CONTENT AND DESIGN OF ADVOCACY EDUCATION COURSES IN CHINESE LAW SCHOOLS: A PROPOSED TEMPLATE

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Introduction

This report summarizes lessons learned and conclusions drawn from two phases of the USAid Grant for Rule of Law in China, and uses those results to begin a look forward to the design and implementation of future such programs.

Phase 1: In the summer of 2007 Pacific-McGeorge faculty members[1] taught a workshop at South China School of Technology in Guangzhou for faculty from three Chinese law schools.[2] The course covered Negotiation and Mediation (Week 1), Advocacy Skills for Arbitration/Trial (Week 2), and Appellate Advocacy (Week 3). A portion of each day focused on the actual advocacy skills targeted on the Syllabus, but the main teaching goal was to discuss and practice methods of teaching such skills to Chinese undergraduates. Thus, Phase 1 was "teacher training."

Phase 2: For three weeks in December 2007 I taught American-style trial skills to a class of 16 undergraduates through the kind hospitality of China University of Politics & Law (CUPL), Beijing. Thus, this phase of the program constituted (a) a full-scale demonstration of the teaching methods and skills from the Phase 1 summer course, and (b) a chance for me and my colleagues at CUPL to gauge the usefulness of the advocacy teaching methods we are teaching and the ways in which those methods, and the design of such courses, can best be adapted to suit needs of Chinese undergraduate law education.

Phase 1: Teacher Training

The Syllabus for the summer course is attached as Appendix A. After each week's coverage, all participants took part in a review of the week and generated reactions, lessons learned, recommendations for improvements, and thoughts about how to apply the week's skills and techniques in their teaching. The following is a compendium of the comments collected.

1. Because of national standards for required courses for undergraduates, only a relatively small proportion of the undergraduate curriculum can be allocated to skills training. Thus, the particular skills covered by the summer course are hard to include in

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[1] Fred Galves, Mary-Beth Moylan, Cary Bricker, Jared Wong, Brian Landsberg & George Harris.

[2] [Zhejiang Gongshang University, School of Law; South China University of Technology; and China University of Political Science and Law

such detail. However, many participants noted that they saw ways to incorporate the skills-oriented, simulation-based teaching methods in their required courses, with two goals: (1) developing the students' skills in both the substantive area and in the skills aspect, e.g, evidence can be more effectively taught, both substantively and procedurally, if some time is invested in a simulation exercise; (2) increasing the students' active involvement in class discussions.[3]

2. There was considerable concern expressed about the time required for teaching such skills, and the demand on faculty. In addition, skills courses seem best suited to students in their 3rd and 4th year of school, but during that time they are also looking for jobs and preparing for examinations. (See discussion below in "Phase 2" section for some further ideas on these issues.)

3. Many saw ways to incorporate skills-style exercises into substantive ("podium") classes as a way of enhancing understanding. For example, in a Comparative Criminal Procedure class, exercises showing the differing methods of processing the case (pre-trial, during trial, and post-trial) and of examining the defendant would bring alive the different requirements, procedures, and philosophies of the systems of countries studied.

4. Participants noted the usefulness of the case analysis method, as taught in the appellate segment of the course, for most substantive law courses.

5. The method of "teach to the whole room" in giving feedback/critiques on performances in a simulation setting was seen as widely applicable as one way to solve the staffing (faculty-student ratio) problem. That is, while under ideal circumstances a skills practice-session group will number between 8 and 12 students (so that all can "learn by doing"), nevertheless a considerable amount of skills knowledge can be imparted to a larger class, by having some students perform but all take notes on the skills advice given. Another way of spreading the learning to a wider number is by having non-performers take on the role of "re-doers" after the faculty commentary. Thus, after advising the performing student to ask more open-ended questions on direct examination, the teacher can call on 2-3 "non-performers" to propose a series of open-ended questions on one portion of the exercise. They can do so from their seat, without the time required for getting them up to the front of the room. The questions can circulate quickly, rapid-fire, in the manner of a "drill."

6. Many commented that they could see ways to use skills-oriented, performance-based exercises as a "mini-course" within a larger substantive course.

7. Participants thought that much of the techniques and the course content could be fruitfully applied at the graduate level, given the problems noted above of required undergraduate courses and staffing (number) issues. This would seem to be consistent

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[3] One participant noted: "When I am giving a class to my students, I am on the podium speaking, and students are not active. I wonder how to involve the students. This has provided techniques." Another: "Interest and enthusiasm of students greatly stimulated by this approach."

with the sequence of such courses in the American system, when students turn to skills courses only during their graduate (J.D.) studies.

8. One Chinese participant commented on the fact that two modes of dispute resolution that were generally described as traditionally Chinese in theory and practice – mediation and negotiation – were being taught in China by American law teachers. One might analyze whether this constitutes irony, or a sign of globalization, or a bit of both – but for purposes of this article and future discussion, it raises interesting questions of how best to inter-relate Chinese and American uses of these techniques.

Phase 2: A Demonstration Course

Course Design

In collaboration with Prof. Xu Shenjian of CUPL and with the support of CUPL's Dean Xue Gangling, we developed the course with three goals in mind: (1) to advance the experience of Chinese law students in trial skills through a simulation setting; (2) to demonstrate a variety of teaching techniques in such a setting for consideration by Chinese professors who are working in, or who desire to develop a facility to work in, experiential modes; and (3) to compare and contrast Chinese and American trial styles and teaching methods.

With three weeks available, we structured the course as a single class of 16 students. On three Mondays and two Wednesdays I lectured and fielded questions on the particular trial skill that was to be focused on: direct examination, cross examination, opening statement, closing argument, and impeachment. The first lecture was preceded by some reflections on the theory underlying Anglo-American adversarial traditions and how that theory affected the style of American trials. On three Tuesdays and two Thursdays we held 2-hour practice sessions in the mornings, followed by 2 hours of videotape review (one-on-one with each student) in the afternoons.

To assist with the basics of each skill, we used a Handbook of Advocacy (Appendix B; Chinese translation, Appendix B-1). For future such courses of longer duration, Steven Lubet's excellent *Modern Trial Advocacy* (NITA, 2004) has been published in Chinese (for information, www.jgclub.com.cn; e-mail cpep@public.bta.net.cn).

