

# **THEATRICAL ADVOCACY:**

## **A report of Advocacy Training at UNE**

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In 1995 the Department of Law introduced a 'Witness Examination Workshop' as part of the unit 'Civil Procedure and Evidence'. The Workshop was a joint project between the Department of Law and the Department of Theatre Studies and involved students from the Department of Theatre Studies acting the role of witnesses, which students from the Department of Law had to examine and cross-examine. In 2000, the School of Law and the School of English, Communication and Theatre will again co-operate to offer a one-semester course 'Trial Advocacy', that has taken the idea for the workshop to a full semester unit.

This paper will outline the development of this joint endeavour in order to reflect on the lessons learned, the benefits for our students and what future steps can be taken to improve Advocacy Training at UNE.

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## ***Background***

The idea for bringing law and theatre students together came from my experience during the Readers course conducted by the NSW Bar Association in 1991. During that course, students were expected to examine and cross-examine witnesses who were played by students from 'NIDA'. The realism and quality of those students were impressive and added a degree of reality to the proceedings, such that I remember one 'witness' managed to have the court quite moved by her story of disability following a car accident.

In 1994, the Department of Law approached the Department of Theatre Studies in order to see if something similar could be developed at UNE. The concept was well received and led to the 'Witness Examination Workshop' which was an optional part of the unit 'Civil Procedure and Evidence'.

The Witness Examination Workshop was conducted over two days toward the end of semester. By the time the Workshop was conducted, the law students had completed the bulk of their formal study in the unit and therefore had been exposed to the relevant rules of evidence and legal rules relating to the examination and cross-examination of witnesses. The Workshop was not designed to introduce them to these rules but to give them an opportunity to apply what they had learned in theory in a situation that was to be as realistic as possible. Students were marked out of 20. In order to encourage students to do the optional workshop, their result for the workshop was used in calculating their final result for the unit if, and only if, it improved their overall grade.

It was perceived that using students from Theatre Studies would add to the realism of the situation. It was hoped that the students from Theatre Studies would respond to the court scenario 'in character' and would thereby expose the law students to a variety of behaviour that they may experience in court. Witnesses could be expected to be shy or argumentative, emotional or withdrawn, responsive or non-responsive, as they saw fit. The law students would need to be able to deal with those issues and still be able to conduct an effective examination.

Another 'realism' factor was to use members of the legal profession to act as judges. The Department was lucky to be able to obtain the services of David Rickard and Bill Walsh of the NSW Bar who agreed to travel to Armidale to sit as judges during the hearings. It was felt that this would be better than using the law school staff as, in a very small school as we then were, the students had close relationships with the staff and would not face the same stress as a new practitioner might when appearing before a judge. The use of 'strangers' to the students, who had extensive advocacy experience, made the experience more 'real' and helped to focus the students on the need to well prepare for the task at hand.

The 'scenario' in the early years was based on a fictitious 'case file' that students used during the course of their study to identify and work through various procedure and evidence issues. That meant that by the time the students came to conduct the case, they had drafted a statement of claim in the matter, identified various evidentiary issues as to relevance and

admissibility and so had 'worked up' the case in much the same way that a lawyer would in preparing a case for hearing.

### ***The Workshop***

The workshop was conducted over two days. The first day we called 'the Learning Day'. Law students were allocated into one of two groups with one of the visiting Barristers acting as a 'coach', rather than as a judge.

For this day students had been given new case files and had been asked to act as counsel. Students from Theatre Studies had been allocated the roles required for each scenario, so students could examine, or cross-examine, any of the characters in the scenarios. This allowed law students to practice their technique subject to guidance from the bench, with peer feedback and in an informal environment. Every student had an opportunity to conduct an examination and cross-examination and to watch their colleagues and receive tuition from 'the bench'.

On day two we returned to the 'case file' that students had worked up during the semester. This time students were allocated a time (that is there was a court list) when they would appear and conduct their matter. Students were required to attend court ½ an hour before their allocated hearing time in order to confer with their client.

Each matter was allocated only one hour, which allowed for a 15 minute examination and 15 minute cross examination of the plaintiff, and the same for the defendant. Students were advised that they should not expect to

complete their whole case in that time, but to merely commence and go as far as they could in the allocated time.

We ensured that the Barristers, now acting as 'judges' did not judge the students that they had coached the day before. The setting was as formal as we could make it, given that we did not, and do not, have a 'Moot Court' room. Marks were allocated out of 20 for their performance.

During the workshop, lecturers from the Department of Theatre Studies attended to mark their students on their performance. The marks allocated here counted towards the students' final result in their Theatre unit.

In 1996 the workshop was run on similar lines. A major change was that we did not use Theatre Students on the 'Learning Day' as we had not been able to use their time productively. Because the aim of that day was teaching, the examinations were broken by students wanting to ask questions of the Barrister judges, or by the judges intervening to make comments or suggestions. The Theatre Students had been unable to get 'into' character and so had benefited little from that day.

