DON'T BE AFRAID OF TRIAL: Making the Teaching of Trial Practice Accessible and Yes, Less Aspirational

GEORGE BACH*

ABSTRACT

Trial practice courses can leave students feeling overwhelmed and intimidated. The pressure to perform at an exceptional level is so great that students can leave the course uninspired and lacking in confidence. What results is a fear of trial in practice, which is bad both for the clients as well as the lawyer.

Increasingly, trials are seen as a complex, expensive, almost insurmountable endeavors. Too often civil cases may settle because a party's attorney is afraid of the trial procedure (regardless of how a factfinder may react to certain facts or witnesses). One response to trial has been to funnel disputes into compelled mediation or arbitration. Indeed, arbitration has become the more common method of conflict resolution for consumer and corporate disputes.

By teaching trial practice in a more student-friendly and less intimidating manner, students will gain confidence in the trial process and be more willing to "take cases to trial" and to trust the system to do its job. One of my favorite things about teaching trial practice is that I see students begin to become lawyers in a way not seen in their first-year courses. They learn to mine facts out of documents and depositions and to put the pieces of a case together. The key, for me, is making that experience accessible and supportive, while turning the students into lawyers. For many, this is the first exposure to experiential learning and to what exactly lawyers do.

By turning the trial practice course into a more welcoming exercise, hopefully the "tent" will be broadened as well. Students of diverse backgrounds can grow in an environment in which their voices are heard.

The main goal of this article is to provide practical tips for how law professors can make trial practice less intimidating for students. This article outlines my approach to teaching trial practice and offers ways to make it

* Professor of Law, University of New Mexico School of Law. Many thanks to my research assistants Annika Cleveland, Daniel Jaynes, Michael Hart, and Khan Muhammad for their remarkable input and support. Many of the thoughts in this article are gleaned from my experience with dozens of remarkable trial attorneys. I am indebted to and credit Professor Barbara Bergman (who taught our trial practice course for decades before she hired me), my colleague David Stout for his constant support and guidance, attorneys K. Lee Peifer, Maureen Sanders, Bill Slease, Matt Garcia, Glenn Smith-Valdez, and the late Phil Davis, among many others in our legal community. Finally, credit to Distinguished Professor Thomas A. Mauet for the excellent trial practice books over the years, which I used as a student, practitioner, and teacher.

more approachable and accessible to students of a wide variety of backgrounds.

ARTICLE CONTENTS

I. INTRODUCTION

"Because American law is very confused, you can't avoid mistakes. I'm sure I've made plenty of mistakes, but if one is bothered by that, you can't do the job. If you take it too seriously and are too concerned that you're making mistakes, then it just becomes unbearable."[1]

- JUDGE RICHARD POSNER

[1] Kristin Samuelson, *Office Space: Judge Richard Posner*, CHI. TRIB. (Oct. 24, 2011, 12:00 AM), https://www.chicagotribune.com/business/ct-xpm-2011-10-24-ct-biz-1024-office-space-posner-20111024-story.html.

Trial practice courses can leave students feeling overwhelmed and intimidated. The pressure to perform at an exceptional level is so great that students can leave the course uninspired and lacking in confidence. What results is a fear of trial in practice, which is bad both for the clients as well as the lawyer.

Increasingly, trials are seen as a complex, expensive, almost insurmountable endeavors. Too often civil cases may settle because a party's attorney is afraid of the trial procedure (regardless of how a factfinder may react to certain facts or witnesses). One response to trial has been to funnel disputes into compelled mediation or arbitration. Indeed, arbitration has become the more common method of conflict resolution for consumer and corporate disputes.[2]

By teaching trial practice in a more student-friendly and less intimidating manner, students will gain confidence in the trial process and be more willing to "take cases to trial" and to trust the system to do its job.[3] I teach a long-established six-hour Evidence/Trial Practice course, split roughly between the learning of the Rules of Evidence and trial practices exercises culminating in a mock trial held at the county courthouse before state and federal judges, with volunteer jurors from the community.[4] The trial practice exercises are conducted by local, well-respected and carefully chosen judges and attorneys. One of my favorite things about the course is that I see students begin to become lawyers in a way not seen in their first-year courses. They learn to mine facts out of documents and depositions and

---

[2] *See* Graham K. Bryant & Kristopher R. McClellan, *The Disappearing Civil Trial: Implications for the Future of Law Practice*, 30 REGENT UNIV. L. REV. 287, 308–09 (2017); Stephen D. Easton, *Why Teach Trial Practice, When There Are "No" Trials?*, 50 UNIV. S.F. L. REV. 1, 20 (2016).

[3] Other scholars have looked at the issue of accessibility in the broader context of legal education. *See, e.g.*, Denitsa R. Mavrova Heinrich, *Cultivating Grit in Law Students: Grit, Deliberate Practice, and the First-Year Law School Curriculum*, 47 CAP. UNIV. L. REV. 341, 349–50 (2019); Kaci Bishop, *Framing Failure in the Legal Classroom: Techniques for Encouraging Growth and Resilience*, 70 ARK. L. REV. 959, 1005–06 (2018); Marybeth Herald, *Getting Students Psyched: Using Psychology to Encourage Classroom Participation*, 15 NEV. L. J. 744, 753 (2015); Palma Joy Strand, *We Are All on the Journey: Transforming Antagonistic Spaces in Law School Classrooms*, 67 J. LEGAL EDUC. 176, 184 (2017).

Others have, in the past, critiqued the way trial advocacy is taught. *See* Thomas F. Geraghty, *Foreword: Teaching Trial Advocacy in the 90s and Beyond*, 66 NOTRE DAME L. REV. 687, 694 (1990) (critiquing aspects of the NITA model: "the law schools and NITA have so far failed to take the next step which they advocated systematic and careful planning of trial advocacy curricula and the encouragement of critical thinking about the litigation and trial process"); Edward J. Imwinkelried, *The Educational Philosophy of the Trial Practice Course: Reweaving the Seamless Web*, 23 GA. L. REV. 663, 664–65 (1989) (Professor Imwinkelried's article describes the tension between trial practice courses and the substantive courses and works to reconcile the two approaches.); Gilda Tuoni, *Two Models for Trial Advocacy Skills Training in Law School—A Critique*, 25 LOY. L. A. L. REV. 111, 121 (1991) (Professor Tuoni compares the semester with the intensive approach.); J. Alexander Tanford, *What We Don't Teach in Trial Advocacy: A Proposed Course in Trial Law*, 41 J. LEGAL EDUC. 251, 255 (1991) (criticizing the omission of "trial law" course).

[4] Typically, there are 64 to 86 students enrolled, so at least sixteen simultaneous trials are held on the Saturday before Thanksgiving.

to put the pieces of a case together. The key to helping the students grow is making that experience accessible and supportive.

An additional benefit to a more accessible approach is addressing the lack of diversity among lawyers doing trial work.[5] By turning the trial practice into a more welcoming environment, hopefully the "tent" will be broadened as well. Students of diverse backgrounds can grow in an environment in which their voices are heard. Trial practice can be a place where that happens.

