TEACHING COURTROOM ADVOCACY PRINCIPLES AND SKILLS ACROSS SYSTEMS AND CULTURES

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I. INTRODUCTION

A silver lining of the COVID-19 pandemic is that it enabled opportunities for cross-cultural, international educational collaboration using internet video conferencing and other technologies. Opportunities emerged for educators and legal professionals from all over the world to work together in ways that were impracticable or impossible just a few years ago. In an increasingly interconnected global economy, it makes sense for students who will collaborate internationally to be taught and trained by teachers from multiple legal systems and cultures.

In the world of basic advocacy skills training, collaborative international teaching may require paradigm shifts in course design, materials, and instructional techniques to accommodate the intermingling of instructors and teachers from different cultures and legal systems. This article recommends that such courses teach baseline oral advocacy skills that are generally recognized as necessary for advocates to perform competently in forums where professional judges are the decision-makers. These forums include adversarial, inquisitorial, and hybrid system bench trials presided over by professional judges, as well as mediations, arbitrations, other alternative dispute resolution ("ADR") forums, or hearings before administrative tribunals. While drawing from the teaching expertise of guest instructors from other countries, collaborative international skills-based courses should be tailored primarily to reflect the laws, procedures, and cultures of the jurisdictions in which the students will practice.

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The remainder of the article is organized as follows. Part II provides background information on trial advocacy practices in both inquisitorial and adversarial systems, including the convergence of procedures in both systems and the development of hybrid systems. Part III points out pitfalls that could potentially undermine cross-system training programs. Part IV identifies a set of baseline advocacy practices and skills and suggests focus areas for cross-system training. Part V concludes the article.

II. AN INTRODUCTION TO WORLDWIDE TRIAL SYSTEMS AND ADVOCACY PRACTICES

The world's trial systems can be roughly divided into two major categories, inquisitorial and adversarial.[2] These are broad categorical labels that do not fully capture the diverse flavor of judicial systems worldwide. Within each of the two primary categories exist multiple variants, depending on the country in which the system is employed.[3] Some jurisdictions have adopted hybrid systems that include both adversarial and inquisitorial procedures and rules.[4] Differences exist in constitutions, laws, procedures, customs, cultural mores, styles, and acceptable trial behavior. This section examines trial systems in light of the role the advocate plays in the courtroom. Of necessity, the section paints with a broad brush; it would be impossible in an article of this length to account for all the variations of style and practice throughout the world.

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2 *See generally* Francesco Parisi, *Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared*, 22 INT'L REV. L. & ECON. 193 (2002) (defining and comparing adversarial and inquisitorial systems).

3 James W. Diehm, *The Introduction of Jury Trials and Adversarial Elements into the Former Soviet Union and Other Inquisitorial Countries*, J. TRANSNAT'L L. & POL'Y, Fall 2001, at 1, 5-6 ("Just as adversarial systems vary from country to country, there are also substantial differences among inquisitorial countries.").

4 Thomas Weigend, *Should We Search for the Truth, and Who Should Do it?*, 36 N.C. J. INT'L L. 389, 402 (2011). According to Weigend,

> It is indeed becoming more and more difficult to place some of today's legal systems in the inquisitorial or adversarial box. During the last few decades, a number of "mixed" legal systems have developed which are faithful to their inquisitorial origins in some respects, but also display distinct adversarial features. Italy, Japan, and Spain–although differing from each other in many respect–are examples of this type of procedural arrangement.

Id.

A. The Inquisitorial System

The inquisitorial system, found primarily in civil code-based jurisdictions,[5] is the predominant legal system throughout most of the world.[6] It is used throughout continental Europe, Central and South America, much of Asia, and parts of Africa.[7] Legal systems derived from Islamic law also use inquisitorial procedures and systems.[8]

The philosophical basis of the inquisitorial trial is a search for truth, led and conducted by a professional judge—or inquisitor.[9] Broadly speaking, the inquisitorial trial can be described as an investigation culminating in a series of sometimes discontinuous live proceedings, in which most of the evidence is gathered prior to trial in the form of affidavits and *ex parte* examinations of witnesses.[10] These materials form a dossier which is made available to all

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5 *See* Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 182 (2005) (discussing the nearly total absence of civil jury trials outside the United States and attributing this to the fact that many politically and economically developed countries "use legislated civil codes in place of the judicially-developed common law and an inquisitorial process in place of an adversarial one"). *Compare* Alexander H. J. Neumann, *Class Action Suits: A German Legal Perspective*, 24 ACC DOCKET 130, 131 (Quarterly Supp. 2006) ("[T]he civil code system is inquisitorial in nature rather than adversarial."), *with* 41 KERRY O'HALLORAN, IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 492 (Sellers, Mortimer, Maxeiner, & James eds., 4th ed. 2021) (observing that civil law systems rely on civil codes and the approach taken in these jurisdictions is inquisitorial in nature "with the judge leading proceedings by questioning the parties to determine facts, clarify issues and rule on compliance with or breach of civil code provisions").

6 *See* Laurie L. Levenson, *Discovery from the Trenches: The Future of* Brady, 60 UCLA L. REV. DISCOURSE 74, 82 (2013) (noting that the inquisitorial system is used in more countries than the adversarial system); Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice?*, JUDICATURE, Oct.-Nov. 1992, at 109, 109 (observing that the inquisitorial system is the predominant system in the industrialized world); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 301 (1989) ("The majority of the world, however, uses some version of the inquisitorial system that evolved primarily in continental Europe.").

7 *See* Raymond M. Auerback, *Governing Law Issues in International Financial Transactions*, 27 INT'L LAW. 303, 316 (1993) ("However, a significant number of emerging nations, in Eastern Europe, Latin America, and Asia have legal systems based on civil law rather than on common law, and legal processes that are inquisitorial or consensual rather than adversarial.").

8 *See* Hossein Esmaeili, *On A Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System*, 26 ARIZ. J. INT'L & COMPAR. L. 1, 33 (2009) (noting that, throughout the Islamic world, implementation of Islamic law in the courts seems to be more inquisitorial in process than adversarial).

9 McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991) ("What makes a system . . . inquisitorial is . . . [an inquisitor who] conduct[s] the factual and legal investigation himself."); Sward, *supra* note 6, at 313 ("Thus, two essential elements of inquisitorial adjudication are: first, that the judge is primarily responsible for supervising the gathering of evidence necessary to resolve the issue; and, second, that the decisionmaker is not, therefore, merely a receptor for information at a neatly packaged trial, but is, instead, an active participant."). *See generally* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 564 (1973).

10 *See* Parisi, *supra* note 2, at 193-94.

parties prior to trial.[11] The trial itself uses evidence directly from the dossier, supplemented with live witness testimony, as necessary.[12]

From an advocacy standpoint, the primary characteristic of the inquisitorial system is the role the judge plays at trial.[13] Judges are the central figures of the inquisitorial trial, regulating and controlling discovery, [14] conducting the primary examination of witnesses,[15] and in most cases, rendering the final decision on the matter at bar.[16] Some civil law jurisdictions also offer trial by jury, but with procedures similar to a judge-

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11 Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 297 (2004) (discussing the process of creating and using the dossier in a criminal inquisitorial trial).

12 *See* Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. INT'L L. 157, 167–68 (2016) (analyzing discovery differences between inquisitorial and adversarial systems in civil cases and noting that, in the inquisitorial system, judges have the exclusive power to gather facts and produce a dossier that is used at trial); Chrisje Brants, *Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands*, 80 U. CIN. L. REV. 1069, 1076 (2012) (describing the role of a dossier in an inquisitorial criminal trial and pointing out that "the central role of the dossier means that there is already one version of the truth on paper that guides the investigation by the court"); Luna, *supra* note 11; Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMPAR. L. REV. 241, 271 (1998) (noting that witness testimony in criminal inquisitorial trials often "merely affirmed, qualified, or rejected [] prior statements reduced to writing" in the dossier).

13 Parisi, *supra* note 2, at 193-94 ("In a typical inquisitorial proceeding, the trial is dominated by a presiding judge, who determines the order in which evidence is taken and who evaluates the content of the gathered evidence.").

14 *See id.*; Edward F. Sherman, *The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice*, 7 TUL. J. INT'L & COMPAR. L. 125, 127-28 (1999) (comparing American and Continental discovery practices).

15 Damaska, *supra* note 9, at 525-26 ("The civil law system, in contrast, belongs to the judge, who calls witnesses, conducts most of the questioning from the bench, and begins most of the examinations."); *see also* Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—and the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 204 (2007) ("Perhaps two features for our purposes best define the civil-law model, to which the label 'inquisitorial' is often attached: first, considerable judicial initiative and control in shaping the course of the proceedings generally; and second, judicial primacy in fact-gathering."); Sward, *supra* note 6, at 313-14 (describing the pre-eminent role of the judge as "not . . . merely a receptor for information at a neatly prepackaged trial, but . . . instead[] [as] an active participant").

16 Indeed, one of the hallmarks of the inquisitorial system is that the judge not only plays an active role in gathering evidence, but also serves as the decisionmaker in the case. *See* Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawye*r, 33 TULSA L.J. 293, 304 n.66 (1997) ("The inquisitorial model places on judges the potentially conflicting roles of fact finder and decisionmaker."); Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1730 (1992) (characterizing the inquisitorial system as one "in which judges accumulate all the evidence, shape the case, and rationally resolve the appropriate issues without party participation").

alone inquisitorial trial.[17] In inquisitorial jury trials, judges and lay jury members deliberate and vote together to reach a verdict.[18]

Depending on the rules and practices of their jurisdictions, advocates may participate in an inquisitorial trial by giving opening statements,[19] conducting follow-up examination of witnesses,[20] and making closing arguments or submissions.[21] Cross-examination of witnesses, a hallmark of the adversary trial system, has not traditionally been part of inquisitorial trials.[22] For that matter, the form of questions in inquisitorial trials is less formal than in adversarial trials.[23]

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17 *See* Raneta Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 7 IND. INT'L & COMPAR. L. REV. 63 (1996) (discussing procedures in the Italian inquisitorial criminal jury trial); Thaman, *supra* note 12 (analyzing the Spanish inquisitorial jury trial and comparing its procedures to inquisitorial jury trials and judge-alone trials in Spain and other Continental jurisdictions); *see also* Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 422 (1992) (pointing out that, in a Continental inquisitorial jury trial, the dossier will be available to counsel the professional, but not the lay, judges).

18 *See* Damaska, *supra* note 9, at 539-40 (noting that professional judges have tremendous influence over lay judges during inquisitorial jury deliberations); Luna, *supra* note 11, at 310-11 (listing several jurisdictions with mixed panels of lay and professional judges).

19 *See, e.g.*, Mack, *supra* note 17, at 89 (discussing that, although rooted in a civil-law inquisitorial system, the Italian criminal jury trial permits the parties to make opening statements); Thaman, *supra* note 12, at 295 (describing the role of the opening statement in the Spanish inquisitorial criminal jury trial).

20 *See, e.g.*, Robert W. Emerson, *Judges as Guardian Angels: The German Practice of Hints and Feedback*, 48 VAND. J. TRANSNAT'L L. 707, 714 (2015) (noting that German judges in the inquisitorial tradition conduct most of the questioning of witnesses in civil cases, and the attorneys for the parties ask follow-up questions).

