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I was delighted when the *Vanderbilt Law Review* asked me to submit a short essay on trial advocacy. This Essay allows me to discuss two concepts, the trial theory and theme, that should be highlighted in every law school litigation course. Several years ago I wrote a text on commercial litigation for practitioners.[1] That text proposed definitions for the concepts of "theory" and "theme"[2] and suggested that trial attorneys organize their pretrial preparation[3] and trial presentation[4] in terms of those concepts. Since the publication of the text, I have attempted to refine the concepts and to use the concepts to restructure my trial practice course. I am now convinced both of the soundness of the concepts and of their utility as a conceptual framework for teaching trial advocacy.

Section I of this Essay sets out the definitions of trial theory and theme. Section II argues that the very purpose of the pretrial stages of litigation is to enable the trial attorney to select a theory and theme for trial. Section III explains how the choice of theory and theme dictates virtually everything that the attorney does at trial. The conclusion urges that law professors structure litigation courses to teach the concepts of theory and theme in addition to mechanics and tactics. So structured, a litigation course can help the student develop the sense of prudential judgment that is valued in a legal counselor.

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1. E. IMWINKELRIED, HANDBOOK FOR THE TRIAL OF CONTRACT LAWSUITS: STRATEGIES AND TECHNIQUES (1981).

2. *Id.* § 1-2.

3. *Id.* § 1-3.

4. *Id.* § 1-4.

I. THE DEFINITIONS OF TRIAL THEORY AND THEME

The literature on trial advocacy frequently utilizes the expressions "theory" and "theme." According to leading litigators, " '[t]heme building' is a familiar subject to all experienced trial attorneys."[5] Some practitioners assert that in a complex case, the use of a theme is the key to success.[6] Other practitioners state that case theory development is essential.[7] James Brosnahan, former chairperson of the American Bar Association Litigation Section's Trial Practice Committee, has characterized the use of a theory as a basic principle of advocacy.[8] In many writings on the subject by trial attorneys, the words "theory" and "theme" are used synonymously.[9]

The academic commentary on the subject also is replete with references to theory and theme. Numerous commentators counsel the trial attorney to select a single theory of the case.[10] Professor McElhaney, one of the most prolific commentators on advocacy, has declared that the necessity for a theory is "[o]ne of the most fundamental rules in trial practice."[11] Choosing a theory is said to be "the first order of business."[12] Other commentators stress the need for a trial theme.[13] Occasionally, however, the academic commentaries imply that there may be a distinction between a theory and a theme.[14] The thesis of this Essay is not only that theory and theme are distinguishable but also that perceiving the distinction is imperative to understanding the pretrial and trial processes.

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5. Turley, *Voir Dire—"It's Just a Whiplash"*, 21 TRIAL, Aug. 1985, at 88.

6. *E.g.*, Arthurs, *Decision Tree Sprouts into King-Size Settlement: In Complex Case, the Theme Is the Key*, LEGAL TIMES, July 29, 1985, at 1.

7. *E.g.*, Shrager, *The Strategy of Theory Development*, 17 TRIAL, June 1981, at 39 ("subject of proper theory development has substantive, strategic, and practical implications").

8. Brosnahan, *Basic Principles of Advocacy: One Trial Lawyer's View*, 9 THE DOCKET, Summer 1985, at 1, 7.

9. *See* Jordan, *Establishing a Theme: An Interview with Susan Jordan*, TRIAL DIPL. J., Fall 1984, at 5.

10. *See, e.g.*, K. HEGLAND, TRIAL AND PRACTICE SKILLS 51, 53 (1978); R. KEETON, TRIAL TACTICS AND METHODS § 10.6 (2d ed. 1973); T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES § 1.4 (1980).

11. McElhaney, *The Theory of the Case*, 6 LITIGATION, Fall 1979, at 51.

12. J. TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 148 (1983).

13. *See* S. GOLDBERG, THE FIRST TRIAL: WHERE DO I SIT? WHAT DO I SAY? 89-94 (1982).

14. *See, e.g., id.* at 89-95; J. JEANS, TRIAL ADVOCACY §§ 4.29, 8.4 (1975); J. TANFORD, *supra* note 12, at 148, 275, 486.

A. Theory

For our purposes, the theory is the set of all the ultimate facts that the attorney must prove to justify the legal outcome that the attorney's client desires.[15] The theory of the case is more particularized than a list of the essential legal elements of a cause of action. In a substantive law instruction on a breach of contract cause of action, the trial judge might instruct the jury that the elements of the cause of action are as follows: The plaintiff and defendant formed a contract; the contract imposed a duty on the defendant and required the plaintiff to fulfill certain conditions to the duty; the plaintiff satisfied all the conditions; the defendant wrongfully breached the duty; and the plaintiff suffered damage as a result of the breach.[16] The theory is more detailed and fact specific than a list of abstract legal elements.[17] Thus, a plaintiff's theory might be: On January 1, 1985, the plaintiff and defendant entered into a contract in Nashville, Tennessee; the contract required the defendant to deliver a generator to the plaintiff on March 1, 1985 and required the plaintiff to pay the defendant $50,000 on February 1, 1985 to activate the defendant's duty; the plaintiff paid the $50,000 on February 1; the defendant failed to deliver the generator on March 1; and the plaintiff incurred $15,000 in damages when she purchased a more expensive substitute generator on April 1, 1985.

Just as the plaintiff or prosecutor can have a theory of the case, so can the defense. A defense theory is possible whether the defense is relying on a simple defense or a true affirmative defense. In the case of a simple defense that negates an element of the plaintiff's or prosecutor's prima facie case, the theory is the converse of an element of the plaintiff's or prosecutor's theory. One of the elements of the opposition's theory is *A*, and the defense claims *non-A*. For example, an element of the prosecutor's theory might be that the defendant was at the crime scene, 150 Wall Street, at 9:00 p.m., on May 1, 1985, when a battery allegedly occurred. A simple alibi defense would be that the defendant was elsewhere at the time, namely, 44 Madison Avenue.

Alternatively, suppose that the defendant relies on a true af-

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15. E. IMWINKELRIED, *supra* note 1, § 1-2.

