CAN I BRING MYSELF TO COURT?: TEACHING PRESENTATION STYLE IN THE TRIAL ADVOCACY CLASSROOM

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*Assistant Professor of Law, Western New England University. Thank you to the many talented colleagues I have been fortunate to work with over the course of my career. Your examples have shown me that there are many ways to achieve excellence in our profession. In particular, thank you, Hon. Donald L. Cabell, Hon. Rita Miller, Jon Loeb, Gwyn Quillen, Stacy W. Harrison, Kristen Hilton, and Jessica Boar, for your mentorship early in my career. Thank you to all my colleagues at WNE for your support of this work and to Zelda Harris, Beth Cohen, Pat Newcombe, Tim Webster, and Nicole Belbin for your feedback and advice. Thank you to Julia Czermerys for your research assistance. Finally, thank you to my family for their steadfast support.

INTRODUCTION

It is the end of the spring semester and, like many legal research and writing professors around the country, I am playing the role of "judge" while my students argue a summary judgment motion. The first student argues for the plaintiff. Her delivery is loud and firm. When she talks about the injustice of the punishment faced by her client, an (imaginary) high school student who has been suspended, she is emphatic, even angry. When plaintiff's counsel concludes her argument, defense counsel takes the podium. Defense counsel speaks quietly, and her delivery is measured. But her argument for the (imaginary) school district makes better use of the relevant law and the case record than her counterpart, and her answers to my questions are thorough.

Which of these students is the more effective advocate? Plaintiff's counsel's delivery certainly matches the style taught in many law school classrooms across the country. Defense counsel, on the other hand, employed a speaking style that was more passive than what is commonly taught in law school. Does her calm command of the law and facts of her case have the makings of an effective advocacy style?

Many of us will have a gut reaction to these questions. If our gut reactions were to differ, however, there is little qualitative or quantitative evidence on which we can rely to settle the ensuing debate. There has been little research on which advocacy styles have proven effective in real courtrooms.[1] We, therefore, must rely upon our own subjective understandings of what an effective advocacy style looks like, and our understandings may differ because they were shaped by our subjective experiences in law school and the legal profession.

Professors who teach trial-level advocacy must design their courses in this same information desert. In the absence of data on the effectiveness of various advocacy styles, trial advocacy courses often rely on traditional expectations for oral advocacy as a model for what a "good" advocacy style looks like.[2] Those traditional expectations teach that the ideal speaking style is forceful, even aggressive. That is because the oral advocacy traditions we follow in the United States trace back to Western antiquity, a place and time when the ideal speaker was a military leader—always male and usually white.[3] Thus, in courses that teach an advocacy style based upon traditional expectations, the unspoken message is that a

1. *See infra* Part III.
2. *See infra* Part III.
3. *See infra* Part III.

communication style coded white and male is superior to other communication styles. Students who cannot conform to this style receive an implicit message that they do not belong in the trial advocacy classroom or the courtroom.

Professors are cognizant of these concerns, but the lack of meaningful data on advocacy styles limits their options. Professors can teach students how to fit themselves into the box of traditional expectations, a fraught proposition in a society that judges women and people of color for being "too" aggressive and "too" emotional.[4] Or, as I do, they can rely on war stories to teach students that there is more than one way to succeed in court. But anecdotes are not pedagogy, and my own experience as a litigator has taught me anecdotes are not enough to convince those who believe in the superiority of a traditional advocacy style that there is value to teaching or employing other advocacy styles.[5]

This Article argues that now is the time to study what real litigators are doing in court to obtain a more definitive answer to whether there are multiple effective trial advocacy styles. Using data from practicing attorneys to inform how professional identity formation is taught in the trial advocacy classroom is a natural next step in the evolution of trial advocacy programs. These programs arose to address concerns about the lack of practical training in law schools and have evolved in tandem with the movement toward teaching professional identity formation.[6] Such a study has the potential to provide an empirical basis for the work of skills faculty who are already challenging our understanding of what a good trial lawyer looks like. That is crucial because a trial advocacy classroom that embraces multiple advocacy styles has the potential to be more welcoming to a diverse student body and provide students with the opportunities for autonomy essential to student well-being.[7]

Part I of this Article gives context to the current movement towards teaching professional identity formation, and the potential role of trial advocacy courses in that movement, by exploring the well-being crisis in the legal profession and some of its potential causes. Part II traces the

4. *See infra* Part III.A.

5. Indeed, one of the inspirations for this Article was a conversation about deposition styles that I had with another attorney. The attorney felt that my "calm and competent" deposition style—developed over a 12-year career representing clients in high-stakes litigation—marked me as a second-rate litigator. That I had learned the style by emulating former colleagues, who were nationally recognized for their skill, did nothing to alter the attorney's view that a "good" litigator must be aggressive. As this story illustrates, war stories are not enough to change the ingrained beliefs of at least some practitioners.

6. *See infra* Part II.

7. *See infra* Part IV.

development of trial advocacy programs in United States law schools and explains the connection between teaching trial advocacy and teaching professional identity formation. Part III highlights a deficiency in the current approach to teaching trial advocacy. Specifically, many trial advocacy courses only teach an "aggressive" advocacy style. This Part discusses why this style is uncomfortable for many students and particularly damaging to women and people of color. Finally, Part IV argues that there is little empirical support for teaching students they must embrace an aggressive advocacy style. This Part proposes addressing this lack of data through qualitative and quantitative research on which litigation styles practicing lawyers have effectively used. Further study has the potential to provide empirical support for the clinical and writing faculty who are working to develop more inclusive experiential learning programs, more closely align teaching pedagogy with legal practice, and provide opportunities for more students to find a litigation style that feels comfortable and authentic.

I. MENTAL HEALTH AND WORK SATISFACTION CONCERNS HAVE REACHED CRISIS LEVELS IN THE LEGAL PROFESSION

Adapting the law school curriculum to better serve an increasingly diverse student body is an essential component of the ongoing effort to address concerns about attorney well-being. For more than a quarter century, commentators have expressed concern about the well-being of members of the legal profession.[8] Although there has been some debate about the scope of the well-being crisis—and whether it is truly unique to the legal profession[9]—there is a consensus that attorneys and law students

8. *See, e.g.*, G. Andrew Benjamin et al., *The Prevalence of Depression, Alcohol Abuse & Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233, 244 (1990) [hereinafter Benjamin et al., *Prevalence of Depression*]; Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265, 265–66 (1997) [hereinafter Allan, *Drug Abuse and Lawyers*]; G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 L. & PSYCH. REV. 113, 113–15, 117 (1992) [hereinafter, Benjamin et al., *Lawyer Assistance*].

9. "[S]ome scholars have questioned the empirical basis for the claims that lawyers are, as a group, more professionally unsatisfied and personally unwell than other members of the population" and have noted flaws in the methodology of studies used to support the idea that the profession is in crisis. Harmony Decosimo, *A Taxonomy of Professional Identity Formation*, 67 ST. LOUIS U.L.J. 1, 26 (2022) (first citing Yair Listokin & Raymond Noonan, *Measuring Lawyer Well-Being Systematically: Evidence from the National Health Interview Survey*, 18 J. EMPIRICAL LEGAL STUD. 4, 32 (2021); and then citing Kathleen E. Hull, *Cross-Examining the Myth of Lawyers' Misery*, 52 VAND. L. REV. 971, 983 (1999)). However, as other commentators have noted, even if attorneys are not more unwell than members of other professions, there are good reasons to take steps to address whatever unwellness does exist. Matthew M. Dammeyer & Narina Nunez, *Anxiety and Depression Among Law Students: Current*

are not a happy bunch. Concerns include mental health issues such as depression, anxiety, and substance abuse; and general dissatisfaction with the profession that contributes to a high attrition rate, particularly among women and people of color.[10]

The cause of these concerns has not been precisely identified. But existing research suggests that there are a number of contributing factors.[11] The ABA's recent embrace of the teaching of professional identity formation reflects an understanding that law schools have a role to play in addressing at least some of the factors that contribute to attorney unhappiness. This Article argues that changing the way that trial advocacy is taught has the potential to address some of the underlying causes of the attorney well-being crisis—at least in the litigation sphere. To understand why, it helps to have some understanding of the well-being issues facing attorneys and some of the factors that are believed to negatively impact attorney well-being.

A. Effects of the Attorney Well-Being Crisis

Understanding the effects of the attorney well-being crisis requires examining the underlying mental health challenges lawyers face. These challenges both impact individual attorneys and reverberate through the whole legal profession.

1. Mental Health Concerns

Both quantitative and qualitative evidence support the conclusion that lawyers have alarming rates of substance abuse disorders, depression, and anxiety.[12] Studies conducted in the early 1990s concluded that lawyers are more likely than the general population to both consume and abuse alcohol.[13] At that time, researchers found that a majority of attorneys used alcohol to reduce stress "regularly or sometimes" and that 18% of lawyers were alcoholics.[14] The alcoholism rate in the general population at that time was 10%.[15]

Knowledge and Future Directions, 23 LAW & HUM. BEHAV. 55, 56 (1999). The sheer size of the attorney population in the United States means that an issue that impacts even a small percentage of attorneys impacts a large number of individual human beings. *Id.*

10. *See infra* Parts I.A, I.B.
11. *See infra* Part I.A.
12. *See infra* Part I.A.1.
13. Allan, *Drug Abuse and Lawyers*, *supra* note 8.
14. *Id.*
15. *Id.* at 265 (citing Benjamin et al., *Lawyer Assistance*, *supra* note 8, at 115).

More recent data suggests that this problem persists. In 2016, the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation published a study of approximately 13,000 practicing lawyers.[16] The study found that between 21 and 36% of attorneys engage in "problematic" drinking.[17] The study's authors therefore concluded that "[a]ttorneys experience problematic drinking . . . consistent with alcohol use disorders at a higher rate than other professional populations."[18]

The same ABA/Hazeldon Betty Ford Foundation study found a 28% depression rate and a 19% anxiety rate among attorneys.[19] These rates are higher than the general population.[20] Similarly, attorneys have higher suicide rates than the general population. Indeed, suicide is the third leading cause of death for attorneys.[21] These results are consistent with prior studies, which have found that attorneys are more likely than non-attorneys to suffer from depression and anxiety.[22] The pandemic likely aggravated these concerns. A 2021 survey by *The American Lawyer* magazine showed a 7% increase in anxiety and a 6% increase in depression among attorneys in 2020.[23] Although there have not yet been any longitudinal studies measuring the pandemic's impact on well-being in general or attorney well-being specifically, there is no reason to expect that such a study would reach findings different from the *American Lawyer* survey. Instead, because the rate of attorney anxiety and depression has historically exceeded that of the general population, the post-pandemic increase in these mental health

16. NAT'L TASK FORCE ON LAW. WELL-BEING, THE PATH TO LAWYER WELL-BEING 7 (2017).

17. *Id.* (citing P. R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED., Jan.–Feb. 2016, at 46, 46 (2016)).

18. Michael Ariens, *Making the Modern American Legal Profession, 1969–Present*, 50 ST. MARY'S L. J. 671, 709 (2019) (quoting Krill et al., *supra* note 17).

19. NAT'L TASK FORCE ON LAW. WELL-BEING, *supra* note 16.

20. Cheryl Ann Krause & Jane Chong, *Lawyer Wellbeing as a Crisis of the Profession*, 71 S.C. L. REV. 203, 208 (2019) (citing Krill et al., *supra* note 17).

21. *Id.* at 207 (first citing P.R. Krill, *Why Lawyers Are Prone to Suicide*, CNN (Jan. 21, 2014), https://www.cnn.com/2014/01/20/opinion/krill-lawyers-suicide/index.html; and then citing Laura Gatland, *Dangerous Dedication: Studies Suggest Long Hours, Productivity Pressures Can Cause Serious Health Problems and a Higher Suicide Rate for Attorneys*, A.B.A. J., Dec. 1997, at 28).

22. *Id.* at 209 (first citing William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079 (1990); and then citing Benjamin et al., *Prevalence of Depression*, *supra* note 8, at 234).

23. Dylan Jackson, *Legal Professionals Were Already Struggling with Stress and Isolation, and the Pandemic Has Made Things Much Worse*, AM. LAW. (May 3, 2021), https://www.law.com/americanlawyer/2021/05/03/lawyers-were-already-struggling-with-stress-and-isolation-and-the-pandemic-has-made-things-much-worse/.

issues among the general population[24] likely points to an increase in the percentage of attorneys dealing with these troubling issues.

The prevalence of substance abuse disorders and other mental health issues raises a chicken-or-egg question: Is it the case that the legal profession attracts people with pre-existing anxiety, depression, and substance abuse problems at a higher rate than other professions? Or, is there something about the legal profession that causes or exacerbates anxiety, depression, and substance abuse issues? Unfortunately, available evidence points to the latter hypothesis.

In the early 2000s, Lawrence Krieger and Kennon Sheldon conducted empirical studies of students at two law schools.[25] At the start of the study, law students had higher subjective well-being than the undergraduate control group.[26] However, over the course of their 1L year, the law students experienced significant increases in depression and negative mood coupled with "precipitous" declines in life satisfaction.[27] Although Sheldon and Krieger did not attempt to pinpoint the reasons for the law students' decreased well-being, they did note that the data suggested that "any later distress among the law students [was] not an effect of pre-existing distress or problematic personality traits."[28]

Krieger's and Sheldon's findings are largely consistent with other studies of law student well-being. Studies in 1984, 1985, 1986, and 1991 all found that law students had higher levels of anxiety and depression than various comparison groups, such as undergraduate, medical, and business students.[29] While some of these studies found that the law students started with higher anxiety rates than the control group, the studies also found that anxiety rates tended to climb throughout law school.[30] Similarly, problematic drinking also tended to increase throughout law school.[31] The fact that student mental health continues to deteriorate throughout law

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24. *See* Tori DeAngelis, *Depression and Anxiety Escalate During Covid*, 52 MONITOR ON PSYCH. 88, 88 (2021).

25. *See* Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 261 (2004) [hereinafter Sheldon & Krieger, *Legal Education Effects*].

26. *Id.* at 271.

27. *Id.* at 280; *see also* Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 566 (2015) [hereinafter Krieger & Sheldon, *What Makes Lawyers Happy*] (citing Sheldon & Krieger, *Legal Education Effects*, *supra* note 25, at 270–73).

28. Sheldon & Krieger, *Legal Education Effects*, *supra* note 25, at 271.

29. Dammeyer & Nunez, *supra* note 9, at 62–66.

30. *Id.* at 63.