In this article, I start with a discussion of the problem described by Dr. Carol Dweck and later, Professor Kaci Bishop, as a "fixed mindset"[6] and how I believe it arises in teaching trial practice. I then address the need for thoughtful diversity, equity, and inclusion training. Then I proceed with an overview of what I teach on Day One. I then discuss trial techniques and style choices with examples of how to relay them in a welcoming manner. I then walk through the trial practice course (Openings, Voir Dire, etc.), describing the manner in which I approach each topic in the hope of instilling confidence in the students. Finally, I address the weeks leading up to trial, trial preparation, verdict, and feedback.

II. EMPHASIZING A GROWTH MINDSET AND AVOIDING A FIXED MINDSET WHEN TEACHING TRIAL PRACTICE

In her book Mindset, Dr. Carol Dweck addressed the important distinction between a "fixed mindset" and a "growth mindset." A "fixed mindset" is the belief "that your qualities are carved in stone . . . ."[7] That mindset confirms that your traits are "simply a hand you're dealt and have to live with . . . ."[8] In contrast, a growth mindset "is based on the belief that qualities are things you can cultivate through your efforts."[9]

Building on the work of Dweck, Angela Duckworth, and K. Anders Ericsson,[10] Professor Kaci Bishop has explained that, generally in legal education, "the fixed mindset" is an unproductive, even dangerous approach to pedagogy.

Regardless of the impetus, once students are feeling that they have failed, they are susceptible to getting caught in the negative cycle of guilt, shame, and blame or stalling out in a fixed-mindset. Such a mindset affects and hampers students' motivation to engage in their studies or put forth

---

[5] *See, e.g.*, *Diversity in the Plaintiff Bar*, 48 JUL. TRIAL 16, 19–22 (2012); *Household Data Annual Averages*, AM. BAR ASS'N. 210 (2008), https://www.americanbar.org/content/dam/aba/administrative/market_research/cpsaat11.pdf.

[6] Bishop, *supra* note 3, at 979–80.

[7] CAROL S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS 6 (2nd ed. 2006).

[8] *Id.* at 6–7.

[9] *Id.* at 7.

[10] *Id.* at 6–7.

effort; it also contributes to a rise in mental health issues. More and more frequently law students "manifest learned helplessness, depression, substance abuse," and other interpersonal problems, and those issues . . . carry forward into the profession.[11]

Similarly, Professor Marybeth Herald has commented that, "The easily discouraged, fixed mindsets often do not respond well to setbacks and feedback and often give up. A smart but fixed-mindset person may be passed by the less gifted but gritty believer in the growth mindset."[12]

This problem is all the more striking in the trial practice context, where students are, at times, taught to seek perfection in their performance.[13] As Professor Bishop has noted, "our striving for perfectionism largely contributes to failure being seen as a bad word-or as something final, from which we cannot recover."[14]

As Professor Lubet argued some time ago, presentation can actually be de-emphasized: "Students will be more successful not because they can speak well or argue more persuasively,
but rather because they can structure facts and law into a compelling
and theoretically sound case."[15] Too often students are urged to be someone they are not – a modern day Clarence Darrow or Johnnie Cochran. It is not attainable for most, resulting in the pressures that drive students – soon to be lawyers – to fear trial.

My approach to trial practice is to instill in each student that "aspirational" trial practice is *not* the goal – that is, they need not aspire to be the modern Clarence Darrow. Instead, the goal, as Lubet indicates, is to get the necessary information out to the jury, and for the student to grow resilient by being themselves (and not some aspirational version of someone else). As my colleague Ted Occhialino once said, "There's only one version of you – and you should be that."[16]

III. DIVERSITY, EQUITY, AND INCLUSION TRAINING

---

[11] Bishop, *supra* note 3, at 979–80 (quoting Carie Rosen, *The Method and the Message*, 12 NEV. L. J. 160, 170, 175–76 (2011)).

[12] Herald, *supra* note 3, at 748.

[13] Bishop, *supra* note 3, at 971 n. 63 ("Perhaps we would have a healthier relationship with failure (and with perfectionism) if instead of saying 'practice makes perfect,' we said 'practice makes permanent' or 'progress not perfection.'")

[14] *Id.* at 968. My colleague David Stout emphasizes Samuel Becket in Worstward Ho: "Ever tried. Ever failed. No matter. Try again. Fail again. *Fail better*."

[15] Steven Lubet, *Advocacy Education: The Case for Structural Knowledge*, 66 NOTRE DAME L. REV. 721, 734 (1991), *quoted in* Thomas F. Geraghty, *Foreword: Teaching Trial Advocacy in the 90s and Beyond*, 66 NOTRE DAME L. REV. 687, 697 (1990).

[16] Professor Occhialino's comment came in a discussion about forthcoming interviews I was to have when in the job market as a new professor. I went to a conference for new professors where we were told to be "slightly better versions of yourselves." I related that to Occhialino and appreciated his wise response.

In all aspects of the trial practice course, the environment must be a safe, supportive one. This includes recruitment of adjunct faculty who assist the students. Our program has long-utilized trial practice adjuncts to critique the students' performances in trial practice exercises. State Supreme Court justices, local state and federal judges, and practicing attorneys work with the students weekly to hone their trial practice skills. There are typically upwards of sixty-four students in a course, and they are divided into evening sessions of eight students each. The adjuncts rotate so that the students are ultimately exposed to all of them. One critical part of providing a safe environment for students to grow is to ensure that the adjunct instructors receive proper training on diversity, equity, and inclusion. Incidents have arisen where instructors – particularly those born in a different era – have not been sensitive to issues of sex, gender[17], race, or ethnicity. These incidents may regrettably be typical of higher education as a whole.

Other scholars have explained that "social science suggests that pedagogy and the classroom environment can either depress or improve the performance of students of color."[18]

Indigenous students may feel as though they are less privy to the implicit normativity of the law faculty, as though they are, as Calder *et al.* note, "'landing' into a whole new world with special rules that seem obtuse and inaccessible; not knowing how to go about learning those rules and sensing that the rules are tied to privilege."[19]

It is important to pick a diverse group of adjuncts. Professor Bouclin defines the role of a mentor in part as "provid[ing] psychosocial assistance through role modeling, confirming the validity of life choices, and counseling."[20]

---

[17] *See generally* Todd A. Berger, *Male Legal Educators Cannot Teach Women How to Practice "Gender Judo": The Need to Critically Re-Assess Current Pedagogical Approaches for Teaching Trial Advocacy*, 45 J. LEGAL PROF. 1, 28 (2020) ("[U]sing the dominant NITA method of teaching trial advocacy employed at most law schools, male professors cannot meaningfully address, or likely will not want to address, how women advocates can combat courtroom gender bias.").

[18] Sean Darling-Hammond & Kristen Holmquist, *Creating Wise Classrooms to Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 24 NAT'L BLACK L. J. 1, 14 (2015).

[19] Suzanne Bouclin, *Marginalized Law Students and Mentorship*, 48 OTTAWA L. REV. 355, 364 (2016) (quoting SUZANNE BOUCLIN, ET AL., PLAYING GAMES WITH LAW, THE ARTS AND THE LEGAL ACADEMY: BEYOND TEXT IN LEGAL EDUCATION 76 (Zenon Bańkowski et al., eds., 2013). "Unsurprisingly then, research has shown that shared experiences based on race, cultural background, sexual orientation, gender expression, first language, and gender, and their subsequent shared understanding of systemic racism, homophobia, linguistic hierarchies, and sexism can be relevant in forming mutually enriching mentoring relationships with people with whom they identify." *Id.* at 365, citing Richard J. Reddick, *Intersecting Identities: Mentoring Contributions and Challenges for Black Faculty Mentoring Black Undergraduates*, 19 MENTORING & TUTORING: PARTNERSHIP IN LEARNING 319, 319 (2011); Jolyn Dahlvig, *Mentoring of African American Students at a Predominantly White Institution (PWI)*, 9 CHRISTIAN HIGHER EDUC. 369, 372–73.