16. *See generally* 3 E. BRANSON & A. REID, THE LAW OF INSTRUCTIONS TO JURIES IN CIVIL AND CRIMINAL CASES ch. 56 (3d ed. 1961) (listing various state court jury instructions in contract actions).

17. E. IMWINKELRIED, *supra* note 1, § 1-2.

firmative defense in the nature of confession and avoidance pleading; the defense is willing to concede the elements of the plaintiff's or prosecutor's prima facie case but attempts to establish additional facts that will avoid responsibility. The defense may be entrapment.[18] The defense theory could be: On June 1, 1985, a third party implanted the idea for the crime in the defendant's mind; the third party was an undercover police officer; the officer made the suggestion to the defendant to induce the defendant to commit the crime;[19] and the third party's conduct was such that it was likely to induce even a normally law-abiding person to commit the crime.[20]

The use of a theory allows the attorney to simplify the trial presentation for the jury. In contemporary federal practice, the standard for discoverability is whether information is logically relevant to the subject matter of the case.[21] During discovery, the attorney may obtain information even though it is not relevant to the issues currently pleaded in the case.[22] The information is discoverable as long as the pleadings could be amended to encompass the issue.[23] Given this lax standard, in a complex case tens of millions of documents may be discoverable.[24] In the *IBM* antitrust case,[25] the parties produced over sixty-four million pages of documents within the first five years of discovery.[26] Nor is the phenomenon limited to federal court. Prior to the tentative settlement of the *Houston Lighting & Power*[27] case in Texas state court, the parties exchanged over forty million pages of documents.[28]

At trial, the standard for admissibility is whether the item of evidence is logically relevant to an issue then pleaded in the case.[29] The Federal Rules of Evidence liberally define logical relevance as

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18. *See* United States v. Pugliese, 346 F.2d 861 (2d Cir. 1965).

19. *See* People v. McIntire, 78 Cal. App. 3d 844, 144 Cal. Rptr. 373 (1978), *vacated*, 23 Cal. 3d 742, 591 P.2d 527, 153 Cal. Rptr. 237 (1979).

20. Comm. Standard Jury Instructions, Criminal, Super. Ct., L.A. County, CALIF. JURY INSTRUCTIONS CRIM., 4th ed. CALJIC 4.60 (Supp. 1984).

21. FED. R. CIV. P. 26.

22. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).

23. *Id.* at 360-61.

24. Pope, *Rule 34: Controlling the Paper Avalanche*, 7 LITIGATION, Spring 1981, at 28.

25. United States v. IBM. One of the many published opinions in the case is 406 F. Supp. 175 (S.D.N.Y. 1975).

26. Pope, *supra* note 24, at 28.

27. Houston Lighting & Power Co. v. Brown & Root, Inc., No. 81-H-0686-C, 130th Jud. Dist., Matagorda County, Tex.

28. Arthurs, *supra* note 6, at 5.

29. FED. R. EVID. 401.

"having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[30] The trial admissibility test is stricter than the pretrial discoverability standard, but even the trial test is so broad that in large antitrust and commercial litigation, the attorneys can justify offering "tens or even hundreds of thousands" of documents.[31] That volume of information obviously would overwhelm the typical trier of fact. A theory enables the attorney to reduce radically the volume of evidence introduced at trial. The theory becomes the relevance standard.[32] To reduce the quantity of evidence to manageable proportions, the attorney offers only the evidence that contributes directly to the development of the theory.[33]

B. Theme

Properly defined, a theme differs fundamentally from a theory. The theme is the label for the attorney's strongest argument on the pivotal element of the theory.[34] Some writers suggest that the theme is "the strong point of your case"[35] or the one idea that "tells the jury why your client should win the case."[36] However, the concept of theme is susceptible to a more precise definition.

The theme should relate to the pivotal element of the theory. If the parties have evolved the case adequately during pretrial discovery, by the time of trial the case may be reducible to a single issue.[37] Pretrial discovery can narrow the controversy between the parties to a particular element of the theory. In a battery prosecution, the issue may be the attacker's identity. Assume, for instance, that although there is overwhelming evidence of an assault in a hotel, the victim initially was hesitant in identifying the defendant. The defendant's statement to the police was a denial of any involvement in the attack. In this situation, the prosecutor reasonably can anticipate that the focus of the trial will be the identity element of his or her theory. In some respects, it is easier to iden-

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30. *Id.*
31. Quinn, *Documents at Trial Require Careful Preparation*, LEGAL TIMES, Aug. 19, 1985, at 11.
32. *See* S. GOLDBERG, *supra* note 13, at 93.
33. J. TANFORD, *supra* note 12, at 486.
34. E. IMWINKELRIED, *supra* note 1, § 1-2.
35. Turley, *supra* note 5, at 88.
36. S. GOLDBERG, *supra* note 13, at 89.
37. T. MAUET, *supra* note 10, § 1.4.

tify the central element today than in the past, particularly in civil cases. Under recent amendments to the Federal Rules of Civil Procedure, judges have expanded powers at pretrial conferences.[38] Many judges use their powers aggressively at those conferences to pressure the parties into detailed stipulations. Extensive stipulations facilitate the singling out of the outcome-determinative question for trial.

The theme not only should relate to the pivotal element of the theory; more specifically, the theme should embody the attorney's most convincing argument on that element.[39] The theme should incorporate the best common sense argument for prevailing on the pivotal element.[40] It is the argument to which the attorney hopes the jury will resort during deliberation in order to counter the opponent's most damning evidence on the central issue.[41] In the battery hypothetical, the victim's early, uncertain identification of the defendant may be the most damaging evidence to the prosecution's theory. However, the other evidence in the case may suggest a persuasive counter-argument. The other evidence may show that the victim was close to the attacker for several minutes. The treating physician is prepared to testify that the victim suffered multiple contusions and lacerations all over his body, and the hotel clerk can add that he traced a long path of blood down a hallway and into a restroom. The prosecutor's theme should be that although the victim understandably was dazed immediately after the attack, he had an excellent opportunity to observe the attacker's face.