Half of the class prepared and practiced a civil case file (Phoenix Industries v. Intech, Inc.), half a criminal file (State v. Lawrence). These files were adapted from files published by NITA (National Institute for Trial Advocacy) and were used by kind permission of NITA.[4] Each student had an opportunity to perform 1 direct and 1 cross examination. I then assigned trial roles: 2 students on a team to do the examinations; the other 2 to serve as that team's witnesses and to open or close. Those assigned the

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[4] While these files are too large to append conveniently to this report, I will be happy to forward them electronically to any interested. They are available in both English and Chinese. Send requests to jleach@pacific.edu.

opening or closing had a practice opportunity for their speech.[5]

Because of both time constraints and the dissimilarity between American and Chinese evidence law, I did not attempt to cover evidence or the introduction and handling of exhibits. We did discuss and practice some basic objections to forms of questions (e.g., "leading") and testimony (e.g., "narrative"). The students embraced this truncated version of evidence law with enthusiasm.

The closing exercises were a half-day trial for each case. The criminal case was presented in a standard criminal-trial setting; the civil case was imagined as a CIETAC-style arbitration (although for class involvement, we also empaneled an advisory jury made up of the students who had tried the criminal case).[6] 80 minutes were allotted to each side to present its case, inclusive of openings, directs and crosses,[7] and closings. Both cases were tried easily within that time frame, leaving time for brief jury deliberations and faculty commentary within a four-hour time block.

Members of CUPL's faculty attended the classes to observe and to offer teaching and performance suggestions. Professors Xu Shenjian and Ma Hongjun joined me as judges / arbitrators at the final trials and offered teaching observations after the students' performances.

Attached as appendices are the Syllabus, the rotation of students in the practice sessions, and trial assignments and logistics.

<u>Student and Faculty Reactions</u>

It would be impossible to overstate the enthusiasm with which all 16 Chinese law students embraced our full-on experiential, simulation-based, American-style trial-skills course. Any preconception I had that they would be less inclined to engage in public performance as a means of learning was quickly dispelled at the outset of the first exercise - drills of direct and cross examination styles of questioning – when they vied with one another to ask the best questions and showed no shyness or hesitation. This was particularly noteworthy in light of their youth – three-five years younger than the American law students we usually teach, and far younger than the practicing lawyers we meet in NITA teaching.

Equally impressive was their inexhaustible curiosity about all levels of the skills we were practicing. They had so many questions that we converted each group's second video

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[5] This was a concession to the press of numbers. Ideally, all students would have practiced a jury speech, but due to time constraints, we opted for the less ideal situation of half the class observing the other half's practice. This enabled us to keep the class size at 16, whereas fuller practices would have required reducing it to 12.

[6] CIETAC practitioners tell us that, increasingly, CIETAC is offering to its litigants the option of an extended, adversarial-style presentation in lieu of a more summary, inquisitorial-style proceeding.

[7] That side's crosses of the other side's witnesses.

review session to a Q & A format, where each student individually could bring her questions about whatever area she was working hardest on or having the most difficulty with. While these sessions were scheduled with each student assigned to a 15-minute block, typically most of the students in the class sat in on their classmate's session – it seemed to me their eagerness for improvement meant they did not want to miss a single item or tip for improvement.

For the trials, the students had almost no preparation for the actual courtroom setting, as the very fine CUPL mock trial courtroom was not available until the day before the trials. I showed them their counsel tables and recommended positions for questioning and openings and closings. They adapted immediately and ventured into "the well" with no hesitation.

My overall impression was that, like American students, the Chinese students relished the opportunity to get on their feet and actually perform a lawyer's role – notwithstanding that they were adapting to an adversarial style that was relatively new to them. In 2004 I had a similar experience teaching trial skills to Italian law undergraduates at the University of Parma; they, too, were also reputed to be so accustomed to the lecture format of pedagogy that they would adapt slowly (if at all) to a performance mode, but this proved not to be so. One might generalize, therefore, that those who choose law as a field of study are in many respects the same the world over: eager to do battle and comfortable with conflict in a public setting.

For purposes of this report, the equally important conclusion is that teaching skills in a learning-by-doing ("experiential") setting appears to be universally effective. Cultural, stylistic, and linguistic differences, while noticeable, do not appear to affect either the rapidity of the students' learning or their enthusiastic embrace of the experience.

The faculty reactions were both positive in terms of how much they noted the students were learning, but also challenging in questioning how these techniques could be adapted to the large size of Chinese law school enrollments and classes. This led me to imagine ways in which to expand the size of the class without (a) having substantially to expand the number of faculty, and (b) losing any major percentage of the skills mastery the students can acquire.[8]

An Opportunity for Comparison

During my stay at CUPL, Professors Xu and Ma organized a mock trial demonstration of a Chinese-style trial. The similarities and differences between this demonstration and the final trials done by the course students provided much opportunity for discussion, and suggested to me how useful it would be to incorporate such a "comparative" aspect more formally in any course that teaches advocacy methods and styles according to American experience.

[8] See below in the section on "Issues for Future Discussion."

With sufficient time and resources, a particularly appealing design would be:

- a segment on the basics of trial skills Chinese-style;
- a segment on those parts of American-style trial styles that differ markedly from Chinese styles;
- demonstration trials in each mode;
- a discussion segment to analyze the differences and make choices about which seem most effective; and
- a closing trial in which both Chinese and American styles and methods are combined.

Issues for Future Discussion

For purposes of developing recommendations for an "advanced" model or template for experiential skills teaching and learning in the setting of Chinese law schools, it appears that our experiences in both Phases of this project have generated at least the following questions. We look forward to the discussions that these issues – and others our colleagues will surely contribute – will encourage.

1. How can the teaching models we have been using be adapted to make them accessible to Chinese undergraduate or graduate law students, especially given restraints of class size and faculty availability? For example, the trial-skills segment could be taught to a class of 32, with 16 students doing the direct and cross examination exercises, 16 playing the witnesses and performing openings or closings, with 4 final trials. This would require, but could be managed within, a four-week course duration.

