, philosophers, scientists (depending on the subject matter) and other instructors provide viewpoints, giving the student advocate a broad base of knowledge from which they can draw.

The 21st Century Text Book also provides participants with links and paths to other similar demonstrations and discussions.²³⁵ These demonstrations are not live; they are prepared and recorded in advance to assure high quality. Actors read from scripts rather than memorizing lines, and editing may be performed with much higher quality than for the substantially more expensive live video performance. Production of still photos with accompanying audio only requires a sound studio rather than a video studio in the case of live video.

V. CONCLUSION

This proposal is neither perfect nor final. Education theory is continuing to evolve and the tools that technology offers are constantly changing. The use of technology may result in the loss of some of the benefits that face-to-face interaction provides in traditional advocacy training programs. But the innovation, flexibility, and benefits of the Effective Advocate Training Program method far outweigh any criticism.

The EATP method is truly a paradigm shift. Advocacy training programs must not remain stagnant. They must continually evolve, recognizing new resources and the needs of the new advocates. The Effective Advocate Training Program method is the future of effective advocacy teaching and learning.

235. The following Mitchell Hamline School of Law staff helped develop the EATP concept and technology delivery system: Sam Easterson, the Educational technologist; Sean Felhofer, the Digital Initiatives Librarian; and Joe Ketzner, the Systems Administrator.

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