21 *See, e.g.*, Van Kessel, *supra* note 17, at 424 (discussing that, in an inquisitorial criminal trial, the prosecutor closes, followed by the defendant, and there is no prosecution rebuttal).

22 Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1018-19 (1974) ("The inquisitorial trial places little emphasis on oral presentation of evidence or on cross-examination by counsel.").

23 Gordon Van Kessel compares the questioning of witnesses in inquisitorial and adversarial trials as follows:

> [T]he presiding judge calls witnesses and questions them in a similar manner. Each witness presents a narrative account and then responds to questions asked by the presiding judge and by counsel. Questioning is informal, with few, if any, objections by counsel and with the opportunity for lengthy explanations and narrative responses. In contrast to the formal, highly structured examinations which occur in American courtrooms, the typical Continental examination takes on the character of an informal discussion between the presiding judge and the accused or the witness. The prosecutor and defense attorney occasionally join in this conversation. Since the Continental system does not divide the questioning into direct examination and cross-examination, the questioning process is not encumbered with technical rules governing the order of proof. In the Continental system, most of the information is obtained through the presiding judge's informal inquiry.

Van Kessel, *supra* note 17, at 423-24.

The judge's preeminent role in the inquisitorial trial necessarily diminishes the role of attorneys as advocates.[24] In many respects, the advocates play a supporting and even cooperative role in the inquisitorial search for truth at trial.[25]

B. The Common-Law Adversarial Trial

A significant number of jurisdictions use the adversarial trial system, derived from the English common-law jury trial.[26] This system exists primarily in countries that were colonized or heavily influenced by the British Empire.[27] The philosophical basis of the adversarial trial is the emergence of truth from the adversary process, a dialectical clash of ideas and evidence from opposing parties.[28]

There are three major types of decision-making forums that employ adversarial procedures. The first is trial by a lay jury.[29] Next is trial by judge alone, with the judge as factfinder or decision-maker; this is by far the most common adversarial forum worldwide.[30] Finally, some jurisdictions use a mixed panel, similar in some respects to the inquisitorial jury, with a presiding judge assisted by laypeople as assessors.[31]

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[24] In fact, some advocates in inquisitorial systems may rely too much on the judge, to the detriment of their clients. *See* Hans-Heinrich Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 VA. L. REV. 239, 249-50 (1970) (commenting that some attorneys fail to investigate their cases, pass up opportunities for follow-up questions, or miss important points raised at trial unless the judge points them out).

[25] *See* Levenson, *supra* note 6 ("Under the inquisitorial model of criminal justice, prosecutors and defense lawyers both work for the judge to determine the truth. The adversarial roles of prosecutors and defense lawyers are dampened in favor of a cohesive system of lawyers, judges, and investigators charged with discovering the facts of the case and coming to an appropriate resolution.").

[26] Patrick Robinson, *The Interaction of Legal Systems in the Work of the International Criminal Tribunal for the Former Yugoslavia*, 16 ILSA J. INT'L & COMPAR. L. 5, 7 (2009) (noting that the common law adversarial system is followed by the United Kingdom, Commonwealth countries, and the United States). *See* Daniel E. Schoeni, *Learning About the Water we Swim in: AFSOUTH's Role in Peru's Transition to an Adversarial Military Justice System*, JAG REP., Jan. 14, 2021, at 1 (summarizing the history and influence of the adversarial trial system).

[27] *See* Schoeni, *supra* note 26 (summarizing the history and influence of the adversarial trial system).

[28] Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process-A Critique of the Role of the Public Defender and A Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 748 (1995) ("The adversarial system works on the assumption that truth will prevail from the conflict between two opposing forces."). *But see* Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 101 (1996) (criticizing the prevailing view that truth emerges from the dialectical clash of ideas in an adversarial trial).

[29] *See* Valerie P. Hans, *Jury Systems Around the World*, 2008 CORNELL L. FAC. PUBL'NS 276 (noting that approximately 40 countries use citizen juries to make decisions in some cases).

[30] *See, eg.*, Kenneth Culp Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 AM. BAR ASS'N J. 723, 725 (1964) (noting that the overwhelming majority of American trials, both civil and criminal, are nonjury trials).

[31] *See* Hans, *supra* note 29 (explaining different models for mixed tribunals of professional judges and lay assessors).

Advocates, not judges, play the preeminent role in adversarial trials.[32] The trial judge in an adversarial trial plays a fundamentally different role from the inquisitorial judge, serving more as a neutral referee or umpire than the central figure at trial.[33] Even where the trial judge is also the factfinder and decision-maker, the selection and questioning of witnesses and presentation of evidence are still controlled by adversary parties in the courtroom.[34] Cross-examination of opposing witnesses, which the noted scholar John Wigmore famously called the "greatest engine ever invented for the discovery of truth,"[35] is a salient feature of the adversary trial.[36]

C. Convergence of Procedures and Practices, Hybrid Tribunals, Alternative Dispute Resolution, and Administrative Tribunals

Numerous scholars have written about the phenomenon of convergence in legal systems and trial procedures throughout the world.[37] While it is beyond the scope of this article to explore the reasons for convergence, it must be recognized and accounted for in legal education and the training of advocates.

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32 Sward, *supra* note 6, at 308-10 (describing the roles of judges and attorneys in the adversarial system).

33 *See* Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*, 21 DUKE J. COMPAR. & INT'L L. 353, 366 (2011) ("The role of an adversarial trial judge is generally compared with that of a referee in a game in which he plays no active part, his function being restricted to ensuring that the parties comply with the rules of the game."); *see also* Damaska, *supra* note 9, at 563-64 (comparing the trial judge in an adversarial trial to an umpire).

34 *See* Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653, 653 (2007) ("Broadly speaking, adversarial procedure leaves most critical pre-trial and trial decisions such as discovery, the framing of issues, the choice of witnesses, the questions directed to witnesses, and the order of proof in the hands of lawyers.").

35 JOHN HENRY WIGMORE, 5 WIGMORE ON EVIDENCE §1367 (James H. Chadbourn ed., rev. 1974).

36 *See* Kwai Hang Ng, *"If I Lie, I Tell You, May Heaven and Earth Destroy Me." Language and Legal Consciousness in Hong Kong Bilingual Common Law*, 43 L. & SOC'Y REV. 369, 376-77 (2009) (explaining the central significance of cross-examination in common law adversarial trials throughout the world).

37 *See* Frédéric Mégret, *Beyond "Fairness": Understanding the Determinants of International Criminal Procedure*, 14 UCLA J. INT'L L. & FOREIGN AFFS. 37, 59 n.73 (2009) (citing multiple articles on the hybridization of adversarial and inquisitorial systems); Hiroshi Fukurai, *Kazakhstan's Jury Experiment and Beyond: Lessons from Emergent Systems of Lay Participation*, 36 ARIZ. J. INT'L. & COMPAR. L. 367 (2019) (analyzing the development of lay participation in trials in Asia, Europe, the Americas, and Africa and concluding that most lay participation occurs in tribunals that mix inquisitorial and adversarial procedures); Rowe, Jr., *supra* note 15 (concluding that there has been some convergence between American civil procedure and procedures in civil law jurisdictions, albeit less than has been generally assumed); John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L. L. 357 (1981) (analyzing how common law and civil law jurisdictions are converging, each adopting characteristics and procedures of the other).

Common-law systems have adopted many features of the civil law, such as codification of laws and doctrines to replace judge-made law.[38] Procedurally, even the venerable adversarial trial now includes many elements and procedures that originated in the inquisitorial tradition.[39] As well, many civil-law inquisitorial jurisdictions have begun grafting in features of the adversary trial, including increased participation of lay decision-makers and a greater role for counsel in shaping the trial's progress and outcome.[40] Several inquisitorial jurisdictions now offer adversarial trial by jury where it never existed before.[41]

Moreover, the international community has created new hybrid tribunals that combine procedures from both inquisitorial and adversarial systems.[42] Tribunals such as the International Criminal Court use mixed panels of professional judges from both adversarial and inquisitorial jurisdictions.[43] These judges preside over trials that feature significant procedural elements from both inquisitorial and adversarial traditions. For instance, judges play a significant inquisitorial role in the pretrial

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38 *See, e.g.*, Merryman, *supra* note 37, at 361 (observing a clear movement toward codification of laws in common law countries).

39 For thorough discussions of the influence of civil law inquisitorial trial procedures in non-criminal adversarial trials, see generally Rowe, Jr., *supra* note 15; Sherman, *supra* note 14. For discussions on the convergence of inquisitorial and adversarial pretrial criminal procedure, see generally Kafayat Motilewa Quadri et al., *Adquisitorial: The Mixing of Two Legal Systems*, 3 INT'L J. HUMANS. AND MGMT. SCIS. 31 (2015); Mar Jimeno-Bulnes, *American Criminal Procedure in A European Context*, 21 CARDOZO J. INT'L & COMPAR. L. 409 (2013); Gerald S. Reamey, *Innovation or Renovation in Criminal Procedure: Is the World Moving Toward a New Model of Adjudication?*, 27 ARIZ. J. INT'L & COMPAR. L. 693 (2010).

40 *See, e.g.*, Weigend, *supra* note 4, at 402-03 ("It is indeed becoming more and more difficult to place some of today's legal systems in the inquisitorial or adversarial box. During the last few decades, a number of 'mixed' legal systems have developed which are faithful to their inquisitorial origins in some respects, but also display distinct adversarial features."); Van Kessel, *supra* note 17, at 420-21 (noting the addition of adversarial elements, including direct and cross examination, in some Continental inquisitorial jurisdictions).

41 *See* Schoeni, *supra* note 26 (noting the addition of jury trials in Latin American countries); Fukurai, *supra* note 37 (examining legal reforms and the introduction of jury trials in multiple countries); Hans, *supra* note 29 (identifying participation of lay decision makers in more than 50 countries); Diehm, *supra* note 3.

42 *See* Jessica Peake, *A Spectrum of International Criminal Procedure: Shifting Patterns of Power Distribution in International Criminal Courts and Tribunals*, 26 PACE INT'L L. REV. 182 (2014) (examining hybrid procedures in the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Tribunal for the Former Yugoslavia); Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMPAR. L. 835 (2005).

43 *See generally The Judges of the Court*, INT'L CRIM. CT., https://www.icc-cpi.int/Publications/JudgesENG.pdf (last visited Sept. 25, 2021) (explaining that judges come from a variety of legal systems and listing biographies of judges currently assigned to the International Criminal Court).

management of the case, but case presentation generally follows adversarial procedures.[44]

The convergence of procedures and traditions, however, cannot mask another reality: trials are no longer the dominant method of resolving non-criminal cases and controversies in the world's legal systems, having been replaced primarily by alternative dispute mechanisms such as arbitration, mediation, and negotiation.[45] As for criminal law, in the United States the overwhelming majority of criminal cases—more than ninety-five percent of cases—are resolved through plea bargaining.[46] Plea bargaining and other forms of pretrial resolution of criminal cases are also becoming prevalent elsewhere throughout the world.[47]

Young advocates entering the profession, even those who choose litigation and dispute resolution as a career path, are much less likely than their predecessors to try a fully contested case before any court, whether inquisitorial, adversarial, or hybrid in nature. Nonetheless, advocates play important roles in alternative dispute resolution proceedings.[48] Advocates

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[44] Peake, *supra* note 42, at 216-17 (analyzing the extent to which pretrial and trial procedures include both adversarial and inquisitorial influences).