Finally, the attorney should reduce the strongest argument on the key element to a short, memorable expression.[42] The expression is a shorthand label for the argument. In the battery case, the prosecutor might capsulize[43] the theme in the expression that the victim was "so close to the attacker for so long" that the identification is trustworthy. The attorney can use the theme as a pervasive motif.[44] While the selection of the theory aids in simplifying the case presentation, the theme lends continuity to the case. The attorney can insinuate or expressly mention the theme at every ma-

38. *See* FED. R. CIV. P. 16 (amendment allows judges to expedite disposition of action and facilitate settlement through numerous pretrial conferences).

39. S. GOLDBERG, *supra* note 13, at 89.

40. *Id.* at 90; *see also* J. TANFORD, *supra* note 12, at 148.

41. S. GOLDBERG, *supra* note 13, at 90.

42. Lee, *Painting the Whole Picture at Summation: Final Strokes*, 19 TRIAL, July 1983, at 63, 66.

43. *See* R. CARLSON, SUCCESSFUL TECHNIQUES FOR CIVIL TRIALS § 6:10 (1983).

44. J. JEANS, *supra* note 14, § 8.4.

jor phase of the trial.[45]

II. The Use of Pretrial Proceedings To Select the Theory and Theme

The concepts of theory and theme help to explain the function of pretrial procedures. At each major stage—intake, pleading, discovery, and final case evaluation on the eve of trial—the attorney must understand the concepts to appreciate his or her objectives.

A. Intake

At the intake stage, the attorney accepts the case and first interviews the client. At this early juncture, one of the attorney's principal goals is to identify every conceivable theory of the case.[46] During intake, perhaps the worst sin an attorney can commit is premature diagnosis.[47] The client undoubtedly has not disclosed to the attorney all the information the client possesses. The client may have forgotten some facts or may be withholding other data until the attorney wins the client's trust. Further, the attorney has not yet spoken with the other witnesses who may furnish additional or conflicting information. Finally, the attorney may know little or nothing about the areas of law involved in the case. For all these reasons, the attorney should use the intake stage primarily to develop a list of plausible theories. The attorney engages in the type of analysis expected of law students on first-year examinations.[48] In the generator contract hypothetical, after interviewing the client the plaintiff's attorney tentatively might identify five potential theories: an oral offer and acceptance; a written contract resting on an acceptance that exactly matches the terms of the offer;[49] a written contract based on UCC section 2-207 even though the terms of the purported acceptance do not exactly match those of the offer;[50] promissory estoppel;[51] and quasi-contract.[52]

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45. R. Keeton, *supra* note 10, § 10.6.

46. *See generally* D. Binder & P. Bergman, Fact Investigation: From Hypothesis to Proof (1984); California Continuing Education of the Bar, Fact Investigation: From Theory Through Discovery (1985).

47. D. Binder & S. Price, Legal Interviewing and Counseling: A Client-Centered Approach 86 (1977).

48. *See* S. Kinyon, Introduction to Law Study and Law Examinations 126 (1971).

49. J. Murray, Contracts § 54, at 111 (2d rev. ed. 1974) (the common-law "mirror image" rule requiring an unconditional acceptance).

50. *Id.* § 51, at 114-16.

51. *Id.* §§ 92-93.

52. *Id.* § 9, at 16.

B. Pleading

The next major stage in pretrial processing is pleading. The function of this stage is to eliminate theories lacking legal merit. The attorney should abandon any theory that cannot withstand a motion to dismiss or demurrer.[53] By this point, the attorneys have had an opportunity to conduct legal research, and they now can appraise the legal merits of the causes of action, crimes, and defenses that the parties have pleaded. Suppose, for instance, that the plaintiff's attorney has pleaded the promissory estoppel theory identified during intake but has alleged reliance on a vague promise by the defendant. In some jurisdictions, even under a promissory estoppel theory, the defendant's promise must satisfy the normal definiteness test for contract promises.[54] If the defendant discovers that rule of law during research, he successfully can move to dismiss that count from the complaint. For that matter, even if the defendant does not demur, the plaintiff's attorney should abandon the theory unless a realistic likelihood exists that the court will overturn the rule of law. Most jurisdictions subscribe to the view than even if a defendant fails to make a pretrial motion to dismiss a legally insufficient count, the issue of legal sufficiency can be raised for the first time at trial or on appeal.[55] The view obtains in both civil[56] and criminal[57] cases. Taking a legally insufficient count to trial builds a ground for appeal into the case. The presence of the count in the pleading creates an unnecessary risk that on appeal, the attorney will lose a favorable trial court judgment. Moreover, the presence of the legally insufficient count makes it less likely that the attorney will win a favorable judgment in the trial court. If the judge dismisses the count during trial in the jury's hearing, the dismissal may prompt the jurors to question the remaining counts. Losing the battle over the insufficient count makes it less probable that the attorney will win the war.

C. Discovery

The function of the discovery stage parallels that of the pleading stage. The purpose of this stage is to winnow out theories lack-

53. *See* FED. R. CIV. P. 12; CAL. CIV. PROC. CODE § 430.30 (West 1973).

54. *See* J. MURRAY, *supra* note 49, § 92.

55. 71 C.J.S. *Pleading* § 560 (1951).

56. *Id.*

57. *E.g., Ex parte* Seaton, 580 S.W.2d 593 (Tex. Crim. App. 1979) (post-conviction proceeding).

ing factual merit. Assume that before the attorney filed the complaint in the generator contract case, he or she believed in good faith that discovery would yield a set of documents constituting a matching offer and acceptance. After thorough discovery, however, the attorney could not locate such a set. In this circumstance, the defense could obtain summary judgment on that count in the complaint.[58] As in the case of a theory lacking legal merit, the plaintiff's attorney should jettison the unsubstantiated theory even if the defense fails to move for summary judgment. Notwithstanding its failure to move for summary judgment, the defense can attack the legal sufficiency of the evidence for the first time at trial.[59] The plaintiff's attorney could suffer a directed verdict on that count during trial.[60] Worse still, a directed verdict on one count reduces the likelihood of obtaining a favorable judgment on the other, sound counts. The unsupported count is "a strawman whom the opponent can easily destroy."[61] The weak count may lower the general credibility of the attorney's case in the jurors' eyes. After rejecting the unsupported count, the jurors may leap quickly to the conclusion that the other counts are equally meritless.