The other change was that we used the one scenario, being the case file that students had worked on throughout the semester over both days. Our reasoning here was that giving the students other matters to work on during the first day had confused them, and they had not had time to properly consider the case or how they would prove the issues raised. By using the same material on both days, students were able to practise on the 'learning day' (when there were no marks to be awarded) and then feel more confident

the next day when they had to appear before a different judge to be assessed. The same model was adopted in 1997.

### ***The 1998 Workshop***

The 1998 Workshop underwent a major reform in order to improve the outcomes of the workshop. Firstly the case scenario was changed from the one that had been the subject of study during the semester. This was necessary to reduce the complexity of the matter.

A case study that tried to raise a number of issues that are dealt with in an evidence course is necessarily complex. It had various evidentiary issues including issues regarding the tender of documents and real evidence.

Because of the time limits on the case, only one witness could be called by either side, which led to Jones v Dunkel issues being raised, and also limited the ability of the parties to cross-examine on issues that could not be established by independent evidence. Although the law students and judges were directed to assume that all witnesses listed in the case scenario would be available to give evidence, that did not stop students feeling constrained and having to answer questions on the availability of witnesses from the bench.

The fact that the case scenario raised many issues also broke up the flow of the witness examination as the law students wanted to spend most of their time arguing points of law regarding the relevance of questions and the admissibility of documents.

From the point of view of the students in Theatre Studies, the exercise was difficult as they did not get the opportunity to develop and explore their character as they were required to sit quietly and wait for the legal argument. Further, the fact that the scenario was scripted, in detail, gave them little room to move in exploring the character issues that they may have wanted to. It has to be remembered that for these students, their performance was an assessable task and they had difficulty being able to demonstrate to their lecturers their ability, and a limited capacity to create the characters that they wanted to.

In order to avoid these complications we developed a simple scenario, limited to a 'one on one' factual dispute. Some personal details were omitted from the 'statements' that were given to the students. This allowed the students from Theatre Studies to decide issues like the characters name, age and the relationships between them. This in turn gave rise to better workshop. The examination and cross-examination flowed and the Theatre Studies students were better able to perform and to be assessed. The law students were forced to focus on the factual issues in the case and in extracting the evidence from the client/witnesses without being distracted by issues of law and complex objections.

### ***Reflections on the Workshop***

The workshop had, in our minds, worked extremely well. Students who undertook the workshop reported great satisfaction with it. Apart from the learning benefits it had been great fun. Students, academic staff and visiting

practitioners had always enjoyed meeting after the event to 'debrief' and to comment on issues and characters that had arisen during the hearings.

All parties liked the judge to give judgement in the matter in order to see how they had performed both as characters and as lawyers. In one case I judged, I gave the decision great thought before coming to the conclusion that the witness could not be believed. The witness was delighted as her 'character' had been lying and that had come across, but in a subtle way. Theatre students have been co-operative but have also cried and shouted, been removed from the court and told their lawyers what they thought of them. Law students have had to deal with absent clients, lying clients, forgetful clients and still argue their case. All of this reflected possibilities that could happen in court.

The workshop still had its limitations. In particular students were still only able to devote a small amount of time to the workshop and we were unable to give any detailed instruction on advocacy skills and ethics. Students still wanted to rely on the paper brief that they had been given and try to get all the evidence in without thinking about the legal issues raised by the case, and without developing a 'theory of the case'. The workshop had been successful, but we felt it could be better for both law and theatre students.

### ***Trial Advocacy- 2000***

In the year 2000 we introduced the unit 'Trial Advocacy'. This is a one-semester unit that builds upon the lessons learned in the Witness Examination Workshop to expose law students to aspects of trial Advocacy.

In studying the unit, students attend a one-hour 'lecture' per week and a two-hour seminar. In the lecture students are given some theory as to trial techniques, which they practice in a subsequent seminar. These seminar sessions are based on one of 4 case scenarios that are handed out to students. In order to facilitate group learning, the students work in a group of 4, with 2 students acting for the plaintiff/prosecution and 2 for the defendant.

At the same time students have to prepare for their final hearing of the matter. This involves interviewing a Theatre Studies client, taking instructions, drafting an application or defence and then, finally, appearing to conduct a trial. The course timetable is shown below.