2. What is the relative usefulness and adaptability of the different segments of advocacy skills: negotiation & mediation, advocacy for arbitration/trial, and appellate advocacy? Should efforts be concentrated on fewer than all three – which, and why?

3. To what extent should the skills being taught be adapted to match more closely Chinese advocacy modes and traditions? And/or: to what extent would it be useful to introduce a comparative aspect between American and Chinese advocacy styles and methods, along the lines discussed above at pp. 5-6?

4. Given the Chinese faculty participants' thoughts about adapting advocacy teaching techniques to their substantive courses, to what extent might the teacher-training segment of the program be adapted to train and practice these pedagogical methods in a substantive-law setting, as opposed to the participants' having to adapt the methods on their own?

5. To what extent would it be useful to add an evidence component to the arbitration/trial skills segment?

Appendix A

WEEK #1

MONDAY, JULY 16th	
9:00 – 10:00	– Welcome; Introduction (Landsberg; Harris)
10:00 – 11:00	– Overview (Landsberg; Harris)
11:00 – 12:00	– Overview (Landsberg; Harris)
BREAK	
3:00 – 4:00	– Overview (Landsberg; Harris)
4:00 – 5:00	– Alternative Dispute Resolution Introduction (Galves) – Negotiation/Settlement Overview – Mediation/Settlement Overview
5:00 – 6:00	– Arbitration/Decision Overview – Online Dispute Resolution Overview – *Jane v. Grow Co.* Negotiation Hypothetical
TUESDAY, JULY 17th	
9:00 – 10:00	– Negotiation/Settlement Overview – *Jane v. Grow Co.* Negotiation Hypothetical: – Fact Gathering; Witness Interviewing; Evidence Evaluation – Assessing Factual & Legal Strengths and Weaknesses – Develop of Settlement Positions/Strategies – Negotiation Theories, Advantages, Disadvantages – *Student Goals; Instructor Goals*
10:00 – 11:00	– *Jane v. Grow Co.* Negotiation Hypothetical: – Conduct Large Group Negotiation Simulation – Review & Critique of Simulation – HOW to Review & Critique Simulation – *Student Goals; Instructor Goals*
11:00 – 12:00	– Drafting the Settlement Agreement & Release – Scope of Release – Review & Critique of Draft Settlement Agreements – *Student Goals; Instructor Goals* – Case Materials [*Phoenix v. Intech*] Review – Break into Small Negotiation Groups – Confidential Client Materials

BREAK	
3:00 – 4:00	– Case Materials [*Phoenix v. Intech*] Review (Cont.) – Fact Gathering; Witness Interviewing; Evidence Evaluation – Assessing Factual & Legal Strengths and Weaknesses – Develop of Settlement Positions/Strategies – Consider Confidential Client Materials in Small Groups
4:00 – 5:00	– Conduct Small Group Negotiation Simulations – Review & Critique of Simulations – HOW to Review & Critique Simulations – *Student Goals; Instructor Goals*
5:00 – 6:00	– Drafting the Settlement Agreement & Release – Scope of Release – Review & Critique of Draft Settlement Agreements – *Student Goals; Instructor Goals*
WEDNESDAY, JULY 18th	
9:00 – 10:00	– Enforcement of Settlement Agreements – Ethical Issues in Negotiation & Settlement – Negotiation/Settlement Curriculum Development – *Student Goals; Instructor Goals*
10:00 – 11:00	– Introduction to Mediation – Duties, Responsibilities of a Mediator – Mediation Theories, Advantages, Disadvantages – Settlement Persuasion Skills/Strategies – Compare & Contrast with Negotiation – Case Materials [*Phoenix v. Intech*] Review: – Roles of: Mediators & Parties – New Confidential Memos from Parties to Mediator – Preparation for Mediation Simulations; Small Groups
11:00 – 12:00	– Conduct Small Group Mediation Simulations – Review & Critique of Simulations – HOW to Review & Critique Simulations – *Student Goals; Instructor Goals*
BREAK	
3:00 – 4:00	– Enforcement of Mediation Settlement Agreements – Ethical Issues in Mediation, Both of Mediators and Parties

	– Mediation Curriculum Development – *Student Goals;Instructor Goals* – Consider Other Forms of Mediation (Mini-Juries) (Non-Binding Arbitration)
4:00 – 5:00	– Introduction to Arbitration – Duties & Responsibilities of an Arbiter – Arbitration Theories -- Advantages, Disadvantages – Arbitration Decisions – Compare & Contrast with Negotiation & Mediation
5:00 – 6:00	– Enforcement of Arbitration – International Arbitration – Drafting Arbitration Clauses – Review & Critique of Drafting Clauses – HOW to Review & Critique Drafts of Arbitration Clauses – *Student Goals; Instructor Goals*
THURSDAY, JULY 19th	
9:00 – 10:00	– Introduction to Online Dispute Resolution "ODR" Online Negotiation, Mediation, Arbitration – ODR: Advantages, Disadvantages – Compare & Contrast with Traditional ADR
10:00 – 11:00	– Conduct ODR Simulations (demonstration)
11:00 – 12:00	– Review & Critique of ODR Simulations (demonstration)
BREAK	
3:00 – 4:00	– HOW to Review & Critique ODR Simulations – *Student Goals;Instructor Goals*
4:00 – 5:00	– Enforcement of Arbitration Awards – Ethical Issues in Arbitration, Both of Arbiters and Parties – Arbitration Curriculum Development – *Student Goals;Instructor Goals*
5:00 – 6:00	– Preparation for Traditional Arbitration Sessions Simulations – Preparing Parties – Preparing Arbiters – HOW to Prepare for Arbitration Sessions Simulations – *Student Goals;Instructor Goals*

FRIDAY, JULY 20th	
9:00 – 10:00	– General Review of ADR/ODR (Overview)
10:00 – 11:00	– Persuasive Use of Litigation Technology in the Presentation of Facts, Evidence, & Legal Arguments
11:00 – 12:00	– Software, Visual/Oral Advocacy
BREAK	
3:00 – 4:00	– Transition from ADR/ODR to Trial Techniques – Face-to-Face ADR v. ODR – (Bricker)
4:00 – 5:00	– Intro to Oral Advocacy/Arbitration(Bricker)
5:00 – 6:00	– Oral Advocacy/Arbitration Basics (Bricker)

WEEK # 2

Notes on terminology:

During Week #2 participants will be divided into two groups (A and B) for the practice sessions. Assignments to these groups will be made at beginning of the Program.