D. Final Pretrial Case Evaluation

The attorney's task is simple if at the close of discovery, there is only one theory remaining with both legal and factual merit. The attorney can identify the theory merely by exercising the traditional skills of legal analysis—evaluating the legal sufficiency of the counts and the evidence supporting each count. The attorney can arrive at the theory by process of elimination. In complex litigation, however, even after complete discovery, several tenable theories may remain. In the generator contract hypothetical, the attorney may conclude that the oral contract, UCC section 2-207, and quasi-contract theories all have factual and legal merit.

Should the attorney take all three theories to trial? The initial impulse might be to do so just to be on the safe side. Yet most experienced litigators answer the question in the negative. It certainly is inadvisable to take multiple theories to trial when the theories are inconsistent.[62] With their law school training, lawyers and judges are comfortable with "even if" arguments: the defendant

58. *See* FED. R. CIV. P. 56; CAL. CIV. PROC. CODE § 437c (West Supp. 1985).
59. 88 C.J.S. *Trial* § 252 (1955).
60. *Id.*
61. E. IMWINKELRIED, *supra* note 1, § 1-3.
62. R. KEETON, *supra* note 10, § 10.6.

has an alibi; but even if he was present at the crime scene, he was entrapped. However, laypersons naturally find such arguments curious and suspect. Common sense tells them that the defendant either was or was not present. When the defense relies on inconsistent arguments, the jurors understandably doubt the defense's candor. There is even a grave risk in taking multiple consistent theories to trial.[63] Urging secondary theories can "weaken your primary contention."[64] Pressing several theories compounds the danger of jury confusion, and jurors may treat the attorney's invocation of other theories as evidence of the attorney's lack of faith in the primary theory. In the opinion of most seasoned litigators, when faced with multiple theories, the attorney must exercise strategic professional judgment and choose a single theory for trial.[65]

The difficulty is that the attorney cannot base the choice on purely legal analysis. The supposition is that all the remaining theories rest on recognized legal rules and are sustained by legally sufficient evidence. The choice calls for prudential judgment rather than legal analysis. In making the choice, the attorney should consider the following factors, *inter alia*:[66]

(1) Which theory has the largest volume of and most cogent corroboration?[67] All the theories have bare factual merit in the sense that they can defeat a summary judgment motion. However, if one theory has superior corroboration—disinterested, unequivocal lay eyewitness testimony or testimony by an eminently credentialed expert—the availability of the corroboration cuts in favor of selecting that theory.

(2) Is the theory based on substantial justice rather than a rule that may strike the jurors as a legal technicality?[68] In the generator contract hypothetical, the defense may have tenable fraud and Statute of Frauds theories. Both defenses could survive a motion to strike, and there is enough evidence supporting each theory that at trial, the judge would have to instruct the jury on the defense. A lay juror, however, probably would find the latter defense unattractive. If the defense relies on the Statute of Frauds, a layperson

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63. *See id.*

64. *Id.*

65. *Id.*

66. In major cases, rather than engage in this multi-factor analysis, some attorneys test possible theories by submitting them to mock juries before trial. Couric, *Winning*, NAT'L L.J., Dec. 2, 1985, at S14.

67. *See* J. TANFORD, *supra* note 12, at 489.

68. *See id.* at 148.

might conclude that the defendant was invoking a legal technicality to walk away from a freely bargained agreement.[69] At a subconscious level, the layperson might find it difficult to excuse nonperformance for the apparently trivial reason that the parties did not document the agreement.

(3) Will the judge give the jury an instruction with favorable language about the theory? The jurors know that the attorneys are partisan advocates—that is, "hired guns." Consequently, the jurors discount what the attorneys say during trial.[70] The jurors accord far more significance to what the judge says at trial, including the judge's statements in the final jury charge. If there is a pattern instruction with favorable language on one theory, during summation an astute attorney can use the instruction to convince the jury that in some sense, the judge approves of the attorney's theory. Assume that for the other possible theories, the pattern instructions contain bland language or, worse, no pattern instruction exists. The attorney will have to overcome the judge's reluctance to give a special instruction. The availability of a favorable instruction on the other theory points toward the choice of that theory for trial.

(4) Does the theory cast the client in a role with which the jurors can identify?[71] Suppose that the two available theories are breach of contract and breach of warranty. If the plaintiff's attorney opts for the former theory, the jurors may view the case as a contest between two businesses. On the other hand, if the attorney chooses the latter theory, the attorney can cast the plaintiff in the role of consumer with whom many jurors will be able to empathize.

(5) Does the theory require that the jurors find intentional misconduct by the opposing party? Many commentators have pointed out that jurors are loath to conclude that a witness has committed perjury.[72] A contention that the witness is mistaken ordinarily is more palatable.[73] By the same reasoning, a juror may be hesitant to find that the opposing party perpetrated an intentional misdeed. Thus, it may be preferable to defend a contract action on

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69. *See* E. FARNSWORTH & W. YOUNG, CASES AND MATERIALS ON CONTRACTS 122-23 (3d ed. 1980) ("technical" defenses).

70. Dombroff, *Jury Instructions Can Be Crucial in Trial Process*, LEGAL TIMES, Feb. 25, 1985, at 26.

71. Begam, *Opening Statement: Some Psychological Considerations*, 16 TRIAL, July 1980, at 33, 34-36.

72. P. BERGMAN, TRIAL ADVOCACY 288-89 (1979).

73. K. HEGLAND, *supra* note 10, at 47.

the ground of mutual mistake rather than outright fraud.

Nothing guarantees that after weighing these factors, the attorney will find that they all conveniently cut in favor of the same theory. The choice is obvious if they do. But in many cases the factors may point in different directions. For example, although a fraud defense may be more appealing to the jurors' sense of justice than a Statute of Frauds theory, there may be superior corroboration for the latter theory. In that event, to choose a trial theory, the attorney not only must consider each factor, but also must decide the weight to attach to each factor—another level of judgment.