31. John M. Burman, *Alcohol Abuse and Legal Education*, 47 J. LEGAL EDUC. 39, 43 n.5 (1997).

school suggests that law school itself is a contributing factor for negative mental health outcomes.[32]

More recently, a 2016 survey of law students found that 17% of law students suffered from depression, 14% from severe anxiety, and another 23% from mild or moderate anxiety.[33] Additionally, a staggering 43% of students reported that they were frequent binge drinkers.[34] The National Task Force on Lawyer Well-Being concluded that there had been no significant improvement in law student well-being in the two decades between the 2016 survey and its most recent predecessor survey, distributed in the 1990s.[35]

In response to the National Task Force's report, several jurisdictions formed their own task forces to study attorney well-being.[36] The state task force reports echo the findings in the national report.[37] Although no attorney well-being research parses data on litigators from data on other practice areas, the recent state task force reports do identify some of the unique stressors litigation attorneys face.[38]

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32. As Dammeyer & Nunez point out in their meta-analysis of research on law student well-being, there are deficiencies in the existing research. For example, all the studies used self-reported data, which creates the possibility of self-reporting bias. Perhaps law students over-report feelings of anxiety because they have been socialized to believe that they should be stressed in law school. Dammeyer & Nunez, *supra* note 9, at 60.

33. NAT'L TASK FORCE ON LAW. WELL-BEING, *supra* note 16.

34. *Id.*

35. *Id.* at 35.

36. ARK. SUP. CT., TASK FORCE ON LAWYER WELL-BRING, ARK. JUDICIARY 5 (2019); COLO. LAW. WELL-BEING, COLORADO SUPREME COURT TASK FORCE ON LAWYER WELL-BEING 6 (Nov. 2021); MARGOT BOTSFORD ET AL., MASS. SUP. JUD. CT. STEERING COMM. ON LAW., REPORT TO THE JUSTICES 1 (2019); N.Y. STATE BAR ASS'N HOUSE OF DELEGATES, REPORT AND RECOMMENDATIONS OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON ATTORNEY WELL-BEING, THIS IS US: FROM STRIVING ALONE TO THRIVING TOGETHER 24, 90 (2021); TEXAS BAR, TEXAS ROUNDTABLE ON LAWYER WELL-BEING REPORT 4 (2018); PAUL L. REIBER ET AL., VT. SUP. CT., VERMONT COMMISSION ON THE WELL-BEING OF THE LEGAL PROFESSION CHARGE AND DESIGNATION 1–2 (2018); JOSEPH M. BOWEN ET AL., VA. STATE BAR, THE OCCUPATIONAL RISKS OF THE PRACTICE OF LAW: REPORT OF THE VIRGINIA STATE BAR PRESIDENT'S SPECIAL COMMITTEE ON LAWYER WELL-BEING, at vii (2020).

37. *See* ARK. SUP. CT., TASK FORCE ON LAWYER WELL-BRING, *supra* note 36, at 1–2, 6; COLORADO SUPREME COURT TASK FORCE ON LAWYER WELL-BEING, *supra* note 36, at 18, 28; *see generally* BOTSFORD ET AL., *supra* note 36; N.Y. STATE BAR ASS'N HOUSE OF DELEGATES, *supra* note 36, at 22–24; TEXAS ROUNDTABLE ON LAWYER WELL-BEING REPORT, *supra* note 36, at 14; REIBER ET AL., *supra* note 36, at 1; BOWEN ET AL., *supra* note 36, at v.

38. *See infra* Part I.B.

2. Unhappiness, Burnout, and Attrition

As alarming as the data on mental health disorders among attorneys is, it does not tell the whole story. While most attorneys do not have diagnosable mental health disorders, that does not mean they are happy. Indeed, anecdotal and qualitative evidence suggests that a significant number of attorneys are unhappy.[39] These attorneys report feeling stressed, burnt out, and trapped in jobs that do not satisfy them.[40]

This problem disproportionately impacts women and people of color. "Women lawyers are unhappier than their male counterparts, and the gendered disparity is greater in law than among people with other types of degrees."[41] Similarly, attorneys of color are more likely to report dissatisfaction with their careers than their white counterparts.[42] It is not surprising then that women of color are the least satisfied group of attorneys; they "report significantly lower levels of career satisfaction than all other race-gender cohorts."[43]

This career dissatisfaction seems to translate directly into attrition, both from high-status jobs and from the profession altogether. Women lawyers are both more likely to be underemployed and more likely to leave the legal profession than men.[44] Pre-pandemic statistics showed that about 30% of women attorneys were underemployed or unemployed during their prime earning years of 36–40,[45] a career period where many attorneys move into leadership roles in their organizations. It is reasonable to assume the pandemic exacerbated this trend because economy-wide data shows that the pandemic drove a significant number of professional women out of the workforce.[46] Although the share of college-educated women in the

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39. Marjorie A. Silver, *Lawyering and Its Discontents: Reclaiming Meaning in the Practice of Law*, 19 TOURO L. REV. 773, 776, 779 (2004).

40. *Id.* (summarizing the anecdotal reports on lawyer discontent shared at a conference on lawyer happiness).

41. Dara E. Purvis, *Legal Education as Hegemonic Masculinity*, 65 VILL. L. REV. 1145, 1148 (2020) (citing Joni Hersch & Erin E. Meyers, *Why Are Seemingly Satisfied Female Lawyers Running for the Exits? Resolving the Paradox Using National Data*, 102 MARQ. L. REV. 915, 936 (2019)).

42. Rachel Stabler, *All Rise: Pursuing Equity in Oral Argument Evaluation*, 101 NEB. L. REV. 438, 452–55 (2023).

43. *Id.* at 459–60 (2023) (quoting Todd A. Collins et al., *Intersecting Disadvantages: Race, Gender, and Age Discrimination Among Attorney*, 98 SOC. SCI. Q. 1642, 1653 (2017)).

44. Purvis, *supra* note 41 (first citing Jane R. Bambauer & Tauhidur Rahman, *The Quiet Resignation: Why Do So Many Female Lawyers Abandon Their Careers?*, 10 U.C. IRVINE L. REV. 799, 807 (2020); and then citing Joyce S. Sterling & Nancy Reichman, *Navigating the Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession*, 8 FIU L. REV. 515, 527 (2013)).

45. Bambauer & Rahman, *supra* note 44.

46. *See* Stephanie Ferguson & Isabella Lucy, *Data Deep Dive: A Decline of Women in the Workforce*, U.S. CHAMBER OF COMMERCE (June 26, 2024),

workforce has recovered from its pandemic low,[47] it is not clear what that recovery means for women in the legal profession. Before the pandemic, the percentage of unemployed and underemployed women attorneys increased, even as the percentage of college-educated women in the workforce grew.[48]

The statistics for attorneys of color are similarly bleak. For example, 50% of attorneys of color leave their law firms within the first three years of practice and 75% leave their firms within the first four years.[49] The overall attrition rate at the same firms is 43% after three years and 55.6% after four years.[50] The retention statistics for women of color are even worse.[51]

Attrition rates among women attorneys and attorneys of color have undoubtedly contributed to the legal profession's stalled progress in diversifying the top tiers of the profession. Indeed, in her commentary at the beginning of the 2022 *Report on Diversity in U.S. Law Firms*, Executive Director Nikia L. Gray noted that firms had made measurable gains in hiring women and people of color. But she sharply criticized those in leadership for failing to "break down the systemic barriers that prevent these individuals from joining them in the ranks of partnership."[52] Despite the progress historically marginalized groups made over the past 50 years, the most powerful positions in the profession are still disproportionately held by white men.[53]

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https://www.uschamber.com/workforce/data-deep-dive-a-decline-of-women-in-the-workforce ("Both men and women suffered a 3% drop in labor force participation at the height of the pandemic. But more than two years later, men have returned to work at a higher rate than women.") (arguing that today, women's labor force participation is still a full percentage point lower than it was pre-pandemic, meaning roughly 617,000 women are missing from the labor force.); Rebecca A. Clay, *Women's Workforce Losses*, 53 MONITOR ON PSYCH. 66, 66–67 (2022) (calling for policy changes to address the millions of women "continuing to stay home" due to workforce challenges that initially came to a head during the pandemic).

47. Catherine Rampell, *Will Gains from the Spectacular 'She-Covery' Last?*, WASH. POST (Nov. 27, 2023), https://www.washingtonpost.com/opinions/2023/11/27/women-workforce-gains-college-educated-mothers-analysis/.

48. Bambauer & Rahman, *supra* note 44 (referencing studies that showed a 25.3% rate of female attorney underemployment in 1993 and a higher 29.1% female attorney underemployment rate in 2010); Rampell, *supra* note 47.

49. Susie Salmon, *Reconstructing the Voice of Authority*, 51 AKRON L. REV. 143, 151 (2017) (citing Luis J. Diaz & Patrick C. Dunican Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 947, 949 (2011)).

50. *Id.*

51. *Id.*

52. NAT'L ASS'N FOR L. PLACEMENT, 2022 REPORT ON DIVERSITY IN U.S. LAW FIRMS 2 (2022) [hereinafter 2022 REPORT ON DIVERSITY].

53. *Id.* at 4.

Progress in increasing people of color's representation at law firms has been slow. For example, in 2022, 19% of practicing attorneys identified as people of color.[54] However, just 11.40% of major law firm partners and 9% of equity partners were people of color.[55] These statistics represent an increase of less than ten percentage points over the past 30 years.[56] Moreover, the progress that has occurred has not been consistent or distributed evenly across racial and ethnic groups.[57]

Women have not fared much better. They have made up more than "40% of law-school graduates since the mid-1980s."[58] As a result, the percentage of women attorneys has gradually increased; as of 2022, 38% of practicing lawyers were women, but only 22.6% of equity partners were women.[59] These figures do indicate progress, but the pace has been glacial.[60] For example, the number of women equity partners at law firms has increased by a mere 7.6 percentage points in the past 18 years.[61] At the current rate of progress, it will take more than 40 years for women and people of color to attain partnership levels at parity with white males.

Partnership numbers do not tell the whole story, of course, but other indicators, such as billing rates and representation in leadership, also point to persistent disparities in who holds power in the profession. The existence of these disparities in the litigation sphere is highlighted by the fact that relatively few women attorneys and attorneys of color have argued before or been invited to submit amicus briefs to the Supreme Court.[62]

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54. ABA NATIONAL LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER DEMOGRAPHICS, AM. BAR ASS'N (2022), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2012-2022.pdf [hereinafter TREND IN LAWYER DEMOGRAPHICS].

55. 2022 REPORT ON DIVERSITY, *supra* note 52, at 3–4, 7, 14, 16, 23.

56. *Id.* at 3.

57. For example, while the percentage of associates of color at major law firms increased from 19.67% to 22% between 2009 and 2015, the number of Black associates fell every year during that same time period. Beginning in 2016, that trend reversed and, in 2022, nearly all of the gains in the percentage of associates of color at major law firms were attributable to an increased number of Black associates. *See id.* at 2, 14.

58. Salmon, *supra* note 49, at 149.

59. TREND IN LAWYER DEMOGRAPHICS, *supra* note 54; 2022 REPORT ON DIVERSITY, *supra* note 52, at 4, 14, 23.

60. Salmon, *supra* note 49, at 149–50.

61. *Compare* 2022 REPORT ON DIVERSITY, *supra* note 52, at 4 ("In 2022, just 22.6% of equity partners [at major firms] were women.") *with* Salmon, *supra* note 49, at 149–50 ("As of 2004, women made up a mere 15% of equity partners in [major] law firms.").

62. *See* Salmon, *supra* note 49, at 150–51; *see also* Purvis, *supra* note 41 (citing Deborah L. Rhode, *Diversity and Gender Equity in Legal Practice*, 82 U. CIN. L. REV. 871, 872 (2014)).

While both attrition and advancement rates certainly reflect the "daunting obstacles to advancement"[63] faced by women and people of color, attrition rates may also provide an excuse not to hire or invest in their careers. After all, employers can correctly predict that any woman they hire is statistically likely to "underinvest in her career compared to a male peer"[64] and that both women and people of color are statistically less likely to remain in their positions long term as compared to white male peers.[65] Thus, the attrition and advancement problems for women and people of color feed into a cycle where the lack of meaningful efforts to address advancement barriers for these groups causes more attrition. That attrition may play a role in reducing employer buy-in to diversity and inclusion efforts, thereby diminishing the programs' potential to create meaningful change.[66]

B. Causes of the Attorney Well-Being Crisis

The causes of the well-being crisis in the legal profession are multifaceted and not precisely understood. A non-exhaustive list of potential causes includes the punishing pace of practice; underrepresentation of people of color, women, and LGBTQ+ attorneys at the highest levels of practice; and a perceived decline in civility and professionalism. In addition, trial attorneys face stressors unique to litigation practice, including courtroom dynamics that demonstrate a lack of respect for attorneys, the need to adhere to schedules unilaterally imposed

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63. Salmon, *supra* note 49 (quoting STEPHANIE A. SCHARF ET AL., NAT'L ASS'N OF WOMEN LAWS., REPORT OF THE EIGHTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS, 4, 15 (Feb. 2014)).

64. Bambauer & Rahman, *supra* note 44, at 841.

65. Salmon, *supra*, note 49; *see generally* Stabler, *supra* note 42, at 458–59 (referencing biases other than racial and gender bias). This proposition is based on the fact that most of the research I found dealt with race and gender bias.

66. It is certainly the case that legal employers say that they are interested in diversity, equity, and inclusion efforts; most larger employers have formal DEI programs. But the modest success of these programs suggests that many employers are not truly committed to addressing the problem of underrepresentation by people of color, women, and other minoritized groups. *See, e.g.*, 2022 REPORT ON DIVERSITY, *supra* note 52, at 3. This report states:

> While the legal industry continues to make measurable gains in the representation of women, people of color, and LGBTQ individuals in the associate and summer associate ranks, it is equally clear that law firm leaders have failed to do the work necessary to break down the systemic barriers that prevent these individuals from joining them in the ranks of partnership. The data demonstrates that we are nowhere near achieving the progress one would expect from an industry that has been focused on the issue of diversity for over 3 decades.

Id. at 2.

by the court, and extended wait times—both to be heard in court and to receive decisions after being heard.[67]

This Article discusses three potential contributors to the attorney well-being crisis: bias, incivility, and lack of self-determination. These potential contributors have been selected for several reasons. First, qualitative evidence and anecdotal reports point to all three as significant issues in the legal profession in general and for litigators in particular. Second, while the connection between these issues and attorney unhappiness, burnout, and attrition has not yet been precisely explained, both anecdotal evidence and my personal experience point to a strong connection. Finally, existing research on these issues suggests the potential to teach skills courses, including trial advocacy, in a manner that reduces the existence and impact of these issues in the profession.

