

Advanced Trial Advocacy: Integrating Mindfulness Theory & Practice
Associate Dean David Zlotnick
Spring 2009

Syllabus

Introduction to the Course

In this course, we will first focus on developing students basic trial skills in direct and cross examination techniques and organization and delivery of openings and closings. We will then move to several topics not necessarily covered in basic trial advocacy such as voir dire, experts witnesses, and advanced cross examination techniques, objections, and motions *in limine*. Most classes will involve student simulations in a courtroom environment.

Unlike other trial advocacy classes, this course will also attempt to integrate the emerging field of “mindfulness” into the course. Drawing from mindfulness practices found in Buddhism and other religious and secular traditions, we will study and practice techniques for remaining “in the moment” in stressful circumstances, learning new approaches to understanding conflict and dealing with strong emotions, and extending compassion and understanding to witnesses and clients. The goal of these practices and the course is to develop trial lawyers who are both good at what they do and good to themselves so that they can have longer and more satisfying careers in the courtroom.

Students need no prior experience with mindfulness practices but must be willing to participate in exercises led by outside mindfulness teachers, the professor, and by fellow students. We will also use additional materials such as literature to promote the goals of the class and to create a reflective yet fun atmosphere. Students must come to the course with a willingness to experiment. The development of this class has been funded by a grant from the Center for Contemplative Mind in Society (CCMS) and my goal is to work collaboratively with my non-lawyer experts and the students in the class to create a model for integrating mindfulness practices into law school skills courses. To learn more about the CCMS, visit the website for the organization at <http://www.contemplativemind.org/about/>. Basic trial advocacy is a prerequisite but may be waived with the permission of the instructor.

Class Organization & Assignment

The trial advocacy portion of the class is patterned on the National Institute of Trial Lawyers (“NITA”) method of trial advocacy training. The NITA method emphasizes that students can only absorb a critique that encompasses one or two of their errors at a time. Any more results in overload and discouragement. Thus, to get the most out of this course, students must pay attention to every student performance, not just their own. The critiques of other students will raise errors you have or might make but which will not be pointed out to you. Students will also be called upon to critique other student performances as the semester proceeds. NITA also stresses a building block approach where students learn one skill at a time, starting with the most basic techniques. For most classes during the semester, the majority of students will be seated in the jury box or at counsel table. Student are expected to stay “in role” as attorneys, witnesses, jurors, or spectators throughout the exercises and wait until the critique session to ask questions.

Grading

During the last two weeks of the course, each student will participate as co-counsel in a full-length simulated civil or criminal trial. The presiding judge will be either a sitting Rhode Island state or federal judge. At times, students will be required to turn in the materials prepared for the in-class assignments, to rewrite an assignment based on the critique in class, or to meet with me during office hours to go over an assignment. These written materials will be included in your grade.

In class student performances and class participation will count for 40% and the final trials will count for 60%. Students who have taken basic trial advocacy will be evaluated on a different scale than those new to the course. In addition, students will be evaluated on their ability to work collaboratively with those of differing skill levels. On the mindfulness component, students will be evaluated only on their willingness to try new things and class participation and discussion. No one will be graded on how “good” they are at mindfulness practices or for adopting any set of beliefs.

Dress & Attendance Policy

Dress requirements exist in all federal and state courts. In order to effect some realism in our trial practice course, students are required to dress in appropriate courtroom attire, which includes coats and ties for men and professional clothing for women for every class in which they are assigned an attorney role, including the first class. You are expected to attend every session of the class. If you are ill or have a family emergency, because class roles are preassigned, you must notify me by telephone in advance if you are unable to attend so that adjustments to the schedule can be made.

Assigned Texts

*Lubet, *Modern Trial Advocacy*, 3rd ed. (or similar text).
Snow *Falling on Cedars*, David Guterson (any edition).