[20] Suzanne Bouclin, *Marginalized Law Students and Mentorship*, 48 OTTAWA L. REV. 355, 360.

Some specific issues that have come up in my experience included commenting on the appearance of a student. Beyond ensuring that the student is dressed in court attire, such comments are inappropriate. Equally offensive is a negative comment about the natural pitch of a student's voice. Some people have naturally high-pitched voices – that is who they are and urging them to somehow conform that to an unidentifiable baritone norm is unacceptable.

"Poise." Too often, female students are told they "have great poise" while male students receive specific, constructive feedback. Indeed, "poise" has unfortunately been used as a euphemism for attractiveness – particularly with regard to students presenting as female. All students should receive supportive, specific feedback that helps them hone their style in a way that does not rely solely on stereotypes about them.[21] "Awareness of the stereotype creates anxiety, which hampers performance."[22] As Professor Palma Joy Strand has explained,

It may well be that faculty and administration are not intentionally confirming stereotypes or generating negative messages about students of color or women. But lack of intent does not mean that stereotypes are not confirmed and negative messages sent. If students experience the environment as antagonistic, it is antagonistic. Perception here is reality.[23]

Confirming stereotypes can include microaggressions that are antithetical to development of a growth mindset. Professor Strand breaks down microaggressions into several categories.[24] In my experience in teaching trial practice, her third category is the most prominent: microinvalidation that may be unconscious.[25] An example arose in my course when an adjunct was reading names of students in the evening session and stopped at one name to ask about the student's heritage. The student responded that they did not know, to which the adjunct responded, "Well you must have been here for a while, given your lack of accent." Professor Strand is correct that such a remark can weaken the student by isolating them and appearing to confirm stereotypes.[26]

Proper amelioration includes training instructors to be more thoughtful in their language and ensuring that no student is made to feel uncomfortable because of their protected status or their identity. To address this in our course, the University's Director of the Office of Equal Opportunity teamed up with the State Supreme Court's Disciplinary Board counsel to create a diversity/sensitivity training. The training is mandatory for all adjuncts. While the training has been extremely helpful, there is a

---

[21] *Id.* at 355.
[22] Strand, *supra* note 3, at 199.
[23] *Id.*
[24] *Id.* at 201–02 (discussing "microassaults," "microinsults," and "microinvalidations").
[25] *Id.*
[26] *Id.* at 203.

need to update it continually. New issues arise every year and while prophylactic training helps avoid more serious incidents, it is impossible to foresee every situation that runs afoul of new and better norms in teaching.

Thus, a critical component of every trial practice experience is ensuring that faculty and all other participants are given Diversity, Equity, and Inclusion training. Doing so will further respect for the individual students and make the entire experience more accessible—and engaging—for all.

IV. DAY ONE: BE YOURSELF

To ensure accessibility, I try to set the tone from the first day of class. First, I tell students not to be afraid of trial practice,[27] that if they want to fear something they should fear the Rules of Evidence, which are clunky beyond belief.[28] Indeed, the "hard" part of my course is mastering the Rules in all their complexities. The students should *enjoy* trial practice—it is the reason many of them chose to go to law school. The goal of the course is to provide a safe, comfortable (and challenging) environment for them to learn basic trial skills. In that environment, the students will develop resiliency and grit.[29]

Next, I tell students to take it seriously, but have fun. To keep it simple. I encourage them to experiment with the trial practice sessions and to take the feedback for what it helps within their preferred style. "You be you."

"You be you" is the core principle to emphasize in trying to make students comfortable in trial practice. We must demythologize the trial lawyer. Not everyone is "Clarence Darrow" or one of the highly respected present-day trial attorneys. A student who is pushed to be someone they are not (a) will hate trial practice, and (b) will come across as fake. If the jury perceives an attorney as disingenuous, it is bad news for the party they represent. Are you folksy? Then be folksy! Are you nerdy? Then be nerdy and not folksy. If you act "folksy"[30] and are not folksy, it will not seem genuine.

---

[27] *See id.* ("Communicating high expectations along with a 'you can do this' message effectively imparts a growth mindset to students.").

[28] FED. R. EVID. 803(3), for example, contains an exception to an exception to the exception to the hearsay rule. *See also* Michelson v. U.S., 335 U.S. 469, 486 (1948) ("We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other. But somehow it has proved a workable even if clumsy . . . .") (discussing character evidence).

[29] *See generally* Heinrich, *supra* note 3, at 362.

[30] References to how "You can put lipstick on a hog and call it Monique, but it is still a pig," fit Ann Richards, but it may not fit you. *See* Ben Zimmer, *Who First Put "Lipstick on a Pig"?*, SLATE (Sept. 10, 2008, 5:37 PM) https://slate.com/news-and-politics/2008/09/where-does-the-expression-lipstick-on-a-pig-come-from.html.

Typically, I will show two clips from the O.J. Simpson trial, one of Johnnie Cochran talking about the identification of Simpson, and another of Barry Scheck discussing the LAPD handling of the evidence.[31] Both presentations have excellent themes but are delivered in the styles specific to the two lawyers. There was only one Johnnie Cochran; there is only one Barry Scheck. They each have their own effective style and if one of them tried to be the other, it would not work.[32]

My first jury trial was a First Amendment retaliation trial.[33] One of the law partners at the firm where I worked and I tried the case—winning the case on liability but only $1.00 in damages. A week or so after the trial, I bumped into one of the jurors at a local store. They said to me, "You really seemed to believe in what you were doing." It was a compliment that has stayed with me and that I cherish; if I had tried to be *someone else* – someone other than my nerdy self, I would not have had the same effect.

On Day One, I also tell the students, "It's good to be nervous." My friend and colleague Maureen Sanders has always said that the nervous energy helps you perform. Professor Herald has discussed the "Illusion of Transparency"—the idea that an audience can see your anxiety, when they cannot.[34] "Telling the students explicitly about the illusion of transparency removed some of its ill effects."[35] A recent example I give my students is a telephonic appearance I made in a bankruptcy case for a client. The matter was already resolved, the Trustee and I simply needed to inform the judge for the Court's approval. Despite practicing for twenty years in federal and state courts at the trial and appellate levels, I was nervous. That was a good thing.

The other example I share with the students—on day one—is that I am nervous to be in front of them (also true). As the semester gets underway, teaching in front of sixty to eighty students is just plain fun. But on the first day, when first impressions may matter a good deal, my nerves are on edge.

Indications of the instructor's own nervousness or anxiety can be helpful to the students in easing their own mind. When I am nervous (or on a day when I am tired for some reason), my diction lapses. I jumble my words. To paraphrase another friend and former colleague, Dave Sidhu:

---

[31] CNN, (RAW) O.J. Simpson Defense: 'If it doesn't fit you must acquit', YOUTUBE (June 14, 2014), https://www.youtube.com/watch?v=NH-VuP_5cA4; Seb Menard, O.J. Simpson Murder Trial (Closing Arguments - Part 4) at 1:24:30, YOUTUBE, https://www.youtube.com/watch?v=x0m0fGpmwm0.