All participants attend the lectures, brainstorming, and the sessions on "discussion/feedback on critique techniques," in plenary session.

The individual groups (A and B) will meet in separate rooms wherever the schedule indicates "break-out groups."

"P-M faculty" refers to the faculty members from Pacific-McGeorge.

"Participant-faculty" refers to those members of a break-out group assigned to play the part of the critiquing professor during a given skills session. These assignments will be rotated so that all get this experience and training.

Monday, July 23, 2007	Tuesday, July 24	Wed., July 25
9:00 to 10:00 **Lecture:** - Theories of persuasion - Theory/theme/brainstorming **10:00 to 10:45** **Brainstorm** session with all participants using Phoenix v. Intech case **10:45 to 12:00** **Lecture:** - Who wins and why: brief pointers on closing argument - "Two-point" critiques / methodology **Lunch** **3:00 to 3:45** Preparation time to draft 6 minutes of a closing argument **3:45 to 5:00** Break-out session: Half of participants perform 6 minutes of a closing argument with P-M faculty critique **5:00 to 6:00** Break-out session: Remaining participants perform 6 minutes of a closing argument. Participant-faculty will conduct short critiques.	**9:00 to 9:45** **Lecture**: Direct Exam/Critiquing of direct **9:45 to 10:30** Preparation time for direct examinations in Phoenix v. Intech file: prepare 6 minutes of a direct **10:30 to 12:00** Break-out session: Half of participants performs direct examinations with P-M faculty critique **Lunch** **3:00 to 4:30** Break-out session: Remaining participants perform direct examinations. Participant-faculty will conduct short critiques. **4:30 to 5:15** Discussion/feedback on critique techniques **5:15 to 6:00** **Lecture:** Cross examination/ Critiquing of cross	**9:00 to 9:45** Preparation time for cross exams: prepare 6 minutes of a cross **9:45 to 11:15** Break-out session: Half of participants perform cross examinations with P-M faculty critique **11:15 to 12:00** Discussion/feedback on critique techniques **Lunch** **3:00 to 4:30** Break-out session: Remaining participants perform direct examinations. Participant-faculty will conduct short critiques **4:30 to 5:15** Discussion/feedback on critique techniques **5:15 to 6:00** **Lecture:** Opening statements/ critiquing opening statements

Thursday, July 26	**Friday, July 27**	
9:00 to 9:45 Preparation time for opening statements: prepare 6 minutes of an opening statement **9:45 to 11:15** Half of participants perform 6 minutes of an opening statement with P-M faculty critique **11:15 to 12:00** Break-out session: Other half of participants perform 6 minutes of an opening statement. Participant-faculty will conduct short critiques **Lunch** **3:00 to 3:45** Continuation of morning break-out session **3:45 to 4:30** Discussion/feedback on critique techniques **4:30 to 6:00** Preparation time for Arbitration hearing	**9:00 to 12:00** Arbitration hearing in the case of <u>Phoenix Enterprises, Inc. v. Intech Electronics, Inc.</u> 1/3 of participants will serve as lawyers in the Arbitration hearing. 1/3 of participants will serve as witnesses in the hearing. 1/3 of participants will serve as Participant-faculty critiquers at the end of the hearing. **Lunch** **3:00 to 4:30** Participant-faculty will conduct critique of lawyers' performances during Arbitration **4:30 to 6:00** Wrap-up session including brief discussion of how to construct an Arbitration-Advocacy Syllabus for Chinese Law Schools. Introduction to next week's agenda	

Week 3

Monday, July 30, 2007:

9:00 a.m. to 10:15 a.m. - Discussion of Ethics and Advocacy by Professor Harris.

10:15 – 10:30 a.m. – Break.

10:30 a.m. to 12 p.m. - Introduction of the Post-Hearing Phase problem. Describe process of writing a post-hearing brief and presenting oral argument to the Arbitrator. Discuss the transferability of persuasive brief writing to many different tribunals and levels of courts. Narrow the universe to the covenant of good faith and fair dealing and the measure of damages for this writing and argument exercise but explain that a real post-hearing brief would cover all legal issues presented in the arbitration. Discuss the approach that would be taken in actual CIETAC arbitration and how our approach will differ for training purposes.

12:00 p.m. to 3:00 p.m. - Mid-Day Break

3:00 to 4:30 p.m. – Introduction of CRAC as a tool for framing a legal argument. Explain the component parts and how we use CRAC to teach a very formulaic system to students who are novice legal writers. Our expectation is that they will eventually follow the system less rigidly as they become better at persuasive writing.

4:30 to 4:45 p.m. – Break.

4:45 to 6:00 p.m. – Present CRAC exercise. Discuss how we use this exercise with students as an initial assignment and provide time for workshop participants to get started on the completion of the exercise.

Tuesday, July 31, 2007:

9:00 to 10:30 a.m. - Complete the CRAC exercise. CRAC exercises will then be taken off to be translated during the rest of the day.

10:30 to 10:45 a.m. - Break

10:45 a.m. to 12:00 p.m. – Review hypothetical student CRAC examples and teacher's guide for providing feedback on these examples.

12:00 p.m. to 3:00 p.m. - Mid-Day Break

3:00 to 4:30 p.m. – Introduction to the concepts of core theory, theme, and perspective in persuasive writing. Discussion of how core theory informs all aspect of a persuasive brief and helps to determine which cases to rely on and which order to present arguments.

4:30 to 4:45 p.m. – Break.