Mock Trial Requirements

Each student will be required to serve as co-counsel in one trial and will be required to attend another in a support role. Counsel will provide their own witnesses for their trials. The trials will be held on the weekends and evenings during the last two weeks of the semester. The schedule and trial assignments will be determined with student input but I will determine your trial partner. Each student must also bring one person to serve as a juror for a trial other than their own. Individuals from outside the school (relatives, friends, etc.) tend to make more realistic jurors and are preferable. If you anticipate asking a law student to serve as your juror, obtain a commitment at the beginning of the semester because the mock trials come very close to exams. No student in this section may serve as a juror in this class. Unless excused in advance, students who do not bring a juror will be penalized on their final

Assignment Table

1	<p>Opening Statements: Finding the Story in Your Case Mindfulness Practice: Finding your Feet, Your Breathe & Your Posture. Guest: Michelle Silberman Hubbard, M.F.A & certified yoga teacher. - Yoga & acting techniques to enhance public speaking. Student Exercises: Opening Statements from <i>The Cat in the Hat</i>, <i>The Three Little Pigs</i>, <i>Horton Hatches an Egg</i>, with suggestions from Ms. Hubbard.</p>	Assignment 1 & Handouts; Lubet, Ch. 1-2, skim Ch. 10.
2	<p>Intro to Direct Examination: Theory of the Case & Question Technique. Mindfulness Practice: Introduction to Vipassana Meditation. Student Exercises: Group exercises and individual direct exams.</p>	Assignment 2; Lubet, Ch. 4; Mindfulness Reading: Tara Brach, <i>Radical Acceptance</i> (excerpts).
3	<p>Intro to Cross Examination: Theory of the Case & Question Technique. Guest: Rebecca Foster, M.A. and certified yoga teacher. Mindfulness Practice: Balancing Effort & Ease: Using Yoga Poses to Understand the Challenge of Cross Examination. Student Exercises: Group exercises and individual direct exams.</p>	Assignment 3; Lubet, Ch. 5; Richard O'Connor, <i>Happy at Last</i> (excerpt).
4	<p>Direct, Cross, & Redirect Examination: Collaborative Learning. Mindfulness Practices: Meditating on Gratitude. Student Exercises: Partnered direct & cross exams.</p>	Assignment 4; Lubet, Ch. 7; "Gratitude" (handout); reaction papers.
5	<p>Direct & Cross Examination: Listening and Follow Up Student Exercises -Blindfolded Directs -Tennis Ball Cross Drill Mindfulness Practices: Being in the Moment - guided "in the moment" meditation from podcast - sensory focusing with candles</p>	Assignment 5 (redo of assignment 4 role plays); Steven Hagan, <i>Buddhism Plain and Simple</i> (excerpt); "In the Moment" meditations (two handouts).
6	<p>Direct & Cross Practice: Refreshing Recollection & Impeachment. Mindfulness Practice: Equanimity practice (mindfulness "time out" during during student exercises). Student Exercises: Individual direct exams (with special witness instructions to forget or make mistakes).</p>	Assignment 6; Lubet, pp. 79-80, 156-57, 149-196; "Equanimity" reading (three handouts).