[32] Being authentic is also a critical aspect of dealing with sex and gender inequality in the courtroom. *See* Berger, *supra* note 17, at 33 ("[W]hile concrete instruction regarding specific 'gender judo' skills is important, this new pedagogical method of teaching trial practice should also leave room for female advocates to figure out how practicing 'gender judo' feels most authentic to them.").

[33] Sanchez v. Matta, 229 F.R.D. 649 (D.N.M. 2004).

[34] Herald, *supra* note 3, at 750, discussing Kenneth Savitsky & Thomas Gilovich, *The Illusion of Transparency and the Alleviation of Speech Anxiety*, 39 J. EXPERIMENTAL SOC. PSYCH. 618, 621 (2003).

[35] Herald, *supra* note 3, at 751.

"Sometimes the words leave my mouth and I have no idea where they are going," and that is fine. The students must know that "perfect is the enemy of the good."[36] As Bishop notes, "Finally, we can create a safe space for and lower the stakes of failure by sharing failure. Sharing quotes or stories about others' journeys, missteps, and failures is the easiest way to share failure."[37]

Also on the first day, I talk to the students about the feedback they may receive. In order to be useful, "[t]he feedback must be prompt, meaningful, and frequent."[38] We use lawyers and judges from the community to provide feedback to students during their trial practice exercises. I assure the students that the feedback will vary, and at times even be contradictory – that adjuncts will contradict other adjuncts or me. Adjuncts are people just like judges and juries and each adjunct reacts differently. The varying comments are useful to alert students to the various perceptions of what they are presenting and how they are presenting it. No one reaction is right, but they are all real.

The potential for contradiction in feedback is perhaps the clearest example of why the students should feel empowered to learn their own style. While the evidence rules have correct and incorrect applications, much of trial practice is stylistic and discretionary. Of course, there are actions within trial practice that can violate the Rules of Evidence (take the "Golden Rule,"[39] for example). But whether to refer to notes, or not, during an opening statement is not a rule—it is a style choice.

Finally, and it is a small but meaningful thing: I tell the students to call me by my first name. I tell them to call me "George," and if they can't stand that to call me "Bach," but "Professor" is not my preferred label. I would say a majority go with "Bach." The point is to make clear that we are in the arena together, working through the challenging problems of trial. I am not sitting "on high" – but I am approachable and accessible, which will hopefully increase the feedback and build their confidence.

V. DAY TWO: IT'S NOT ABOUT WINNING

On the second day of teaching trial practice, I run through what the day of trial will look like—from going to the courthouse[40] to receiving the final feedback. The following are points I emphasize on the second day of trial practice.

---

[36] *See, e.g.*, LISA J. DECARO AND LEONARD MATHEO, THE LAWYER'S WINNING EDGE 216–17 (Bradford Pub. Co. 2004).

[37] *See* Bishop, *supra* note 3, at 991.

[38] Heinrich, *supra* note 3, at 373; K. Anders Ericsson, *Expert Performance in Medicine*, 79 ACAD. MED. 1472, 1474 (2004).

[39] THOMAS A. MAUET & STEPHEN EASTON, TRIAL TECHNIQUES AND TRIALS 439 (11th ed. 2021).

[40] Pandemic permitting.

I tell the students up front that their verdict in the mock trial "*does not matter*." I don't even collect or track the verdicts. While I do collect written feedback and recommended grades from the judge and critiquer evaluating the trial, the verdicts—pedagogically speaking—do not matter.

In our win/lose culture, it is so hard to convince students that "winning" is not the goal of the mock trial. I suppose that saying the verdicts do not matter is different than making them not matter to the students, who want a result. I had a situation in which two students "lost" the bench trial verdict—although they received full points for their performance. The students asked me how it was possible that they lost the verdict, since they did everything correct. What a great teachable moment about the practice of law! My friend, the late Phil Davis used to say, "I've lost cases I should have won; I've won cases I should have lost." Phil once told me about a hard loss where he spent a month afterwards staring at the wall. One of my first bosses once told me that the law is a profession in which you have to be okay failing (i.e., losing a trial) from time to time. My colleague David Stout says it this way:

Lawyers who try cases will not win every case. If we want to eradicate fear of trial, we need to develop a healthy attitude toward the process. We try the best case we can and leave the results to the jury – results ultimately (win or lose) are not in our control and that is a valuable lesson. As a friend once said, "Lawyers who claim never to have lost a case haven't tried the hard cases."[41]

Giving the students space to voice their concerns is important to ensuring growth from the "loss." At the same time, cautioning them that trial means someone must lose is an equally critical aspect of their learning.

More important than winning, of course, is learning resilience and gaining confidence. I used to work at Philmont Scout Ranch and the department I worked in had a motto: "Humble Pride." Be confident in your work, but humble toward others – the court, the jury, and opponents. I teach the students to "fake it 'til you make it" with confidence. When the judge asks you to enter your appearance, stand up immediately. Do not exchange weak glances with opposing counsel about who will go first. Stand and deliver. Move around the courtroom like a "respectful" owner. Do all of this even if you do not feel like it.

Part of ownership is maintaining the landscape. Keep counsel's table organized. I once tried a case with a lawyer who had documents everywhere, sliding off the podium into disarray. Nothing says lack of confidence like a mess.[42]

---

[41] June 7, 2022, note from Professor David Stout to author, quoting the late Bill Carpenter (on file with author).

[42] The late Professor Ann Scales used to teach "straight backs and neat stacks." June 29, 2022, note from Maureen Sanders (on file with author).

Master the poker face! A student can project confidence (even by faking it) by maintaining the poker face. Professor George Fisher has provided videos with his casebook on evidence[43] that includes a clip from a San Diego infanticide trial. After the prosecutor loses a motion in limine, he stands wide-eyed and mouth agape. The clip is the classic example of how important it is (especially in front of a jury) for an advocate to control their facial expressions. The "deer in headlights" look is bad advocacy. I tell students that, if anything (e.g. after a side bar in which they may have lost the argument) they should put a slight smile on their face as if they won. Eventually, even if they do not always win, the feigned confidence will start to feel real.

As Professor Herald notes, "The goal of participation is not perfection, but rather it is learning through practice and feedback."[44] What students need to do for trial is get the information across well and in a compelling format. Some people excel at this, but as odd as it sounds, excelling is not necessary to win at trial. The goal of the lessons of the second day is to plant the seed that trial is attainable and that they can grow to have confidence in their own resilience.

VI. CIVILITY AND PROFESSIONALISM

Recently, a State Supreme Court Justice remarked at a dinner I attended that zealous advocacy does not include being rude and obstructive, rather "it's the opposite of that." To address proactively the tendency of student teams to get into "tit for tat" battles before their mock trial, I score ten points of their final grade for Civility and Professionalism. One way for students to feel that trial practice (or for that matter, the practice of law more broadly) is accessible is to keep the vitriol and antagonism out of it.