1. Bias

That attorneys in minoritized groups tend to be both unhappier and more likely to leave the legal profession than their white male counterparts points to a connection between bias and well-being issues. Evidence suggests that bias impacts the law school experience and continues to play a role once attorneys enter the profession.[68] This discussion will focus on two types of bias: racial and gender bias. This focus is not because these are the only biases that impact law students and attorneys but because more data exists on how these biases impact the profession than for other biases that attorneys may encounter, such as anti-LGBTQ+, class, anti-obesity, and religious bias.[69]

Despite efforts to reduce bias in legal education, evidence suggests that both racial and gender bias impact well-being and achievement beginning in law school. For example, "one longitudinal study published in 2016 using data from two law schools found that 'self-identification as a person of color . . . was a statistically significant negative predictor' of 1L grades and overall law school grades."[70] This disparity persisted even when controlling for factors usually correlated with law school success, such as college grades and LSAT scores, suggesting there is something about law school itself that is causing this disparity.[71] Similarly, there has traditionally

67. *See* BOTSFORD ET AL., *supra* note 36, at 11–12.

68. *See infra* Part I.B.1.

69. *See generally* Stabler, *supra* note 42, at 458–59 (referencing biases other than racial and gender bias).

70. *Id.* at 452 (quoting Alexia Brunet Marks & Scott A. Moss, *What Predicts Law Student Success: A Longitudinal Study Correlating Law Student Applicant Data and Law School Outcomes*, 13 J. EMPIRICAL LEGAL STUD. 205, 243 (2016)).

71. *Id.*

been a grade disparity among male and female students; although it has abated in recent years, men remain statistically less likely than women to fall in the bottom quartile of a class.[72]

People of color and women also report feeling less comfortable, happy, and confident in school than their white male peers.[73] Given the intersectionality of racial and gender bias, it is perhaps unsurprising that Black women are the group least satisfied with their law school experience. In a study of law students, "Black women [we]re the least likely of all race [and] gender groups to rate their overall experience as 'good' or 'excellent.'"[74]

The discomfort women and people of color experience in law school seems to impact their engagement in class.[75] For example, more than 30 years of studies on law student participation show women are consistently less likely to speak in class than men.[76]

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72. *Id.* at 455–56.

73. Purvis, *supra* note 41 ("Women students feel worse about their own abilities to succeed," rating themselves as less competent than men even where their performance was equal) (citing Felice Batlan et al., *Not Our Mother's Law School?: A Third-Wave Feminist Study of Women's Experiences in Law School*, 39 U. BALT. L.F. 124, 142–43 (2009)); LAW SCH. SURV. OF STUDENT ENGAGEMENT, THE CHANGING LANDSCAPE OF LEGAL EDUCATION 15 (2020) (showing white students were more satisfied with their law school experience than any other racial group).

74. Stabler, *supra* note 42, at 459–60 (citing LAW SCH. SURV. OF STUDENT ENGAGEMENT, *supra* note 73, at 16).

75. *See* Purvis, *supra* note 41 ("Women students report more feelings of alienation, leading to frustration and disillusionment with the law."); This is a problem that especially impacts women and people of color. Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN'S L.J. 81, 83 (1996). The article discusses studies of law students showing that women, and particularly women of color:

> (1) . . . voluntarily participated in class at a lower rate than men; (2) . . . suffered decreased self-esteem in law school at a greater rate than men; (3) . . . reported a lack of adequate mentors and role models because there are few persons like themselves on law school faculties; and (4) [felt that] women and minority professors were perceived by students as having a greater burden to prove their competence than white male professors.

Id. (first citing Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); then citing Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1 (1989–90); then citing Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender in Nine Law Schools*, 44 J. LEGAL EDUC. 311 (1994); and then citing Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988)).

76. Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1242 (1988); Homer & Schwartz, *supra* note 75, at 50; Krauskopf, *supra* note 75, at 325–26; Marsha Garrison et al., *Succeeding in Law School: A Comparison of Women's Experiences at Brooklyn Law School and the University of Pennsylvania*, 3 MICH. J. GENDER & L. 515, 524–25 (1996); Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389, 403–09 (2006); Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U.J. GENDER SOC. POL'Y &

The situation does not improve when law students join the bar. Attorneys of color report "recurring identity-based challenges and discrimination, no matter how far in their career they have advanced."[77] For example, attorneys of color report experiencing a host of macro- and microaggressions, including court officials scrutinizing their bar credentials more heavily than those of white colleagues, judges mistaking them for criminal defendants or translators, and colleagues making assumptions about their national origin or language abilities.[78] This recurrent discrimination takes a toll on attorneys of color's emotions and prospects. Indeed, racial bias has been playing a role in how partners evaluate associates' work product, leading to lower evaluations for attorneys of color.[79]

Women attorneys face similar challenges. Women attorneys are more likely than males to experience demeaning comments, to be interrupted by judges during oral arguments, and to receive negative comments from a court than men.[80] Gender bias—like racial bias—also appears to impact career advancement. "A 2012 study suggested that one reason women are less likely to reach partner was because of the effect of gender bias on their performance evaluation."[81] After years of improvement, implicit bias against women in the workplace now appears to be increasing. The percentage of young men who agreed with the statement: "It is much better for everyone involved if the man is the achiever outside the home and the woman takes care of the home and family" has increased to 48% in 2014 from a 1990s low of 20%.[82]

Women of color seem to be the group most impacted by bias. Within the legal profession, "women of color are about twice as likely as minority men to report unfair treatment based on race."[83] They also "report

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L. 511, 531–32 (2005); Lauren A. Graber, *Are We There Yet? Progress Toward Gender-Neutral Legal Education*, 33 B.C.J.L. & SOC. JUST. 45, 67 (2013).

77. MASS. SUPREME JUD. CT. STANDING COMM. ON LAW. WELL-BEING, MASS. SUPREME JUD. CT., REPORT SUMMARIZING AFFINITY BAR TOWN HALL MEETINGS 2–3 (2021).

78. *Id.* at 5, 12–13.

79. Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS 3 (finding that written work of Black employees was judged more harshly than that of white employees).

80. Stabler, *supra* note 42, at 457; Bambauer & Rahman, *supra* note 44, at 812.

81. Stabler, *supra* note 42, at 456 (citing Monica Biernat et al., *The Language of Performance Evaluations: Gender-Based Shifts in Content and Consistency of Judgment*, 3 SOC. PSYCH. & PERSONALITY SCI. 186, 190 (2012)).

82. Bambauer & Rahman, *supra* note 44, at 827 (citing Stephanie Coontz, *Do Millennial Men Want Stay-at-Home Wives?*, N.Y. TIMES, https://perma.cc/8CYD-A8H4 (Mar. 31, 2017)).

83. Stabler, *supra* note 42, at 459 (quoting Collins, *supra* note 43, at 1652).

significantly lower levels of career satisfaction than all other race-gender cohorts."[84]

Although bias in the profession will not be eliminated with just one reform, as discussed *infra*,[85] teaching skills courses in a way that allows room for students to develop their own voice and style is one starting place. This is one way to make the skills classroom more welcoming to a wider range of students.

2. Incivility

Incivility in the profession is also frequently flagged as a cause of attorney dissatisfaction. This concern disproportionately impacts litigators, with many of the most high-profile incidents of incivility in the profession involving trial attorneys. In just the last year, for example, trade publications have reported on a Pennsylvania attorney who was sanctioned for repeatedly insulting opposing counsel during a deposition;[86] a New York judge who chastised attorneys at a large firm for refusing to extend a filing deadline when opposing counsel's child was born prematurely;[87] and the increase in combative language in judicial opinions.[88]

The National Task Force on Lawyer Well-Being succinctly summarized the problem in its 2017 report: "Chronic incivility is corrosive. It depletes energy and motivation, increases burnout, and inflicts emotional and physiological damage. It diminishes productivity, performance, creativity, and helping behaviors."[89] An attorney does not need to be the target of abusive behavior for incivility to affect them negatively. "[M]erely witnessing incivility directed at colleagues can negatively impact employees' work experience, resulting in an increase in aggressive thoughts and a decrease in the observer's performance, creativity, and concern for

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84. *Id.* at 459 (quoting Collins, *supra* note 43).

85. *See infra* Part IV.

86. Debra Cassens Weiss, *Judge Sanctions Lawyer for 'Obnoxious' and 'Appalling' Deposition Conduct*, A.B.A. J. (May 10, 2023), https://www.abajournal.com/news/article/judge-sanctions-lawyer-for-obnoxious-and-appalling-deposition-conduct.

87. Debra Cassens Weiss, *Judge Chastises BigLaw Lawyers for Making Demands After Opposing Counsel Seeks Delay for Newborn*, A.B.A. J. (May 9, 2023), https://www.abajournal.com/news/article/judge-chastises-biglaw-lawyers-for-making-demands-after-lawyer-seeks-delay-for-newborn.

88. Avalon Zoppo, *'Disturbed by Some Language:' Judge Concerned by Rise in Combative Opinions*, THE NAT'L L. J. (Feb. 27, 2023), https://www.law.com/nationallawjournal/2023/02/27/disturbed-by-some-language-judge-concerned-by-rise-in-combative-opinions/.

89. NAT'L TASK FORCE ON LAW. WELL-BEING, *supra* note 16, at 15.

colleagues' welfare."[90] Interestingly, evidence suggests that those who engage in uncivil behavior may be hurting themselves too. The most professional lawyers tend to be the more satisfied with their careers, while the least professional lawyers are less satisfied.[91]

Unfortunately, although there have been initiatives to address incivility in the profession since at least the 1980s,[92] the number of attorneys reporting incivility has risen in recent years. In a 1992 survey, 42% of attorneys reported civility concerns; in a 2007 survey, the number was 72%.[93] Whether this reflects an increase in incivility or a decline in tolerance for certain behaviors is unknown.[94]

Incivility and bias are also connected. For example, studies suggest that women attorneys are more likely than male attorneys to be on the receiving end of an opposing attorney's abuse.[95] And incivility can, of course, take the form of racist, sexist, or otherwise bigoted comments. Thus, while incivility is undoubtedly corrosive for all attorneys, its effects are felt most keenly by groups that also experience other types of micro- and macroaggressions.

As discussed *infra*,[96] there is also a link between incivility and the predominance of an aggressive litigation style.[97] Thus, providing viable alternatives to aggression is a small step towards a less corrosive profession.

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90. Krause & Chong, *supra* note 20, at 234 (citing Christine L. Porath & Amir Erez, *Does Rudeness Really Matter? Effects of Rudeness on Task Performance and Helpfulness*, 50 ACAD. MGMT. J. 1181, 1181–82 (2007)).

91. Heather D. Baum, *Inward Bound: An Exploration of Character Development in Law School*, 39 U. ARK. LITTLE ROCK L. REV. 25, 36 (2016) (first citing Lawrence S. Krieger, *What We're Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts on Revitalizing the Profession from Its Roots*, 13 J. L. & HEALTH 1, 16–17 (1998–99); and then citing Lawrence S. Krieger, *The Most Ethical of People, the Least Ethical of People: Proposing Self-Determination Theory to Measure Professional Character Formation*, 8 U. ST. THOMAS L. J. 168 (2011)). Of course, correlation does not equal causation. We do not know whether it is unhappiness that leads to unprofessional behavior, unprofessional behavior that leads to unhappiness, or some combination of the two.

92. Ronald L. Carlson, *Competency and Professionalism in Modern Litigation: The Role of Law Schools*, 23 GA. L. REV. 689, 696–97, 701 (1989).

93. NAT'L TASK FORCE ON LAW. WELL-BEING, *supra* note 16, at 15.

94. *See generally id.*

95. Lilia M. Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts*, 27 LAW & SOC. INQUIRY 235, 243–44 (survey of 4,608 practicing attorneys found that nearly 75% of female attorneys had experienced "some form of interpersonal mistreatment" in the past five years as compared to 50% of men).

96. *See infra* Part III.B.

97. *See infra* Part III.B.

3. Lack of Self-Determination

Finally, legal education and the legal profession seem to excel at stripping attorneys of their self-determination. Self-determination theory helps explain why this is so. Self-determination theory is a theory of human motivation that grew out of studies comparing intrinsic (internal) and extrinsic (external) motivation in the 1970s.[98] According to self-determination theory, all humans have a fundamental need for autonomy, competence, and relatedness.[99] Autonomy is the ability to make choices for yourself; competence is the feeling of mastery over a skill; and relatedness is a feeling of connection to others.[100] All three are correlated with increased subjective well-being.[101]

The nature of attorneys' professional obligations means that attorneys generally must prioritize the needs of clients, courts, and supervisors over their own needs.[102] Moreover, many attorneys learn early in law school that thinking and acting like a lawyer means thinking and acting in a way that is not necessarily compatible with who they were before law school.[103] As a result, many attorneys feel like they lack control over their own lives, doubt their own competence, and feel disconnected from others. In other words, their fundamental needs for autonomy, competence, and relatedness are not being met in law school or in the practice of law.

To date, the most rigorous study of attorney well-being supports the idea that lack of self-determination is one of the most significant contributors to attorney unhappiness. In a 2002 study, Kennon M. Sheldon and Lawrence S. Krieger followed students at two law schools for the duration of their education.[104] They found that law school decreased law students' subjective sense of well-being.[105] Subjects showed increased anxiety, depression, negative mood, physical symptoms, and a decrease in life satisfaction.[106] Based upon the data collected, Sheldon and Krieger concluded "that *all negative outcomes resulted from decreases in*

98. Krieger & Sheldon, *What Makes Lawyers Happy*, *supra* note 27, at 564.

99. *Id.*

100. *See* Paula J. Manning, *Understanding the Impact of Inadequate Feedback: A Means to Reduce Law Student Psychological Distress, Increase Motivation, and Improve Learning Outcomes*, 43 CUMB. L. REV. 225, 229–38 (2013).

101. Kreiger & Sheldon, *What Makes Lawyers Happy*, *supra* note 27, at 579.

102. *See, e.g.*, Silver, *supra* note 39, at 779–80.

103. MASS. SUPREME JUD. CT., MASS. SUPREME JUD. CT. STANDING COMM. ON LAW. WELL-BEING, *supra* note 77, at 13.

104. Krieger & Sheldon, *What Makes Lawyers Happy*, *supra* note 27, at 565–66.

105. *Id.* at 566.