The selection of the theory does not complete the pretrial case evaluation. The attorney still must attempt to predict the pivotal trial issue and formulate a theme to win the issue. "Every case without exception has a main controlling issue."[74] In a major case in which the parties enter into detailed stipulations, it can be a simple matter to identify the element of the theory that will be the central focus at trial. The stipulations may eliminate practically every element but one. In other cases, the attorney must review the course of pretrial discovery to forecast the issue. The key clue often is the content of the opposing attorney's questions at the deposition of the attorney's client. If the vast majority of the questions dealt with contract formation, one might expect that that element of the plaintiff's theory will be the battleground at trial.

After identifying the pivotal element, the attorney must devise a theme for the element. The attorney must identify the argument that has the greatest common sense appeal to counter the opposition's best evidence on the central issue. The battery case will turn on the identification element. In that case, a prosecution theme stressing the victim's long opportunity for close observation of the attacker may be optimal. If the opposition has superior percipient witness testimony on the key issue but the testimony is at odds with an item of physical evidence, the theme should highlight the physical evidence. When the physical evidence is a skidmark in the defendant's lane, the plaintiff's attorney might employ the theme, "the case of the telltale skidmark."[75] As in choosing the trial theory, the selection of the trial theme calls for an exercise of prudential judgment. There may be a myriad of possible arguments and

74. Beasley, *Closing Statements*, in TRIAL PRACTICE FOR THE GENERAL PRACTITIONER—COURSE OF STUDY TRANSCRIPT 98, 99 (L. Packel ed. 1980).

75. Lee, *supra* note 42, at 66.

themes that would be legally permissible and that are supported by sufficient evidence. An analysis of the legal issues, even the legal sufficiency of the supporting evidence, will not suffice.

III. The Use of the Theory and Theme at Trial

The judgments made on the theory and theme are vital because they should determine almost everything that the attorney does at trial. As one well-respected litigator has remarked, "the trial is only the playing out of the theory."[76] Every step at trial is explicable in terms of the theory and theme, and explaining the trial in these terms gives new meaning to many of the old bromides about trial advocacy.

A. Jury Selection

There is probably more lore and legend about jury selection than any other part of the trial.[77] In some jurisdictions, the attorney may make short preliminary remarks to the panel even before questioning the panel members. One adage about jury selection is that the remarks constitute the attorney's first opportunity for advocacy to the jury and that the attorney, therefore, should not waste the opportunity by merely describing voir dire procedures. Once the questioning begins, the conventional wisdom is that the attorney should expose the weakness in his or her case.[78] The attorney should obtain the panel members' commitment that they will not decide the case against the attorney's client solely because of that weakness.[79] Further, according to the commentators, the attorney should attempt to indoctrinate the members on favorable law.[80] The jury selection stage concludes with challenges and strikes. The attorney is supposed to use challenges and strikes to eliminate panel members who might be predisposed to vote against the attorney's case.

These adages border on the cliche.[81] On first hearing, they sound trite. Yet they can take on new meaning in light of the concepts of theory and theme. The attorney's preliminary remarks

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76. Jordan, *supra* note 9.

77. *See, e.g.*, Darrow, *Selecting a Jury, reprinted in* J. Jeans, *supra* note 14, § 7.7.

78. Crump, *Attorneys' Goals and Tactics in Voir Dire Examination*, 43 Tex. B.J. 244, 244-46 (1980).

79. *Id.*

80. J. Jeans, *supra* note 14, §§ 7.19-.22; J. Tanford, *supra* note 12, at 240.

81. *See* Fahringer, *"In the Valley of the Blind"—Jury Selection in a Criminal Case*, Trial Dipl. J., Summer 1980, at 23.

constitute an important opportunity for advocacy. More to the point, the attorney can use the remarks to give the panel an abbreviated version of the theory of the case. In the generator contract hypothetical, the plaintiff's attorney could make these remarks:

> The parties, my client Ms. Kessel and the defendant, are asking you to resolve their disagreement. Ms. Kessel says that on January 1, 1985, the defendant orally agreed to sell her a generator for $50,000. She also says that the defendant broke that promise and now owes her $15,000. The defendant denies that there was any such agreement. We are looking for jurors who can fairly and impartially decide this dispute.[82]

In one or two minutes, the attorney tersely can describe the theory and give the jury a framework for all the testimony that will develop the theory.

There is also a large element of truth in the counsel that the attorney should expose the "weakness" of his or her case during voir dire and seek the members' commitment not to find against the attorney's case because of that weakness. The weakness in question is the opposition's best evidence on the pivotal element of the theory. In the battery hypothetical, that evidence is the victim's early hesitancy in identifying the attacker. The evidence will sound less damning to the jury, and the prosecutor will appear more credible if he or she mentions the evidence before the defense raises the issue:

> Q: There may be evidence in this case that after the attack, Mr. Williams, the victim, was uncertain about identifying his attacker. Have you ever had an experience in which you were uncertain in identifying someone, even a friend?
>
> Q: So would you necessarily reject Mr. Williams' testimony simply because of his earlier uncertainty?

The attorney can then indoctrinate on "the favorable law," that is, the pattern jury instruction supporting the theme:

> Q: At the end of this case, his honor is going to read you an instruction on eyewitness identification. The instruction will tell you that in deciding whether to believe Mr. Williams' identification of the defendant, you should consider how close Mr. Williams was to the attacker. If his honor gives you that instruction, will you do your best to follow it?
>
> Q: And if he instructs you to consider how long the attack lasted—how long Mr. Williams had to observe the attacker—will you carry out that instruction?