4:45 to 6:00 p.m. – Break out groups for core theory and theme exercise. Divide into groups of 4 or 5. Review a problem based on Phoenix v. Intech measure of damages. Present a few authorities relating to the appropriate measure of lost profits. Discuss how to ascertain the core theory and how to present the theme depending on which side is represented. Articulate a core theory and draft a theme and then discuss how the core theory helps to inform the rules that will be advocated.

<u>Wednesday, August 1, 2007</u>:

9:00 to 10:30 a.m. - Review CRAC exercise from the previous day – first peer review and then review by Pacific/McGeorge faculty.

10:30 to 10:45 a.m. - Break

10:45 a.m. to 12:00 p.m. – Lecture on organization in brief writing including outlining, sign posting, road maps, and umbrella sections.

12:00 p.m. to 3:00 p.m. - Mid-Day Break

3:00 to 4:30 p.m. – Draft outlines of lost profits portion of the post-hearing brief including initial road map paragraph and headings for any sub-parts of the argument.

4:30 to 4:45 p.m. – Break.

4:45 to 6:00 p.m. – Break out groups for outlining exercise. Peer review outlines drafted earlier in the afternoon. Re-convene for group observations about differences in approaches taken and reliance on authorities depending on which side of the argument the advocate advances.

<u>Thursday, August 2, 2007</u>:

9:00 to 10:30 a.m. – Writing about the facts. Focus on the importance of telling a coherent story even in a situation where the arbitrator has heard the facts emerge from live witnesses. Chronological or topical orientation is appropriate, but there must be a flow to the story and proper citation to the record. Exercise relating to fact selection and emphasis.

10:30 to 10:45 a.m. - Break

10:45 a.m. to 12:00 p.m. – Draft Statement of Facts for Post-Hearing Brief.

12:00 p.m. to 3:00 p.m. - Mid-Day Break

3:00 to 4:30 p.m. – Lecture on Oral Argument skills. Demonstration oral argument and critique by Pacific/McGeorge leaders. Start oral arguments by workshop participants.

4:30 to 4:45 p.m. – Break.

4:45 to 6:00 p.m. – Practice brief oral arguments with other workshop participants serving as judges and critiquers.

Friday, August 3, 2007:

9:00 to 10:30 a.m. – Complete oral arguments from the prior day. Discuss teaching written and oral advocacy skills. Focus on the importance of small groups and individual feedback for both types of advocacy. Conclude the persuasive written and oral advocacy phase.

10:30 to 10:45 a.m. - Break

10:45 a.m. to 12:00 p.m. – Curriculum drafting session for Advocacy phase. Discuss how to incorporate all skills into Chinese curriculum, plan pilot projects.

12:00 p.m. to 3:00 p.m. - Mid-Day Break

3:00 to 6:00 p.m. – Re-convene with American University clinical group for end of the workshop wrap up. Round table discussion about how the work of the workshop can be incorporated into Chinese law school classrooms.

Appendix B

Pacific-McGeorge / CUPL ADVOCACY HANDBOOK

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I. Overview of Trial Persuasion: Definition and Significance

A. Defined

In the adversarial system, each side presents its case in a way designed to persuade the fact-finder (decision-maker), whether arbitrator, judge or jury, that its version of the facts makes more sense than the opponent's such that its side should prevail. Some of the pivotal elements of persuasion include:

1. The credibility of the side's witnesses and evidence (documents, displays, etc.);

2. A coherent Case Theory and Case Theme:

   -*Case Theory* is a succinct statement by each side of what happened and why it happened. (See Section C below.)

   -*Case Theme* is a short, easy-to-remember version of the Theory, a "bumper-sticker" incorporating a powerful moral sense of right and justice, and appealing to the fact-finder's desire to arrive at a just result.

3. The trustworthiness of the attorney presenting that side's case, and the power of his belief in his side's case, which he must embody in his presentation. Trustworthiness equals credibility.

B. Use of Persuasion in an Arbitration/Trial Setting

In our course we will focus on ways to be effective advocates in an arbitration, including how to present one's witnesses to maximize their credibility and persuasive effect. There is a direct correlation between the lawyer's demeanor in the courtroom and the effectiveness of his witness when testifying.

As to the attorney's trustworthiness and belief:

1. The attorney must be reliable in all aspects of the trial presentation: well-prepared, timely, equipped with the pertinent law and facts to support his arguments, and appropriately argumentative on behalf of his case - committed to his position and reasonable in his presentation.

2. The attorney must show his belief in his case by the strength of his voice; by the energy of his examinations and other courtroom activities; and by his unflagging attention to detail.

3. As is evident from the above observations, it has been well said that

   "trial work is 10% inspiration, and 90% perspiration."

<u>II. Opening Statement</u>

<u>A. Defined</u>

Opening Statement is generally considered to be limited to a factual outline of the case to be presented. Its function is to provide an overview of the case so that the fact-finder / decision-maker will be better able to remember the facts in context as they come into evidence through the witnesses and documentary evidence. However, most experienced trial lawyers also consider the Opening Statement as the first - and best - opportunity to orient the decision-maker to the emotional appeal of their case. They intend that, by the end of their Opening Statement, the decision-maker will have an inclination, whether conscious or subconscious, that right and justice lie on their side of the case.

<u>B. Techniques</u>

1. Always start with a statement of your Theme and Theory. Those elements summarize the first impression that you want your case to make on the decision-maker. This first moment of attention is not a time to waste on bland observations like, "This is a rather simple case," or, "You will hear a lot of evidence today on both sides of the issue ...” Instead, tell the fact-finders with the first words out of your mouth why they should view the case in your side's favor.

2. In the body of your opening statement, keep the factual summary simple and confined to the essential facts. The decision-maker cannot memorize the entire case through an oral presentation before she has met and assessed the participants. Instead, she needs the facts in outline form so that she can categorize and organize the facts as she hears them through the presentation of evidence. The clearer an outline you give, the better able the decision-maker will be to remember your side's facts.

3. Make the opening statement factual, instead of argumentative. It is more persuasive to describe your case using vivid facts than to attempt to persuade, at the outset of a case, by arguing inferences, conclusions, or appeals to sympathy, emotion, or calls for justice. Those argumentative and oratorical devices are reserved for Closing Argument. (The initial statement of Theme and Theory <u>is</u> argumentative, but is generally considered a permissible deviation from the rule against argument.)