[45] *See* Ruxton McClure, "*Can the Leopard Change Its Spots?"—a Call for an African Dispute Resolution Mechanism*, 29 OHIO ST. J. ON DISP. RESOL. 333 (2014) (observing that alternative dispute resolution mechanisms are the dominant form for domestic dispute resolution throughout the world, as well as for international disputes); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012) ("Thus, in American civil justice, we have gone from a world in which trials, typically jury trials, were routine, to a world in which trials have become 'vanishingly rare.'"); Margo Schlanger, *What We Know, and What We Should Know About American Trial Trends*, 2006 J. DISP. RESOL. 35, 42-50 (collecting articles and data about the decreasing number of trials, both criminal and civil, bench and jury, in both state and federal courts in the United States); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (noting significant reduction in the overall percentage of cases going to trial in both state and federal courts in the United States).

[46] One estimate is 97.1% of criminal cases in the United States. *See* FAIR TRIALS, THE DISAPPEARING TRIAL: TOWARDS A RIGHTS-BASED APPROACH TO TRIAL WAIVER SYSTEMS (2017), https://www.fairtrials.org/sites/default/files/publication_pdf/Report-The-Disappearing-Trial.pdf; *see also* Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 13 (2013) ("Plea bargaining continued its rise over the next four decades and, today, over 96% of convictions in the federal system result from pleas of guilt rather than decisions by juries.").

[47] *See generally* FAIR TRIALS, *supra* note 46; Andrew M. Pardieck et al., *Bargained Justice: The Rise of False Testimony for False Pleas*, 44 FORDHAM INT'L L.J. 469, 472-73 (2020) (noting that plea bargaining has become a predominant means of resolving criminal charges worldwide).

[48] Many ADR processes require or permit attorneys to call witnesses, present evidence, and make arguments to fact finders in an environment less formal than a courtroom trial. *See generally* Roger Haydock & John Sonsteng, TRIAL ADVOCACY BEFORE JUDGES, JURORS, AND ARBITRATORS §§ 1.3-1.4 (4th ed. 2011) (listing multiple ADR processes as alternatives to a trial, including negotiated settlements and plea bargains, mediation, fact and issue finding, mini-trials, summary jury trials, moderated settlement conferences, collaborative law, and private judging); *Alternative Dispute Resolution (ADR): Overview*, FINDLAW (Aug. 3, 2018), https://www.findlaw.com/adr/

from both the inquisitorial and adversarial traditions are likely to find familiar procedures and practices in ADR rules.[49] Administrative tribunals and hearings represent another category of forums in which attorneys are likely to play advocacy roles. These forums include a variety of practices and procedures from both inquisitorial and adversarial systems.[50]

Communication technology, such as internet-based synchronous videoconferencing, provides a cost-effective platform to bring specialists together from multiple traditions and jurisdictions, not only for collaborative training,[51] but also for the real-time presentation of cases across cultures and jurisdictions.[52] The question arises of how best to train attorneys to be effective advocates, not only to try cases in the courtroom, but to persuade decision-makers in alternative forums; to operate not only in their home jurisdictions, but in international jurisdictions or arbitration bodies; to be conversant and effective not only with the rules, procedures, and styles that currently exist in their jurisdictions, but rules as they will continue to evolve through the phenomenon of convergence.

III. CHALLENGES OF TEACHING ACROSS SYSTEMS AND CULTURES

This section identifies and analyzes some of the potential pitfalls organizations and instructors may face when designing and teaching advocacy skills courses across cultures and systems. These challenges

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arbitration/arbitration-overview.html (listing multiple ADR processes and explaining how they work in practice).

[49] The American Arbitration Association maintains a website that contains rules and procedures for multiple arbitration and mediation forums, including Commercial, Construction, Consumer, Employment, Labor, and International Dispute Resolution. *Rules, Forms & Fees*, AM. ARB. ASS'N, https://www.adr.org/Rules (last visited Aug. 26, 2021). The model rules for International Dispute Resolution contemplate roles for mediators and arbitrators that are quite similar to those of an inquisitorial judge, including extensive involvement with the parties to assemble information prior to a mediation or arbitration, as well as procedures that include both inquisitorial and adversarial elements. *See generally* INT'L DISP. RESOL. PROCS. (INT'L CTR. FOR DISP. RESOL. 2021), https://www.adr.org/sites/default/files/ICDR_Rules_1.pdf.

[50] Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMPAR. L. 3, 8-27 (2015) (identifying five models of administrative adjudication in use worldwide and noting that the administrative adjudication systems of any given country cannot be described by a single model).

[51] *See, e.g.*, Ramiro Luna Rivera, *Beyond Video Conferencing: International Collaborative Projects*, OBSERVATORY INST. FOR THE FUTURE OF EDUC. (Mar. 23, 2020), https://observatory.tec.mx/edu-bits-2/beyond-video-conferencing (sharing platforms and best practices for international educational collaboration using web-based resources such as videoconferencing technology).

[52] *See, e.g.*, Michael Hotz, *CPR's Arbitration Committee Tackles ADR Video Conferencing*, CPR INT'L INST. FOR CONFLICT PREVENTION AND RESOL.: CPR SPEAKS (Apr. 27, 2020), https://blog.cpradr.org/2020/04/27/cprs-arbitration-committee-tackles-adr-video-conferencing/ (recounting the story of an international merger and acquisitions arbitration that included both pre-COVID live hearings and post-COVID remote videoconferencing hearings).

include uneven development of baseline advocacy training programs worldwide, legal ethnocentrism, and ignorance.

A. Uneven Development of Advocacy Skills Education

There is a continuing debate worldwide about the proper balance of legal theory and skills training in legal education.[53] As one scholar has written, "[w]hether or not legal education does, *or should*, prepare students for professional practice is, in fact, one of the central debates in the academy." [54] Worldwide, there is a growing trend for legal education to include not only the theoretical study of legal doctrine, but also training in the skills lawyers need to practice law.[55] Not all universities and law schools throughout the world have the mandate, resources, or expertise to provide such training, however.[56] There is nothing approaching a worldwide consensus on whether or how to integrate skills training at the law school level.

Post-graduate skills training is sometimes, but not always, available to new lawyers. Many countries worldwide use apprenticeship or pupilage programs to provide on-the-job skills training to new lawyers.[57] The quality

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[53] Stephen A. Rosenbaum, *Beyond the Fakultas's Four Walls: Linking Education, Practice, and the Legal Profession*, 23 PAC. RIM L. & POL'Y J. 395, 401-04 (2014) (discussing the skills and theory debate in the context of legal education in Southeast Asia); RICHARD J. WILSON, THE ROLE OF PRACTICE IN LEGAL EDUCATION (2010), http://ssrn.com/abstract=1695618 (synthesizing and analyzing national reports and information from nineteen countries).

[54] WILSON, *supra* note 53, at 2.

[55] *See, e.g.*, Michael A. Simons & Margaret E. McGuinness, *American Legal Education, Skills Training, and Transnational Legal Practice: Combining Dao and Shu for the Global Practitioner*, 8 TSINGHUA CHINA L. REV. 125 (2015) (asserting that transnational law courses must integrate skills training to be complete); Molley Townes O'Brien & John Littrich, *Using Assessment Practice to Evaluate the Legal Skills Curriculum*, 5 J.U. TEACHING & LEARNING PRAC. 61, 64-66 (2008) (reviewing the growth and development of skills training in legal education in the United States and Commonwealth countries).

[56] *See, e.g.*, Willem H. Gravett, *Pericles Should Learn to Fix a Leaky Pipe—Why Trial Advocacy Should Become Part of the LLB Curriculum (Part 1)*, 21 POTCHEFSTROOM ELEC. L.J. 1 (2018) (arguing for the inclusion of skills training as part of the South African undergraduate law degree); Rosenbaum, *supra* note 53 (discussing the skills and theory debate in the context of legal education in Southeast Asia); WILSON, *supra* note 53.

[57] *See* WILSON, *supra* note 53, at app. 1 (listing countries from both common law and civil law traditions that require apprenticeships or pupilages of new law graduates); Kirsten A. Dauphinais, *Training a Countervailing Elite: The Necessity of an Effective Lawyering Skills Pedagogy for a Sustainable Rule of Law Revival in East Africa*, 85 N.D. L. REV. 53 (2009) (noting that most former British Commonwealth countries in sub-Saharan Africa use the pupillage system); Sandra R. Klein, *Legal Education in the United States and England: A Comparative Analysis*, 13 LOY. L.A. INT'L & COMPAR. L.J. 601 (1991) (explaining the role of post-graduate apprenticeship programs in training English solicitors and barristers).

of training in these programs varies depending on the skills, personalities, resources, and practice areas of supervising attorneys.[58]

Depending on resources, law firms, government agencies, law societies, bar associations, inns of court, and other similar organizations may provide training to both new and established lawyers.[59] Advocacy instructors and student advocates in these jurisdictions are likely to have access to advocacy training materials tailored to the procedural rules and acceptable practices in their jurisdictions. These materials include textbooks, manuals, and case files based on local law. Furthermore, these jurisdictions are likely to have cadres of advocacy instructors from the legal academy, bench, and bar.

Some nations, however—particularly in the developing world—do not yet have established skills training programs, instructors, and teaching materials of their own.[60] To carry out effective training programs, these jurisdictions may benefit from inviting guest instructors from other countries. In these countries, training materials are often imported or adapted from the guest instructors' home jurisdictions.[61]

Building capacity for a jurisdiction to offer effective advocacy skills training effectively on its own takes time and resources. External entities such as foreign governments, non-governmental organizations, educational

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58 Michele R. Pistone & John J. Hoeffner, *No Path but One: Law School Survival in an Age of Disruptive Technology*, 59 WAYNE L. REV. 193, 217 (2013) ("Three centuries of failure should be enough to conclude that reliance on busy practitioners to provide an adequate legal education is an inherently and deeply flawed strategy-although exceptions will exist, on average, practitioners simply have better things to do."); Richard J. Wilson, *Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education*, 10 GERMAN L.J. 823, 832-33 (2009) (observing that there are many problems with legal apprenticeships worldwide, including exploitation of students, uneven content, lack of reflective learning, and discrimination in opportunity).

59 *See, e.g.*, H. Lalla Shishkevish, *Continuing Legal Education*, MICH. BAR J., June 2017, at 36, 37 ("The American Bar Association as well as many law firms, CLE providers, and corporations have been working to define competencies for use in hiring, training, evaluation, and talent management."); Yanneck Ostaficzuk & Suzanne Gagnon, *Professional Excellence Through Competency Development*, 95 CANADIAN BAR REV. 123, 127 (2017) ("Frequently set forth by law societies in Canada and other parts of the world, in this approach the parameters to meet to comply with mandatory professional development requirements are set."); *see also About CLEAA*, CLEAA, https://cleaa.asn.au/about-cleaa/ (last visited Sept. 25, 2021) (explaining that the organization is "dedicated to the needs of professionals from Australia, New Zealand, Asia and the South Pacific who are involved in providing continuing legal education and professional development to the legal profession"); *Overview*, *About Us*, L.E.A.D., https://www.lssalead.org.za/about-us/overview/ (last visited Sept. 25, 2021) (describing the organization's training events and programs for law students, candidate attorneys, and licensed attorneys).