7	<p>Direct & Cross: Dealing with Objections I Guest: John Grasso, Esq. Student Exercises: Individual crosses with direct and objections by guest attorney. Mindfulness Practice: Dealing with Anger when it Arises (mindfulness “time out” during student exercises).</p>	Assignment 7; “Anger” meditations (handout).
8	<p>Direct & Cross: Exhibits & Diagram Foundations Mindfulness Technique: Dealing with Tedium (drawing exercise). Student Exercises: Individual directs & crosses with exhibits and diagrams.</p>	Assignment 8; Lubet, Ch.10, “Tedium” handout.
9	<p>Direct & Cross Examination: Impeachment with Prior Convictions & Character Evidence Mindfulness Practice: student led practice “the Rules for Being Human.” Student Exercises: directs & crosses with impeachment evidence.</p>	Assignment 9; Impeachment Handout; (handout in class).
10	<p>Expert Witnesses: Foundations & Teaching the Jury Your Theory of the Case Guest: Kerry Egan, M.Div. Mindfulness Practice: “Examination of Consciousness.” Student Exercises: directs & crosses with experts.</p>	Assignment 10; Lubet, Ch. 8; “Examination of Consciousness” handout.
11	<p>Direct & Cross Examination: Objections II Mindfulness Practice: Working with Mantra Meditation. Student Exercises: Objection Vignettes.</p>	Assignment 11; Lubet, Ch. 9; Meditation “mantras” (handout).
12	<p>Direct & Cross Examination: Putting It All Together. Mindfulness Practice: Embarrassment. Student Exercises: direct & cross examinations (with special instructions to witnesses to forget and make mistakes).</p>	Assignment 12; “Embarrassment” (handout).
13	<p>Mini-Trial: Two Hour Trial Exercise Mindfulness Exercise: Conscious Eating. Student Exercise: mini-trial in teams.</p>	Assignment 13, “Conscious Eating” handout.
14	<p>Connecting with Clients & Witnesses: Using Law & Literature. Guest: Nancy Geary, J.D. Class Discussion of <i>Snow Falling on Cedars</i>.</p>	Assignment 14; David Gutterson, <i>Snow Falling on Cedars</i> ; Abbe Smith, <i>Defending Defending</i> (excerpt).
15	<p>Exploratory & Confrontational Cross Examination. Mindfulness Practice: Meditation on “Fear of the Unknown.”</p>	Assignment 15; “Fear of the Unknown” (handout).

	Student Exercises: direct & crosses with surprise witnesses.	
16	Jury Selection I: Ingratiation Mindfulness Practice: Reflecting on Decision Making. Student Exercises: mock jury selection using trial packets.	Assignment 16; Lubet, Ch. 14, Jury Selection material (handout), Decision Making meditation (handout).
17	Jury Selection II: Elimination & Indoctrination. Student Exercises: mock jury selection using trial packets. Mindfulness Practice: student led practice TBA	(handout in class)
18	Opening Statement: Reprise Guest: Amy Edwards, J.D., L.I.C.S.W. Mindfulness Practice: - opening meditation led by Ms. Edwards - hypnosis for public speaking Student Exercises: Opening Statements for the opposite side	Assignment 18; Lubet, Ch. 12.
19	Deepening Our Understanding of Mindfulness Theory & Practice Guest: Lakshyan Schanzer, Psy.D. Mindfulness Practice: - “wakeful” and “mindful” states of consciousness - “anchoring” techniques - partner mindfulness exercises	Body/Mind Center materials (handout).
20	Connecting with Witnesses & Jurors Guest: Lakshyan Schanzer Mindfulness Practice: - “entrainment” training - “mirroring”	Body/Mind Center materials (handout).
21	Closing Argument: Melding Logic & Persuasion Mindfulness Practice: Meditation on Accepting Change Student Exercises: Closing Argument from trial packets	Assignment 21; Lubet, Ch. 13; Meditation on “Change” (handout).
22	The Limits of Mindfulness & Trial Advocacy Mindfulness Exercise: Reflecting on Limitations Guests: John Grasso, Esq. & Michelle Alves, Esq. Demonstration: Direct & Cross of Rape Victim with Consent Defense	Lubet, Ch. 1, Ch. 3, Prince Arjuna’s Dilemma (handout).

Closing Arguments

This assignment is to prepare a closing argument for your assigned trial for your side of the case. Student not doing the closing at trial are responsible for performing a closing for your own side of the case. Assume that all relevant and admissible evidence was presented. Closing arguments are to be approximately 10 minutes in length.