4. The Opening statement should tell the “story” of your client’s case in an interesting manner that grabs the fact-finder’s attention and makes him want to hear the evidence to follow.

5. To the extent possible, eliminate relying on notes when you deliver your opening statement. While having notes with you that contain your outline is certainly permissible, try to avoid reading them as you present your case to the fact-finder. Instead, engage in eye contact with the fact-finder as you persuasively convey though your factual recitation why your client should prevail.

6. End your opening statement by letting the fact-finder clearly know what outcome you are seeking in the case. At an arbitration, for example, that would mean telling the fact-finder that at the end of the presentation of evidence you will be asking the panel to find in favor of your client and to award damages in the amount of _____.

III. Direct Examination

A. Defined

Direct examination consists of a lawyer asking witnesses in his case questions that establish facts and elements needed to win the case, and the witnesses answering those questions in a clear and persuasive manner. During direct examination the fact-finder will be assessing the witnesses' credibility and reliability. Typically, these are "friendly" witnesses, in that they affirmatively support the side's case or, at least, take no position favoring one side over the other.

B. Techniques

1. The goal is to have the WITNESS tell the story - tell what he saw, heard, or knows. The more he does the talking and the attorney stays "in the background," the better.

2. The best way to keep the focus on the witness is to use open-ended questions that require the witness to give a detailed answer. Try to begin most of your questions with the following words:

   WHO
   WHAT
   WHERE
   WHEN
   HOW
   WHY
   DESCRIBE
   TELL US

3. Scientific studies show that listeners remember best what they hear FIRST and LAST. Thus, the principles of "PRIMACY" and "RECENCY" ("first" and "last") suggest that you should begin and end your direct examination of a witness with a relatively important topic.

4. For effective presentation, the attorney and witness must have repeatedly practiced the examination before the arbitration. The fewer surprises in the courtroom the better. Also, if counsel works with the witness outside the arbitration, the witness will be more confident when presenting her testimony in the arbitration. From the first moment the witness begins testifying, the fact finder will be assessing her credibility on the stand. The more confident she feels and seems in her presentation of facts, the more believable she will be.

5. The questioner must take an active interest in the answers the witness is giving. This is one of the hardest parts of direct examination, because the attorney and witness have practiced the exam, and the attorney already knows the answers. Direct eye contact with the witness helps greatly to give the message that the attorney is listening closely and with interest. As with opening statement, the lawyer should avoid looking at notes when asking questions in the proceeding. Instead, the lawyer should convey a sense of "I'm hearing this for the first time" when directing the witness.

6. A standard outline for a fact witness on direct examination is to spend the first part of the questioning on the witness's background, then "set the scene" for the fact-finder, and finally to have the witness tell the story of the case. With respect to setting the scene, the witness may describe the parties to the action, the nature of the action, the physical lay-out where the action took place, and other descriptions that give the fact-finder context for the story that follows.

7. If there are relevant exhibits in the case, having a witness describe specific exhibits and make use of them when explaining relevant facts in the case, makes the story come to life in a more vivid and persuasive manner.

8. As you witness recounts facts, make sure that you break up the testimony with short questions. Letting a witness talk, uninterrupted, for any length of time runs the risk of boring the fact-finder and leading to statements by that witness that are harmful rather than helpful to your client's case. It is your job as counsel to control the examination through your carefully placed, short, open questions, rather than relinquishing control to the witness.

IV. Cross Examination

A. Defined

Cross examination is the questioning of the other side's witnesses. It may have one or more of several goals:

1. To diminish the harmful effect of the witness's direct testimony.

2. To obtain information that is helpful to the cross examiner's side.

3. To reduce the credibility of the witness.

B. Techniques

1. Because the witness is typically unfriendly to the cross examiner's case, firm control of the witness is essential. Otherwise, the witness takes the opportunity to strengthen his testimony on behalf of that witness's side.

2. In contrast to direct examination, where the focus of the examination is on the witness, during cross examination the focus is on the lawyer. In effect, the cross-examining attorney becomes the witness; through carefully crafted questions that contain factual assertions, the lawyer's goal is to control the witness to the point where the majority of the witness's answers are confined to one of two words: "yes" or "no." A successful cross is one where the witness effectively confirms the correctness of the cross-examining attorney's assertions.

3. The primary method of control is the use of "leading questions," which are defined as one-fact, declaratory statements with a question mark at the end. In other words the "questions" are really assertions of fact followed by a phrase requiring a response. For example:

   - You left the office at 4:00 pm, didn't you?
   - You took a bus, didn't you?
   -You were alone on that bus?
   - The window on the bus was open?
   - You saw a car drive by?
   - The car was metallic green in color?

4. **Never** ask an open-ended question (questions that begin with the words: "who, what, where , when, why, describe, tell us...") during cross examination. Use of open questions on cross will often result in the witness effectively wresting control of the examination from the lawyer and providing evidence that is harmful to your client's case.

5. Confine cross to those points you need for your Closing Argument (see below), including good points for your side, weaknesses in the points the other side has made through their witnesses, and credibility problems that make this witness less believable when testifying. When you have done your best to make those points, STOP ASKING QUESTIONS! A

cross-examination that makes the same point over and over tends to lose its effectiveness and offers the witness a chance to explain away "bad" answers for the other side.

6. If a witness fails to answer your carefully crafted one-fact question, and instead gives the answer SHE wanted to give, try repeating your question verbatim after she completes that answer. If she still refuses to answer the question posed, try asking your question, again, word for word, a third time. By the second or third time the witness will usually get back on track and under your control as the examining lawyer.

7. Just as with Opening Statement, Closing Argument and Direct Examination, the concept of primacy and recency applies to cross examination. In other words, start and end your cross examination with important points.

V. Closing Argument

A. Defined

In Closing Argument, the attorneys summarize the case presented and make their last attempts to persuade the fact-finder that the arbitration should be decided in their side's favor. The goals here are to compel the decision-maker to take a positive view of one side's evidence, to weave the evidence together to show how it fits within the applicable law, and to persuade the decision-maker that a ruling for that side is the fair and just result.