60 Bruce L. Ottley, *Developing Legal Education in a Developing Country: A Case Study of Papua New Guinea*, 31 J. LEGAL EDUC. 183, 184-85 (1981) (describing Papua New Guinea's reliance on Australian faculty and teaching materials and methods in the establishment of its law school).

61 *See id.* In the author's experience teaching in advocacy programs overseas, it is not uncommon for instructors to bring their own materials with them along with books and other teaching materials to donate to attorneys in the host country.

institutions, and non-profit organizations often step in to help meet current training needs and build capacity for the future.[62]

These programs can accomplish a tremendous amount of good in developing countries, but there are potential pitfalls associated with legal capacity-building in a foreign country.[63] These include legal ethnocentrism, advocacy evangelism, and ignorance.

B. Legal Ethnocentrism and Advocacy Evangelism

The term "ethnocentric" is defined as "tending to view the world from the perspective of one's own culture, sometimes with an assumption of superiority; limited as regards knowledge and appreciation of other cultures and communities."[64] Legal ethnocentrism occurs when one views other legal systems as inferior, as if to say, "we are the Greeks, all others are barbarians."[65] According to Nora Demleiter, two conclusions follow when another system is classified as inferior: "first, an inferior system never has anything to teach a superior system, and second, the superior system is justified in challenging, intervening in and changing an inferior structure."[66]

Legal ethnocentrism can be particularly pronounced when guest instructors from Western countries teach in countries that have emerged from the yoke of colonialism in the last half-century or are considered part of the developing world.[67] When implemented through a construct of ethnocentrism, even capacity-building programs designed with the best of intentions can become a form of legal neocolonialism. Furthermore, the

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62 *Cf.* Leo P. Martinez, *Legal Education in a Modern World: Evolution at Work*, 9 CHARLESTON L. REV. 267, 288 (2015) ("Unlike the United States-where law is taught primarily by a faculty whose primary occupation is full-time engagement in teaching, scholarship, and service-in Chile, Argentina, and the rest of South America, practicing lawyers and jurists, whose status is similar to adjunct professors in the United States, teach law. . . . [I]t is also worth noting that for many in the profession in South America, it is viewed as part of one's professional obligations to teach classes in one's area of expertise."); Frank W. Munger et al., *Mobilizing Law for Justice in Asia: A Comparative Approach*, 31 WIS. INT'L L.J. 353, 362 (2013) (noting the involvement of many types of organizations in supporting rule of law initiatives, including international organizations, world powers, private foundations, non-governmental organizations, and networks of activists).

63 *See* Margaret Y. K. Woo, *Reflections on International Legal Education and Exchanges*, 51 J. LEGAL EDUC. 449 (2001) ("[W]e need to be aware of the differences in social, cultural, and political milieu that separate us from our foreign counterparts. These may manifest in differences in communication styles, variation [sic] in learning, [and] differences in cultural assumptions.").

64 *Ethnocentric*, OXFORD ENGLISH DICTIONARY (3d ed. 2010).

65 K. N. LLEWELLYN, THE BRAMBLE BUSH 42-43 (7th prtg. 1981).

66 Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 742-43 (1999).

67 *Id.* at 743 ("While legal ethnocentrism affects the view of all other legal systems, its effect is most noticeable on the legal systems in non-Western, non-Christian, non-white, and economically less developed countries.").

subtle (and sometimes explicit) condescension of legal ethnocentrism can infect the substance and tone of a training program.[68]

An offshoot of legal ethnocentrism is advocacy evangelism—the effort to convert foreign jurisdictions to procedures, practices, and styles that are familiar to the evangelists from their own home jurisdictions.[69] This is particularly an issue with American practitioners and teachers, who may feel the desire to teach jury storytelling and persuasion techniques in jurisdictions where they can never be used—or to attorneys who will never try a case to a jury.[70] The theory is that these techniques (1) have intrinsic normative value that can help any legal system improve; (2) can easily be scaled down or adapted to bench trials; and (3) represent the highest form of advocacy, to which all legal systems and courtroom practitioners should aspire.[71]

Some of the persuasion techniques used in American jury trials are effective because of conditions and procedures that are unique to American

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[68] Luna, *supra* note 11, at 282 (observing that ethnocentrism has serious consequences not only for "foreign nations who are force-fed Western values" but also for Americans who may be unable to challenge their own status quo because they believe it is the only fair way to proceed, being ignorant of alternatives).

[69] *See, e.g.*, Demleitner, *supra* note 66. Demleitner writes about Western efforts to impose Western legal models on other systems, stating:

> The Western belief in the superiority of its legal systems has triggered a contest for the preeminence of a specific Western legal system in many developing countries, especially in Eastern Europe and the former USSR. *Western lawyers have become missionaries*, engaged in one of many marketplace struggles fought in transitional systems. The competition for the adoption of a particular legal model, however, is often not grounded in comparative inquiry but rather is based on beliefs about the presumed inferiority of the "other" system, restricted to a reductionist understanding of "foreign" legal cultures and informed by marketing strategies that extol the virtues of the product peddled.

Id. at 743-44 (emphasis added).

[70] *See* C.J. Williams & Leonard T. Strand, *Judicial Advocacy: How to Advocate to a Judge*, 43 AM. J. TRIAL ADVOC. 281, 281 (2020) ("Law schools and other organizations teach skills associated with trial advocacy with a presumption that the decision-maker is a jury."). The author has taught in multiple courses throughout the United States in which the target audience consisted of lawyers practicing in specialized courts where trial by jury was not an option under the governing rules of their courts. Nonetheless, the curricula included training in jury-trial storytelling techniques for both opening and closing arguments. Students frequently commented that this portion of the course was a waste of their time, given the procedural rules in their jurisdictions and the tendency of judges to insist on efficient, to-the-point oral advocacy at trial.

[71] *Cf.* C.J. Williams, *Advocating Altering Advocacy Academics: A Proposal to Change the Pedagogical Approach to Legal Advocacy*, 25 SUFFOLK J. TRIAL & APP. ADVOC. 203, 215–16 (2020) ("[T]here has been little thought given to the difference between arguing to a jury . . . in comparison to arguing to a district judge."); John N. Sharifi, *Approaching the Bench: Trial Techniques for Defense Counsel in Criminal Bench Trials*, 28 AM. J. TRIAL ADVOC. 687, 687 (2005) ("Rarely, if ever, are trial advocacy techniques taught in the context of bench trials. The conventional wisdom seems to be that good jury trial skills suffice in a bench trial, so there is no need for instruction tailored specifically for bench trials. As a practicing criminal defense lawyer, this author disagrees, at least in part, with that proposition.").

jurisdictions.[72] These include "relaxed pleading, broad discovery, jury trial, limited cost shifting, potentially remarkable awards for pain and suffering or punitive damages, and heavy reliance on private lawyers to enforce public norms, to name several but not all the distinguishing characteristics."[73] Additionally, in criminal cases, constitutional double jeopardy doctrines prevent prosecutorial retrial of a case after an acquittal.[74]

These quintessentially American conditions foster a culture of psychological storytelling and persuasion techniques that lead jurors to make decisions while unconsciously relying more on emotion than the disciplined application of the law to the facts.[75] American jury trial persuasion techniques may not be as effective in other forums—including bench trials, arbitration hearings, or proceedings before expert administrative law judges and panels;[76] or even in non-American jury trials, such as those held in inquisitorial countries or in other common law adversarial jurisdictions.[77]

Legal ethnocentrism and advocacy evangelism impede collaborative advocacy teaching across cultures and jurisdictions, for three primary reasons. First, visiting instructors may fail to adapt training and techniques to other jurisdictions; in extreme cases, they may seek to reform advocacy practices in other jurisdictions to match those of their home jurisdictions.[78]

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[72] Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMPAR. L. 709, 709 (2005) ("Not only does America conceive itself, often ruefully, as the litigation superpower, but it also has a set of procedural characteristics that seem to set it off from almost all of the rest of the world.").

[73] *Id.* at 709-10.

[74] U.S. CONST. amend V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

[75] *E.g.*, Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1 (2001) (providing an example of trial preparation and presentation methods based on the psychological therapy technique of psychodrama, as well as a description of the persuasive goals of American jury trial practitioners). There are costs and drawbacks to using certain common, if not generally accepted, American jury persuasion techniques. Joanna P. Kimbell & Alison Berry, *The Tully Message Box as a Heuristic for Modeling Legal Argumentation and Detecting Covert Advocacy*, 28 S.L.J. 311, 314 (2018) (identifying covert advocacy tactics designed to encourage juries to make decisions for extralegal, improper reasons, or to evaluate evidence in illogical ways).

[76] Williams & Strand, *supra* note 70 ("We begin this Article with the fundamental premise that persuading a judge is different than persuading a jury, and persuading a single judge is different from persuading a group of judges.").

[77] Valerie P. Hans, *Trial by Jury: Story of a Legal Transplant*, 51 L. AND SOC'Y REV. 471 (2017) (providing a thorough comparative discussion of jury procedures worldwide); Damaska, *supra* note 9, at 539-40 (describing the interaction between inquisitorial judges and lay jurors during deliberations and referring to the judge as a "towering figure" in deliberations who advises lay jurors how to resolve factual and evidentiary issues). Jury trials in other countries may differ considerably from American jury trials for a number of reasons, including procedural differences, the interaction of professional judges and lay jurors, the use of special verdicts instead of general verdicts, methods of jury instruction, and the legal impact of a jury's verdict as either advisory or final. *See generally* Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 OHIO ST. J. CRIM. L. 629, 635-41 (2008) (providing descriptions of the various jury systems across the world).

[78] *See supra* notes 68-75 and accompanying text.

Second, where the techniques being taught cannot be used or have only marginal utility in the jurisdiction, the credibility of the instructor suffers.[79] Worse yet, the instruction itself is likely to be ignored or devalued by host nation students if it is seen as being inapplicable to their practice.[80] Third, host-nation instructors and students may resent the implicit message of that theirs is a system in need of conversion.[81] Such resentment can lead to the rejection of the messenger and the message.[82]

Even in an era of convergence, in which diverse systems and procedures come more closely to resemble each other, there is no such thing as a one-size-fits-all solution to advocacy training. Every jurisdiction has its own unique procedural and cultural practices, such that what is considered effective advocacy in one jurisdiction might not be tolerated at all in another jurisdiction—even if both are part of the same overall adversarial or inquisitorial tradition. Nonetheless, training across legal systems and cultures can be valuable to all participants so long as guest instructors focus on fundamental baseline advocacy skills, rather than trying to evangelize their own jurisdiction's peculiar brand of advocacy to a new audience.

C. Ignorance

Ignorance may be considered as a subset of legal ethnocentrism. In some cases, it is likely informed by unconscious assumptions or implicit bias. As the scholar Pierre Lepaulle wrote nearly a century ago, "[w]hen one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are simply due to

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79 *Cf.* Louise Harmon & Eileen Kaufman, *Innocents Abroad: Reflections on Summer Abroad Law Programs*, 30 T. JEFFERSON L. REV. 69, 149 (2007) ("In the India program, for example, the presence of a distinguished scholar from the United States legal academy of South Asian descent helps to answer the inevitable questions about whether faculty from the West are knowledgeable enough to teach anyone about their rich and complex culture.").