Even the hoary sayings about striking "unfavorable jurors" make more sense in light of the concepts of theory and theme. Rather than inquiring generally whether the prospective juror

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82. *Cf.* E. IMWINKELRIED, *supra* note 1, § 2-1a, at 32.

probably will vote against the attorney's case, the attorney should ask whether the panel member would be inclined to reject the theme. The prosecutor in the battery case should strike any member who was an undergraduate psychology major. In all likelihood, a panel member with that major has been exposed to numerous experiments indicating the unreliability of eyewitness identification.[83] The member would be dubious of the "so close for so long" argument. The attorney has only a small number of strikes. The best candidate for a strike, the juror the attorney least wants, is a juror inclined to reject the attorney's theme.[84]

B. Opening Statement

As with jury selection, the opening statement is a critical stage in the trial. The general consensus among practitioners is that in most cases jurors ultimately return the same verdict that they would have voted for immediately after the opening.[85] The opening statement is becoming more important today. In two-thirds of the federal judicial districts and one-fifth of the states, attorneys no longer participate in the voir dire examination; the judge conducts the entire examination.[86] In these jurisdictions, the opening statement represents the attorney's initial chance to develop rapport with the jurors. Commentators frequently assert that the attorney should use the opportunity to tell the jurors a "story" about his or her case.[87] In addition, the commentators urge that because the trial judge usually allows so little time for opening the attorney should eschew a diffuse, "shotgun" approach.[88] The attorney instead should concentrate on and spend more time discussing the strength of his or her story.[89]

The commentators' advice becomes more concrete and usable

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83. *See* Levine & Tapp, *The Psychology of Criminal Identification: The Gap From* Wade *to* Kirby, 121 U. PA. L. REV. 1079 (1973) (summarizing many of the experiments). *But see* McCloskey & Egeth, *Eyewitness Identification: What Can a Psychologist Tell a Jury?*, 38 AM. PSYCHOLOGIST 550 (1983) (questioning propriety of expert psychological testimony concerning eyewitness identification); McCloskey & Egeth, *A Time to Speak, or a Time to Keep Silence?*, 38 AM. PSYCHOLOGIST 573 (1983).

84. *Annual Meeting of Trial Lawyers of America*, 54 U.S.L.W. 2094, 2096 (Aug. 13, 1985) (reviewing psychologist-lawyer Lisa Blue's presentation).

85. *See* Klieman, *A Checklist for Opening Statements*, TRIAL DIPL. J., Summer 1985, at 34; McElhaney, *Opening Statements*, 2 LITIGATION, Summer 1976, at 45;Vinson, *How to Persuade Jurors*, 71 A.B.A. J. 72 (1985). *But see* J. TANFORD, *supra* note 12, at 215 n.54.

86. Fahringer, *supra* note 81, at 36 n.5.

87. J. JEANS, *supra* note 14, § 8.6, at 202.

88. L. DECOF, ART OF ADVOCACY: OPENING STATEMENT § 1.10(2) (1982).

89. *Id.*

if interpreted in light of the concepts of theory and theme. Simply stated, the theory is the story.[90] During opening statement, the attorney can go into much greater detail than in the preliminary remarks before voir dire examination, but both the remarks and the opening statement should be used to advance the same theory. Further, the "strength" that should be underscored during the opening is the theme. In the battery hypothetical, the prosecutor should devote the most time to previewing the testimony concerning the length of the attack and the victim's proximity to the attacker. The prosecutor might act out part of the attack to give the jurors a sense of how long the attack lasted.[91] At least once during the opening—probably near the end when the judge is least likely to sustain an objection that the prosecutor is becoming argumentative[92]—the attorney should sound the theme.[93]

C. *Structuring the Case-in-Chief*

The psychological principles of primary and recency are well settled: "[W]e tend to remember what we hear first and what we heard last."[94] Trial attorneys long have appreciated that they should apply those principles in determining the sequence of their witnesses.[95] If the jurors will have the longest memory of what they hear first and can recall most easily what they hear last, the case-in-chief should begin and end with strong witnesses.[96]

The rub is defining a "strong" witness. Perhaps most litigators assume that the opening witness should be the most dramatic witness. Starting with a dramatic witness arrests the jury's attention. In medical malpractice cases, many plaintiffs' attorneys make it a practice to call the defendant doctor as the first witness in the plaintiff's case-in-chief. They reason that the jurors will be attentive during the direct confrontation between the defendant and the plaintiff's attorney. Similarly, many, if not most, litigators believe that the closing witness should be the most sympathetic witness. In personal injury practice, the plaintiff's final witness often is the

90. Klieman, *supra* note 85, at 36.
91. E. IMWINKELRIED, *supra* note 1, § 3-4c, at 45.
92. *See generally* J. JEANS, *supra* note 14, § 8.13 (discussing argumentative objection).
93. *Id.* § 8.4.
94. Parker, *Applied Psychology in Trial Practice*, 7 DEF. L.J. 33, 35, 37 (1960).
95. Colley, *Principles of Direct Examination*, TRIAL DIPL. J., Spring 1979, at 15.
96. J. TANFORD, *supra* note 12, at 499 (citing T. MAUET, *supra* note 10, at 18); Schrag, *Preparing Witnesses for Trial*, in 1 CALIFORNIA CIVIL PROCEDURE DURING TRIAL § 5.5 (1982); *see also* K. HEGLAND, *supra* note 10, at 11.

seriously injured plaintiff. The obvious extent of the witness' injuries presumably generates jury sympathy.

The term "strong" witness, however, can be redefined in light of the concepts of theory and theme. The opening witness should be the best theory witness. Under the primacy principle, the first witness' testimony is the information the jurors will remember longest.[97] The attorney wants the jury to recall the theory throughout the case because the theory functions as a conceptual framework for all of the attorney's evidence. The jury may comprehend the rest of the evidence better when the first witness is the best theory witness. Suppose that in the generator contract hypothetical, the plaintiff's plant manager participated in the preliminary negotiations, received the telephone call in which the defendant's president informed the manager that the generator would not be delivered, and supervised the cover efforts to find a substitute generator. The manager's testimony would give the jury an excellent overview with which to appreciate all the later testimony about formation, breach, and damages.

The concluding witness should be the best theme witness. Under the recency principle, the last witness' testimony is the information that jurors can remember most easily.[98] The attorney must ensure that the jurors recall the theme during deliberation. The best way to ensure their recall is to position the strongest theme witness at the end of the case-in-chief. In the contract hypothetical, the plaintiff's theme might be that although the defendant now denies the existence of a contract, at one time the defendant acted as if a contract did exist. At his deposition, the defendant's shipping superintendent admitted that the defendant's president had ordered him to box the generator for shipment and tbat the defendant's routine practice is to prepare goods for shipment only after a firm agreement has been reached.[99] The superintendent may not be the most dramatic or sympathetic witness. However, his testimony may be the lynchpin of the plaintiff's best argument for prevailing on the pivotal element of contract formation.