B. Techniques

1. Do not try to tell the whole story – to recount every detail of evidence you elicited during the arbitration. Instead, focus on the one or two central issues that will decide the case in your client's favor. Once you have done so, recount *selected* facts you proved that help establish why these pivotal issues should be resolved in your client's favor.

2. Reduce your closing argument to an outline rather than a fully written-out speech. The result will free you from extensive reliance on notes and in turn from reading the closing rather than truly communicating with the fact finders by talking conversationally and engaging in continuous eye contact. It is important to address the decision-maker directly, candidly, and from the heart: too much reliance on notes inhibits persuasive presentation during closing.

3. When arguing your client's case though the presentation of issues and facts, make use of visual evidence: photographs, diagrams, lists of pertinent items of evidence. Studies show that we assimilate much more information visually than aurally. What we see tends to convince us more than what we hear.

4. Speak with a voice that conveys conviction, compassion, and fervor. If you believe in your client's case, and convey that belief through your voice, you will necessarily present your closing argument persuasively.

5. Acknowledge the difficult areas of your case, those areas that strengthen your adversary's case, and give the best explanations you can as to how these areas can be harmonized with a verdict in your client's favor. Candor works better than cowardice.

6. Refer directly to the points of law that tie most closely to your analysis of the facts.

7. Give the fact-finders guidance with respect to deciding which witnesses were credible, and which gave testimony that had too many holes: show through your argument why one witness should be believed more readily than another.

8. Tell the fact-finders what the correct result should be before concluding your closing argument. That means directly articulating the verdict you are seeking rather than leaving anything to mystery.

VI. Impeachment[9]

A. Defined

In general, the term "impeachment" covers (includes) a variety of techniques whose purpose is to draw into question the credibility of the witness being examined. It is, therefore, almost exclusively used on cross-examination, although technically there is no rule against its being used on direct examination of one's own witness (e.g., if the witness is "hostile" or "adverse" to the questioner).

B. Techniques

1. There are nine generally-listed modes of impeachment:

    i. Bias – the witness favors the other side (e.g., the witness thinks all policemen are honest); or prejudice – the witness disfavors the side of the questioner (e.g., the witness thinks all African-Americans are dishonest).

    ii.. Affiliation with the other side – e.g., the witness is the defendant's brother.

    iii. Poor ability to observe – the witness was unable to see/hear clearly, for reasons of position, eyesight, hearing, etc.

    iv. Poor ability to remember – the witness is old, or otherwise memory-impaired.

    v. Poor ability to recount – the witness does not really know what he is talking about (e.g., the witness describes the car as a Toyota, but also admits that it has a symbol that looks like a blue-and-white propeller = BMW).

    vi. Interest in the outcome – e.g., the witness will make or lose money depending on which side wins.

    vii. Conviction of crime – the witness has a criminal record.

    viii. Reputation for poor truthfulness.

    ix. Prior inconsistent statement – the witness has earlier (before trial) said something directly contradictory to her present testimony.

2. The first eight modes of impeachment are done by the usual forms of question to the witness on cross, i.e., leading questions; or, in some cases, by asking another witness (W2) about the witness (W1) whose credibility is being impeached. For example, W2 can be called to the stand to testify that he knows that W1's reputation for truthfulness in the community is poor.

[9] This section of the Handbook was added while Prof. Leach was in China; its translation into Chinese was done there and not added to the Chinese version of the Handbook included here as Appendix B-1.

3. The last mode of impeachment – by prior inconsistent statement ("PIS") – requires a specific set of steps:

   a. **R**ecommit the witness to what he said on direct – to show the jury what specific part of the witness's direct testimony you are about to attack as NOT truthful.

   b. **A**ccredit (make believable) the circumstances (situation) under which the witness made the prior statement – to show the jury that the prior statement is more trustworthy than the present (direct) testimony.

   c. **C**onfront the witness with the prior statement – to show the jury that the present (direct) testimony is NOT truthful.

3. As an example, suppose you represent the Plaintiff/driver of a Toyota ("π/T") who claims that the Defendant/driver of a Suzuki ("Δ/S") went through a red light and hit π/T. A bystander ("B") at the scene told the investigating police officer that he saw Δ/S go through the red light – therefore, also confirming that your client π/T had the green light. At trial, however, you are surprised to see B take the witness stand and testify, on direct examination for Δ/S, that Δ/S had the green light, and it was π/T who went through the red light. Your impeachment by PIS would go like this:

   a. **R**ecommit the witness to what he said on direct – "Mr. B, you told this jury on direct examination that Δ/S had the green light, did I hear that right?"

   b. **A**ccredit (make believable) the circumstances (situation) under which the witness made the prior statement – "You gave a statement to the investigating officer, didn't you? In that statement you told the truth? This was immediately following the accident you had just seen? So your memory of the accident was fresh? You tried your best to tell the officer exactly what you had seen, didn't you? After the officer wrote down what you told him, he gave you the chance to read it over? You took that time, didn't you, to read it over? Then you signed it? And by signing it, you meant to show that your statement was accurate? And complete?"

   c. **C**onfront the witness with the prior statement – "This document I am showing you is your statement to the officer, isn't it? This is your signature here? Please watch as I read, so that you see I am reading it accurately: it says, 'I saw the Δ/S come northbound on State Street and go right through the red light.' I read that correctly, didn't I?"

4. Some impeachments by PIS depend not on what WAS said on the prior occasion, but on what was NOT said. This is called "impeachment by omission." The idea is that the witness would have said the detail if it were so, and the fact that they did not is proof that they did not really have that detail at the time, but added it later. In our example, if B testifies on direct

that your client π/T was going at a high rate of speed up to the intersection, but did not tell that to the officer, that seems unbelievable – B surely would have given such an important detail at the time if it were true. So the **C**onfrontation goes: "Please look with me at your statement to the officer. It doesn't say anywhere in this statement, does it, that π/T was going fast? And it certainly doesn't contain the words 'at a high rate of speed' that you used on direct examination – does it?"