To cultivate good professionalism habits, I urge the students to speak with opposing counsel early and often. To try to work things out. Indeed, in other courses (such as Clinic) I have told students that they should reach for the phone when working with opposing counsel. Too often, knee-jerk responses are sent by email that only inflame the situation.[45]

In trial practice, I urge students to collaborate and work through issues with opposing counsel. I tell them to be good to each other and themselves.[46] One year, I was horrified to learn that the students had started a "pool" on which teams would win or lose each mock trial. I addressed it

---

[43] GEORGE FISHER, EVIDENCE (3d ed. 2012).

[44] Herald, *supra* note 3, at 748.

[45] When it comes to written communications, I encourage students to write *letters* (so 20th century) and attach them to emails, after they've tried the phone.

[46] It is possible for this collaborative approach to be taken too far. One year, a judge and critiquer told me that their mock trial was very, very scripted. Too scripted. I think it's fine for opposing teams to practice with each other, but when it becomes a boring scripted performance, too much is lost.

immediately at the beginning of a class—in a mock hearsay review problem: "I *heard* that there was a pool set up for the mock trial . . . That statement hopefully is not offered for the truth . . . ." The concern, of course, is that some students might feel alienated as unwilling participants in the pool, students might feel added pressure, students might focus too much on the verdict instead of the process, etc. The more students practice civility and professionalism, the more likely it is that they will find trial practice— and indeed, their careers—more accessible.

The example I give on this point is the friendship I built with attorney Bill Slease over the course of half a dozen cases as opposing counsel. I first met Bill when I was a lawyer for the ACLU of New Mexico, and he defended counties throughout the state. Over the course of many lawsuits (some that were very contentious between the parties), a friendship grew to the point where we were able to fly and rent cars together to other states to take depositions. We later taught a course on Employment Law together. One of the eventual assets of the collegiality was that we could do joint presentations to law students about a number of civil rights cases from the perspectives of plaintiff and defendant.

I know Bill joins me in letting our example communicate an important message about civility: Don't be a bully. There is nothing inconsistent with civility and zealous representation. And there is the added advantage of making trial, and trial practice, palatable.

VII. EVENING TRIAL PRACTICE SESSIONS

As noted, in addition to the weekly lectures on a trial practice technique, the students practice two hours in the evening, once a week, with practitioners from the community, including state Supreme Court Justices, trial court judges, and local attorneys. These sessions are invaluable in that, with proper feedback, the students gain confidence and resilience. (And some receive job offers!)

I have the students wear court attire. This has always been a part of the trial practice component at UNM Law. Although there is always the usual discourse on what exactly to wear and what level of formality is required, I recommend that, when wearing a suit, the students just make sure their suit jackets and pants match.[47] While one could argue that requiring court attire cuts against my approachable/accessible theory, I argue it helps the students to take practice more seriously and prepares them for the real world. The point of making trial practice approachable/accessible is not to make it easy or unrealistic, it is to find the best way to grow the students' confidence in their work and to cultivate grit. As Professor Denitsa Manrova Heinrich has noted, "The type of practice required is deliberate practice—a

[47]Another story from real-life: I finished my first appellate argument only to realize that in my 4:00 a.m. anxiety, I mismatched my suit jacket and pants.

concentrated and effortful practice aimed at learning or improving a particular skill or aspect of performance."[48] Deliberate practice contains four elements: "a well-defined goal aimed at improving a specific aspect of performance, disciplined concentration, informative feedback, and corrected repetition . . . ."[49] Professor Heinrich's recommendations that "deliberate practice" cultivating grit be included in the 1L curriculum apply equally well to the upper level trial practice course.[50] "[G]rit grows through practice."[51]

Professor Bishop notes that, "[f]or students to truly learn from their mistakes and to improve, they need not only to acknowledge failures, but also to study them."[52] Video review of evening trial practice performances has always been a critical part of our program. The students are encouraged to watch their own performances and to meet with me twice a semester to review them and obtain additional feedback.[53] This additional feedback from me—in addition to the feedback they received from the evening adjuncts on the spot—again emphasizes the positive while including constructive criticism. It ideally results in what some students have called a "shot of self-esteem" when coming by the office and reviewing their performance.

VIII. OPENING STATEMENTS

Within each trial practice exercise, I try to instill in the students an approach that allows them to develop a growth mindset and one that ensures they are not beaten down by the experience. It starts with one of the first parts of trial: opening statements.[54]

Let the students use their notes! This is my great heresy. No, students should not read their openings statements. But too many times when I see students pushed to go without notes,[55] they stumble by getting stuck (with the look I used to manifest in community theatre when I feared dropping a line—looking up at the ceiling in the hope that it would appear).

---

[48] Heinrich, *supra* note 3, at 362, citing Angela L. Duckworth et al., *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. PERSONALITY & SOC. PSYCH. 1087, 1087 (2007).

[49] Heinrich, *supra* note 3, at 365, citing ANDERS ERICSSON & ROBERT POOL, PEAK: SECRETS FROM THE NEW SCIENCE ON EXPERTISE 25, 85, 98–100 (2016).

[50] Indeed, Heinrich recommends that law schools model business school's case-method problem solving approach, which is very similar to trial practice simulations. Heinrich, *supra* note 3, at 375, citing Todd D. Rakoff & Marta Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 603–04 (2007).

[51] Heinrich, *supra* note 3, at 377.

[52] Bishop, *supra* note 3, at 1001.

[53] *See* Darling-Hammond & Holmquist, *supra* note 18, at 47 ("A number of professors explained that it is important to connect with students on an individual level because, without the connection, students often slip through the cracks.").

[54] Although voir dire naturally comes first, we start with openings to help students start to develop the story of their case. Voir dire follows in the second week of trial practice.

[55] *See, e.g.*, J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS, AND ETHICS 174 (2009) ("With practice, you will quickly learn that if you know the facts well, you can give an effective opening statement without notes.").

Even if everyone had the same memorization powers (they don't), the nervousness of speaking to a jury of strangers can throw a student.

I agree with the approach that encourages the use of bullet points[56] that can be glanced at during delivery. This provides a crutch (and crutches are OK!) and empowers students who simply do not have photographic memories[57] and are not masters of the extemporaneous speaking.

In addition to showing video clips of some strong opening statements, I usually demonstrate themes by using one from one of my previous cases from practice. I try to do it cold—and with notes—to demonstrate that it can be effective without being perfect.

There is also an opportunity to emphasize the fun nature of opening statements. I have fun with the "grabber"[58]: the first minute of opening that gets the jury's attention. (The students are expected to practice the grabber as a part of their practice opening statements.) I borrow from the Blues Brothers to emphasize pacing and tone:

> It's 106 miles to Chicago.
> We got a full tank of gas.
> Half a pack of cigarettes.
> It's dark, and we're wearing sunglasses.[59]

Opening is an important place to emphasize that the students should be themselves and think about the *language* that they are using.[60] They need to avoid legalese. For some reason, the first year of law school seems to have trained students to be as "articulate" and "fancy" with their vocabulary as possible. The result is not only usually disingenuous, but it fails to connect with most jurors.[61]

Finally, I ask them how they get to Carnegie Hall? Practice![62] They should practice in front of their friends, spouses, kids, or their dogs. Dogs are best.