Week	Hearing Preparation	Lecture (1 hour/week)	Seminar (2 hours/week)	Reading
<b>1</b> 28 February		Introduction and allocation of roles		Text xi-xiv
<b>2</b> 6 March		Ethics of Advocacy		Hunter 174-187 NSW Bar Rules 1-72
<b>3</b> 13 March		Theory of the case		Text 7-10 Hunter 413-422
<b>4</b> 20 March		Presentation skills (Guest lecturer)		
<b>5</b> 27 March	Interview plaintiff and complete application	Court etiquette; appearances and opening address	Discuss theory of case and proof issues	Text 29-57 Hunter 422-428
<b>6</b> 3 April	Interview defendant and complete defence	Objections	Practice appearances and opening	Text 247-268
<b>8 April</b>	<b>to 30 April</b>	<b>Mid Semester</b>	<b>Break</b>	
<b>7</b> 1 May	If necessary, interview plaintiff for further instructions and lodge defence to cross claim	Examination-in-chief and re-examination.		Text 59-126 Hunter 365-375; 384-385.
<b>8</b> 8 May		Exhibits	Practice examination-in-chief with opposition	Text 129-162 Hunter 428-430
<b>9</b> 15 May		Cross examination (video)	<b>ALL MATTERS LISTED FOR MENTION</b>	Text 163-209 Hunter 375-384
<b>10</b> 22 May		Closing submissions	Practice cross examination and re-examination	Text 211-245 Hunter 422-428.
<b>11</b> 28 May			Practice closing address and submissions.	
<b>12</b> 5 June	<b>Hearings</b>		<b>Hearings</b>	
<b>13</b> 12 June				

### ***Lessons learned in 2000 for the future.***

At all times students are required to conduct themselves, in the hearings and in the seminars, in accordance with 'mock' court rules that are based on the *Local Court (Civil Claims) Act* and Rules. This unit is meant to be about advocacy, rather than procedure so the idea of having 'court rules' was originally dismissed by the teaching staff. We did not want students to become distracted by compliance with them and this unit was not meant to be a substitute for PLT. Interestingly the students asked for the rules to be provided as they felt that they wanted a point of reference. Accordingly the rules that had been drafted were circulated and from then on, all court appearances were conducted in accordance with the rules. This did not lead to substantive arguments about compliance but did appear to give the students a feeling of security in that they could refer to something for guidance as to what was to happen and what was expected.

In order to increase the reality of the situation, theatre studies students were not given a scenario. Rather they were briefed on the sorts of disputes that could give rise to one of the remedies in the 'Advocacy Court'. The Court was limited to granting an apprehended violence order, a declaration or damages. Students were also told that the dispute had to be limited to the two parties, that is there were no independent witnesses. Within those parameters the students from Theatre Studies were asked, under instruction from their lecturer, to create a scenario of conflict that would ultimately be heard in the court.

This approach, it was hoped would achieve a number of objectives:

1. It would require the law students to seek instructions and to discover for themselves what the case was about, and consider what remedy should be sought.
2. It would reinforce the need to ask pertinent questions in order to extract the information, a matter that was overlooked when students were given the case details.
3. It would allow the Theatre Studies students freedom to develop their characterisation unconstrained by a script.

The approach has had some difficulties. In particular the students from Theatre Studies have not developed the scenario to sufficient detail for the lawyers. They have a general picture but have not considered issues such as what was said or seen. The scenarios have tended to focus on moral justification rather than legal or factual disputes. Often the defendants agree with the plaintiff's version of events but want to point to some factors to justify their actions but do not give rise to a legal defence or, more importantly, an issue of fact to be resolved by way of a court hearing.

In order to avoid this in later years we will need to consider how to develop the scenarios with more detail. One proposal is to issue the theatre studies students with a 'pro forma' for them to work through, a draft is shown at the end of the paper. Combined with that it may be necessary for my colleague from Theatre Studies and I to sit down with them, before they give instructions

to their lawyer, and go through the story to give them guidance on issues of characterisation and the issues raised in their scenario. This would allow us to ensure that the story was one that could be litigated and involved adequate factual disputes.

From the point of view of the law students, it became apparent that they had been used to looking at legal issues, so often failed to see factual disputes. They have come to say that there is nothing to argue on the basis that, given their instructions, the legal result is clear. They have to be told that the law may be clear if the facts are as they have been told, but the issue will be one of fact rather than law.

It has been clear that we have not given sufficient guidance on pleadings. Issues of pleadings are covered in the unit Civil Procedure and Evidence but without formal instruction on pleadings in this unit, students have had difficulty preparing pleadings. The tendency has been to plead everything in their instructions without considering what is or is not a material fact, and what they have to prove to establish their case. That aspect will need greater attention in later years.

### ***Conclusion***

Advocacy training continues to develop at UNE in a unique collaboration between Theatre Studies and Law. As expected our first attempt at a one semester unit has had 'teething troubles' and we look forward to rectifying them next year, to give students a valuable learning experience in preparing a case for hearing.



### **Suggested Pro Forma for Clients:**

What is your name:

What is your address:

How old are you:

What is your occupation:

What is the name of the other side:

What is your relationship (if any) with the person on the other side:

What happened?

When did it happen?

Where were you?

Where were they?

What did you see?

What did you say?

What did they say?

What has been the effect of this incident on you?

Has it cost you money, and if so how much and why?

Where does the other side disagree with your version of events?

What do they say happened?