
EDWARD OHLBAUM ANNUAL PAPER IN ADVOCACY SCHOLARSHIP

THE “OHLBAUM PAPER” AND ADVOCACY SCHOLARSHIP—WHY NOW?

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This brief Article has multiple intentions and responsibilities: to introduce this year’s (and the inaugural) Edward Ohlbaum Annual Paper in Advocacy Scholarship (“Ohlbaum paper”); to recap Eddie’s contribution to trial advocacy knowledge and instruction; and to contextualize this contribution in a history of advocacy instruction, advocacy writing, and changes in the structure and focus of legal academia.

OHLBAUM AND HIS LEGACY

Perhaps it is easiest to begin with Eddie Ohlbaum. Let me start with an excerpt from his obituary:

Despite the big titles he held and the grand awards he won, Temple University law professor Edward Ohlbaum was at heart a trial lawyer and teacher, equally comfortable in front of a jury or a classroom.

An expert on evidence, an advocate for the American justice system, a defender of children’s rights, and the author of three books, Mr. Ohlbaum, 64, died Thursday, March 13 [2014], after battling kidney cancer. He kept his medical condition private and continued working until the day before he died.

He spent nearly 30 years on the Temple law faculty, during which he conceived, built, and sustained a trial advocacy program that has drawn national accolades.¹

A better telling comes from colleagues. As one wrote, “Professor Ohlbaum

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1. Jeff Gammage, *Edward Ohlbaum, Temple Law Professor*, PHILA. INQUIRER (Mar. 16, 2014), http://articles.philly.com/2014-03-16/news/48247346_1_law-professor-temple-university-wesleyan-university.

demonstrates how to use the art of advocacy to win the judge's evidentiary ruling and, in turn, shows how this ruling is used in the art of advocacy."² Consider his specific insights on the interplay of advocacy and evidentiary rules:

For many courtroom lawyers, evidence is regarded as an obstacle to avoid, rather than an opportunity to persuade. Both objecting and proffering inevitably invite the advocate to discuss the purpose or relevance of the evidence in question. To persuade the judge to exclude or include evidence, the trial lawyer must summarize the projected proof, its evidentiary basis or lack thereof, and most important, its projected impact on the case. Making and meeting objections provide recurring opportunities to re-argue the case as it relates to the evidence that is subject to scrutiny. Yet, trial lawyers customarily approach evidence like the mythological Greeks approached the three-headed Cerberus who stood guard at Hades—humbly, deftly, and with trepidation—hoping to ultimately survive, but expecting to be harmed in the process.³

Eddie's accomplishments may be summarized as imbuing the teaching of advocacy with a mastery of the law of evidence,⁴ both in what he brought to the lectern and in what he demanded that students, practitioners, and judges grasp, and in emphasizing the roles of theory and ethics as core to advocacy practice and writing.⁵ This was his scholarship agenda.

THE CONTEXT—THE HISTORY AND PRESENT OF ADVOCACY SCHOLARSHIP

So Eddie was at the fore of bringing scholarship to bear on what some academics disdained⁶—the trench warfare of the courtroom. He did so in a field that, at least to some, was (and is) relatively young. As Terence MacCarthy opined, “[T]here is little history on trial advocacy. In fact, there is absolutely

2. William Eleazer, *Introduction*, 31 STETSON L. REV. 1, 3 (2001).

3. Edward D. Ohlbaum, *Jacob's Voice, Esau's Hands: Evidence-Speak for Trial Lawyers*, 31 STETSON L. REV. 7, 10 (2001).

4. See, e.g., *Tome v. United States*, 513 U.S. 150, 160 (U.S. 1995) (citing Edward D. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(b), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. REV. 231, 245).

5. Eleanor W. Myers & Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 FORDHAM L. REV. 1055 (2000); Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMP. L. REV. 1, 55 (1993) [hereinafter Ohlbaum, *Basic Instinct*]. Eddie was also a student of the literature of trials, and his widow bequeathed to Temple his massive collection of over 120 volumes from the “Notable Trials Library,” with titles as diverse as *The Baccarat Case* and *Murder in Tombstone: The Forgotten Trial of Wyatt Earp*.