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97. Parker, *supra* note 94, at 35.

98. *Id.*

99. *See* E. IMWINKELRIED, *supra* note 1, § 4-3, at 53.

D. Organizing the Direct Examination

The recency principle applies to the organization of each witness' direct examination as well as to the overall sequencing of witnesses.[100] Therefore, many commentators recommend that litigators end the direct examination on "a high note," "the most significant item of evidence."[101] Unfortunately, like "strong witness," "high note" is a vague expression. In the theory-theme schema, however, "high note" is readily definable. The "high note" is the testimony that most directly supports the theme. The end of direct examination is a naturally emphatic position, and the attorney wants to emphasize the testimony pertinent to the strongest argument on the central element of the theory. By way of example, assume that the defendant's shipping superintendent was present when the defendant's president phoned the plaintiff's manager and told the manager that the defendant refused to deliver the generator. If the plaintiff's attorney conducted the superintendent's direct examination in chronological order, the witness would testify about contract formation (boxing the generator for shipment) before breach (the telephone call). That sequence would be unwise. At trial, there will be little or no dispute that the defendant's president made the phone call. The focus at trial will be on the question of whether there was a contract. The attorney should deviate from chronological order to end the direct examination with the testimony about the theme and contract formation.

E. Cross-Examination

The threshold question in planning cross-examination is whether the attorney should cross-examine the witness.[102] It is not a foregone conclusion that the attorney should cross-examine every opposing witness. "An ancient rule of litigation is not to cross-examine a witness whose testimony has not been harmful."[103] The rule can be described more precisely as follows: Do not cross-examine a witness whose testimony has not been harmful to the attorney's theory. The opposing witness' testimony can be relevant to the case without damaging the theory. Suppose, for example, that the attorney is defending a murder case. The defensive theory is self-defense. The prosecution witness, a forensic pathologist, tes-

100. K. HEGLAND, *supra* note 10, at 11.
101. J. JEANS, *supra* note 14, § 9.11, at 221.
102. P. BERGMAN, *supra* note 71, at 151.
103. *Id.*

tifies only that the pattern of the wounds indicates neither an accident nor suicide. The defense theory enables the attorney to neutralize the pathologist's testimony. Since the testimony works no harm to the self-defense theory, the attorney can excuse the witness without cross-examination.[104] The attorney might add: "Doctor, you have been very helpful. Thank you. I see no need to cross-examine you."[105]

After the decision is made to cross-examine the witness, the next question is what purposes should be pursued during the examination. Judge Goldstein, one of the leading American authorities on trial advocacy, wrote that it is a "cardinal principle"[106] that "the primary purpose of cross-examination is to secure admissions favorable to the side of the cross-examiner."[107] This principle also can be recast in terms of theory and theme. An effective use of cross-examination is to elicit opposing witnesses' testimony that establishes the elements of the attorney's theory. The attorney would love to be able to use opposing witnesses' testimony as corroboration during closing argument.[108] More importantly, the best use of cross-examination is to elicit opposing witnesses' testimony that supports the theme. Most writers on cross-examination favor a short cross, developing a handful of "major"[109] or "salient"[110] points. In order to keep the questioning brief, the cross-examiner must establish priorities. There usually is insufficient time to develop all the facts that are supportive of the attorney's theory. However, the choice of theme determines the priorities. Since the theme represents the attorney's best hope for winning the case, the first priority should be to seek corroboration for that argument. If time is short, the attorney should elicit that corroboration even if doing so means disregarding potential corroboration for other elements of the theory.

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104. *See* Jenner, *Meeting Expert Testimony—The Defense Perspective*, in SCIENTIFIC AND EXPERT EVIDENCE 87, 89 (E. Imwinkelried 2d ed. 1981).

105. *Id.*

106. Goldstein, *The Cardinal Principles of Cross-Examination*, in 1959 TRIAL LAWYER'S GUIDE 331 (I. Goldstein ed.).

107. *Id.* at 338.

108. *See id.*

109. *See* Browne, *The Delicate Art of Cross-Examination*, 5 CALIF. LAW., Apr. 1985, at 22, 24.

110. Comisky, *Observations on the Preparation and Conduct of Cross-Examination*, 30 THE PRACTICAL LAW., Jan. 15, 1984, at 23, 30.

F. Jury Instructions

Just as jurors are skeptical of statements made by the attorneys as advocates, jurors sometimes perceive that witnesses have a financial or emotional "vested interest in the outcome of the case."[111] In sharp contrast, jurors "typically listen more closely and weigh more heavily almost everything said to them by the judge, including the jury instructions."[112] Hence, commentators on trial practice stress the need to request "instructions that favor you[r]" case.[113]

What are the sorts of "favorable" instructions that the attorney should request? There are two types. First, the attorney should ask for a substantive law instruction incorporating the attorney's theory of the case.[114] The attorney should request that the trial judge tailor the pattern instruction to the case by mentioning the specific names, places, dates, and events involved in the litigation.[115] The more the judge uses specific references, the more the substantive law instruction will sound like a repetition of the theory that the attorney has been proclaiming throughout the trial.

Second, the attorney should request an instruction supporting the theme. In most instances, this will be an evidentiary instruction. In the battery hypothetical, the prosecutor might ask for an instruction on the manner in which the jurors should evaluate the trustworthiness of the victim's eyewitness identification. Some model instructions on eyewitness identification expressly direct the jury to consider "how long . . . a time was available"[116] for observation and "how . . . close the witness was."[117] The theme, "so close for so long," contains the considerations mentioned in the instruction. The theme is ideal in that it uses the same words, "close" and "long," employed in the instruction. When the jury hears the judge's charge, it may sound as if the judge is legitimating the prosecutor's theme. The instruction will seem to confirm what the prosecutor has said throughout the trial; namely, that it is proper for the jury to decide the key identification element on

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111. Dombroff, *supra* note 70, at 26.