80 Peggy Maisel, *The Roles of U.S. Law Faculty in Developing Countries: Striving for Effective Cross-Cultural Collaboration*, 14 CLINICAL L. REV. 465, 473-74 (2008) ("This ethnocentrism was based on assumptions made without learning about the local context and without meaningful consultation with legal scholars in the host country. As a result, few of the desired 'reforms' were ultimately accepted or institutionalized.").

81 *Cf.* Kathleen Kelly Janus & Dee Smythe, *Navigating Culture in the Field: Cultural Competency Training Lessons from the International Human Rights Clinic*, 56 N.Y. SCH. L. REV. 445, 448-49 (2011) (recognizing the risk that human rights lawyers with poor cultural competency skills could be perceived as Western imperialists by people in other countries whom they are trying to help).

82 *Cf.* Robert C. Bordone & Rachel A. Viscomi, *The Wicked Problem of Rethinking Negotiation Teaching*, 31 NEGOT. J. 65 (2015) ("Several authors note that the cultural assumptions that permeate traditional negotiation teaching hinder its resonance abroad . . . The risk is that we will substitute one set of unhelpful cultural assumptions for another.").

historical accident or temporary social situation."[83] Ignorance is, however, a powerful obstacle to training across cultures and systems in its own right. Through ignorance, the well-meaning organization or instructor can create just as much damage as the ethnocentric advocacy evangelist.

To illustrate, I share a cautionary tale, drawn from my own experience. Several years ago, I traveled to Botswana to teach a trial skills class for Justice Advocacy Africa, a non-profit organization that teaches advocacy training courses in sub-Saharan Africa.[84] Truth be told, when making all the travel arrangements for the trip, I did not spend much time or effort learning about Botswana's legal system. This did not worry me, however, because I felt with my background, training, and experience as an advocacy instructor, I knew enough to get by. Like the United States, Botswana's courts use adversarial procedures.[85] As well, Botswana's legal system is heavily influenced by British common law.[86] I had examined the course outline, and all the trial elements looked familiar to me: case analysis, opening statements, direct and cross-examinations, closing arguments. The teaching methodology, based on the time-tested system used by the National Institute for Trial Advocacy ("NITA"),[87] was also familiar to me. Moreover, the teaching materials were almost identical to those I had used many times when teaching trial advocacy courses for NITA and other organizations.

On the long flight to Africa, I brushed up on the materials for the opening statement workshop I was assigned to teach. I found myself wishing I knew more about Botswanan juries so I could tailor my presentation; I wanted to help my Botswanan students figure out how best to connect with jurors in their culture, as opposed to mine.

I had a stroke of good luck when I became acquainted with the man sitting directly across the aisle from me. He was an advocate from South Africa, returning home from a trip to the United States. I told him why I was traveling to Botswana, and he mentioned that he had often been retained by local firms to appear as an advocate in Botswanan courts.[88] When I asked

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83 Pierre Lepaulle, *The Function of Comparative Law with a Critique of Sociological Jurisprudence*, 35 HARV. L. REV. 838, 858 (1922).

84 *Justice Advocacy Africa*, JUST. ADVOC. AFR., http://www.justiceadvocacyafrica.com/ (last visited Sept. 25, 2021).

85 Rowland J. V. Cole, *Recognising* [sic] *the Centrality of Disclosure to the Realisation* [sic] *of Equality of Arms in Criminal Proceedings in Botswana*, 23 S. AFR. J. CRIM. JUST. 327, 335 (2010).

86 *Introduction to Botswana's Legal System*, LEGAL LIT BW (Sept. 20, 2017), https://legallit.wordpress.com/2017/09/20/introduction-to-botswanas%e2%80%8b-legal-system/. Botswana's legal system is based on the Roman-Dutch common law of South Africa and the customary law practiced by Botswana's indigenous tribes. *Id.* The Roman-Dutch common law was heavily influenced by British common law. *Id.*

87 *See infra* notes 112-14 and accompanying text.

88 I later came to understand the significance of the title of "advocate" in the Botswana legal system. *See* Jeffrey Bookbinder, *A Guide to Litigation in Botswana*, ICLG.COM: AFRICAN LAW AND BUSINESS (Nov. 10, 2015), https://iclg.com/alb/5950-a-guide-to-dispute-resolution-in-botswana

him for insights about how best to persuade Botswanan juries, he diplomatically informed me that Botswana did not have the institution of trial by jury.

In my ignorance, I had assumed that the British had given the right to trial by jury to all their former colonies and protectorates, just as they had to my own country. My new South African friend wryly suggested the British might have learned a lesson or two from giving jury trials to their rogue American colonies in the eighteenth century. I should have known better; I should have researched more before I boarded the plane, but I had assumed similarity of systems based on commonality of ancestry. To borrow a phrase from my late father-in-law, my problem was *I just didn't know what I didn't know*.

To be clear, I never wanted to be the ugly American courtroom advocacy imperialist, barging into Africa to teach the natives how to try a case the *American way*. That is why I felt I needed to know more about trial by jury in Botswana. Unfortunately, absent my fortuitous meeting with a South African advocate, I might have inadvertently accomplished what I would never have done intentionally.

I arrived in Botswana humbler about my cultural competency than when I boarded the plane in the United States. I kept my eyes and ears open as I listened to my fellow faculty members, most of whom were from former British Commonwealth countries in Africa; their legal systems, customs, and advocacy practices were closer to those of Botswana than were my own. I paid attention as I watched and listened to my students, setting aside much of the prescriptivism that is a hallmark of NITA-style advocacy training. When I gave critiques and corrections, I tried to do so in the context of their version of the adversarial trial system, not my own. My teaching had evolved from a thought that had existed only in its nascent stages when I asked my South African friend about Botswanan juries. I came to understand the importance of teaching sound advocacy practices in a way that was both culturally competent and appropriate for the jurisdiction in which I was teaching.

Ignorance is a potential pitfall for any well-meaning organization or instructor teaching in a foreign jurisdiction. Instructors from inquisitorial jurisdictions may be unschooled or inexperienced in skills that are de rigueur in an adversarial jurisdiction, such as opening statements or cross-examination.[89] On the other hand, instructors from adversarial jurisdictions might be unaccustomed to the leading role of the inquisitorial judge and its consequent impact on advocacy decisions at trial.[90] This is not to say that

("The Botswana legal system comprises a split bar of attorneys (akin to UK solicitors) and advocates (akin to UK barristers). The system evolved from the model used in South Africa.").

89 *See* Van Kessel, *supra* note 17.

90 *See* Jescheck, *supra* note 24.

guest instructors cannot do useful work in foreign jurisdictions, but rather that they must be aware of their experiential limitations when teaching outside their home countries.

An imported training program or instructor that does not account for the conditions and practices of the host nation, or modify training materials to reflect them, will be of marginal utility to students. Suppose that a student in Tanzania is taught American procedures for introducing documents into evidence. She may learn a skill that she cannot use either in America because she is not licensed there or in Tanzania because it would not satisfy Tanzania's rigid evidentiary authentication requirements.[91]

IV. UNIVERSAL BASELINE SKILLS AND PRACTICES FOR COLLABORATIVE ADVOCACY TEACHING ACROSS SYSTEMS AND CULTURES

As discussed in Section II,[92] there is no such thing as a set of universal advocacy practices and procedures that apply to all courts and proceedings throughout the world. And yet, we live in world that is deeply interconnected.

Anyone who has ever taught an advocacy course with colleagues from another country has experienced simultaneous recognition by all instructors of effective or deficient student advocacy performances. Experience suggests that it is possible for collaborative advocacy teaching across systems and cultures using baseline advocacy skills and practices that are universally applicable. In other words, the foundational building blocks of effective advocacy are common to all advocates.

To teach baseline advocacy practices across cultures and systems, instructors must overcome the temptation to teach advocates cultural norms and advanced techniques from their own jurisdictions. For example, it is unlikely that storytelling and persuasion techniques from American jury trials will help advocates succeed before a panel of three professional judges in a hybrid tribunal with mixed adversarial and inquisitorial procedures—or even in an adversarial bench trial with a single judge.[93]

In this day and age, the reality is that most advocates, regardless of system, will practice before professional judges, arbitrators, or administrative tribunals.[94] Accordingly, universal baseline advocacy techniques should equip law students and attorneys to succeed in persuading legal professionals

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91 *See generally* Ronald J. Allen et al., *Reforming the Law of Evidence of Tanzania (Part Two): Conceptual Overview and Practical Steps*, 32 BOS. U. INT'L L.J. 1 (2014) (noting the complexity and archaic nature of Tanzania's evidence code).

92 *See* discussion *supra* Section II.

93 Williams, *supra* note 71 (observing that persuasion techniques for juries and judges are different, and, in fact, "some jury advocacy methods may . . . be inappropriate, inapplicable, or even ineffective when trying to advocate to a judge").

94 Williams & Strand, *supra* note 70.

rather than laypeople.[95] Because jury trials are typically reserved only for the most serious cases, it makes sense to reserve specialized training in persuasion techniques directed to lay decision-makers, for advanced courses that occur later in an advocate's career.

This article suggests both a foundation and a framework for basic advocacy skills training across systems and cultures. The foundation consists of four important elements: (1) realistic, simple case files or fact patterns using local law; (2) instructional teaching materials that are tailored to the system and culture of the jurisdiction in which students are being taught; (3) critiquing methodologies that are culturally appropriate, student-centered, and skills-focused; (4) guest instructors from other countries who understand the challenges of cross-cultural teaching and are willing to lay aside preconceptions, personal biases, and advocacy evangelism.

The framework consists of six essential advocacy skills—including both oral and written elements—that are common to decision-making forums where decision-makers are professionals rather than laypeople: (1) case analysis, the ability to examine facts in light of applicable law, burdens of pleading and persuasion, and available remedies; (2) identification and articulation of basic case theories, or in other words, an explanation of why the advocate's cause should prevail; (3) efficient opening statements or case roadmaps, in jurisdictions that permit them; (4) essential witness examination skills, including pre-trial witness interviews, examination in chief, follow-up to judicial examinations, or basic cross-examination where permitted; (5) basic argumentation structure for submissions or closing arguments and motions or applications to the court; (6) fidelity to the truth and candor to the tribunal as indispensable elements of persuasion.

This section briefly discusses each of the foundational elements. It then analyzes each of the basic framework skills in more detail and proposes a set of objective evaluation criteria for each of them.

A. The Foundation: Case Files, Teaching Materials, Critiquing Methodology, and Instructors

1. Case Files and Fact Patterns

Simple, realistic case files and fact patterns or simulations are critical foundational elements of many legal skills training courses. They are used in trial and appellate advocacy, arbitration, mediation, negotiation, and

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[95] Paul Holland, *Sharing Stories: Narrative Lawyering in Bench Trials*, 16 CLINICAL L. REV. 195, 196 (2009) ("[I]t is insufficient to view bench trials primarily in terms of what they lack (i.e., jurors) and necessary to focus on what they present: a set of distinctive interactions between lawyers and judges that demands a distinctive lawyering approach.").

transaction skills courses.[96] Both case files or fact patterns can be written with basic, intermediate, and advanced skills training in mind.[97]

The case file features a closed universe of facts and issues that can be used to focus on discrete skills. A case file typically contains all the witness statements, evidence, pleadings, statutes, and other critical documents that would be generated by a case.[98] Student advocates using case files focus almost exclusively on oral advocacy skills rather than integrated lawyering skills; in other words, they don't worry about case investigation, witness interviews, drafting pleadings and responses, writing motions, creating jury instructions, and the like.