Organization is critical. Start by reiterating or spinning out a variety of your theme. Then, have a clear road map that identifies the issue or issues (no more than three) the jury must accept to prove your affirmative theory of the case. Carefully following your road map, explain how the evidence supports each critical issue. You can break each critical issue into different parts. For example, if identification is the key issue, the prosecutor could first focus on the evidence that shows opportunity to observe and then perhaps separately argue why the innocent victim is credible. While the closing can have story-like parts, unlike an opening, it should be broken up in a logical, issue-oriented way. The jury is tired and wants to know the end is near so giving them and then following a road map provides a reason to pay attention.

Plaintiff/prosecutors must cover more ground because they must show that the evidence satisfies all the elements of the claim/offense. However, spend the majority of your time on the contested issues and don't waste time or primacy on easily proved elements. Defendants usually focus on fewer issues because they only need to disprove one element to win. For either side, however, start with your affirmative case that deals with your theory. Only after talking about the strengths of your case-in-chief, should you selectively attack the other side's case. This "negative case" should not be exhaustive. Hit them where they are weak.

In most jurisdictions including federal courts, lawyers often make extensive use of the jury instructions in argument, to frame the affirmative issues, explain how to deal with certain pieces of evidence (such as prior convictions), and to frame conclusions at the end on why their side should prevail. Rhode Island state judges, however, are extremely restrictive on attorneys discussing the law. Therefore, for your final trials, your discussion of the law itself should be limited and come near the end of your closing. You can easily get around this restriction by simply framing your issues closely to the eventual jury instructions. Conclude by asking the jury to return a verdict in your favor. Sometimes explaining the verdict form is helpful, particularly in cases where there are multiple interrogatories or multiple counts.

Some do's & don'ts. Don't violate the "Golden Rule" by asking the jury to put themselves in the shoes of any party or witness. Don't give your personal opinion about anything, especially on the credibility of any witness or the ultimate merits of the case. In a pinch, use "I/we submit" language instead but try harder to argue from the facts and evidence ("You should not believe Witness Y because she has a vested interest in the outcome of the case as demonstrated by her testimony that . . ."). Don't make bald conclusions about the evidence. Each sub-conclusion should be tied to the relevant facts. Nor should closing argument simply review the testimony and other evidence. Think about closing as a series of mini-conclusions bundled with the facts that support those mini-conclusions, all leading up to the ultimate conclusion that your side wins. Focus your critical arguments on your best facts -- those that are undisputed, rely on physical evidence, and common sense wherever possible. And speaking of evidence, you must use some piece of evidence at least once during your argument. Show it to the jury and argue why it is important. Keep your theory in mind when deciding what facts and evidence to include. Don't be afraid of controversy. If the jury must believe a particular witness for you to prevail, argue why they should believe that witness. In other words, get to the heart of the matter by being realistic about the facts and issues but remain an aggressive advocate of your version of the story. Using rhetorical questions can be an effective

technique so long as you answer them.

In federal court, plaintiff/prosecutions go first, then the defendant, then the plaintiff/prosecutor can speak again if they reserved time for rebuttal before they began (about 2-3 minutes). In Rhode Island state court, the party with the burden of proof (plaintiffs/prosecutors) goes last in closing arguments and there is no rebuttal. In class we will follow the federal rule, in your trials the Rhode Island rule.

You may not read the closing argument. While you can have available a "key word" outline or a check list of points to be covered, you must not rely on your notes except to refresh your memory. Remember that eye contact is essential to an effective closing argument. Use of notes detracts from your presentation. Think about where in the courtroom you want to be during different parts of your argument. Remember "home base" is your strongest spot. Also consider using hand gesture and voice to emphasis important points.

Mindfulness Practice

Much of trial preparation is prepared backwards, with an eye toward closing argument. Your direct and crosses, physical evidence, and demonstrative exhibits are all keyed to your theory of the case which is summarized and explained in closing. As a result, lawyers can get very attached to their prepared closing argument and fail to adjust to both negative and positive developments during trial. Very little can lose the jury faster or anger the judge than a closing argument that fails to match the testimony and evidence that was actually admitted. Thus, a great closer is a lawyer who can adapt their presentation while retaining the structure and integrity of the planned presentation.