106. *Id.*

satisfaction of the fundamental needs for autonomy, competence, and relatedness to others after students entered law school."[107]

> Sheldon and Krieger later studied practicing attorneys with similar results. Attorneys with greater autonomy, competence, and relatedness were happier, on average, than attorneys in positions[108] that allowed for less autonomy, competence, and relatedness.[109] Thus, Sheldon and Krieger proposed that both school and work settings should provide autonomy-supportive teaching and supervision as a cost-effective and data-supported strategy for improving morale.[110] A professor or supervisor is autonomy-supportive where they "(1) acknowledge[] the perspectives or preferences of the other; (2) provide[] meaningful choices to the other; and (3) when asserting control rather than providing choices, explains to the other the reasons why that is necessary."[111] As discussed more fully *infra*,[112] providing students a menu of advocacy styles from which they can choose is one way that professors can be autonomy-supportive.

II. ROLE OF TRIAL ADVOCACY COURSES IN ADDRESSING THE ATTORNEY WELL-BEING CRISIS

As discussed, the current movement to teach professional identity formation in law school reflects a growing consensus that law school faculty can create a law school experience that is more inclusive and less damaging to student well-being. One hope is that, over time, improvements in the law school experience will translate to improvements in the profession. The trial advocacy classroom is a natural place for this type of meaningful reform to occur. Trial advocacy courses and the idea of teaching professional identity formation grew out of the same movement

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107. *Id.* at 567 (citing Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCH. BULL. 883, 893–94 (2007) [hereinafter Sheldon & Krieger, *Understanding Negative Effects*]) (emphasis in original).

108. The study confirmed Sheldon and Krieger's hypothesis that attorneys in positions that provide more autonomy are happier. For example, judges were the group of attorneys with the highest subjective well-being. *Id.* at 579–80.

109. *Id.* at 590–94, 596.

110. *Id.* at 625.

111. *Id.* at 582 (citing Sheldon & Krieger, *Understanding Negative Effects*, *supra* note 107, at 894).

112. *See infra* Part IV.

and share the same goals of arming students with the skills and traits needed for success in the profession.

The development of trial and appellate advocacy courses at American law schools first gained steam in the late 1960s.[113] At that time, legal education was "entrenched in a decidedly-non experiential mode."[114] Most courses were taught by career academics[115] who taught almost exclusively using the casebook method, a teaching method first developed in the 1800s.[116] The ABA standards in place in the 1960s stated that the goal of legal education was to prepare students to pass the bar examination,[117] so this focus on teaching students how to read and write about the law made sense.

The casebook model of legal education was not without its detractors, however. Critics claimed that by focusing on the casebook method and devaluing practical experience for faculty,[118] law schools had created a

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113. Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 567 (2018).

114. *Id.* at 560–61.

115. Dean Christopher C. Langdell of Harvard Law School, who is credited with popularizing the casebook method, also redefined the qualifications for teaching law. What was once the province of practicing judges or lawyers working a few hours a week became almost exclusively the province of career academics with minimal practice experience. *Id.* at 553. "What qualifies a person . . . to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law," Langdell said in 1873. *Id.* at 553 (quoting JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 37 (1978)). Other law schools followed suit, and a faculty composed almost entirely of career academics became the standard. *Id.* By 1901, one-quarter of law professors went directly from law school to teaching. *Id.* at 553–54. By 2003, the faculty at the top 25 law schools had "an average of 1.4 years of legal practice experience, [while] new law professors at all other schools had 3.8 years of practice experience . . . ." *Id.* at 554.

116. Joy, *supra* note 113, at 552–53. In 1940, the ABA's Standards for Legal Education stated that "teaching in [ABA] approved schools is based fundamentally but not exclusively on the case method." *Id.* at 564–65 (quoting STANDARDS OF THE AMERICAN BAR ASSOCIATION FOR LEGAL EDUCATION: FACTORS BEARING ON THE APPROVAL OF LAW SCHOOLS BY THE AMERICAN BAR ASSOCIATION (1940)). *See generally* AM. BAR ASS'N, SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023–2024 v (2023), [hereinafter ABA STANDARDS 2023] (no longer mentioning the casebook method).

117. It was not until 1993 that the ABA amended Standard 301 to state that the focus of law school should not only be to prepare students to take the bar but also to prepare students for the actual practice of law. *Compare* AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATION Standard 301 (1992) [hereinafter ABA STANDARDS 1992], *with* AM. BAR ASS'N, SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 1993, Standard 301 (1993) [hereinafter ABA STANDARDS 1993].

118. Joy, *supra* note 113, at 554, n.13 ("In 1929, one lawyer stated that law teaching was 'becoming a cloistered profession, closed to the active practitioner who is frequently regarded with

chasm between law schools and practitioners. As early as 1916, experiential learning proponents suggested that experiential training in law schools could help to bridge this chasm.[119]

By the late 1960s, the movement for increased skills training began to gain national momentum.[120] This movement coincided with a period of tremendous change in the legal profession. For the first time, law schools began to open their doors in large numbers to women, people of color, and other groups who had previously been largely excluded from the legal profession.[121] At the same time, decisions like *Gideon v. Wainwright*[122]

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suspicion if not contempt.'") (quoting EDWARD T. LEE, *IN RE* THE SECTION OF LEGAL EDUCATION AND THE AMERICAN BAR ASSOCIATION: IS THE ASSOCIATION TO BE CONTROLLED BY A BLOC? 14 (1929)).

119. *Id.* at 560; Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 6–7 (2000) (discussing a 1916 New York State Bar resolution that would have required law schools to offer clinical courses and a 1921 study by the Carnegie Foundation for the Advancement of Teaching that identified "practical skills training" as a necessary component of legal education); *see also* Peter Toll Hoffman, *Law Schools and the Changing Face of Practice*, 56 N.Y.L. SCH. L. REV. 203, 209–10 (2012).

120. *See* Joy, *supra* note 113.

121. Calls to improve the quality of legal education very often coincide with periods where new groups gain admission to the profession. This suggests that elitism and bias contribute to perceptions of a "worsening" profession. *See* Bryant Garth, *Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POL'Y REV. 503, 507–08, 516 (2012) (analogizing concerns about the contracting legal market following the 2008 Recession to Great Depression rhetoric about the "wrong . . . people" joining the profession and noting that, in both instances, criticism was directed at lower ranking schools that allow the "lower classes" to access a legal education); William M. Sullivan, *After Ten Years: The Carnegie Report and Contemporary Legal Education*, 14 U. ST. THOMAS L.J. 331, 332 (2018) [hereinafter Sullivan, *After Ten*] (describing resistance by the legal elite in the 1920s to efforts to make legal education more practice-oriented for the benefit of practitioners who served smaller clients, a group of attorneys "drawn increasingly from the ranks of recent immigrants"); *see also* Ariens, *supra* note 18, at 673 (citing Reece Smith Jr., *Report of the Task Force on Utilization*, 97 A.B.A. ANN. REP. 818, 819 (1972)) ("[T]hey often blamed an overcrowding of the profession, which made underemployed lawyers willing to engage in unethical behavior.") (explaining how lawyers reacted to criticism of the profession in the 1970s, but noting that the decline in real income for lawyers that began in 1970s suggested that there was some truth to the idea that the profession was overcrowded). For example, there were concerns about the quality of the bar well before the 1960s and 1970s. *See* Barry et al., *supra* note 119, at 11–12; *see also* Roger Cramton, *Lawyer Competence & Law Schools*, 4 U. ARK. LITTLE ROCK L. REV. 1, 5 (1981) (arguing that the idea that the lawyer competency problem began in the 1970s is unsupported):

> There is a logical problem in attributing the deficiencies of a large portion of the legal profession to *recent* graduates, since they inevitably constitute a small portion of the profession as a whole. If fifty percent of lawyers really were incompetent, it could not be a new problem, since only a small proportion of the bar (perhaps five to seven percent are new entrants each year.

Id. (emphasis added). But those concerns did not give rise to reform until the demographics of the law school classroom began to change. Salmon, *supra* note 49, at 153 ("When more accessible schools arose, providing legal-education opportunities for a more diverse population, products of the elite university schools decried graduates of those schools—primarily immigrants or members of minority groups or lower socioeconomic classes—as not just unqualified but unethical.") (citing Lucille A. Jewel,

were expanding the role of counsel in criminal cases and other compulsory proceedings.[123] This shift created a demand that outstripped the supply of experienced trial attorneys.[124] All of these factors played a role in creating the perception that the quality of advocacy in the United States was on the decline.

In the early 1970s, several prominent judges started a national conversation to address this perceived decline.[125] The court system was overburdened, the judges said, and there was "an insufficient number of capable trial lawyers" to assist in the administration of justice.[126] Massachusetts Supreme Judicial Court Chief Justice G. Joseph Tauro warned in 1970: "[T]oo many cases are being tried—or, more candidly,

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Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy, 56 BUFF. L. REV. 1155, 1177–79 (2008)).

122. 372 U.S. 335, 344 (1963) (establishing the right to counsel for indigent criminal defendants).

123. *See* Irving R. Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A. J. 175, 175 (1974). Changes to the law also created increased demand for civil trial lawyers during this time. Ariens, *supra* note 18, at 698–99 (questioning the idea that there was a civil litigation explosion in the 1970s and proposing what changed was the recognition of new types of liability).

124. Kaufman, *supra* note 123.

125. *See* G. Joseph Tauro, *Trial Advocacy at the Crossroads*, 56 A.B.A. J. 460, 460–61 (1970); Warren E. Burger, *Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 227, 229–30, 234 (1973) (recapping remarks that Chief Justice Burger made about addressing the low quality of advocacy in U.S. courts); Kaufman, *supra* note 123, at 176 ("Judges have been exceedingly troubled by the increasing number of instances of poor representation that come to our attention."); ADVISORY COMMITTEE ON PROPOSED RULES FOR ADMISSION TO PRACTICE, QUALIFICATIONS FOR PRACTICE BEFORE THE UNITED STATES COURTS IN THE SECOND CIRCUIT, 67 F.R.D. 159, 164 (1975) [hereinafter QUALIFICATIONS FOR THE SECOND CIRCUIT] ("[T]here is a lack of competency in trial advocacy in the Federal Courts . . . directly attributable to the lack of legal training."); FINAL REPORT OF THE COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, 83 F.R.D. 215, 218 (1979) [hereinafter PRACTICE IN THE FEDERAL COURTS] ("The investigations of the committee . . . have established that there is a significant problem with the quality of trial advocacy in the federal trial courts."); David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973) ("[T]he right to counsel too often means little more than pro forma representation.") (expressing concerns of the Chief Judge of the United States Court of Appeals for the District of Columbia); *see also* Carlson, *supra* note 92, at 691–92 (explaining that "[m]any are of the view that Justice Burger's Sonnet Lecture at Fordham University was the shot across the bow that precipitated major popular and scholarly reaction to the issue" of trial lawyer competency; yet, others dispute the extent of the problem, stating that "there was general agreement on the point that decisive steps were needed to address the quality of legal representation in the courts."); Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 576 n.1, 577 n.4, 582 n.18 (1987) (compiling sources criticizing lawyer incompetence between 1975 and 1987).

126. Tauro, *supra* note 125, at 460–61; *see also* Burger, *supra* note 125, at 237 (recapping remarks that Chief Justice Burger made about addressing the low quality of advocacy in U.S. courts); Kaufman, *supra* note 123; QUALIFICATIONS FOR THE SECOND CIRCUIT, *supra* note 125; PRACTICE IN THE FEDERAL COURTS, *supra* note 125; Bazelon, *supra* note 125, at 5.

mishandled—by lawyers who lack the requisite competence and skill to represent their clients in court."[127] Similarly, Chief Judge of the Second Circuit Court of Appeals Irving R. Kaufman, wrote in 1974: "I shall not hazard a guess as to the exact percentage of cases that have suffered from inadequate advocacy, but I can say that in my view it is not insubstantial."[128] United States Supreme Court Chief Justice Warren Burger was willing to qualify the problem. In his view: "[F]rom one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation."[129]

The judges' call for reform spurred the creation of committees to study the issue. In 1974, Chief Justice Kaufman appointed a committee charged with improving the quality of advocacy in the Second Circuit.[130] A few years later, the Judicial Conference of the United States appointed a committee "to investigate the quality of trial advocacy in the federal courts" nationwide.[131] Both committees recommended expanding law school trial advocacy programs and requiring related courses like Evidence, among other reforms.[132] As the Judicial Conference explained, "[t]he logical starting place for learning the art of advocacy is in law school, where students can obtain supervised trial experience under the watchful eye of a qualified teacher."[133] By 1981, at least seven major studies had considered how to address the perceived problem of attorney incompetence; though recommendations in these studies varied, expanding law school trial advocacy offerings was a common theme.[134]

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127. Tauro, *supra* note 125, at 460.

128. Kaufman, *supra* note 123, at 176.

129. Burger, *supra* note 125, at 234.

130. QUALIFICATIONS FOR THE SECOND CIRCUIT, *supra* note 125, at 161. The scope of the Committee's activities included:

> (1) an examination of the quality of advocacy in the courts of this Circuit;
> (2) recommendations for improvements;
> (3) recommendations for innovative programs to teach the art of advocacy in the law schools;
> (4) recommendations for amendments in the rules of admission to the federal courts;
> (5) a consideration of post-admission educational projects;
> (6) an analysis of standards and procedures for professional discipline.

Id.

131. PRACTICE IN THE FEDERAL COURTS, *supra* note 125. The Judicial Conference formed its committee after the Second Circuit committee's report prompted concerns that a proliferation of circuit-specific requirements for admission to federal courts would make it difficult for law schools to prepare students for federal practice. The Judicial Conference committee's goal was to propose reforms that could be implemented uniformly across the nation. *Id.* at 218–19.

132. *Id.* at 221.

133. *Id.* at 227.

134. Carlson, *supra* note 92, at 693–95.

Despite a growing consensus as to the value of trial advocacy programs, interested law students were often unable to enroll. In 1970, there were only 235 law school faculty nationwide who described themselves as teachers of trial advocacy or appellate practice, or roughly 1.6 faculty members per accredited law school.[135] The Judicial Conference committee estimated that "only about one in three law students who desire[d] to take a trial skills course [we]re able to do so."[136] The Judicial Conference committee attributed the lack of seats in trial advocacy courses, in part, to resistance by some members of the academy. The committee noted, "[s]ome law schools in recent years have made substantial advancements in the fields of clinical education and trial advocacy training, but it is clear, as one speaker before the committee observed, that 'the efforts today in clinical training amount in some cases to little more than tokens.'"[137]

The committees' recommendations "stirred heated discussion focusing on the desirability of basic change—voluntary or mandated—in legal education," a discussion that "frequently had an adversarial and confrontational tone."[138] Law schools expressed concern about the cost of running trial advocacy programs and the potential loss of academic freedom if the ABA were to mandate additional required courses.[139] Both the Second Circuit committee and the Judicial Conference committee dismissed these concerns as relatively unimportant when weighed against the harm caused by untrained litigators.[140]

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135. *See* Richard Markus, *A Theory of Trial Advocacy*, 56 TUL. L. REV. 95, 95 n.1 (1981); The trial advocacy courses that were offered in the 1960s and 1970s typically bore little resemblance to the simulation courses typical of today. One commentator described the trial advocacy course that he took at a top law school in the 1970s as follows:

> The trial advocacy class attracted over eighty students, meeting only in a large group, and the work consisted of listening to lectures and watching demonstrations. However, the class provided few opportunities for the students to perform any of the trial skills being discussed and those opportunities were limited to only a handful of students.