Fact patterns, or simulations, differ from closed case files in two important respects. First, a fact pattern does not contain a closed universe of legal documents and issues; rather, it contains a base "story" or fact pattern that an instructor can use as a foundation for testing multiple skills, both oral and written, including the drafting of pleadings, preparation for realistic witness interviews, researching legal issues, and preparing all documents associated with the development and resolution of a case.[99] Second, fact patterns may be created from whole cloth or easily adapted from found materials such as newspaper articles, songs, short stories, television programs, or works of literature.[100]

In the United States, there is a plethora of available case files. NITA has published them for nearly fifty years, as have other legal education

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96 *See, e.g.*, Symposium, *Opening Perspectives: Oral Trial Advocacy, Contemporary Justice and the International Context*, 14 SW. J.L. & TRADE AMS. 221 (2008) (listing the categories and variety of advocacy training case files prepared by NITA instructors through the years).

97 *See, e.g.*, James M. Dedman, *Notes from the National College*, PROSECUTOR, Mar.-Apr. 1998, at 6 (announcing three levels of trial advocacy courses with basic, intermediate, and advanced case files).

98 David B. Oppenheimer, *Using A Simulated Case File to Teach Civil Procedure: The Ninety-Percent Solution*, 65 J. LEGAL EDUC. 817, 826 (2016) (describing a case file as a "running exemplar from a real or imagined case, providing a fact pattern and sample documents").

99 I occasionally teach an advanced advocacy class based on a fact pattern scenario rather than a case file. The scenario begins with the students receiving the phone number of a client, whom they must call for an initial client interview. Throughout the semester, students generate all documents necessary to create the case and bring it to a jury trial. The course is time and resource intensive, but well worth the effort in student outcomes. For an overview of legal simulation techniques, see generally Paula Schaefer, *Injecting Law Student Drama into the Classroom: Transforming an E-Discovery Class (or Any Law School Class) with a Complex, Student-Generated Simulation*, 12 NEV. L.J. 130 (2011) (explaining how a complex simulation allows students to realistically experience the practice of law while working with clients, generating documents on their own, and facing unexpected circumstances).

100 For example, Hugh Selby, an Australian barrister and long-time advocacy trainer, has adapted the Jack and Jill fairy tale as a fact pattern to teach a wide variety of advocacy skills. *See generally* Hugh Selby, *Advocacy in Court: Preparation and Performance*, LISTEN NOTES, https://www.listennotes.com/podcasts/advocacy-in-court-preparation-and-Ln4g6pa2AJ_/ (last visited Sept. 26, 2021). His podcast, *Advocacy in Court: Preparation and Performance*, uses the fact pattern throughout. *Id.*

publishers.[101] Many of these case files are designed to prepare students for jury trials in American jurisdictions and include materials that might not be used in foreign jurisdictions, such as potentially inadmissible statements and exhibits (so students can make and respond to evidentiary objections), jury instructions, and verdict forms.

Foreign jurisdictions, especially those where skills training is in its nascent stages, may require the creation of case files or fact patterns based on causes of action or cases familiar to the jurisdiction, as well as local substantive and procedural law. Although drafting case files and fact patterns is a time-consuming task, it is not prohibitively difficult. Like teaching itself, it can be done collaboratively, with instructors from multiple locations working together to create and refine the case file. In writing these materials, it is especially important to ensure that the factual and legal issues addressed in the case file are appropriate for the jurisdiction; otherwise, the teaching value of the case file is considerably diminished. Thus, it is critical for host-nation personnel to play a key role in creating and vetting the case file or fact pattern.

2. Textbooks and Teaching Materials

Teaching materials such as textbooks or outlines are also important in skills training. Many skills training courses require students to prepare outside the classroom so that class time can be focused on the development of skills through live performance. Teaching materials that explain the skill and provide example scripts for students facilitate out-of-class preparation and can be used as reference materials once a course has ended.

As with case files, textbooks and outlines are readily available in the United States. NITA publishes these materials, as do the standard legal textbook publishers.[102] Some materials are also published outside the United States.[103]

The advent of open-access textbook publishing can facilitate the creation of baseline advocacy training materials that can be used in different

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[101] *See, e.g.*, *Products*, NITA, https://www.nita.org/publications/case-files (last visited Aug. 26, 2021).

[102] A search of the student-oriented marketplace website, textbooks.com, found 230 trial advocacy textbooks available to American students. *Buy Textbooks*, TEXTBOOKS.COM, https://www.textbooks.com/Search.php?dHTxt=trial+advocacy&TYP=SBJ&CSID=2CCMBDODTT2BKAOCCTOAT2SCS&PART=PRINT&TXT=trial+advocacy (last visited Aug. 10, 2021).

[103] For example, a search of the database, WorldCat, for books on the subject of "trial practice" yielded the following results for several countries: England, twenty-eight titles; Australia, ten titles; Canada, sixteen titles; Spain, two titles; France, seven titles; Germany, seven titles; Kenya, four titles; South Africa, five titles; India, eight titles; China, four titles; Japan, three titles; Brazil, one title; and Mexico, eighty titles. *Search results for "trial practice"*, WORLDCAT, https://www.worldcat.org/search?qt=worldcat_org_bks&q=%22trial+practice%22&fq=dt%3Abks (last visited Aug. 26, 2021).

countries and legal systems and published at low or no cost to students.[104] Creative commons licenses allow for country-specific modification of training materials to reflect the country's procedural rules and advocacy practices.[105] This model offers considerable promise for cross-system collaborative teaching because instructors can work together to tailor already-existing teaching materials without the lead time that would otherwise be necessary to create these materials from whole cloth. Students can access these materials online using computers, tablets, or smartphones.[106] They can also download the materials as e-books or PDF files. If desired, they can even order custom-printed hard copy books.[107]

3. Culturally Appropriate, Student-Centered, Skills-Based Critiquing Methodology

A good advocate pays attention to both the way in which a message is delivered and the content of that message. In teaching scenarios, delivery of a performance critique may in fact be more important than the substance of the critique. Accordingly, foreign instructors should recognize and address cultural competency issues when critiquing and coaching students from other countries or legal traditions.

NITA pioneered a four-step critiquing methodology that has been quite influential in advocacy training programs throughout the world.[108] These steps are (1) headnote, (2) playback, (3) prescription, and (4) rationale.[109] The methodology helps instructors efficiently identify performance deficiencies and prescribe solutions for them.

In the United States, where NITA courses are almost always delivered to licensed attorneys of mixed experience levels, the method works well. Participants are told from the beginning that the purpose of the program is

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[104] Open-access resources are those "that reside in the public domain or have been released under an intellectual property license that permits their free use and re-purposing by others." *Open Educational Resources: About OER*, *Morris Library*, S. ILL. UNIV., https://libguides.lib.siu.edu/oer (last visited Aug. 10, 2021) (emphasis omitted); *see also 7 Things You Should Know About…Open Educational Resources*, EDUCAUSE (June 2010), https://library.educause.edu/-/media/files/library/2010/5/eli7061-pdf.pdf (explaining what open educational resources are and how they can be used).

[105] *See Open Textbooks: The Affordable, Flexible Alternative*, CARLI (Oct. 2019), https://www.carli.illinois.edu/sites/files/coll_man/Trifold_Open_textbook_brochure_31October2019.pdf.

[106] *See* LAURI M. AESOPH, SELF-PUBLISHING GUIDE ch. 35 (2018) (ebook).

[107] *See id.* at ch. 39.

[108] *See Opening Perspectives: Oral Trial Advocacy, Contemporary Justice and the International Context*, *supra* note 96 (listing NITA's multiple advocacy training programs in Europe, South America, Africa, and Asia); Thomas F. Geraghty, *Foreword: Teaching Trial Advocacy in the 90s and Beyond*, 66 NOTRE DAME L. REV. 687, 688-89 (1991) (noting the dominance of the NITA training methodology in law school and CLE advocacy courses in the United States).

[109] Christopher W. Behan, *From Voyeur to Lawyer: Vicarious Learning and the Transformational Advocacy Critique*, 38 STETSON L. REV. 1, 7 (2008) (describing the NITA critiquing template).

not to praise them for what they are already doing competently or well, but to identify weaknesses and deficiencies and help fix them quickly.[110] The NITA method—particularly with its emphasis on correct playback of a student's mistake—also helps to reinforce the status and authority of the instructor, which can be useful in a society that does not intrinsically recognize or respect teachers as authority figures.

Even for licensed professionals steeped in American culture, however, the methodology is not perfect. The NITA method can be rigid.[111] Moreover, the communication style of the critique can alter its message. In the hands of instructor who are focused on sending a message of their own superiority and mastery of concepts in comparison to the students, it can shatter confidence, rather than build it. Some students wonder if they can do anything right when the course focuses almost exclusively on their mistakes.[112] On the other hand, an instructor who is focused upon empowering the students—for example, by praise and recognition of personal progress—can assist everyone in the class to progress.

Fortunately, the NITA method and its derivatives can be adapted for use in other cultures. In countries where criticism is better accepted when accompanied by praise, instructors can use the same four-step method to identify both strengths and weaknesses. For example, Justice Advocacy Africa, a non-profit organization that teaches trial advocacy courses in sub-Saharan Africa, has modified the NITA methodology by requiring its instructors to begin each critique by pointing out an area in which the student demonstrated success or mastery of a skill.[113] In these jurisdictions, this is especially important when critiquing senior attorneys in the presence of their junior colleagues.[114]

There is no requirement to use the NITA method, of course. Where time is not at a premium, such as in semester-long courses taught at law schools or lengthy workshop courses with small cohorts of students, instructors can integrate or prefer other teaching techniques such as Socratic dialogue with the students, on-the-spot corrections, peer reviews, or repeated performances until a skill is mastered.[115] In truth, the NITA method is not a one-size-fits all solution to all critiquing situations and issues.

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110 *Id.* at 10.

111 *Id.* at 11.

112 *See* Kenney Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69, 79-80 (1982).

113 *Teaching Trial Advocacy in Africa: The Magic of Mombasa*, BLOGGER.COM: ADVOCACY TEACHING BLOG (Aug. 7, 2015), https://advocacyteaching.blogspot.com/2015/08/teaching-trial-advocacy-in-africa-magic.html (describing the Justice Advocacy Africa modification to the NITA critiquing methodology).

114 *See id.*

115 *See generally* Behan, *supra* note 109 (describing and analyzing multiple critiquing methods).