6. See, e.g., Eric B. Easton, *LRW Program Design: A Manifesto for the Future*, 16 LEGAL WRITING J.: LEGAL WRITING INST. 591, 594 (2010) (“[L]egal education has straddled the divide between the academy and the profession. And since Langdell's day, the academy has had the upper hand.” (footnote omitted)); Arturo López Torres, *MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 NEB. L. REV. 132, 133 (1998) (“The question of whether law schools should teach lawyering or practical skills is longstanding and steeped in debate.” (footnote omitted)).

none before 1971.”⁷

MacCarthy’s history is correct *if* one limits a “history of trial advocacy” as he does to formal training programs, be they those pioneered by the National Institute of Trial Advocacy in 1971 or advocacy courses taught in law schools.⁸ But there is more; a rich literature of trial advocacy is traceable in this country back to at least 1852 and the publication of Edward William Cox’s *The Advocate: His Training, Practice, Rights, and Duties*.⁹ A large number of lawyer-teaching-lawyer-from-experience texts followed, with the earliest to gain extensive readership, acclaim, and republishing being Francis Wellman’s 1903 classic *The Art of Cross-Examination*.¹⁰ Among those to follow were Louis E. Schwartz’s 1933 *Cross-Examination of Plaintiffs in Personal Injury Actions*;¹¹ Lane Goldstein’s 1935 *Trial Technique*;¹² Noel C. Stevenson’s 1971 *Successful Cross Examination Strategy*;¹³ Irving Younger’s 1976 *The Art of Cross-Examination*;¹⁴ F. Lee Bailey and Henry B. Rothblatt’s 1978 *Cross-Examination in Criminal Trials*;¹⁵ and Robert L. Habush’s 1990 *Art of Advocacy: Cross-Examination of Non-Medical*.¹⁶

The abundance of titles for attorney self-help begs two questions: Are the texts “scholarship” in terms of research and testing rather than anecdote and “take my word for it”? And, even if their advisories are correct, are they efficacious methods of teaching? At a minimum, some of the advice—even from acknowledged masters such as Younger—is incomplete.¹⁷ Often, it is idiosyncratic to that writer’s level of experience and special field of practice, and thus not transferable to day-to-day trial work or adoptable by those with less

7. Terrence F. MacCarthy, *The History of Teaching Trial Advocacy*, 38 STETSON L. REV. 115, 117 (2008).

8. *Id.* at 118–19.

9. EDWARD W. COX, *THE ADVOCATE: HIS TRAINING, PRACTICE, RIGHTS, AND DUTIES* (1852); see Philip Gaines, *Writing the Discursive Proto-Culture of Modern Anglo-American Trial Advocacy: Edward William Cox’s The Advocate*, 51 AM. J. LEGAL HIST. 333, 333 (2011).

10. FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* (1903).

11. LOUIS E. SCHWARTZ, *CROSS-EXAMINATION OF PLAINTIFFS IN PERSONAL INJURY ACTIONS* (1933).

12. LANE GOLDSTEIN, *TRIAL TECHNIQUE* (1935).

13. NOEL C. STEVENSON, *SUCCESSFUL CROSS EXAMINATION STRATEGY* (1971).

14. IRVING YOUNGER, *THE ART OF CROSS-EXAMINATION* (1976).

15. F. LEE BAILEY & HENRY B. ROTHBLATT, *CROSS-EXAMINATION IN CRIMINAL TRIALS* (1978).

16. ROBERT L. HABUSH, *ART OF ADVOCACY: CROSS-EXAMINATION OF NON-MEDICAL* (1990). As is manifest from these titles, the focus was not on the entirety of trial persuasion skills but often solely on the specific tool of cross-examination. By contrast, much less interest and effort were devoted to direct examination. H. Mitchell Caldwell et al., *Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination*, 76 NOTRE DAME L. REV. 423, 433 (2001).

17. See, e.g., Jules Epstein, *Are the “10 Commandments of Cross-Examination” Sufficient?*, VOICES@TEMP. L. (Oct. 21, 2015), <http://www2.law.temple.edu/voices/are-the-10-commandments-of-cross-examination-sufficient/> (emphasizing the failure of Younger’s commandments to include the need to present a story, the power of visual imagery, or problems attendant to special classes of witnesses such as children).

practice and/or differing personalities. Elsewhere, the advice is demonstrably wrong, however well intentioned at its writing.