As we near the end of the semester, this is also a good time to start thinking about the changes that have occurred for you in this class, both in terms of mindfulness and in learning to be a trial lawyer. But there is also a distinct mindfulness perspective on change; a recognition that despite its constant presence in our lives, we often resist it or ask it come more quickly. Today's mindfulness practice asks you to reflect on changes, both slow and fast and also to empower you to think about how much change you are ready to embrace at any given time. For your closings at trial, try to open to the uniqueness and dynamism of every trial and see if you can incorporate what really happened in the trial into your prepared remarks. More broadly, for today, each of you has been on your own journey in this class and have to think about how much or how little of what has been presented you are ready and willing to incorporate into your life and to do this without harshness or judgment about yourself.



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Books



Raising an Optimistic Child: A Proven Plan for Depression-Proofing Young Children for Life (McGraw-Hill, 2006) by Bob Murray and Alicia Fortinberry.

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Creating Optimism: A Proven Seven-Step Program for Overcoming Depression (McGraw-Hill, 2004) by Bob Murray and Alicia Fortinberry.

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Meditation: Change

By Bob Murray, PhD

I remember riding on a train in England, travelling between London and Bristol, where I was then living, looking at the countryside as it sped by. I was quite young then and climbing up the ladder of what I thought would be my career as a TV producer with the BBC. How wrong we can be!

Looking back on that journey--the memory is probably an amalgam of many that I took at that time--I question the wisdom of speed. I could look and admire the beauty that I passed, but not feel connected to it. To feel connected I had to walk through the fields and feel the undulating earth beneath my feet.

We're told that we have to get from place to place--to go to meetings, to achieve goals, to meet targets, to advance our careers. To change, always change.

But here in the fields, or in the woods or by a river there are different, older, saner voices.

Imagine lying on the grass on a fine warm day. Feel the ground support you. There's something unchanging about the ground. Something solid, something permanent.

Give me your mind for a moment.

If you're depressed or anxious you probably feel the lack of something solid, a grounding. Your life is a leaf that the winds of rapid change, or the cold of isolation, has torn off from the branch that held you. You feel yourself falling, moving towards oblivion. There is no stasis to cling onto. Just voices that say you must move on, hurry, be different, change. They tell you to be that which you cannot be, to do that which you cannot do, to achieve. For what? Ah! For what?

But rest, now. Rest on this solid ground. Listen to the leaves sing you a lullaby, it is, perhaps, the song of All There Is. The singing is of peace, of hope, of the possibility of renewal.

You can look up and watch small clouds drift across the blue infinity that you call the sky, making ever-changing shapes. A cloud can be a face, and then a castle, and then candy floss and still be indisputably a cloud. And then nothing. For now your mind and the vapors that make the cloud play games together. Exchanging shapes and fantasies. You talk to each other silently, you revere each other intensely, you give to each other willingly.

This is change you can accept. You can accept even the ending when the cloud dissipates into nothing. Everything changes. But in the existence of All There Is everything changes at its own preordained pace. A cloud rapidly, the earth you rest upon slowly, a galaxy more slowly still and our universe takes an infinite time to go through its cycle from creation to extinction.

A rock, a planet, a human can accept change without stress if that change is geared to its own cycles.

Give me your breath for a moment.

Breathe slowly, gently and without force. You can feel inner change and yet sense a control over your being that is missing in your stress, your anxiety, your depression. Your breathing is unique to you--no two people breathe at the same pace or in the same way, no two lungs are the same size. But so is the rate at which you can tolerate change unique to you.

With your breathing take in the power to be human and let go of the forces that try to make you something else. These are the forces that control you through their power to make you hurried, stressed. That force change upon you. That refuse to allow you to find your own ground.