Hoffman, *supra* note 119, at 204.

136. PRACTICE IN THE FEDERAL COURTS, *supra* note 125, at 229.

137. *Id.* at 229.

138. Cramton, *supra* note 121, at 2.

139. *Id.* at 2 n.4.

140. The Judicial Conference committee was clear that it found cost to be a poor excuse for the failure to offer more trial advocacy courses. It stated:

> While the law schools complain of the costs entailed in teaching Trial Advocacy, at the same time they apparently have no difficulty in funding courses in such subjects as 'Urban Development,' 'Macro-economics and the Law,' and 'Psychoanalysis and the Law' . . . .We do not argue that these courses lack value, but we do consider that if the courts and the public are to be adequately served, and if students are demanding training in the technique of litigation and not getting it, then the priorities demand that the necessary resources be diverted to

An ABA task force also studied the issue. Its 1979 report reached a different conclusion about the cause of attorney incompetence:[141]

> A lawyer's actual performance may fall short of the appropriate standard for any number of reasons unrelated to competence: inattention, laziness, the press of other work, economic factors, or mistake. Indeed, available evidence suggests that reasons such as these, not a lack of capacity to do a proper job (incompetence in the narrow sense), are the cause of most instances of lawyer failure.[142]

Nonetheless, like the Second Circuit and Judicial Conference committees, the ABA task force recommended that law schools increase their emphasis on practical skills by providing instruction in fundamental skills like oral communication, interviewing, counseling, and negotiation; as well as training in litigation skills "to all students desiring it."[143]

The ABA task force's recommendations led to a dramatic expansion in experiential learning courses. In a 1974 to 1975 survey, 109 law schools reported 834 experiential learning courses.[144] By 1990, 119 law schools reported 1,763 courses.[145] Trial advocacy programs increased at a rate similar to other skills courses. The number of faculty who designated themselves as teachers of trial advocacy or appellate practice grew from 235 in 1970, to 397 in 1975, and 639 in 1980.[146] By 1987, an ABA report described professional skills training as "a standard part of law school curricula."[147]

> and more emphasis be placed on trial advocacy rather than on more esoteric subjects.

QUALIFICATIONS FOR THE SECOND CIRCUIT, *supra* note 125, at 169–70; PRACTICE IN THE FEDERAL COURTS, *supra* note 125, at 230. The Judicial Conference committee's comments, while perhaps more measured, were no less dismissive: "[I]t is incumbent upon law schools to remedy serious identified deficiencies in the education of lawyers, even if the remedy involves the investment of additional funds or a shift in emphasis." *Id.*

141. ABA TASK FORCE ON LAWYER COMPETENCY, THE ROLE OF LAW SCHOOLS 9 (1979).

142. *Id.*

143. *Id.* at 3–4.

144. Joy, *supra* note 113, at 569.

145. *Id.*; *see also* James W. McElhaney, *Toward the Effective Teaching of Trial Advocacy*, 29 U. MIAMI L. REV. 198, 202 (1975) (noting expansion of trial advocacy programs in the 1970s and the clear trend towards abandoning lecture courses in favor of "workshop type" courses).

146. Markus, *supra* note 135.

147. Carlson, *supra* note 92, at 695, 695 n.26 (citing *Long Range Planning for Legal Education in the United States*, REPORT OF ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR 3, 23 (1987)).

As trial advocacy programs grew in number, their content evolved. In the early 1970s, most trial advocacy courses "were outgrowths of what was called 'practice court,' where the students were expected to draft and file every document in a case."[148] That changed rapidly with the founding of the National Institute for Trial Advocacy (NITA) in 1971.[149] NITA pioneered a teaching method that includes not only lectures and demonstrations of skills, but also practicing the skills through simulation exercises.[150] "The introduction of NITA materials for advocacy training and the 'NITA methodology' into the law schools was so rapid and successful that by 1975, four years after NITA's founding, a number of schools were offering trial advocacy courses that followed the NITA model."[151] In the law school curriculum today, a trial advocacy course without a simulation component would be almost unthinkable.[152]

Although trial advocacy programs and other skills courses grew rapidlyin the 1970s and 1980s, the ABA did not first require law schools to offer experiential learning opportunities until 1996.[153] This change followed the release of the influential MacCrate Report in 1992.[154] The MacCrate Report, officially called *Legal Education and Professional Development—An Educational Continuum*, was the product of the ABA's Task Force on Law Schools and the Profession.[155] The MacCrate Report called upon law schools to reorient their approach to emphasize the teaching of practical skills.

The report spurred a national conversation that, despite some pushback by law schools, eventually led to skills courses becoming a mandatory part

148. Hoffman, *supra* note 119, at 210.

149. *Id.* at 210–11.

150. *Id.* at 210–11.

151. *Id.* at 211.

152. This Article does not criticize the NITA method, which is characterized by skill demonstrations by experienced faculty and simulations to allow students to practice the skills demonstrated. *Id.* Indeed, this Article assumes that trial advocacy will continue to be taught using a simulation method. Instead, as discussed in Part IV, it argues that trial advocacy courses should demonstrate and encourage students to try a wider range of advocacy styles so that each student can find an effective style that feels comfortable and authentic. *See infra* Part IV.

153. *See* Robert MacCrate, *Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development*, 10 CLINICAL L. REV. 805, 818, 820 (2004); AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 302(d) (October 1996) [hereinafter ABA STANDARDS 1996] ("A law school shall offer live-client or other real-life practice experiences. This might be accomplished through clinics or externships. A law school need not offer this experience to all students.").

154. Joy, *supra* note 113, at 571–72.

155. *See generally* AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT–AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

of the law school curriculum.[156] Specifically, in 1993 the ABA amended Standard 301 (Objectives of Program of Legal Education) to state that the focus of law school should not only be to prepare students to take the bar exam but also to prepare students for practice.[157] In 1996, the ABA adopted Standard 302 (Learning Outcomes), which required schools to offer all students "adequate opportunities for instruction in professional skills" and to require schools to offer "real-life practice experiences."[158] In 2010, the ABA amended Standard 302 to require all law students to earn at least one experiential credit.[159] In 2014, the requirement—now contained in Standard 303—was increased to six credits.[160]

A course must meet the criteria set out in Standards 303 (Curriculum) and 304 (Experiential Courses) to qualify as an experiential learning course.[161] After the most recent revisions to these standards, experiential learning courses must "integrate doctrine, theory, skills, and legal ethics" and require student self-evaluation.[162] Because of these requirements, particularly that skills courses teach self-evaluation, legal skills courses have become one of the primary places where professional identity formation concepts are introduced to law students.[163]

That trial advocacy and other skills courses and professional identity formation are linked is also unsurprising given their shared history. The notion that law schools can and should teach professional identity formation arose from the same movement that led law schools to expand skills-based courses. The same MacCrate Report that was so influential in increasing the status of skills-based courses is also generally accepted as one of the first places to discuss the concept of teaching professional identity formation in law school.[164] Among other things, the task force that drafted the MacCrate

156. Joy, *supra* note 113, at 571–73.

157. *Compare* ABA STANDARDS 1992, *supra* note 117 *with* ABA STANDARDS 1993, *supra* note 117. Note that some earlier versions of the ABA Standards and Rules of Procedure, including the 1992 and 1993 versions, did not include titles for the standards. I have used the titles from the 2023–24 version of the Standards and Rules of Procedure.

158. ABA STANDARDS 1996, *supra* note 153; *see* Joy, *supra* note 113, at 572.

159. Joy, *supra* note 113, at 554–55.

160. AM. BAR ASS'N, SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATION, Standard 303, at 16 (2014–15).

161. ABA STANDARDS 2023, *supra* note 116, at 18, 20.

162. Allison Korn & Laila L. Hlass, *Assessing the Experiential (R)evolution*, 65 VILL. L. REV. 713, 721 (2020).

163. *See* Daisy Hurst Floyd, *Practical Wisdom*, 10 U. ST. THOMAS L.J. 195, 222 (2012) (stating that pedagogy that fosters professional identity formation has three characteristics: "it provides feedback on students' ideas and conduct; it allows for self-assessment; and it develops skills of reflection.").

164. *See* Baum, *supra* note 91, at 28–29; Karen Tokarz et al., *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 WASH. U. J.L. & POL'Y 11, 16–17 (2013).

Report was charged with determining "what skills, what attitudes, what character traits, what quality of mind are required for lawyers?"[165] In keeping with that charge, the Report identified four values necessary for effective lawyering, along with character traits needed to attain those values.[166]

After the MacCrate Report, many clinical and skills faculty were leaders in incorporating the teaching of professional identity formation into their courses.[167] Law schools as a whole, however, were slow to embrace the teaching of professional identity formation.[168] This began to change in 2007 when the Carnegie Foundation published a study of the professional training of lawyers.[169] The Carnegie Report concluded that legal education was too heavily focused on teaching legal doctrine at the expense of teaching practice skills and professional values.[170] The Report's recommendations to improve legal education included a call to teach professional identity formation.[171] Specifically, the Report's authors envisioned "providing entrants to the field effective ways to engage and make their own the ethical standards, social roles, and responsibilities of the profession, grounded in the profession's fundamental purposes."[172]

Calls for reform accelerated following the Great Recession of 2007–09.[173] The Great Recession created a landscape where on-the-job training opportunities for new lawyers dwindled because, among other things, many new lawyers were entering the profession as solo practitioners, and clients at larger firms had become resistant to staffing newly minted attorneys on

165. *See* Baum, *supra* note 91, at 29 (quoting ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION, at vi (1st ed. 2007)).

166. *Id.*

167. *See, e.g.*, Barry et al., *supra* note 119, at 41–49 (summarizing early 2000s approaches to clinical teaching, many of which emphasized the teaching of values).

168. Russell G. Pearce, *MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values*, 23 PACE L. REV. 575, 584–86 (2003) (positing that the MacCrate Report had minimal impact on teaching of values because, although the report discussed both skills and values, it treated values as secondary); Karen Tokarz et al., *supra* note 164, at 17 ("However, the tendency of law school faculties to be risk adverse when considering curricular reform, combined with the lack of specific prescriptions or methods in the *Report* for measuring the performance of skills and values, may have diminished the transformative effect of the *Report*.").

169. *See* Katherine R. Kruse, *Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice*, 45 MCGEORGE L. REV. 7, 8 (2013).

170. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW 3, 9–10 (Carnegie Foundation for the Advancement of Teaching, 2007).

171. *Id.*; *see also* Baum, *supra* note 91, at 30.

172. Sullivan, *After Ten*, *supra* note 121, at 334.

173. *See* Karen Tokarz et al., *supra* note 164, at 21 (citing STATE BAR CAL., TASK FORCE ON ADMISSION REG. REFORM: PHASE I FINAL REPORT 1 (June 24, 2013)).

their matters.[174] Indeed, in 2008, the ABA Council on the Section of Legal Education and Admissions to the Bar charged the ABA Standards Review Committee with undertaking a comprehensive review of law school accreditation standards.[175] The ABA Standards Review Committee issued its report in 2013.[176] Two years later, the ABA Standards and Rules of Procedure for Approval of Law Schools were revised.[177]

The 2015 revisions required schools to establish learning outcomes in four areas of competency. In response, some schools began to adopt learning outcomes that either explicitly or implicitly included fostering the development of certain character traits.[178] The 2022 revisions to the ABA Standards accelerated this trend by explicitly requiring schools to "provide substantial opportunities for . . . (3) the development of professional identity."[179]

Both the language of newly renovated Standard 303 and related interpretive material suggest that one purpose of requiring teaching professional identity formation is to address some of the problems that have led to the current well-being crisis in the legal profession. According to the ABA's interpretation of revised Standard 303, "[p]rofessional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society"[180] and professional identity formation "should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice."[181]

Standard 303 also now requires schools to educate students on "bias, cross-cultural competency, and racism."[182] The ABA's interpretation of this rule states that law schools' teaching of professional identity formation must introduce students to the "obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism."[183]

Although there is sure to be some variation in how law schools implement the mandate to teach professional identity formation, it seems

174. *See id.*

175. *Id.* at 22–23.

176. *Id.*

177. AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022–2023 Standard 303(b), at 18 (2022) [hereinafter ABA STANDARDS 2022].

178. Baum, *supra* note 91, at 30–32.

179. ABA STANDARDS 2022, *supra* note 177.

180. ABA STANDARDS 2023, *supra* note 116, Standard 303 (Interpretation 303–05), at 19.

181. *Id.*

182. ABA STANDARDS 2022, *supra* note 177, Standard 303(c), at 18.

183. ABA STANDARDS 2023, *supra* note 116, Standard 303 (Interpretation 303–06), at 19.

likely that skills courses will continue to play a key role. This is because Standards 303 and 304 seem to envision it, which is what skills courses have long done.[184] Therefore, the mandate that law schools teach professional identity in a way that addresses longstanding issues in the legal profession, coupled with the fact that skills faculty are already adept at teaching professional formation, means that skills faculty—including trial advocacy faculty—are once again positioned to be a driving force in innovating the law school curriculum to address well-being challenges. It is thus an ideal time to consider if we are teaching advocacy skills in a way that fosters healthy professional identity formation and addresses bias, cultural competency, and racism in the profession.

III. THE CURRENT APPROACH TO TRIAL ADVOCACY ASSUMES THERE IS ONE "BEST" WAY TO BE A TRIAL ATTORNEY

Although law school trial advocacy programs were groundbreaking, marking the first significant effort to add skills training to the curricula of most law schools, trial advocacy programs are in some ways mired in a distant past. When it comes to teaching style, most trial advocacy programs focus on teaching students how to meet traditional expectations for persuasive oral advocacy.[185] This advocacy style is taught not necessarily because it is superior to other styles, but because it is the style that

184. Indeed, some scholars have lamented the tendency to treat experiential learning courses as "the repository for the many aspects of lawyering that are excluded from substantive law courses taught with the casebook method." Barry et al., *supra* note 119, at 37–38.