IX. VOIR DIRE

---

[56] MAUET & EASTON, *supra* note 39, at 97; DECARO & MATHEO, *supra* note 36, at 207–08 (urging that lawyers only memorize the introduction); ROGER HAYDOCK & JOHN SONSTENG, TRIAL ADVOCACY BEFORE JUDGES, JURORS AND ARBITRATORS 258 (3rd ed. 2004) (recommending a key word outline).

[57] I recall attending ACLU conferences and watching the brilliant Erwin Chemerinsky talk about cases and relay their citations from memory.

[58] MAUET & EASTON, *supra* note 39, at 78; TANFORD, *supra* note 55, at 164; HAYDOCK & SONSTENG, *supra* note 56, at 263.

[59] THE BLUES BROTHERS (Universal Pictures June 18, 1980).

[60] MAUET & EASTON, *supra* note 39, at 97; MARILYN J. BERGER ET AL., TRIAL ADVOCACY PLANNING, ANALYSIS, AND STRATEGY 259 (2nd ed. 2008).

[61] MAUET & EASTON, *supra* note 39, at 97.

[62] Michael Pollak, *The Origins of that Famous Carnegie Hall Joke*, N.Y. TIMES (Nov. 27, 2009), https://www.nytimes.com/2009/11/29/nyregion/29fyi.html.

In my opinion, voir dire is the toughest part of trial and the part that takes the most courage. What an opportunity to build resilience and to make the process accessible. Standing in front of a [potentially large] group of strangers and getting them to talk about themselves is a real challenge, particularly if the student-lawyer has any sort of stage fright. It is probably the one part of trial that is least "accessible" in that the advocate has the least control. Many students—and practitioners—struggle with voir dire.

I tell the students that I liken it to my social anxiety at social gatherings, cocktail parties, back-to-school barbecues, and similar scenarios where small talk is expected. Those sorts of events make me so anxious – I worry about asking the right questions and saying the right things. What is the best way to relate to people in those contexts? Ask them about themselves. So, for example, my go-to question at such events is, "Are you doing any travel/taking any trips?" The key is not to talk about oneself,[63] except briefly in order to facilitate connection with the other person. Rather, the point is to find out what one can about the prospective jurors.

Particularly these days when voir dire may be limited,[64] I do not recommend that lawyers start with asking the jurors about their vacations.[65] Rather, they should adopt that feeling, that sense of comfort. The goal is to get people talking about *themselves*. The real problem with voir dire, of course, is when lawyers talk too much and do not listen.[66] That is a serious cocktail party faux pas, and a serious error when it comes to trial practice. Of course, if successful, it is very empowering to the advocate to be the one who can then steer the conversation in a manner to get the information that one needs from the jurors to prepare for jury selection.

The other idea I encourage students to remember is that of the inchworm. They need to go slow. Do not start by asking, "Who here hates insurance companies?" *Inch* up to it. They can get a juror to open up, but not if they are too direct. Not if they are Clarence Darrow cross-examining the juror. Instead, they should be themselves, and calmly inch up to the difficult question.

> "This case involves an insurance claim."
> "Has anyone ever had to file a claim with an insurance company?"
> "Did anyone ever experience any problems doing that?"
> "What kind of problems?"
> "How did you feel about that?"
> "How do you feel about that now?"

---

[63] MAUET & EASTON, *supra* note 39, at 71.

[64] *See, e.g.*, Ratliff v. Schiber Truck Co., 150 F.3d 949, 955 (8th Cir. 1998) (recounting that the district court limited counsel to only twenty minutes for voir dire).

[65] Although, when stuck, it's not the worst voir dire question.

[66] DECARO & MATHEO, *supra* note 36, at 197 ("*Listen* to the jurors.").

"Given that, how do you feel about sitting on this trial?"
"Do you think it's the right trial for you?

Voir dire is another great opportunity to remind them to keep their language simple.[67] To talk like a human, not a lawyer. As an aside, I've always disliked the adage "learn to think like a lawyer." I prefer to tell students not to forget to think like a *human*; the lawyer stuff will come.

X. DIRECT EXAMINATIONS

The primary suggestion I have for making direct examinations accessible is to keep a conversational tone (but remember it's not a conversation).[68] If it's approached as a demonstration of the lawyer's prowess and skill, not only will the more anxious advocate become intimidated, it will become more about the lawyer than the witness.[69] The nice thing about making trial practice accessible is that it generally parallels better practice—that is, keeping the focus where it should be. And in direct examinations, that focus should be on the witness.

Direct examinations—which many people are surprised to learn involve less control than cross examinations—can be challenging for students and lawyers. As with openings, I have seen students pushed to practice directing an expert witness without notes. Taken to its logical extreme, that strikes me as malpractice, at least for those without photographic memories. The students should use their notes. Particularly with complicated testimony such as expert witnesses, it is critical that the lawyer have thought through the examination in detail. Yes, the lawyer should be prepared to listen to the witness and follow up as necessary, instead of just following a script. But in my opinion, there should be a script – even if it is reduced to bullet-point form.[70] Preparation reduces the anxiety of having to "wing it."

XI. CROSS EXAMINATIONS AND IMPEACHMENT

Cross examination is where so many misplaced pre-conceptions are found. Television and movies have instilled the expectations of an "AHA!" moment. Skillful cross is effective without that overreach. Overcoming the pre-conception makes it accessible and achievable. The fears students have regarding cross and impeachment can be addressed by simplifying the process using the following suggestions.

---

[67] *See, e.g.*, MAUET & EASTON, *supra* note 39, at 135.

[68] TANFORD, *supra* note 55, at 256.

[69] *Id*. at 242 ("Conducting direct examination is like conducting an orchestra. You are in charge, but others must produce the sounds."); MAUET & EASTON, *supra* note 39, at 137 ("Direct examination requires that you take a back seat and let the witness be the center of attention.").

[70] TANFORD, *supra* note 55, at 242–44; HAYDOCK & SONSTENG, *supra* note 56, at 301–02.

After a trial with my law partner, Matt Garcia, the judge told a colleague of ours that "Matt and George put on exactly the amount of evidence they needed to win, and nothing more." In my view, that is one key to trial. No overreach. Keep it moving and, to the extent possible, keep the jury from becoming bored.

This is particularly true with cross examination. I tell the students to "Get up there. Get the good stuff. Take your shots. And sit down."[71] Students try too hard to hit homeruns. Rarely is there a "A Few Good Men" Jack Nicholson moment where the witness turns under pressure.[72] Less is more.

The other critical component with cross is that advocates peg their questions to source impeachment material and that they have it handy.[73] Without that, they can flounder and panic. If they peg their questions to the source (depositions, police reports, etc.) and have it ready to go if impeachment becomes necessary, then they can be effective. Our program has long required that students show where they have cross-referenced their source material in their cross-examination outlines in their trial notebooks.[74] They must have the source material handy (at the podium) to engage in proper impeachment.[75] Witness folders are ideal for this. Otherwise, there is delay and waste of time.

The next important technique is knowing when to stop.[76] "Just stop!", I tell my students. "If you find yourself feeling the tendency to say, "Soooooo . . ." or "And THEREFORE . . .", it is one question too many. Less is more. By avoiding overreach and the pitfalls that come with, the students can grow their resilience in this area.