Two examples will suffice. Wellman averred that the type and sound of cross-examination should be determined by the type of witness being encountered—an honest but mistaken witness versus a perjuring one—but maintained that this distinction can be discerned from the witness's appearance and bearing:

Witnesses of a low grade of intelligence, when they testify falsely, usually display it in various ways: in the voice, in a certain vacant expression of the eyes, in a nervous twisting about in the witness chair On the other hand, there is something about the manner of an honest but ignorant witness that makes it at once manifest to an experienced lawyer that he is narrating only the things that he has actually seen and heard.¹⁸

That behavior and body language are poor indicators of deception cannot now be doubted.¹⁹

Perhaps more troubling than Wellman's error is the failure in other tomes to maintain consistency. Goldstein's *Trial Technique*,²⁰ after urging attorneys to "never cross-examine unless you know the answer,"²¹ reverses field within a page when describing how to question a witness by "leading a witness to believe that the lawyer knows all about the subject under discussion by indicating one or two or three things as evidence of [the lawyer's] knowledge, and then permit[ting] [the witness] to give the balance of the details."²² That is a question to which the lawyer does not know the answer.

Beyond the flaws of faux insights and inconsistency, many of these tomes were written prior to, or in disregard of, strong research on the psychology of decision making.²³ By contrast, advocacy scholarship of recent vintage is now at

18. FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* 67 (4th ed., Collier Books 1970) (1903).

19. Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 *CARDOZO L. REV.* 2557, 2565 (2008) ("[F]ew reliable cues to deception exist and in particular, the cues widely believed by the public to signify deception generally do not."); James P. Timony, *Demeanor Credibility*, 49 *CATH. U. L. REV.* 903, 933–34 (2000) ("In what appears to be a knowledgeable analysis of the empirical research of the effect of demeanor on credibility, psychologist Jeremy A. Blumenthal finds that deception clues are present more often in the voice than in the face or rest of the body. Empirical data led Blumenthal to conclude that two of the leading visual clues associated with 'perceived deception'—a witness's averted eyes and a decrease in smiling—were not significantly present in 'actual deception.' (footnote omitted)).

20. GOLDSTEIN, *supra* note 12.

21. *Id.* § 559.

22. *Id.* § 560.

23. Sara Whitaker & Steven Lubet, *Clarence Darrow, Neuroscientist: What Trial Lawyers Can Learn from Decision Science*, 36 *AM. J. TRIAL ADVOC.* 61, 62 (2012). Sometimes great lawyers intuited what science now shows, as best articulated by Clarence Darrow: "If a man wants to do something, and he is intelligent, he can give a reason for it You've got to get him to want to do it That is how the mind acts." *Id.* (second omission in original) (quoting JOHN A. FARRELL, *CLARENCE DARROW: ATTORNEY FOR THE DAMNED* 287 (2011)). As Lubet and Whitaker elaborate,

That is how the mind acts. With those last two sentences, Clarence Darrow presaged the

the stage of incorporating science and research into advocacy theory,²⁴ sometimes confirming the adages taught for years and elsewhere acknowledging that we don’t know enough yet. Illustrative of the latter is Whitaker and Lubet’s assessment of whether Younger’s commandment to leave the concluding point for closing argument, and end cross-examination at the penultimate, is good science:

The real issue is whether lawyers should trust juries to figure things out on their own. Here, decision science provides no clear answer. The fact that people distrust advocates would seem to support the claim that jurors need to discover truths on their own, and their skepticism makes them capable of doing so. Yet, other areas of decision science suggest that the knockout punch might be exactly what Dr. Kahneman ordered. Negativity bias dictates that a well-emphasized negative fact is fast-tracked to the decision-making parts of our brain. This could be taken as an endorsement of the so-called knockout punch—a damning fact or testimony that can override everything else. We are thus left with two unsatisfying answers: Younger’s professed faith in jurors’ acuity and in the uncertainty of decision scientists. Thus, there is great potential for groundbreaking research in this area.²⁵

It is fair to say that current advocacy scholarship recognizes the value of solid research and interdisciplinary foundations.