Regardless of the critiquing methodology that is chosen, cultural competency demands that an instructor focus on objective criteria related to the advocacy skill that is being taught.[116] Critiques that focus on things a student cannot change—such as an accent, or culturally would not dream of changing—such as a culture's gender roles or the treatment of certain witnesses on the stand, will be counterproductive at best, if not outright harmful.[117] Instead, a global mindset mandates that instructors develop the "ability to recognize cultural signals—the unique values and experiences that shape the ways people think and do things—and intuitively adjust [their] behavior to be more effective."[118]

Even stylistic critiques can be counterproductive if they are socially or culturally unrealistic. For example, in a 2011 study comparing questioning techniques from transcripts of American and Romanian trials, researchers found that American attorneys tended to cross-examine witnesses at a much quicker and more aggressive pace than their Romanian counterparts. The researchers called this method the "question cascade technique" and characterized it as "a rapid-fire approach, leaving almost no time to answer, which has a 'bombing' and dizzying effect on the witness, repeating the same verb structures and changing only one word in the sentence."[119] In contrast, Romanian attorneys are required to submit witness questions to judges, who ask the questions themselves. Not intending to undermine the witness's credibility, judges used a different technique. Researchers labeled this "the multi-unit questioning technique," and described its purpose as "making the question more explicit to the witness." Judges also reformulated the witnesses' oral testimony into written statements that are typed by the court

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[116] For an excellent example of this, see the SBI/A-to-F feedback model used in the Children's Rights Moot Court Competition, jointly sponsored by Leiden University and the Baker McKenzie law firm. *See Baker McKenzie Joins Leiden University to Co-Present the International Children's Rights Moot Court*, BAKER MCKENZIE (Jan. 18, 2021), https://www.bakermckenzie.com/en/newsroom/2021/1/international-childrens-rights-moot-court. SBI stands for Situation/Specific, Behavior, Impact. *The Situation-Behavior-Impact Feedback Tool*, MINDTOOLS, https://www.mindtools.com/pages/article/situation-behavior-impact-feedback.htm (last visited Sept. 26, 2021). Each is defined as follows: Situation/Specific—stage or background—when, what points, what/who was being addressed; Behavior—what the person did or said; Impact—the effect of their behavior on you, the other team, or on the debate. Ton Liefaard, Professor, Training Presentation to Children's Rights Moot Court Judges: Providing Quality Feedback with a Global Mindset (May 18, 2001). A to F tips for feedback include the following: Actionable—the person can do something about it; Balanced—between positive and areas for improvement if that is required; Clear—easily understood; Descriptive/Specific—described the situation and observed behavior in sufficient detail to be helpful; Empathetic—done with sensitivity and understanding of feelings; Factual—based on observations and facts. *Id.*

[117] *Cf.* Liefaard, *supra* note 116 (reminding instructors to be aware of their own biases and to adopt a global mindset in critiquing students from other cultures).

[118] *Id.*

[119] *See* Marcela Alina Fărcaşiu, PhD Abstract, *Language in the Courtroom: A Comparative Study of American and Romanian Criminal Trials*, 19 INT'L J. SPEECH, LANGUAGE, AND L. 109, 110 (2012).

clerk and signed by the witness.[120] Given these goals, a culturally inappropriate critique might attempt to push a Romanian attorney to adopt American-style questioning techniques that would not be possible to use in Romanian courts.

Aside from culture, seemingly mundane factors such as courtroom technology or the availability of support personnel can affect advocacy practices. For example, in many African courts, attorneys will not ask the next question of a witness until the judge looks up or nods in assent. While this significantly affects the pace and tempo of an examination, there is a very practical reason for the custom. In the absence of court reporters or stenographers, the trial record consists only of the judge's hand-written notes; it makes no sense for advocates to press a witness while the judge is still taking notes of the previous question and answer.

Foreign instructors and organizations teaching in host countries, whether in person or virtually, can avoid the pitfalls of culturally insensitive or destructive critiquing methodologies through the following practices. First, taking the time to learn about the host nation's procedures, practices, and resources prior to teaching will help avoid critiquing advocates for behavior that is appropriate for their circumstances. Second, working in concert with and listening to host-nation attorney instructors ensures culturally sensitive critiques. Third, adjusting critiquing templates to reflect cultural mores and practices in the host nation facilitates student acceptance of substantive critiques. Finally, basing all critiques on universally acceptable objective evaluation criteria focuses instructors and students on skill improvement.

4. Instructors

The final foundational element of any successful skills training course is the instructor team. An advocacy skills instructor must first and foremost be trained and proficient in helping develop skills in others.[121] In assembling instructor teams, faculty members or course managers would be well-advised to prioritize teaching ability over professional practice reputation. Because skills teaching frequently takes place in a team environment, it is also

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[120] *Id.* at 111.

[121] *See* Mark Caldwell, *Becoming an Advocacy Teacher*, BLOGGER.COM: ADVOCACY TEACHING BLOG (Dec. 28, 2010), https://advocacyteaching.blogspot.com/2010/12/becoming-advocacy-teacher.html; Mark Caldwell, *Great Advocacy Teachers: What We Are Looking for*, BLOGGER.COM: ADVOCACY TEACHING BLOG (Aug. 12, 2010), https://advocacyteaching.blogspot.com/2010/08/characteristics-of-great-advocacy.html [hereinafter Caldwell, *Great Advocacy Teachers*].

important to select team members who can subordinate their egos to the team agenda and training objectives.[122]

In countries where systematic advocacy skills training is new, building a cohort of qualified teachers may require a multi-year investment in skills teacher training programs. Especially in the beginning stages of building a country's organic skills training structure, foreign instructors may play an outsized role. These individuals must be dedicated to principles of cultural competency as they work to build capacity in the context and structure of the host nation's existing legal system.

When teaching skills in collaborative international courses, guest instructors from outside the host jurisdiction should play a support role to host-jurisdiction course managers and instructors. Doing so helps minimize the possibilities for legal chauvinism or misplaced advocacy evangelism. Ideally, course goals and training agendas will be set primarily by host-jurisdiction course managers. In the classroom, when sufficient personnel are available, it is helpful to pair host-nation instructors with guest instructors; in such cases, the host-nation instructor should take the lead in assigning teaching and critiquing responsibilities.

B. The Framework: Universal Baseline Advocacy Skills

There are several assumptions underlying this section. First, because of the phenomenon of convergence, courts and other tribunals from both the inquisitorial and adversarial traditions use rules, procedures, and practices that are influenced by both systems—as do hybrid tribunals, arbitration panels, and administrative tribunals.[123] Second, most advocates will practice in forums in which professional judges, arbitrators, or administrative panels decide the case, rather than laypeople. Thus, advanced jury persuasion techniques—American, common law, inquisitorial, or hybrid—are best left for specialized courses directed to students and lawyers who are trying jury cases, rather than teaching students to try a jury case on the theory they can "scale it down" to work in any forum.[124] Third, identifying a set of baseline advocacy skills facilitates collaborative teaching with instructors from multiple countries and legal traditions.[125] The suggested framework can be modified to fit the procedures, rules, and customs used in the home jurisdiction.

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122 *See* Caldwell, *Great Advocacy Teachers*, *supra* note 121; *see also* Christopher W. Behan, *Becoming an Adjunct Trial Advocacy Professor*, BLOGGER.COM: ADVOCACY TEACHING BLOG (Jan. 28, 2011), https://advocacyteaching.blogspot.com/2011/01/becoming-adjunct-trial-advocacy.html.

123 *See* Weigend, *supra* note 4 and accompanying text.

124 *See* Williams, *supra* note 71 and accompanying text.

125 *See Opening Perspectives: Oral Trial Advocacy, Contemporary Justice and the International Context*, *supra* note 96 and accompanying text.

This section identifies and discusses each of the proposed universal baseline skills in turn.

1. Case Analysis

Case analysis, the ability to organize a case according to its facts, applicable law, burdens of pleading and persuasion, and available remedies, is one of the most important structural elements of an advocacy skills course.[126] Disciplined case analysis helps students learn to bring order out of the chaos of facts, documents, information, and exhibits that are part of any case file. [127] More importantly, disciplined case analysis is a necessary precursor to effective advocacy; the advocate who understands the strengths, weaknesses, and goals of her case is better able to influence the proceedings and represent her client's interests.[128] Although given in a different context, a famous quote by Yogi Berra illustrates the significance of case analysis: "You got to be very careful if you don't know where you're going, because you might not get there."[129]

Case analysis takes place at all stages of a case from the first client interview to the final appeal and can be taught on a sliding scale of complexity. At the low end of the scale is the time-honored NITA method in which students identify and discuss "good facts" and "bad facts" for the major issues in a case.[130] This is an efficient way to stimulate analysis of the law and facts in the case file, frequently through group discussion. At the high end of the training scale are written tools such as elements and proof checklists, case analysis templates, or memoranda written to supervisory attorneys analyzing the case.[131]

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[126] *See* Geraghty, *supra* note 108, at 689 ("Perhaps the most important contribution that NITA has made in this respect is to introduce methodologies for case analysis.").

[127] *See* Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMP. L. REV. 1, 5 (1993) ("[B]y requiring students to recognize a governing case analysis on which all examinations and arguments must be grounded, trial techniques become more persuasive, trial analysis more sophisticated, trial advocates more proficient, and the trial process more instinctual.").

[128] *Id.* ("Good trial lawyers—teachers of advocacy and otherwise—have long understood the intimate relationship between fact analysis and forensic performance.").

[129] Nate Scott, *The 50 Greatest Yogi Berra Quotes*, USA TODAY SPORTS: FOR THE WIN (Mar. 28, 2019, 8:00 AM), https://ftw.usatoday.com/2019/03/the-50-greatest-yogi-berra-quotes.

[130] Having taught in NITA courses for nearly two decades, I can personally attest that the good facts/bad facts method is frequently used to teach case analysis, often in small-group settings at the beginning of an advocacy course.

[131] These written products tend to be used more in law school courses than in short, performance focused courses targeted to practicing lawyers. It takes time for students to write them and for instructors to assess and provide feedback on them. Nonetheless, if there are sufficient instructor resources available, the inclusion of written case analysis assignments is an effective way to help deepen an advocacy student's understanding of case analysis.

When case analysis is taught early in an advocacy skills course, instructors frequently refer to it when coaching students on the other skills taught in the course. For example, if a line of questioning is of questionable utility, the instructor may ask the student how it fits into her case analysis before providing guidance on how to rewrite the questions to better fit the advocate's ultimate objective in the case.

2. Identification of Basic Case Theories

The bridge between case analysis and oral courtroom advocacy is the ability to identify and express basic case theories. The late Edward Ohlbaum defined a case theory as "the underpinning of a lawyer's comprehensive and logical explanation to the jury of why the client is in court and entitled to a verdict."[132]

Case theories are the building blocks of persuasion in oral advocacy.[133] They help decision-makers—even experienced professional judges—understand and decide the issues in a case.

A case theory is a basic argument that distills the advocate's case analysis into a concise and persuasive legal and factual explanation as to why the advocate's cause should prevail. The introductory phrase, "[w]e win because . . ." followed by a brief statement that ties the facts and the law together, is a useful template for constructing a case theory. The case theory forms the foundation for opening statements and final submissions.[134] It is also an effective litmus test for advocacy decisions at trial: if a question, exhibit, or argument does not support or advance the advocate's theory of the case, the advocate should steer clear of it.[135]

The beauty of well-crafted case theories is that they can be used at all stages of a trial. Where opening statements are permitted, the advocate can weave them into the statement. If a judge limits opening statements or purports to deny them altogether, an advocate can still briefly state the theme and theory as a substitute for a more extensive opening statement. With a case theory firmly in mind, advocates focus witness examinations in ways that are useful to a decision-maker, thereby preventing the waste of time and its consequent impact on the advocate's effectiveness.

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132 Ohlbaum, *supra* note 127, at 17.