Appendix B-1

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在一个竞争对立的体系中，各方都用精心设计的方式来表述自己的观点，试图向事实调查人（决策者）－－仲裁员、法官或者陪审团说明自己一方的观点比对方的更合理，从而应当被采纳。

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Appendix C

CUPL ADVOCACY COURSE – Prof. Leach & Xu
Nov. 26 - Dec. 14, 2007

SYLLABUS

Date	Time	Subject	Assignment to Prepare
Mon 11/26	9:35-10:35	Lecture-Introduction	Handbook, sections I-III. Read both case files (Phoenix; Lawrence); read your assigned case file two more times
Tues 11/27	9:35-11:35	Practice Session 1	Roles on "Assignment Sheet"
Wed 11/28	9:35-10:35	Lecture-Direct & Cross	Handbook, sections II-III
Thurs 11/29	9:35-11:35	Practice Session 2	Roles on "Assignment Sheet"
Mon 12/3	9:35-10:35	Lecture-Impeachment	Handout on Impeachment
Tues 12/4	9:35-11:35	Practice Session 3	Roles on "Assignment Sheet"
Wed 12/5	9:35-10:35	Lec-Opening Statemnt	Handbook, section IV
Thurs 12/6	9:35-11:35	Practice Session 4	Roles on "Assignment Sheet"
Mon 12/10	9:35-10:35	Lec-Closing Argument	Handbook, section V
Tues 12/11	9:35-11:35	Practice Session 5	Roles to be assigned
Thu 12/13	8:00-12:00	Arbitration-Civil Case	Roles to be assigned
Thu 12/13	2:00-6:00	Trial-Criminal Case	Roles to be assigned

Appendix D

CUPL ADVOCACY COURSE - Prof. Leach & Prof. Xu

PRACTICE SESSION ASSIGNMENT SHEET

CIVIL CASE

Team No.	Student	Representing	PS 1	PS 2	PS 3	PS 4	PS 5	Arbitration
							O/S & C/A	
1-2	1. Zhu	Claimant	D-Tan	X-Adams	W-Lin	DNP		D&X-Zhu
	2. Zhang	Claimant	W-Tan	DNP	D-Lin	X-Taylor	C/A-Zhang	C/A-Zhang
3-4	3. Yang	Respondent	X-Tan	D-Adams	W-Taylor	DNP		D&X-Yang
	4. Lao	Respondent	DNP	W-Adams	D-Taylor	X-Lin		D&X-Lao
5-6	5. Yu	Claimant	X-Adams	D-Tan	DNP	W-Lin	O/S-Yu	O/S-Yu
	6. Wang	Claimant	DNP	W-Tan	X-Taylor	D-Lin		D&X-Wang
7-8	7. Ou	Respondent	D-Adams	X-Tan	DNP	W-Taylor	O/S-Ou	O/S-Ou
	8. Chen	Respondent	W-Adams	DNP	X-Lin	D-Taylor	C/A-Chen	C/A-Chen

CRIM CASE

Team No.	Student	Representing	PS 1	PS 2	PS 3	PS 4	PS 5	Trial
9-10	9. Huang	State	D-Fitzgerald	X-Lawrence	W-Wright	DNP		D&X-Huang
	10. Bao	State	W-Fitzgerald	DNP	D-Wright	X-Williams	C/A-Bao	C/A-Bao
11-12	11. Yue	Defendant	X-Fitzgerald	D-Lawrence	W-Williams	DNP	C/A-Yue	C/A-Yue
	12. Ma	Defendant	DNP	W-Lawrence	D-Williams	X-Wright		D&X-Ma
13-14	13. Dong	State	X-Lawrence	D-Fitzgerald	DNP	W-Wright		D&X-Dong
	14. Luo	State	DNP	W-Fitzgerald	X-Williams	D-Wright	O/S-Luo	O/S-Luo
15-16	15. Kong	Defendant	D-Lawrence	X-Fitzgerald	DNP	W-Williams	O/S-Kong	O/S-Kong
	16. Song	Defendant	W-Lawrence	DNP	X-Wright	D-Williams		D&X-Song

KEY: D = Perform Direct Examination X = Perform Cross Examination	W = Perform Role of the Witness DNP = Does Not Perform

Appendix E

CUPL ADVOCACY COURSE – Prof. Leach & Xu   Nov. 26-Dec. 13, 2008

Trial Assignments*

A. Civil Case – Phoenix v. Intech – Morning Arbitration – 8:00-12:00

1. Representing Claimant Phoenix

Direct & Cross of Witnesses	*Witnesses – O/S – C/A*
Zhu Jianxin	Zhang Mingfeng
Wang Miao	Yu Liang

2. Representing Respondent Intech

Direct & Cross of Witnesses	*Witnesses – O/S – C/A*
Yang Li	Ou Changmei
Lao Yan	Chen Zhangxian

B. Criminal Case – State v. Lawrence – Afternoon Trial – 2:00-6:00

1. Represesenting State (prosecution)

Direct & Cross of Witnesses	*Witnesses – O/S – C/A*
Huang Quanliang	Bao Mengdan
Bao Han	Luo Fang

2. Representing Defendant Lawrence

Direct & Cross of Witnesses	*Witnesses – O/S – C/A*
Ma Yun	Yue Hongchi
Song Chen	Kong Lingtao

* Within these assigned trial roles, divide up the tasks as your team thinks best. It makes most sense to divide the larger/smaller roles to even up the tasks. For example, the attorney who directs Fitzgerald (=larger) would cross Williams (=smaller); the witness who plays Lawrence (=larger) would give the O/S (=smaller).

Trial Time Limits

Each side is allowed 80 minutes to present its case: O/S, Direct of 2 witnesses, its Crosses of the OTHER side's 2 witnesses, and C/A. Allocate the time as your team thinks best. The following are SUGGESTED for your guidance:

O/S	**10 minutes**
D/Witness 1	**15 minutes**
D/Witness 2	**12 minutes**
X/Opponent's Witness 1	**12 minutes**
X/Opponent's Witness 2	**10 minutes**
C/A (including, for P, rebuttal)	**15 minutes**