MORE CONTEXT:

A CHANGED/CHANGING APPROACH TO LEGAL EDUCATION

That the practice of law is now more welcomed as a core component and focus of legal education cannot be denied, as witnessed by the ubiquity of trial advocacy courses in law school curricula²⁶ and the proliferation of in-house clinical education in law schools.²⁷ In part acknowledging and in part driving

field of decision science, sixty years before its development. For many decades, scientists, economists, and courts assumed that human beings were essentially rational, and that decisions were the product of linear and deductive thought. Clarence Darrow knew better, and science has finally backed him up.

Id.

24. See, e.g., STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE § 11.2 (4th ed. 2009) (“Most **jurors**, however, are **visual learners** who rely on their sense of sight to understand and process information.”); Ann T. Greeley, *Understanding Jury Psychology Through Research: A Powerful Technique for Your Trial Preparation Arsenal*, A.B.A. BRIEF, Spring 2010, at 48, 49–50; Caldwell et al., *supra* note 16, at 423; Philip Gaines, *Communicating with Juries: Episodic Representational Structure in Cross-Examination*, 67 TENN. L. REV. 599 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499–511 (1998).

25. Whitaker & Lubet, *supra* note 23, at 108–09.

26. Peter Toll Hoffman, *Law Schools and the Changing Face of Practice*, 56 N.Y.L. SCH. L. REV. 203, 211 (2012) (“[T]rial advocacy courses have now become ‘a permanent fixture in the law school curriculum.’” (quoting Ohlbaum, *Basic Instinct*, *supra* note 5, at 2–3)).

27. See, e.g., Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 78 (2009) (“[T]here may be as many as 1,200 distinct clinics in 170 of the nation’s roughly 200 law schools . . .”).

these changes are the series of reports over the last century, among the most significant of which are the “MacCrate Report” of 1992²⁸ and the 2007 “Carnegie Report.”²⁹ These reports called for law schools to “move from a focus primarily on legal doctrine and theory to include more of an emphasis on programs that prepare students for the profession. Law schools have been exhorted to teach more skills”³⁰

ON TO THE EDWARD OHLBAUM ANNUAL PAPER IN ADVOCACY SCHOLARSHIP

In this context of a move to research-informed advocacy literature and a greater advocacy presence in the law school curriculum, why an “Ohlbaum paper,” and why “advocacy scholarship”? The easy and first answer is to perpetuate and build upon Ed Ohlbaum’s work and vision; the second is because, as a law school that is committed to advocacy as a core component of legal education and that has blossomed and grown in significant part due to that commitment, it is the logical “next step.” For advocacy to be completely on a par with doctrinal offerings it needs a scholarship component. And for advocacy as an art, science, and discipline to advance it requires constant reexamination and correction.

The first Ohlbaum paper, “Bringing Demonstrative Evidence in from the Cold: The Academy’s Role in Developing Model Rules,”³¹ is a fitting one. Professor Maureen Howard and practitioner Jeffrey Barnum focus on a meeting place of doctrine and practice—the use of demonstrative evidence. They bemoan the academic/doctrinal failure to develop a uniform language and analytic approach for this type of proof, and then urge that two constituencies become one: “Evidence and trial advocacy teachers should exchange drafts and comments on proposed demonstrative evidence rules.”³² Doctrinal and practice education and research are joined.

Given the importance of demonstrative and all visual evidence to the adjudicative process and the art of persuasion, this is precisely the type of scholarship Ed Ohlbaum would have supported and welcomed. And thus does Temple Beasley School of Law, with this first Ohlbaum paper.

28. THE TASK FORCE ON LAW SCHOOLS & THE PROFESSION, A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report%29.authcheckdam.pdf.

29. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

30. COMM. ON THE PROF. EDUC. CONTINUUM, SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, A.B.A., TWENTY YEARS AFTER THE MACCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE CHALLENGES FACING THE ACADEMY, BAR, AND JUDICIARY 7 (2013), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june2013councilmeeting/2013_open_session_e_report_prof_educ_continuum_committee.authcheckdam.pdf.

31. Maureen A. Howard & Jeffrey C. Barnum, *Bringing Demonstrative Evidence in from the Cold: The Academy’s Role in Developing Modern Rules*, 88 TEMP. LAW REV. 513 (2016).

32. *Id.* at 546.