133 *Id.*

134 *Id.* ("The case theory provides the structural basis for every phase of the trial allowing the attorney to present the case in a coherent and conceptually tight fashion.").

135 *See supra* notes 70-73 and accompanying text.

3. Written and Oral Opening Statements

The opening statement in a trial, hearing, or arbitration is often the first opportunity for persuasive written or oral advocacy. Narrowly defined, the opening statement includes the theory of the case, as well as the advocate's roadmap or framework for the presentation of witnesses and evidence.[136] In bench trials, attorneys might submit a written trial brief or opening statement, supplemented by an oral opening statement at trial if permitted by the judge.[137]

The opening statement is not a universal component of trial advocacy. Until recent years, opening statements were almost entirely unknown in inquisitorial trials.[138] Additionally, many judges in adversarial jurisdictions either altogether prohibit or severely limit opening statements in hearings and trials.[139]

Nonetheless, I suggest that opening statements should be included in basic advocacy courses, so advocates are prepared to give them when permitted to do so.[140] However, I recommend departing from the practice of teaching advocates to give opening statements in the storytelling style of a jury trial. In my personal teaching experience, I have found that beginning advocates struggle with effective storytelling; some work so hard on trying to integrate storytelling techniques that they neglect the legal framework of the case, giving short shrift to ensuring the theory of their case is clear and understandable. The struggle is especially pronounced in jurisdictions

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[136] As former United States Chief Justice Warren E. Burger wrote:

> [A]n opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument.

United States v. Dinitz, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring); *see also* 1 BETTE J. ROTH ET AL., ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 12:5 (Laws. Coop. Publ'g 2020) (explaining the role of opening statements at trial).

[137] *See, e.g.*, Kevin P. Feehan, *Persuading the Canadian Bench: Effective Advocacy Before Canadian Judges and Juries - The Judge-Alone Trial*, *in* AAJ ANNUAL CONVENTION REFERENCE MATERIALS CANADIAN CAUCUS (Am. Ass'n for Just. 2008) (documenting the Canadian practice of a two-part opening statement that includes an oral phase for technical questions and issues of process, and a written opening that includes "the theme and theory of the case, identification of issues, and anticipated evidence to be given by the witnesses in order of presentation and with reference to documents"); *see also* Williams & Strand, *supra* note 70, at 310-13 (recommending the submission of pretrial bench briefs in judge-alone trials that can, if necessary, serve as a substitute for an opening statement, in conjunction with a brief opening statement appropriate for a judicial audience if permitted by the judge).

[138] *See* Weigend, *supra* note 4 and accompanying text.

[139] *Cf.* Williams & Strand, *supra* note 70, at 312 ("Many judges prefer to request pretrial briefing in lieu of opening statements to allow the trial to proceed immediately to the presentation of evidence.").

[140] As one advocate has written, "[t]he opening statement in a trial is a wonderful opportunity to create a favourable [sic] first impression. One should never waive the opportunity to make an opening statement." Feehan, *supra* note 137 (quoting Robert Calvert).

wherein advocates *know* they will not be given the freedom to use storytelling techniques in bench trials before magistrates or judges.

Instead, I recommend focusing on the development and delivery of written opening statements, as well as short, efficient oral opening statements that are tailored to the preferences and time pressures of professional judges. These should include brief statements of theme and theory, as well as an outline or roadmap of the case and what the advocate intends to prove at trial. This format for opening statements can be used in most forums that permit an opening statement.

4. Essential Witness Examination Skills

Witness testimony, whether written or oral, is an essential component of trials, arbitrations, and administrative hearings. A competent advocate must be able to conduct two types of witness examinations. The first is fact-gathering interviews, in which an advocate asks questions of the witness to obtain necessary information for case investigation purposes.[141] These interviews are used to generate pleadings, applications, and motions in a case, as well as to draft affidavits or other forms of sworn testimony from the witness. The second type of examination is for testimonial purposes in trials or hearings, in which a judge or attorney asks questions of the witness to help the decision-maker understand the case and reach a verdict or decision.[142]

Procedural rules often permit a combination of written and oral witness testimony. For example, the pretrial investigative dossier in an inquisitorial trial contains witness statements and affidavits, but the court still calls these witnesses to supplement what is already in the dossier.[143] Similarly, in adversarial civil litigation that is affidavit-based, there is not only the opportunity to cross-examine the deponent but also to supplement their affidavit by spoken evidence on direct.[144] Live testimony allows the factfinder to observe witness demeanor, sincerity, body language and other

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[141] *See, e.g.*, R, Davis Younts, *Pre-Trial Witness Interviews*, JAG REP., 2011, at 20 (explaining purpose and technique for pretrial witness case investigation interviews).

[142] *See supra* notes 10-14 and accompanying text (comparing and contrasting questioning methods in inquisitorial and adversarial trials).

[143] *See* Damaska, *supra* note 9, at 525.

[144] For example, the United States District Court for the District of Hawaii has developed a "Declarations Procedure," which requires direct evidence by affidavit or declaration in a nonjury civil trial. Witnesses are permitted to testify orally on cross-examination and on redirect. The court held that a declaration in lieu of direct testimony does not violate Rule 43(a).

Susan Nauss Exon, *The Internet Meets Obi-Wan Kenobi in the Court of Next Resort*, 8 BOS. U. J. SCI. & TECH. L. 1, 30 (2002). This reflects a growing trend in civil cases in adversarial systems, not only in the United States, but in foreign jurisdictions as well. *E.g.* Andrew I. Chukwuemerie, *Affidavit Evidence and Electronically Generated Materials in Nigerian Courts*, 3 SCRIPT-ED 176 (2006).

mannerisms, all of which are considered essential elements in determining credibility.[145]

Advocates should learn basic witness examination and presentation techniques. Although the form and style of questioning may differ from one jurisdiction to another, witness examination is a baseline advocacy skill. As with all other advocacy skills, planning for witness examinations begins with case analysis, wherein the advocate must determine whether a witness is likely to be called, who will call the witness, and what information is needed from the witness during a trial or hearing.[146] Sound questioning principles include organization, asking single-fact questions that are easy for witnesses and decision-makers to understand, listening to witness answers and following up appropriately, and ensuring that all questions advance the advocate's theory of the case.

This portion of an advocacy course could be organized as follows. First, training on the relationships between case investigation, case analysis, case theory, and the goals of a witness examination. Second, basic questioning techniques for witness interviews and for witness testimony in a trial or hearing. Third, in jurisdictions that permit cross-examination, training on goals of cross-examination, effective organization and questioning techniques, and decision-making during live cross-examinations Finally, where witness testimony is required to introduce exhibits at trial, specialized training on evidentiary foundations and effective use of exhibits as part of an examination in chief.

5. Basic Argumentation Skills

The submission or closing argument is the advocate's final opportunity to persuade the factfinder that her client should prevail at trial.[147] A good argument explains the legal significance of the facts and evidence that were introduced at trial, laying out a well-reasoned path for the decision-maker to follow in reaching a verdict.[148] It recounts all that happened at trial, essentially telling the story of the trial while advancing the advocate's theory of the case. It explains why the advocate's position should prevail over her opponent's, why some witnesses are believable while others are not, and why the law supports the requested verdict or remedy. In short, the submission or closing argument is the crowning event of the trial.[149]

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[145] *See* James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 916-18 (2000) (tracing the history of live testimony as a tool for credibility determinations at trial).
[146] *See* Geraghty, *supra* note 108.
[147] Haydock & Sonsteng, *supra* note 48, at 603.
[148] *See id.* at 603-04.
[149] *See id.*

Because of the significant role of final arguments at trial, teaching basic oral argument skills is an essential baseline skill in any advocacy course. As with instruction on opening statements, a basic course should focus on making concise and persuasive arguments to judges—not juries—leaving aside storytelling and emotional appeals and focusing instead on teaching advocates to use reason, logic, and the law to construct persuasive arguments. In many respects, teaching argumentation skills is ideal for collaborative courses across systems and cultures: experienced advocacy teachers recognize sound arguments when they see them, and it can be a revelatory experience for a student to hear someone from another culture explain why an argument fell short and how it could be improved.

6. Fidelity to the Truth and Candor to the Tribunal as Indispensable Elements of Persuasion

In an earlier section, this article discussed the importance of selecting the right faculty members for advocacy courses. While it is important to select faculty members who are skilled in teaching, culturally competent, and able to support the goals and objectives of course managers, it is critical to select people who model ethical behavior and professionalism in their teaching.[150] Advocacy courses should include not only formal ethics training, but also training in the persuasive effect of fidelity to the truth and candor to and by the tribunal. This type of training can only occur when faculty are already committed to and living these principles in their own professional lives.[151]

Thus, woven throughout any cross-cultural advocacy course are opportunities to emphasize that truth and candor are fundamental values—not to mention persuasive elements in their own right—in tribunals throughout the world. In a skills course, this type of training bridges the gap between theory and practice; student advocates must learn to play the hand they are dealt while remaining true to professional responsibility rules and ethical standards, just as real advocates do every day in jurisdictions throughout the world.

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150 *Cf.* Nicola A. Boothe-Perry, *Professionalism's Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?*, 55 LOY. L. REV. 517 (2009) (suggesting greater synergy is needed between the legal academy and the practicing bar in demonstrating and teaching ethical behavior).

151 *See* Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 83 FORDHAM L. REV. 1147, 1150 (2014) ("[E]thics, manners and civility in the courtroom are essential ingredients and the lubricants of the inherently contentious adversary system of justice; they must be understood and developed by law students beginning in law school.").

V. CONCLUSION

Advocacy skills education is an invaluable component of legal education, particularly for attorneys who represent clients in trials, arbitrations, and administrative hearings. In an interconnected world, there are plenty of opportunities to collaborate in teaching advocacy courses across cultures and legal systems. These courses can be offered live in a host country, or virtually, using internet-based videoconferencing technology.

Even where instructors and students come from different legal systems and traditions, it is possible to offer culturally competent and effective advocacy training by focusing on baseline advocacy skills that apply in both inquisitorial and adversarial systems. The key to identify these baseline skills is to focus on advocacy in forums where the decision-makers are professional judges and lawyers, rather than lay jurors. The reality is that for most lawyers in the world, the majority of their advocacy will be directed to judges, arbitrators, or administrative panels.

The foundation for an effective advocacy course consists of three elements: (1) case files and fact patterns that are tailored to the jurisdiction in which the course is being taught; (2) teaching materials that focus on universal baseline advocacy skills, but have been customized to reflect local laws, procedures, and practices; and (3) instructors who are good teachers dedicated to principles of cultural competence and are willing to support course managers and host-nation instructors in achieving course goals objectives. The baseline advocacy skills framework consists of six fundamental skills: (1) case analysis; (2) identification and articulation of basic case themes and theories; (3) efficient opening statements or case roadmaps; (4) essential witness examination skills; (5) basic summation or closing argument skills; and (6) fidelity to the truth and candor to the tribunal as indispensable elements of persuasion.

Effectively teaching trial advocacy skills across cultures and systems requires more than flying to another location to teach the natives how things are done in one's own country or jurisdiction. It requires a genuine commitment to teach universally applicable trial advocacy skills, tailored to the legal system, procedures, and culture of the jurisdictions in which the students—and not guest foreign instructors—practice.