We underestimate our power. The voices of rapid change depend on your compliance, your "yes" to each of their frantic demands. Breathe in deeply. Say "No!" as you exhale. "No" is your power.

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Relax and connect to your inner power and spirituality with these meditations and movement exercises, both powerful antidepressants.

Empower Your Body

By Alicia Fortinberry, MS



The best way to relieve stress and reprogram the mind and body for optimal health, flexibility and vitality.

Transform Your Life and Your Relationships

By Bob Murray, PhD



A simple plan to harness the innate healing power of relationships.

If you can control your own body, your own breath, you can begin to control your world. Of course unexpected things will happen that cause change--earthquakes, accidents, economic recessions, climatic change. These you can surmount, take in your stride, if you are in control of you.

Give me your future for a moment.

As you lie there try and picture, no, try and feel, the slow movement of the earth beneath you. The massive tectonic plates of the earth's crust forcing slow, profound change. Where you lie will one day be a mountain, or a sea.

Picture, no, feel, the slow growth of an oak. Feel it flex its roots. Feel the movement of sap within its timber veins.

Now picture, no, feel, you. You as you were meant to be. You who have your own pace of change. Your own right to live in your own time. Your right to "No!"

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About the Author

Dr. Bob Murray is a widely published psychologist and expert on depression, post-traumatic stress and relationships. Together with his wife and long-term collaborator Alicia Fortinberry, he is founder of the highly successful Uplift Program, and author of the new book *Creating Optimism: A Proven, 7-Step Program for Overcoming Depression* (McGraw-Hill, 2004). They offer seminars, courses and audio-programs teaching people how to beat depression and improve self-esteem by creating healing relationships.

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Excerpts from Students' Reflective Journals

I really benefitted from the mentoring exercise. I was apprehensive about working with X because he has a year on me in law school, has taken Trial Ad before, and has more aggressive style than me. However, knowing that I needed to write this account of my internal experience made me more aware of what I was feeling during the process contemplate why I felt that way. When we actually got together to review the fact pattern and go over strategy and cross, X was so optimistic and positive I immediately felt silly for being so concerned. We met right before I did my first direct and he was very encouraging beforehand and made a point to tell me what a good job I did afterwards.

I also found the tennis ball cross-examination exercise to be very helpful in part because of the active listening improvements like those elicited from the blindfolded directs. Only being able to talk with the tennis ball in my hand really made me understand how often I had been interrupting people without even realizing it. I also realized through this exercise that when you allow the witness to fully answer your question, they sometimes produce information that actually helps the cross-examiner's case. Further, jurors most likely respond more favorably to attorneys that do not seem to badger the witness by constantly interrupting them and not affording them their full opportunity to speak.

Yoga teacher – eagle pose and cross-examinations

I thought the reading for this day's lesson, the theme, yoga poses and then the cross-examinations were well tied together and this seemed like one of the most cohesive lesson plans. I also enjoyed reading "happy at last" and have found the exercise detailed in the reading to be an "eye-opener." I think tying the reading's suggestion of setting realistic and reasonable expectations for ourselves to what expectations we have for cross-examinations – gave a good backdrop to the course. I like tying the yoga poses from the beginning of class to the theme of cross-examinations – the theme that both were going to be difficult, but not impossible. And the lesson that we were not always going to do something well, but practice makes it better.

Having to analyze a raisin did make me realize that while I like to eat, it is more of a consumption relationship with food, and I need to stop and enjoy or at least take note of what I am eating. Having us eat while developing our trial strategy was an excellent way to drive the point home. It easy to say that you will take note of your meals but as the exercise showed, it is hard to put into practice.

Pre-trial meditation; I wasn't opposed to the idea, but I also didn't expect that I would enjoy it as much as I did. I haven't been very successful at meditating on my own but I like meditating as a group more because I like the energy that it creates between the people in the