As with exhibits, students must get the impeachment formula down and down well. The best way to gain confidence in this area is, as with exhibits, simple repetition. In addition to the impeachment formula, which is described well in numerous authorities,[77] what I teach is to not give up too easily. Yes, it is important to use judgment when impeaching – is it trivial or worth impeaching? But, when it is important, students who are afraid of the technique may go with a gut feeling to just move on. If it is important, fight for it. The students should not worry if they flounder at first. If they give up without pushing themselves, they will not be resilient. But if they

---

[71] MAUET & EASTON, *supra* note 39, at 223.

[72] HAYDOCK & SONSTENG, *supra* note 56, at 479 ("Some cases may involve dramatic moments, but many do not.")

[73] BERGER ET AL., *supra* note 60, at 406.

[74] Again, credit here goes to my predecessor and mentor Barbara Bergman for this established approach.

[75] A running bit of trial humor between my law partner and me was the need to unseal the depositions when impeaching at trial. While not technically necessary, I love the effect of unsealing the depositions at trial in front of the jury. Trial is theatre, after all, and this is an easy way to make it dramatic.

[76] MAUET & EASTON, *supra* note 39, at 211.

[77] *Id.* at 227–40; TANFORD, *supra* note 55, at 242–44; HAYDOCK & SONSTENG, *supra* note 56, at 532–39.

are given simple impeachment problems to practice, they will grow the confidence to complete a successful impeachment.

XII. EXHIBITS

This is an area where I think trial practice teachers generally get it right. Exhibits can be very accessible once the basic formula is down. In my experience, most teachers focus on that – just get the formula down, then apply it to different kinds of exhibits. It is interesting that something about the physical nature of it makes this area one where, historically, even the traditional pedagogy works: keep it simple. Lay the foundation. Move it in. Repeat. The formula for admitting anything is written down and is easily obtainable.[78] If anything, trial practice teachers can learn about making other areas more accessible by reminding themselves of the simple, straightforward way exhibits are usually taught.

The one possibility for overcomplicating exhibits is by confusing students on the "Best Evidence" rule when they are struggling with the formula. The "Best Evidence" rule gets so little traction these days anyway,[79] that it is better to cover it separate from admitting exhibits. I've seen students fall into the "*better* evidence" trap because of this confusion.

XIII. EXPERTS

The key to making examinations of expert witnesses accessible is to remind the students that they are not experts in [fill in the blank – damages, accident reconstruction, etc.],[80] but they also do not have to be to be effective. The second thing is to convince them (because it's true) that expert witnesses are the most fun that can be had in a case.

First, one of the cool things about the practice of law is that you learn in great detail about things you never may have expected to know.[81] Second, experts are fun, because they may like to talk – a lot. Getting them to talk during discovery is so much fun. Third, one can get ahold of what they have written in the past,[82] what they testified to, and any successful

---

[78] MAUET & EASTON, *supra* note 39, at 272–73.

[79] *See e.g.*, State v. Hanson, 348 P.3d 1070, 1072 (N.M. Ct. App. 2015) ("As a practical matter, the best evidence rule infrequently applies, since a witness can typically testify based on independent firsthand knowledge of an event, even though a writing recording facts related to the event may also be available."), citing KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 234, at 135 (7th ed. 2013).

[80] MAUET & EASTON, *supra* note 39, at 415 ("Experts know more about the subject matter than you do."); FRANK D. ROTHSCHILD, *Top Ten Screw-Ups in Direct and Cross-Examination of Experts*, *in* 2000 WILEY EXPERT WITNESS UPDATE, NEW DEVELOPMENTS IN PERSONAL INJURY LITIGATION 143 (Eric Pierson, ed., 2000) (advising lawyers not to battle on the expert's turf).

[81] One of the most interesting expert issues for me was a case I did with the late Phil Davis. It involved a Navajo employee who was allegedly terminated because his Navajo supervisors believed he practiced witchcraft. Complaint at 3, Blackwater v. Process Equipment & Service Co., 1:10-cv-00382-RB-LFG (D.N.M. 2010).

[82] MAUET & EASTON, *supra* note 39, at 415. "Obtain copies of every book and article the expert has ever written and read them." *Id.*

motions to exclude or limit their testimony – or to impeach them at trial. I always show my students a well-worn copy of a book by an opposing expert.[83]

On directs, the main thing to emphasize is for the students to *help* keep it simple.[84] Rather than attempting to demonstrate the lawyer's mastery of the information in the expert's field, of course have the expert do it – but break it down.[85] The expert is the expert and should do the talking when it is your witness. Make sure that the expert *simplifies* and explains what it is they are saying.[86] In this sense, the expert is a small example of what the student should be doing the entire trial—making it easy to understand and making it make sense—far more important than talking well and giving a great closing speech.

XIV. CLOSINGS

If everything else is done with confidence, closing should be the fun part. As with openings, the key is to be oneself. But I typically tell students, "Closing is why you came to law school." They can have fun with it as long as they reiterate the theme. They can say the stuff they could not say in opening.[87]

I like the students to experiment with closings—as always within their comfort level. With fewer (although some) limits and with ten weeks of trial practice behind them, they can push themselves out of their zone. They can play with drama or flair that may not seem natural to them. It may not work, and by now they should know that is okay.

One other caveat is reasonableness. My law partner once described the key to closings this way: "Be the most reasonable person in the room." When it comes to the *way* you close your case, the *way* you argue the evidence, and the *way* you ask for damages, focus on being the most reasonable person in the room. This is particularly true in close cases (and many cases that go to trial these days are "close" cases).

And being "reasonable" should fit well with the earlier work the student has done in demonstrating conviction and being genuine.[88] If the jury trusts you, they will view you as reasonable, even with a big ask.

---

[83] I also tell the students that, although he was an opposing expert, I really liked him and respected him. Again, the adversarial practice does not have to be antagonistic.

[84] BERGER ET AL., *supra* note 60, at 469–70.

[85] ROTHSCHILD, *supra* note 80, at 134.

[86] TANFORD, *supra* note 55, at 363. "Many experts do not speak naturally in lay terms." *Id.*

[87] *See* MAUET & EASTON, *supra* note 39, at 75–76.

[88] *See* United States v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986) ("Cases are to be decided by a dispassionate review of the evidence admitted in court."); State v. Banks, 215 S.W.3d 118, 122 (Mo. 2007) (The prosecutor called the defendant "the devil himself." "In so doing, the State failed to distinguish proper and legitimate argument from personal and inflammatory attack.").

XV. LEADING UP TO THE MOCK TRIAL

No matter how much cheerleading and soothing one does, the weeks leading up to the mock trial will be busy and stressful for the students. I recall one year where I taught Constitutional Rights the same semester as the Evidence/Trial Practice course. The students in my Constitutional Rights section actually worked on their mock trial demonstrative exhibits during the Constitutional Rights lectures.

The weeks leading up to the mock trial are a good time to remind the students that trial practice is also a course in stress-management.[89] I encourage them to pace themselves and to develop pacing and stress and time-management skills now, before they have actual clients, actual cases, and actual trials.

Breathing: my friend Maureen Sanders reminds students to breathe. Sometimes I'll ask the students two weeks before their trial, "Are you breathing?" I had the good fortune of taking "Voice" as a part of my Dramatic Arts program in college.[90] Although I never perfected it, my Voice instructor insisted we sing/speak through our diaphragm, not our upper chest. She would make us lie on our backs to practice in class. A student recently told me that she was having trouble projecting. I relayed to her what I was taught—breathe through your stomach. I told her to lie on her back and practice. After trial, she came up to me and said, "I breathed through my stomach like you said, and I could project!" Sometimes something as simple as breathing can make trial practice more accessible.