185. *See* Stabler, *supra* note 42, at 460 (quoting Salmon, *supra* note 49, at 159) ("Traditional expectations for persuasive oral advocacy 'tend[] to favor dress, demeanor, and delivery associated with white men.'"); Salmon, *supra* note 49, at 154–55 ("Female speech was considered inherently untrustworthy under the Classical paradigm. Women, ruled by their wombs and the hysteria those organs caused, spoke from untrustworthy motives."); Marcus Lind-Martinez, *Latinidad, White Supremacy, and Reforming First-Year Moot Court Competitions to Confront Racial and Ethnic Bias*, 23 HARV. LATINX L. REV. 125, 132 (2020) (noting that for Latinos and other students of color, success in law school in general and in oral argument competitions in particular "requires linguistic and cognitive assimilation with the dominant group."); *see also* Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103:1 DICK. L. REV. 7, 20 (1998) ("Legal writing pedagogy contributes to the muting of outsider voices . . . and thereby both reflects and perpetuates the biases in legal language and reasoning.") (discussing how current skills pedagogy contributes to this issue because it teaches about the legal profession as it currently is). Perceptions of "good" public speaking are culturally specific. The style of public speaking currently taught in education institutions in the United States thus "is far from universal" and "may not resonate with the experiences of students socialized in non-Anglo speech communities." David Boromisza-Habashi et al., *Public Speaking as Cultural Ideal: Internationalizing the Public Speaking Curriculum*, 9 J. INT'L & INTERCULTURAL COMMC'N. 1, 1 (2015). This raises the question of whether continuing to idealize one style of public speaking puts United States law students at a disadvantage in an increasingly globalized society.

audiences expect. In other words, much of what we teach about persuasion in trial advocacy programs is taught because that is always how it has been taught.

Indeed, scholars have suggested that our current understanding of what it means to be a persuasive advocate, including expected "dress, demeanor, and delivery," originates "in the Classical rhetoric of ancient Greece and Rome."[186] Classical rhetoric calls upon the aspiring litigator to argue with "the demeanor and delivery" of those who were considered to be the most credible and persuasive in the classical era: "the military leader or warrior--always a man,"[187] and often a white man.[188] Thus, the unspoken message in many trial advocacy courses is that there is just one correct way to be a great trial attorney—and that is to present in a style associated with white men.[189] This puts women, people of color, and even white men who do not measure up to traditional standards of hegemonic white masculinity[190] in an uncomfortable position.[191] And nowhere is that discomfort more keenly felt than when it comes to advice on the use of emotion—particularly anger—in trial advocacy.

Although not universally recommended, emotion—including anger—is frequently presented as essential to successful trial advocacy.[192] Some

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186. Salmon, *supra* note 49, at 144 (citing Daphne O'Regan, *Eying the Body to Find Truth: How Classical Rhetoric's Rules for Demeanor Distort and Sustain Our Legal Regime*, 37 PACE L. REV. 379 (2016)).

187. *Id.* at 154 (citing O'Regan, *supra* note 186, at 387).

188. Stabler, *supra* note 42, at 460.

189. *See generally supra* text accompanying note 185.

190. Purvis, *supra* note 41, at 1150 (citing Dara E. Purvis, *Trump, Gender Rebels, and Masculinities*, 54 WAKE FOREST L. REV. 423, 430, 439 (2019)).

> [H]egemonic masculinity is the single idea of manhood seen as better than all other, less manly, alternatives. People of all genders may be judged harshly against the standard of hegemonic masculinity, either because they fail to achieve it or, because of factors including gender, sexual orientation, race, economic class, and so on, they will *never* be able to achieve hegemonic masculinity. Hegemonic masculinity is deeply encoded within the legal profession.

Id. (emphasis in original).

191. Purvis, *supra* note 41, at 1152.

> This makes legal education unpleasant for many students, but particularly so for women (and other underrepresented groups), who will never truly measure up. But because hegemonic masculinity is an unspoken correlation to the skills law school rewards, and not an explicit preference for male students, the gendered element is buried beneath arguments about professional skills and abstract pedagogy.

Id. (describing the impact of markers of success in law school being coded white and male); *see* Stabler, *supra* note 42 at 470.

192. There seems to be some pushback on the idea that an aggressive litigation style is commonly taught in law schools. The review of relevant literature in this Article puts that criticism to rest. But speaking with practitioners is also instructive. Many will tell you that during their law school

experts argue that an aggressive trial presentation style is the single most effective presentation style.[193] "An aggressive style of trial advocacy entails the use of an angry tone, using aggressive words, varying the voice, using exaggerated hand gestures, and looking the audience squarely in the eye."[194] It is often distinguished from a "passive style" which "involves maintaining a quieter, steady voice, standing still at a podium, looking at notes, pausing often, and even seeming unmotivated or uninterested."[195]

Why anger and other strong emotions? Scholars have suggested that strong emotions help to hold the audience's attention, convey belief in the righteousness of the client's cause, and meet juror expectations for how attorneys ought to behave, given how attorneys are portrayed on television.[196] For these reasons, a number of textbooks assigned in trial advocacy classes present strong emotion as an essential tool in the trial attorney's toolbox.[197]

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experience, they explicitly or implicitly received the message that litigators must be aggressive and employ emotion. As one example of the predominance of the belief that a good lawyer must employ strong emotion, the Women's Bar Association of Massachusetts recently held a panel called *Emotion in the Courtroom: How to Use It Effectively While Avoiding Potential Pitfalls and Biases*. *See Emotion in the Courtroom: How to Use It Effectively While Avoiding Potential Pitfalls and Biases*, THE WOMEN'S BAR ASS'N, https://wbawbf.org/wba/events/emotion-courtroom-how-use-it-effectively-while-avoiding-potential-pitfalls-and-biases (last visited Dec. 10, 2024).

193. *See* Todd A. Berger, *Male Legal Educators Cannot Teach Women How to Practice "Gender Judo": The Need to Critically Re-Assess Current Pedagogical Approaches for Teaching Trial Advocacy*, 45 J. LEGAL PROF. 1, 7 (2020) [hereinafter Berger, *How to Practice "Gender Judo"*]; Debra Cassens Weiss, *Showing Anger Can Backfire for Female Lawyers, Studies Say; Law Prof Suggests 'Gender Judo' Response*, A.B.A. J. (Aug. 6, 2018), https://www.abajournal.com/news/article/showing_anger_in_the_courtroom_can_backfire_for_women_lawyers_study_suggest [hereinafter Weiss, *Showing Anger*].

194. Berger, *supra* note 193, at 6.

195. *Id.*

196. *See id.* at 7; *see also* STEVEN LUBET & J.C. LORE., MODERN TRIAL ADVOCACY 507 (6th ed. 2020) ("There will be points in many trials that virtually call out for an outward display of feeling, and a flat presentation may be regarded as an absence of conviction."); STEVEN GOLDBERG & TRACY MCCORMACK, THE FIRST TRIAL, (WHERE DO I SIT? WHAT DO I SAY?) IN A NUTSHELL 299–301, 430–31 (3d ed. 2016); L. TIMOTHY PERRIN ET AL., THE ART & SCIENCE OF TRIAL ADVOCACY 461–63 (Carolina Acad. Press, LLC., 2d ed. 2011) (2003).

197. *See, e.g.*, LUBET & LORE., *supra* note 196 ("The absence of emotion may be taken as a lack of belief in the righteousness of your case."); GOLDBERG & MCCORMACK, *supra* note 196, at 430–31; PERRIN ET AL., *supra* note 196, at 461 (advising that a good closing will invoke both logic and emotion); DAVID J. F. GROSS & CHARLES F. WEBBER, THE POWER TRIAL METHOD (2d ed. 2014) 75–76, 79, 224, 232 (recommending the use of emotion in opening and closing statements). *But see, e.g.*, MARILYN J. BERGER ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY, 578, 585, 587 (3d ed. 2011) (advocating appeals to jurors' emotions—which may include sincere righteous indignation—but cautioning against anger); ROGER HAYDOCK & JOHN SONSTENG, TRIAL ADVOCACY BEFORE JUDGES, JURORS, AND ARBITRATORS 101–02, 328, 331 (5th ed. 2015) (advising that emotion may be appropriate at certain times in the trial, but cautioning against anger).

The idea that an angry, aggressive attorney is a competent attorney is so commonplace that sociologists have studied the phenomenon. In two different studies, researchers tested focus group reactions to actor portrayals of aggressive and passive attorneys. Those sociological studies did seem to confirm that—for some attorneys—an aggressive style is effective.[198] However, as discussed below, the design of studies may make it difficult to translate their findings to the work of real litigators in actual courtrooms.

A. Women and People of Color Are Penalized for Aggressive Advocacy

Regardless of whether an aggressive presentation style is effective for some attorneys, recommending such a style is problematic because anger is not a tool that all attorneys can wield comfortably or without consequence. For example, consider that the trope of an angry woman or person of color is not perceived as likeable or competent. In a 2022 study, observers attributed displays of anger by individuals in these groups to defects in their disposition—consistent with stereotypes about women and people of color.[199] Women and people of color who display anger are thus seen as overly emotional instead of full of conviction in the righteousness of their cause.[200] Multiple studies have confirmed that gender stereotypes and biases against "emotional" women limit the ability of women attorneys to employ anger in professional settings.[201] Women who express anger in

198. *See* Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 LAW & HUM. BEHAV. 533, 535–36 (1996); Jessica M. Salerno et al., *Closing with Emotion: The Differential Impact of Male Versus Female Attorneys Expressing Anger in Court*, 42 LAW & HUM. BEHAV. 385, 388–92 (2018) [hereinafter *Closing with Emotion*]. Commentators who discuss anger in the courtroom also often cite to a B.S. Honors thesis. Christian B. May, Anger in the Courtroom: The Effects of Attorney Gender and Emotion on Juror Perceptions 10–11, 18–19 (Apr. 21, 2014) (B.S. Honors College thesis, Georgia Southern University). In both the published studies and the honors thesis study, participants viewed male actors' portrayals of attorneys as more effective when the actors adopted an aggressive speaking style. An "aggressive" speaking style included employing anger for emphasis.

199. *See* Daphna Motro et al., *Race and Reactions to Women's Expressions of Anger at Work: Examining the Effects of the "Angry Black Woman" Stereotype*, 107 J. APPLIED PSYCH. 142, 143 (2022) (discussing parallel-constraint-satisfaction theory research on how people form impressions of others, which has shown that "observed behavior that is open to ambiguous interpretation is likely to be affected by the presence of stereotypes, which constrain how we interpret an event until that interpretation is consistent with our stereotypes"); *see also Closing with Emotion*, *supra* note 198, at 387; May, *supra* note 198, at 10–12.

200. *See* Motro et al., *supra* note 199; Hahn & Clayton, *supra* note 198, at 537; *Closing with Emotion*, *supra* note 198, at 387; May, *supra* note 198, at 10.

201. Victoria L. Brescoll & Eric Luis Uhlmann, *Can an Angry Woman Get Ahead? Status Conferral, Gender, and Expression of Emotion in the Workplace*, 19 PSYCH. SCI. 268, 270 (2008); Jessica M. Salerno, & Liana C. Peter-Hagene, *One Angry Woman: Anger Expression Increases*

professional settings are perceived as less competent and less effective than their non-angry counterparts.[202] Angry men, on the other hand, are perceived as more effective.[203] This holds true in the legal profession. For example, the same three sociological studies that found a correlation between anger and perceived attorney competence presented their findings with a significant caveat: anger benefitted only the male attorneys.[204] The studies showed that focus groups rated actors portraying male attorneys as more competent when they displayed anger.[205] The focus groups did not feel the same way about the actors portraying angry women attorneys. In fact, in two of the three studies, focus groups actually penalized the angry women attorneys.[206] They rated the angry women attorneys as the least competent attorneys and the attorneys they were least likely to hire.[207] The angry women were not "strong" like their male counterparts, but rather "shrill" and unlikeable.[208] In the third study, women attorneys fared slightly better. They were able to adopt an aggressive demeanor without penalty; however, men benefited from an aggressive presentation style more than women did.[209]

Surveys of practicing attorneys echo these findings. For example, in a 2005 study by the California State Bar, 54% of women attorneys reported experiencing gender bias in the courtroom.[210] Among the subtle acts of gender bias, women respondents reported being told they sounded shrill.[211] Similarly, in a 2018 survey of nearly 3,000 attorneys, the majority of women attorneys surveyed reported they had been penalized for what was perceived as being too assertive.[212]

Influence for Men, But Decreases Influence for Women, During Group Deliberation, 39 LAW AND HUM. BEHAV. 581, 581–82, 589–91 (2015).

202. Brescoll & Uhlmann, *supra* note 201; Salerno & Peter-Hagene, *supra* note 201.

203. Brescoll & Uhlmann, *supra* note 201; Salerno & Peter-Hagene, *supra* note 201.

204. Hahn & Clayton, *supra* note 198, at 536, 542; *Closing with Emotion*, *supra* note 198, at 398; May, *supra* note 198.

205. Hahn & Clayton, *supra* note 198, at 536–37; *Closing with Emotion*, *supra* note 198, at 398; May, *supra* note 198.

206. *Closing with Emotion*, *supra* note 198, at 398; May, *supra* note 198, at 10.

207. May, *supra* note 198, at 18.

208. *Closing with Emotion*, *supra* note 198, at 398.

209. Hahn & Clayton, *supra* note 198, at 538.

210. Connie Lee, *Gender Bias in the Courtroom: Combatting Implicit Bias Against Women Trial Attorneys and Litigators*, 22 CARDOZO J.L. & GENDER 229, 234 (2016).

211. *Id.*

212. Weiss, *Showing Anger Can Backfire*, *supra* note 193 (claiming in the 2018 survey study, "only 46% of women of color and 48% of white women" said they were not penalized for being assertive.).

Similar stereotypes and biases prevent people of color from employing anger as a persuasive tool.[213] Attorneys and law students of color report that they "take extra care to avoid appearing emotional—in particular, angry."[214] But, despite suppressing outward displays of emotion, attorneys of color still report being caricatured as "angry Black women," "aggressive Black men," "dragon ladies," and similar stereotypes.[215] One recent study has shown that these negative stereotypes may also impact career prospects. In the 2022 study, psychologists found that Black women who verbally expressed anger at work received lower performance evaluations than Black or white men or white women who expressed anger.[216]

Because women and people of color are penalized for displaying anger, some commentators argue that trial advocacy professors should teach students in these groups special techniques to combat implicit bias. For example, there have been recent articles advocating "gender judo."[217] Gender judo is a term first coined by Professor Joan Williams to describe women "mixing strong messages of competence, or 'masculinity' with equally strong messages of warmth, or 'femininity'" in order to overcome biases against women in the workforce.[218] "[I]n the context of trial advocacy, when practicing 'gender judo,' a female lawyer must strike the appropriate balance between aggressively advocating for her client . . . while at the same time not being so aggressive that her performance violates gender norms."[219] In other words, gender judo is a trial skill just for the ladies. And, as those who have studied gender judo recognize, gender judo is not a long-term solution to the problem of implicit

213. *See, e.g.*, Jessica M. Salerno et al., *Women and African Americans Are Less Influential When They Express Anger During Group Decision Making*, 3 GRP. PROCESSES & INTERGROUP RELS. 57, 58–59, 61, 74 (2019).

214. Stabler, *supra* note 42, at 462 (citing WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY 117 (2008)).

215. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 10, 25 (2006); Stabler, *supra* note 42, at 462; MASS. SUPREME JUDICIAL CT. STANDING COMM. ON LAW. WELL-BEING, MASS. SUPREME JUD. CT., *supra* note 77, at 15.

216. *See* Motro, et al., *supra* note 199, at 148–49 (analyzing results of focus group and student evaluations of four actors playing role of an employee receiving a performance review).

217. Berger, *supra* note 193, at 13; Weiss, *Showing Anger*, *supra* note 193.

218. Joan C. Williams, *Women, Work and the Art of Gender Judo*, WASH. POST (Jan. 24, 2014), https://www.washingtonpost.com/opinions/women-work-and-the-art-of-gender-judo/2014/01/24/29e209b2-82b2-11e3-8099-9181471f7aaf_story.html.

219. Berger, *supra* note 193, at 13. Whether gender judo is a successful strategy for combatting implicit bias against female litigators has not been studied. *See id.* at 15. However, Professor Williams' research has demonstrated that successful women across multiple professions report using gender judo techniques. *See, e.g.*, Joan C. Williams et al., *Tools for Change: Boosting the Retention of Women in the STEM Pipeline*, 6 J. RES. GENDER STUD. 11, 37–38 (2016); Williams, *supra* note 218.

bias. Combatting implicit bias by teaching a special litigation style for women (or any other marginalized group) raises new problems.[220]

First, gender judo is bound to be uncomfortable for many women. It requires women to walk a tightrope between aggression and femininity, which is more difficult than what their male counterparts are asked to do.[221] Moreover, gender judo requires all women to be both aggressive and feminine when not all women feel comfortable behaving aggressively or in stereotypically feminine ways.[222] The message to those students is that they can only be successful litigators if they pretend to be someone they are not. This message implicitly reinforces negative stereotypes that paint women litigators as inferior to male litigators. That, in turn, can lead to a "cycle of diminished achievement" for women litigators whose performance suffers

220. There do not seem to be any commentators calling for aggression "judo" by marginalized groups other than women. However, the extent to which people of color need to adopt white cultural norms to appear "professional" has been the subject of extensive debate. *See, e.g.*, Leah Goodridge, *Professionalism as a Racial Construct*, 69 UCLA L. REV. DISCOURSE 38, 44 (2022) (noting, among other things, that most senior Black attorneys reported professionalism standard for Black attorneys was higher than for white attorneys). One example is the ongoing debate over whether Black women should forgo natural and protective hairstyles to conform to white ideals of professionalism. *See, e.g.*, Janice Gassam Asare, *How Hair Discrimination Affects Black Women at Work*, HARV. BUS. REV. (May 10, 2023), https://hbr.org/2023/05/how-hair-discrimination-affects-black-women-at-work (citing 2023 survey of Black women in which two-thirds respondents reportedly changed their hairstyle for a job interview).

221. Weiss, *Showing Anger*, *supra* note 193; "[T]he imperative to excel under stressful courtroom conditions without abandoning the traits that judges and juries positively associate with being female . . . is a devilishly narrow path to walk, and it can severely hinder the ability to offer a client the best and most zealous defense." Professor Laura Bazelon, *What It Takes to Be a Trial Lawyer if You're Not a Man*, ATLANTIC (Sep. 2018), https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778/; Berger, *supra* note 193, at 15 (citing LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 107 (2d ed. 2003)) (discussing studies of salary negotiations, which show that expectations that women appear "competent, ambitious, and competitive" without being perceived as "overbearing and dominant" make negotiation for women more difficult than for their male counterparts).

222. *See* Purvis, *supra* note 41, at 1153 (arguing addressing gender discrimination in law school curriculum by adding more "feminine" skills is misguided because dream education or skill set of one woman is not the same for every woman); In her writing on gender judo, Professor Williams advocates for women finding their own style of gender judo by picking the masculine and feminine qualities that work for them. Williams, *supra* note 218 ("The women my research team interviewed played to feminine stereotypes in very targeted ways. No woman slept her way to the top. No one acted like a little girl. Instead, they chose elements of traditional femininity they felt comfortable with."). But because of entrenched thinking about the necessity of aggression in litigation, those who advocate for gender judo in trial advocacy do not give female attorneys a menu of qualities from which to choose. Aggression is *the* masculine trait that women must employ along with a countervailing feminine trait. *Id.*; *see* Weiss, *Showing Anger*, *supra* note 193 (describing the "double bind" faced by female lawyers in which they must avoid being seen as "too aggressive or not aggressive enough").

due to stereotype threats[223] and can make trial practice less enjoyable for women.[224]

Second, teaching gender judo can also be stigmatizing. Implicit in teaching a special style of trial advocacy for women is the idea that women cannot succeed by trying cases the way a man would. Because the unspoken standard by which law students and attorneys are measured is still one of hegemonic white masculinity, this is tantamount to telling women that they can "never truly measure up."[225]

Third, teaching a special style of trial advocacy just for women may limit women's opportunities for mentoring. Professor Berger recognized that concern in a 2020 article where he proposed that male professors could not competently teach trial advocacy to women students because male professors lack lived experience practicing gender judo.[226] Although Professor Berger's suggestion was presumably tongue-in-cheek, it highlights a very real concern. If women cannot try a case the way that men do, then there is limited value in having male litigators mentor women litigators. Because men are still disproportionately represented at the highest levels of the profession,[227] removing men from the pool of available mentors would significantly limit women's opportunities to receive mentoring.[228] Given the important role that mentoring plays in career progression and well-being—especially for women and people of color—any approach that reduces mentoring opportunities should be questioned.[229]

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223. Salmon, *supra* note 49, at 166–68 (discussing stereotype threat, the "social-psychological threat that arises when one is in a situation or doing something for which a negative stereotype about one's group applies" that can cause "the person experiencing it to perform more poorly at the task than she ordinarily would.") (quoting Claude M Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCH. 613, 614 (1997)).

224. George Bach, *Don't Be Afraid of Trial: Making the Teaching of Trial Practice Accessible and Yes, Less Aspirational*, 22 CONN. PUB. INT. L.J. 29, 36 ("'You be you' is the core principle to emphasize in trying to make students comfortable in trial practice . . . . A student who is pushed to be someone they are not (a) will hate trial practice, and (b) will come across as fake.").

225. Purvis, *supra* note 41, at 1152.

226. Berger, *supra* note 193, at 19.

227. *See supra* Part I.A.2; *see also* TREND IN LAWYER DEMOGRAPHICS *supra* note 54; 2022 REPORT ON DIVERSITY, *supra* note 52, at 4.

228. The same is true for other marginalized groups, particularly attorneys of color. As discussed in Part I.A.2, *supra* p. 9, people of color continue to be underrepresented in the profession, particularly in leadership roles. Thus, teaching any marginalized group a "special" litigation style to combat implicit bias has the potential to artificially limit the pool of available mentors.

229. NAT'L TASK FORCE ON LAW. WELL-BEING, *supra* note 16, at 16, 36–39, 41; *see also* MASS. SUPREME JUD. CT. STANDING COMM. ON LAW. WELL-BEING, MASS. SUPREME JUD. CT., *supra* note 77, at 9 (noting members of affinity bar associations reported difficulty in finding mentors that shared their background because attorneys of color are underrepresented in leadership positions in the profession).

Finally, teaching gender judo is inconsistent with the recently revised ABA Standard 303(c), which requires law schools to teach students about their professional obligation to "promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law."[230] Contrary to what some gender judo proponents have argued, teaching gender judo does not merely give students a tool for navigating bias.[231] It actually perpetuates bias by reinforcing hegemonic white masculine ideals. That is because the gender judo concept accepts the premise that an aggressive advocacy style is preferred. Instead of teaching students to eliminate bias, gender judo thus accepts bias as inevitable and puts the burden on women to appease those who harbor gender bias.

Teaching students to change themselves in this way runs contrary to the bulk of scholarship on how law school faculty should teach professional identity formation. Scholars agree that faculty should help each student integrate the lawyer identity into the student's current identity.[232] Professional identity formation should not require students to abandon the person they were before law school.[233]

B. Teaching an Aggressive Litigation Style Raises Other Concerns

Teaching aggressive advocacy as the ideal does not just hurt women and people of color. White men are not a monolith. For some white men, an aggressive and angry style of advocacy feels inauthentic and uncomfortable. These men are also harmed by the message that they must nonetheless adopt an aggressive style and cannot be themselves in the courtroom.[234]

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230. Neil W. Hamilton & Louis D. Bilionis, *Revised ABA Standards 303(b) and (c) and the Formation of a Lawyer's Professional Identity, Part 1: Understanding the New Requirements*, NALP Bulletin+: PDQ (NAT'L ASSOC. FOR L. PLACEMENT), (May 2022), https://www.nalp.org/revised-aba-standards-part-1.

231. Berger, *supra* note 193, at 32 (responding to the argument that gender judo endorses bias and asserting that we must teach students to deal with implicit bias until it is eliminated).

232. Floyd, *supra* note 163, at 207 ("Incorporating *identity* helps law students integrate their new professional roles with their existing understanding of themselves, including incorporating their pre-law school values and concerns.") (advocating for incorporating identity formation into law school curriculum); Patrick Emery Longan et al., *A Virtue Ethics Approach to Professional Identity: Lessons for the First Year and Beyond*, 89 U.M.K.C . L. REV. 645, 654–55 (2021) (discussing the need to integrate lawyer identity into students' current identity as part of professional identity formation).

233. *See* Baum, *supra* note 91, at 38 (criticizing law school as character-formative, primarily in the negative sense because it inhibits positive character traits such as curiosity and genuine intellectual interest).

234. *See* Fischer, *supra* note 75, at 84–85.

> But it is not just women and minorities who have felt alienated in law school: '[M]any male law school graduates—from a number of years ago as well as

Trial advocacy courses that encourage an aggressive litigation style have also been linked with incivility.[235] The idea is that students take the aggressive trial manner they learned in trial advocacy class and apply it to the litigation process, becoming "the Rambo or pit bull litigator" who is contentious at all stages of litigation.[236] This is not only harmful to the profession as a whole because it breeds incivility,[237] but also because it is detrimental to those who embrace pit bull tactics. Otherwise, women attorneys risk alienating the many judges who pride themselves on making decisions based on reason—not emotion.[238]

IV. A NEW APPROACH TO TRIAL ADVOCACY IS NEEDED

Professor Susie Salmon aptly described law professors as facing a choice between teaching minoritized groups to "embrace the language of power, and risk being coopted by it, or reject the language of power, and risk not being heard[.]"[239] As discussed, the dominant approach to teaching trial advocacy has largely been to teach students to embrace the language of power by adopting an aggressive style of advocacy. Though the negative consequences of that approach are understood, these consequences persist because of the perceived benefits of aggressive advocacy. This Article proposes that it is time to reject the language of power and develop a new approach to teaching trial advocacy, recognizing that aggressive advocacy is not the only effective advocacy style.

First, there is little evidence to suggest that teaching students who belong to minoritized groups to adopt an aggressive advocacy style has had the desired effect of helping these students meet traditional expectations for persuasive oral advocacy.[240] Linguists suggest that "regardless of the

> recently, and inside as well as outside law school faculties—defer to nobody in their dislike of the law school experiences.

Id. (quoting Lee E. Teitelbaum et al., *Gender, Legal Education, and Legal Careers*, 41 J. LEGAL EDUC. 443, 463 (1991)); Purvis, *supra* note 41, at 1153 (arguing that diversifying curriculum not only helps women, but also creates more room for everyone to fit in and use their strengths).

235. *See supra* Part I.B.2.

236. J. Patrick Hazel, *Beyond Trial Advocacy*, 13 ADVOC.: STATE BAR LITIG. SECTION REP. (State Bar Texas) 131, 131 (1994); *see* C.J. Williams, *Advocating Altering Advocacy Academics: A Proposal to Change the Pedagogical Approach to Legal Advocacy*, 25 SUFFOLK J. TRIAL & APP. ADVOC. 203, 205 (2020) [hereinafter Williams, *Altering Advocacy*] (arguing that law schools overemphasize trial advocacy at the expense of other litigation skills, which, among other things, leads students to behave improperly in front of judges who generally are less impressed by emotional appeals than a jury might be).

237. *See supra* Part I.B.2.

238. *See* Williams, *Advocating Advocacy*, *supra* note 236, at 228.

239. Salmon, *supra* note 49, at 174 (quoting Stanchi, *supra* note 185, at 9–10).

240. *See id.* at 174–75.

speaker's demeanor or speaking style, the identity of the speaker and her gender, race, and other traits determine whether her speech is valued."[241] In other words, no matter how well a woman or person of color employs an aggressive advocacy style, and no matter how acrobatically they engage in judo to avoid appearing "too" aggressive, they will not eliminate the implicit or explicit biases of their audience. They are therefore exhausting themselves for no real gain.

Second, despite the ubiquitousness of the classical style of oral advocacy, it is not at all clear that it is the single best approach to trial advocacy or that students—regardless of gender, race, ethnicity, or other personal characteristics—cannot be as successful with other styles. Indeed, multiple indicators point to the conclusion that successful litigators come in various molds and employ many different advocacy styles. Since the early days of trial advocacy programs, scholars have recognized that "capable trial lawyers" employ a "variety of styles."[242] And most trial advocacy textbooks advise students that they should be themselves, even if they also advise students about the importance of employing emotion.[243]

Moreover, there is little empirical support for the idea that an aggressive style or the use of anger are preferable to other advocacy styles. Early research on trial lawyer performance suggests precisely the opposite. In a 1978 study, 89 federal judges were asked to rate identical videotaped performances by attorneys.[244] The judges "disagreed widely on the quality of any one performance," which suggested that the judges disagreed "about the essential ingredients of a good performance, perhaps related to personal style in performing a particular task of advocacy . . . ."[245] In other words, the study found that assessments of trial attorney competence were highly subjective, with no one style universally praised.[246]

The handful of sociological studies finding that jurors perceived angry male attorneys as more effective than calm male attorneys do not necessarily compel an opposite conclusion.[247] None of the studies used real

241. *Id.* at 175 (citing Stanchi, *supra* note 185, at 49).