"Trials are a rough and ready business."[91] My common refrain in advance of the mock trial is: "Don't forget, the stakes are low here; no one is going to jail, and no one is paying any money." The hope is that they have at least one trial experience in a safe, supportive environment. The hope is that they get to try one case in front of judges and critiquers who *want* them to succeed, who are giving up the Saturday before Thanksgiving to help them succeed. If these hopes are realized, the mock trial will strengthen their confidence and make them more resilient.

I remind the students that mistakes happen. As Bishop says, "Merely letting students know explicitly that we have high expectations for them and their work *and* that we expect them to make mistakes helps students engage in their learning process."[92] They will flub something up. But most mistakes in the law are fixable.[93] I then share with the students my failed effort to lay the foundation for a witness in an employment discrimination trial. It was my first or second trial. No matter what I asked, I was unable to lay the

---

[89] For them *and* me (particularly running in-person trials during the pandemic).

[90] A nice preparation for trial practice, by the way.

[91] Bandera v. City of Quincy, 344 F.3d 47, 54 (1st Cir. 2003).

[92] Bishop, *supra* note 3, at 987. "Finally, we can create a safe space for and lower the stakes of failure by sharing failure." *Id.* at 991.

[93] As my colleague April Land reminds me, with the exception of statute of limitations!

foundation for the testimony. The judge—a great federal judge—seeing I was struggling, ended the day, leaving me with an opportunity to try to figure it out that evening. The partner I worked for and I were not able to find a way, but in the end, it did not matter –we won the trial.

The point of the story is to show the students that errors are not usually fatal, and that all lawyers make mistakes.[94] "Mistakes are accepted and even encouraged as part of the learning process."[95] Hopefully that knowledge helps put them at ease.

I hope it has been made clear by my approach to writing this article that I make every effort to model humility – what Professor Stout describes as "one of the most important attributes and is the key to a growth mindset."[96]

You are not entirely in control.

One aspect of trial—good and bad—is the spontaneous nature of it. Although surprises are fewer these days, particularly in civil cases, one still never knows what may happen. A door that was shut by a judge's pretrial ruling may suddenly open because of something a witness says.[97] If a witness gives you something, use it![98]

I also urge the students to realize that some witnesses are great while others are a "living travesty" – even in a mock trial. (This is often true in practice as well.) Witnesses get nervous, have a bad day, memories fail them etc.). If students can learn to expect the unexpected and appreciate that they are not entirely in control,[99] they will have more confidence and more flexibility in the courtroom.

XVI. TRIAL FEEDBACK

Of course, the whole effort to build grit and resilience through attainable goals is for naught if the feedback is not helpful. After the mock

---

[94] *See also* Bishop, *supra* note 3, at 993 ("Vulnerability helps to build trust, which is important in creating a safe space for failure."); Darling-Hammond & Holmquist, *supra* note 18, at 64 ("Professors established this environment by admitting their own fallibility . . . .).

[95] *See* Darling-Hammond & Holmquist, *supra* note 18, at 64.

[96] Professor David Stout (on file with author).

[97] A recent example from the headlines was when the door was opened for Kate Moss's testimony on the Johnny Depp/Amber Heard trial. Julia Jacobs, *Kate Moss Denies Johnny Depp Pushed Her Down Stairs in Testimony*, N.Y. TIMES (May 25, 2022), https://www.nytimes.com/2022/05/25/arts/kate-moss-johnny-depp-trial.html.

My favorite—and the credit went entirely to my law partner Matthew Garcia for catching it—was when a defendant testified to the effect of, "I'd never experienced anything like that." Never is a strong word! The door was opened.

[98] The "glove does not fit" from the O.J. Simpson trial being the best example of this.

[99] In my twenties, I once sat behind an older couple in a movie theater. I heard one say to the other, "Young people think they have so much control over life. If takes forever to figure out little control you actually have."

trial, we have the trial judge and the critiquer provide feedback on the trial. The "Goldilocks" rule matters here. Too little feedback leaves students frustrated that their efforts were wasted. The feedback should be constructive and specific. Use the "sandwich" method:[100] start positive, put criticism in the middle, end positive.[101] Specificity is important. As discussed above regarding diversity, equity and inclusion, the feedback must be substantive and constructive.

Conversely, I remember stepping into a courtroom where the judge and critiquer were going into their third hour of feedback after a mock trial. (I played the "court security needs us to go home" card.) The students were exhausted and deflated. The feedback should be helpful, on point, and specific, but not so great in detail that the students are worn down.

XVII. A QUICK WORD ON VISUAL AIDS

This may be an area where I am just wrong and perhaps I make the exercise *too* accessible. With visual aids, I let students know that the technology is there and that they are welcome to try it. But I caution that I have seen even the best trial lawyers struggle with PowerPoints. (And if you are going to use PowerPoints, have a backup!)[102] Instead I encourage the use of a flipchart. Print off a diagram! Draw on a whiteboard! Until the students feel confident at the basic techniques of trial, I worry less about how nimble they are with certain forms of technology.

XVIII. CONCLUSION

Whether or not trials are the best format for dispute resolution is a discussion for another day. However, as long as they stand as a part of our legal infrastructure, students—and later, lawyers—should not be afraid of going to trial. Over time, with so much emphasis being placed on perfection and performance, trials have become too daunting. By changing the emphasis and making each aspect of the trial accessible (and yes, even fun), the students will develop the resilience and confidence they need to succeed on practice. Will they all be outstanding performers as trial attorneys? No. Do they need to be? Absolutely not. They need to be confident and diligent and to get the information across. They can successfully represent their

---

[100] Anne Dohrenwend, *Serving Up the Feedback Sandwich*, FAM. PRAC. MGMT. 43 (2002).

[101] Bishop, *supra* note 3, at 994 ("For students to feel safe trying new skills, arguments, or ways of thinking, even when those skills, arguments, and thinking are imperfect, we have a duty to help them see that these trials and errors are indeed praiseworthy.").

[102] I use PowerPoints to teach, although I've never used them at trial. I started teaching by using a chalkboard and large poster sheets. Then, on a student's suggestion, I moved to PowerPoints. Occasionally they fail, and in class I always have a backup ready. The worst experience I ever had was a lecture to a group of trial lawyers when, inexplicably, the words began disappearing off my slides. Literally, there were a few letters where there should have been lines of words. I had a back-up.

clients by tapping into who they are, rather than aspiring to be someone they are not.

By breaking down this increasingly cumbersome process into accessible parts, we also make it more available to those who might find it too intimidating. By ensuring that we consider diversity, equity, and inclusion, in the trial practice arena, we will increase the likelihood that we address the access to justice issues that plague our system. By enabling advocates from all communities to embrace their particular model of zealous advocacy, we will empower them and, in turn, their clients.

I personally hope jury trials last and that they are not eradicated by arbitration or other dispute resolution mechanisms. The genius of having members of the community gather to consider the charges or claims before them has been blurred by the labyrinth that is now the legal process. I hope that this article takes some of the myth and mystifying aspects out of teaching trial practice, with an eye towards making the whole exercise accessible.