242. *See* James P. Schaller, *Teaching Trial Advocacy*, 58 A.B.A. J. 1279, 1280 (1972).

243. *See, e.g.*, BERGER, ET AL., *supra* note 197, at 571, 574, 578, 587–88 (describing "sincerity" as the most important trait of a trial attorney); GROSS & WEBBER, *supra* note 197, at 18–22 (advising attorneys to be themselves); LUBET & LORE., *supra* note 196, at 6 (discussing importance of sincerity).

244. Cramton, *supra* note 121.

245. *Id.* (citing A. Partridge & G. Bermant, THE QUALITY OF ADVOCACY IN FEDERAL COURTS (1978)).

246. *Id.*; *see also* LUBET & LORE., *supra* note 196, at 506 (noting lack of consensus regarding the desirability of using emotion in closing argument).

247. Hahn & Clayton, *supra* note 198, at 536; *Closing with Emotion*, *supra* note 198, at 389; May, *supra* note 198, at 19–20.

attorneys; they instead relied on actors to read the same script in either an angry or calm manner.[248] The problem with this study design is that it was unlikely to result in a realistic portrayal of how a "calm" attorney would deliver a closing. Anyone who has litigated knows that there is more to litigation style than being angry or not angry.[249] An attorney with a more measured litigation style is unlikely to take a script written for a more emotive colleague and read it in a monotone. Instead, that attorney will create their own script that employs rhetorical devices that fit the attorney's personal style. Thus, by taking the same script and having actors read it with or without anger, the researchers created a situation where the focus group panel was likely to sense that something was missing from the calm delivery.

In short, the studies that have been done to date do not tell us which litigation styles are effective or whether there is a single most effective style. This points to the need for further study. Fortunately, it is an ideal time to conduct qualitative and quantitative research on this topic for two main reasons.

First, courts in the vast majority of states switched to online court proceedings during the pandemic.[250] Some states continue to make videos of COVID-era proceedings available online [251] and others livestream their proceedings,[252] creating a large pool of data that can be used to determine how attorneys behave in practice. Is the aggressive/non-aggressive binary true? Or are there other styles of advocacy being employed in practice? Is there a statistically significant difference in success rates for attorneys who use an aggressive advocacy style versus other styles? Answering these questions will require selecting an appropriate data set, developing criteria

248. Hahn & Clayton, *supra* note 198, at 535; *Closing with Emotion*, *supra* note 198, at 389; May, *supra* note 198, at 12–13.

249. The studies' designs are understandable because they allowed researchers to manipulate a single variable: anger. The resulting findings (particularly the findings regarding how the focus groups reacted to angry women) are certainly interesting. It is unclear, however, whether the findings can be translated directly into advice for trial lawyer behavior.

250. PEW CHARITABLE TRUSTS, HOW COURTS EMBRACED TECHNOLOGY, MET THE PANDEMIC CHALLENGE, AND REVOLUTIONIZED THEIR OPERATIONS 5 (2021).

251. *See, e.g.*, *Massachusetts Appeals Court Oral Arguments*, YOUTUBE, https://www.youtube.com/@massappealsct (last visited Dec. 10, 2024); *see also* Allie Reed, *Virtual Court Hearings Earn Permanent Spot After Pandemic's End*, BL (May 18, 2023), https://perma.cc/PX6Y-8QEN.

252. *See, e.g.*, *Lenawee County Probate & Juvenile Court*, YOUTUBE, https://www.youtube.com/@lenaweecountyprobatejuveni395 (last visited Dec. 10, 2024); *Livestream Courts*, WIS. CT. SYSTEM, https://www.wicourts.gov/courts/livestream.html (last visited Dec. 10, 2024); *Livestream and Virtual Courtrooms*, COLO. JUD. BRANCH, https://www.coloradojudicial.gov/livestream-and-virtual-courtrooms (last visited Dec. 10, 2024).

to code that data, and then reviewing a smaller sample set of data to test the study design. The beauty of using COVID-era data is that it is truly representative of the range of attorney styles employed in practice. In most places, physical court buildings were closed for a set period and attorneys had no choice but to appear via video conference.[253] There are thus no problems with self-selection into or out of the data set.

Second, the recent changes to the ABA standards have increased interest in how to best teach law students about professional identity formation, cross-cultural competency, and anti-racism.[254] There has been an explosion in conferences, workshops, and scholarship on these topics.[255] Because law school administrators and faculty are currently engaged with these topics, it is a good time to survey the legal community on this topic. The current level of interest and engagement should translate to a strong response rate on such a survey. If the results of studies and surveys point to the need to change how trial advocacy is taught, faculty are also more likely to be receptive. This is because of increased interest in diversity, equity, and inclusion, as well as professional identity formation issues spurred by the changes the ABA has mandated.[256] In other words, there is current

253. *See Lenawee County Probate & Juvenile Court*, *supra* note 252; *see also Livestream Courts*, WIS. CT. SYSTEM, *supra* note 252; *see also Livestream and Virtual Courtrooms*, COLO. JUD. BRANCH, *supra* note 252.

254. *See generally* ABA Standards 2023, *supra* note 116, at 18–20.

255. I make this assertion based upon my personal experience as a law professor who subscribes to various related listservs and mailing. In just the past few months, for example, the American Association of Law Schools has released a program for its annual meeting that includes three workshops on professional identity formation. *See Program: 2024 AALS Annual Meeting*, ASS'N OF AM. L. SCHS., https://memberaccess.aals.org/eweb/DynamicPage.aspx?WebKey=B199E9C2-30E6-4808-83B9-D1982C251EDD&RegPath=EventRegFees&REg_evt_key=c39e87c4-cbb0-4c97-ae56-812b065359be&Site=AALS (last visited Dec. 10, 2024); the New England Legal Writing Workshop's conference theme focused on professional identity formation for the second year in a row. *See New England Legal Writing Conference*, B.U. SCH. OF L., https://www.bu.edu/law/engagements/new-england-legal-writing-conference/ (last visited Dec. 10, 2024); the Legal Writing Institute announced a one-day workshop focused on professional identity formation. *One-Day Workshops*, LEGALWRITING INST. (last visited Dec. 10, 2024) https://www.lwionline.org/one-day-workshops.

256. Historically, there has been some resistance to changing the law school curriculum. *See, e.g.*, Tokarz, et al., *supra* note 164, at 17 (noting that law school faculties tend "to be risk averse when considering curricular reform . . . ."); Law schools' reluctance to change their curricula is cyclical:

> [T]here appears to be a predictable cycle that occurs in response to the issuance of each new study or report urging the greater incorporation of clinical and lawyering skills courses into the curriculum. First, the appearance of a new study or report initially generates favorable comment . . . . Next, an inevitable backlash follows . . . . Nonetheless, some incremental progress is made in response to the initial study or report before the law school community ultimately loses interests in the discussion and shifts its attention to other issues.

Hoffman, *supra* note 119, at 220–21.

momentum towards a more equitable, practical, and humane law school experience and an attendant opportunity to capitalize on that momentum.

A. A Call for Further Study

Further study of trial advocacy styles using data related to actual practicing attorneys has multiple potential benefits. It has the potential to broaden our understanding of the characteristics of a good trial lawyer, counter persistent criticism that legal education is divorced from reality, and provide an empirical basis for the work of skills faculty who are already challenging the status quo.

1. Further Study May Help Students Develop a Professional Identity that Feels Comfortable and Authentic

Advocacy style research has the potential to prove that attorneys can be themselves in court by establishing that there are multiple effective litigation styles. This will, in turn, lay the foundation for teaching trial advocacy in a more autonomy-supportive and inclusive way. As discussed, research points to the conclusion that a legal education that supports autonomy is essential to students' subjective well-being.

Autonomy support is defined as the "extent to which the person in authority (1) acknowledges the perspectives or preferences of the other; (2) provides meaningful choices to the other; and (3) when asserting control rather than providing choices, explains to the other the reasons why that is necessary."[257] A trial advocacy curriculum that provides students with a range of advocacy styles to choose from supports this autonomy. It also increases students' opportunities to employ their top strengths, which correlates with subjective well-being.[258] Varying advocacy styles will presumably rely on varying strengths, thus expanding the range of strengths students can employ to succeed.

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257. Krieger & Sheldon, *What Makes Lawyers Happy*, *supra* note 27, at 582 (citing Sheldon & Krieger, *Understanding Negative Effects*, *supra* note 107, at 894); *see* NAT'L TASK FORCE ON LAW. WELL-BEING, *supra* note 16, at 16–17, 54–55 (recommending enhancing lawyers' sense of autonomy and control to improve well-being) (citations omitted).

258. *See* Baum, *supra* note 91, at 37 (citing Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 411 (2009)) ("One study of law students established that law students who used their top strengths the most reported greater life satisfaction, less depression, and less stress compared to law students who did not."); Susan L. Brooks, *Fostering Wholehearted Lawyers: Practical Guidance for Supporting Law Students' Professional Identity Formation*, 14 U. ST. THOMAS L.J. 412, 425 (2018) (recommending students focus on their strengths to develop resilience).

Broadening our understanding of what an effective trial lawyer looks like is particularly important for women and people of color. It can help to alleviate some of the discomfort that these groups feel as a result of being held to standards that implicitly favor maleness and whiteness. And, to the extent that the research shows that trial attorneys can be effective without employing anger; it has the potential to address the problem of audiences penalizing angry women and people of color without requiring them to engage in judo to find just the right level of anger. Women and people of color *can* adopt a style that does not rely on anger at all.

2. Further Study Will Determine What Practitioners Are Actually Doing

One of the most persistent criticisms of legal education is that it is divorced from the reality of practice. Despite the progress that law schools have made in reorienting legal education to include more skills education, a significant number of attorneys continue to believe that legal education does not sufficiently prepare students for practice.[259] For example, a 2009 survey found that 90% of lawyers and 65% of law students agree with the statement "law schools 'do not teach the practical business skills needed to practice in today's economy.'"[260]

Studying the trial advocacy styles of practicing attorneys provides one means of addressing this criticism. It provides an opportunity for skills faculty to identify what works in real courtrooms and translate that knowledge into the trial advocacy curriculum.[261] This is true regardless of the outcome of the studies. If the studies confirm that aggressive advocacy is the best advocacy style, then trial advocacy professors will be better able to articulate why this approach works. If the studies show that there are other successful styles of advocacy, then they will provide the foundation for developing a new theory underlying trial practice.

259. Joy, *supra* note 113, at 574

260. *Id.* (quoting LEXISNEXIS, STATE OF THE LEGAL INDUSTRY SURVEY 7 (2009), https://web.archive.org/web/20100423180222/http://www.lexisnexis.com/document/state_of_the_legal_industry_survey_findings.pdf).

261. "[A] key component of experiential education is articulating the theories underlying practice, which are used to help students internalize what they absorb from practice experiences and transfer it to other contexts." Kruse, *supra* note 169, at 26.

3. Further Study Will Provide an Empirical Basis for the Work of Clinical and Writing Faculty Who Are Already Challenging the Status Quo in this Area

Laying an empirical framework for challenging the status quo in favor of a classical rhetorical style is particularly important because calls for change to the law school curriculum tend to be met with resistance. [262] That is true regardless of who is advocating for change, but it is of particular note here because the traditional dichotomy between doctrine and skills courses makes the potential for backlash especially strong. Because the skills faculty at many law schools are not on a tenure track, trial advocacy is often taught by non-tenured faculty, including long-term contract faculty and adjuncts.[263] Lack of job security makes it more difficult for these faculty members to advocate for curricular change because they are vulnerable to student complaints about perceived failures in their teaching and coaching style.[264] Data that explicitly validates a professor's decision to teach trial advocacy in a more inclusive way will provide a layer of protection against complaints by students and other faculty members who are resistant to change.

B. Caveats

The proposed studies are not necessarily a panacea for the current limitations of the trial advocacy curriculum. Even with empirical evidence to validate the idea that there is no one right way to be a trial lawyer, it will be difficult to change ingrained perceptions about what a trial lawyer should look like. Indeed, workplace data shows that there is a persistent gap

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262. *See, e.g.*, Hoffman, *supra* note 119, at 220–21 (describing backlash that has accompanied prior movements to reform curriculum); Tokarz et al., *supra* note 164, at 17 (noting that law school faculties tend "to be risk averse when considering curricular reform . . . .").

263. Mary Beth Beazley, *Shouting into the Wind: How the ABA Standards Promote Inequality in Legal Education, and What Law Students and Faculty Should Do About It*, 65 VILL. L. REV. 1037, 1057 (2020) (arguing because writing and clinical faculty are often non-tenured, it is more difficult for them to propose changes to teaching style).

264. *See id.* at 1057, 1062:

> [A]t most schools, legal-writing faculty [who often run moot court and trial advocacy teams] are not eligible for tenure, often at the mercy of renewable short-term contracts. This lack of status and job security makes them vulnerable, particularly if their coaching methods and philosophies do not produce winning teams, most particularly if students complain about this perceived coaching failure.

Salmon, *supra* note 49, at 176–77; Kruse, *supra* note 169, at 9 (noting dichotomy between doctrinal and skills courses places decisions for curricular change primarily in the hands of doctrinal faculty).

between what traits are seen as successful in the workplace and what traits are actually successful.[265] Merely pointing to this gap will not eliminate it. However, research on implicit bias suggests a roadmap for broadening the understanding of good trial advocacy.[266]

> Studies have shown that people are better able to avoid implicit bias when they are (1) exposed to counter-stereotypical examples,[267] and (2) encouraged to work against their own biases.[268] The proposed studies can provide a foundation for both of those best practices.

CONCLUSION

Trial advocacy professors have long been at the forefront when it comes to incorporating practical training and professional identity formation into the law school curriculum. However, a lack of qualitative and quantitative data about the effective litigation styles in real courtrooms stands in the way of further evolution of trial advocacy courses. Until evidence demonstrates that there is more than one way to be a good trial attorney, trial advocacy programs will continue to elevate the aggressive style of advocacy over others. Further study regarding the effectiveness of various litigation styles is the answer. Such studies have the potential to provide empirical support for the clinical and writing faculty who are working to develop more inclusive experiential learning programs that teach a variety of litigation styles. That, in turn, will provide opportunities for more students to find a comfortable and authentic litigation style.

265. *See, e.g.*, Baum, *supra* note 91, at 34 (discussing the Institute for the Advancement of the American Legal System (IAALS) survey that showed that there is an inconsistency between what employers say they are looking for in an employee and "what they actually look for when making hiring decisions").

266. Lee, *supra* note 210, at 247–48; *cf.* Stabler, *supra* note 42, at 468–69.

267. Lee, *supra* note 210, at 247–48.

268. Stabler, *supra* note 42, at 468–69.