112. *Id.*

113. T. MAUET, *supra* note 10, at 317.

114. S. GOLDBERG, *supra* note 13, at 95.

115. Dombroff, *supra* note 70, at 26.

116. Imwinkelried, *Identification Evidence*, in 15TH ANNUAL DEFENDING CRIMINAL CASES: CHANGING FRONTIERS OF CRIMINAL DEFENSE 659, 694-95 (E. Margolin ed. 1977) (citing jury instructions set out in United States v. Holley, 502 F.2d 273 (4th Cir. 1974)).

117. *Id.*

the basis of the "how close" and "how long" considerations.

G. Closing Argument

In most jurisdictions, the last step before jury deliberation is the attorneys' closing arguments or summations. As in jury selection, the topic of summation has generated a huge lore.[118] One often repeated piece of advice is that early in the summation, the attorney should try to simplify the case for the jury.[119] The attorney should attempt to "[reduce] the entire trial to one issue"[120] "upon which . . . the whole case revolves."[121] The attorney should focus on "the fundamental issue"[122] and give the jurors a rationale for resolving that issue in favor of the attorney's client.[123]

These aphorisms can be understood in terms of the concepts of theory and theme. The reason for choosing a theory and theme is to give the trial presentation simplicity and continuity. At the outset of the summation, the attorney can simplify the case by restating the theory and listing the elements of the theory that are undisputed or overwhelmingly proven. Of course, the remaining fundamental issue is the pivotal element of the theory, and the theme embodies the attorney's best argument for prevailing on the element.[124] Hence, the theme should be the centerpiece of the closing argument.[125] In the battery hypothetical, the body of the summation should elaborate upon the "so close for so long" theme. To be sure, the attorney should reiterate the theme explicitly.[126] However, the attorney can and should do more. The attorney should review deliberately and meticulously all the testimony that sustains the theme, particularly testimony by opposing witnesses. The attorney should quote the jury instruction directing the jurors to consider the length of the opportunity for observation and the victim's proximity to the attacker. In addition, the attorney should

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118. *See generally* A. ORDOVER, 6 CRIMINAL LAW ADVOCACY: ARGUMENT TO THE JURY (1982); L. SMITH, ART OF ADVOCACY: SUMMATION (1978).

119. *See* P. BERGMAN, *supra* note 72, at 279.

120. *Id.*; *see also* Stein, *Interview with Jacob A. Stein—The Closing Argument*, TRIAL DIPL. J., Spring 1985, at 8, 11 ("a single determinative issue to the jury").

121. J. JEANS, *supra* note 14, § 16.12, at 376.

122. Beasley, *Closing Statements*, in TRIAL PRACTICE FOR THE GENERAL PRACTITIONER—COURSE OF STUDY TRANSCRIPT 98, 100 (L. Packel ed. 1980).

123. Vinson & Anthony, *The Closing Argument: Applications of Attribution Theory*, TRIAL DIPL. J., Spring 1984, at 33.

124. E. IMWINKELRIED, *supra* note 1, § 1-2.

125. S. GOLDBERG, *supra* note 13, at 394.

126. K. HEGLAND, *supra* note 10, at 38-40.

give the jury an analogy, based on common experience, that demonstrates that the argument incorporated in the theme makes sense.[127] At an early point in the summation, the prosecutor might assert that the attack lasted longer than the length of time he or she had been speaking and that the attacker was closer to the victim than he or she was to the jury. The prosecutor could ask rhetorically whether anyone sitting in the jury box would have difficulty identifying the prosecutor in the hallway after trial.[128] The first words the attorney utters in preliminary remarks before voir dire examination should state the theory, and the concluding words in the summation should assert the theme.

IV. CONCLUSION

There is widespread realization among litigators that a sense of strategic judgment is essential to success in trial practice. Experienced litigators often write about the necessity for a theory and theme in trial work,[129] and legal journals frequently report exceptional settlements and verdicts attained by attorneys who have critically evaluated their cases and devised sound theories and themes.[130]

It is becoming increasingly clear that the concepts of trial theory and theme should play an equally important role in designing law school litigation courses. The thrust of sections II and III of this Essay was to demonstrate both that the purpose of pretrial procedure is to put the attorney in a position to make an intelligent choice of theory and theme and that the choice dictates virtually everything the attorney does at trial. It is possible to teach a litigation course with an exclusive focus on mechanics and tactics. However, such a course is incomplete. The course may succeed in teaching students what procedural tools are available and how to use the procedures for the greatest short-term advantage, but mechanics and tactics cannot answer the most important question: why? Only a litigation course that concentrates on strategic judgment—a course that uses theory and theme as its organizing concepts—can provide satisfactory answers to that question.

Moreover, litigation courses can make their maximum contribution to the curriculum only if the courses are designed to achieve

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127. McElhaney, *Analogies in Final Argument*, 6 LITIGATION, Winter 1980, at 37, 37-38.

128. *See* J. TANFORD, *supra* note 12, at 180 (use of rhetorical questions).

129. *See, e.g.*, Jordan, *supra* note 9, at 5; Shrager, *supra* note 7, at 39.

130. Arthurs, *supra* note 6, at 5.

the broader objective of developing students' professional judgment. Clients value attorneys not only for their legal expertise but also for their prudential judgment. The client views the attorney as a counselor as well as a legal technician.[131] Before making a final decision whether to go to trial or to waive a right, the client wants the benefit of both the attorney's mature perspective and his or her legal knowledge.[132]

Litigation courses that are built around the concepts of theory and theme are excellent vehicles for helping students develop professional judgment. Such courses force students beyond traditional legal analysis and require them to grapple with difficult strategic questions: Which theory will best encourage the jurors to identify with the client? Which theme will most effectively counter the client's prior inconsistent statement immediately after the incident? These questions are not only outcome-determinative at trial; they are questions that demand analysis beyond an appraisal of rules of law and the legal sufficiency of evidence.

To some extent students can pursue the same educational objective in conventional substantive law courses. The authors of some recently published casebooks for substantive law courses commendably have gone out of their way to include counseling questions requiring that the students utilize prudence as well as precedent.[133] In those courses, however, a discussion of judgmental problems usually comes at a cost. Time is lost that could—and some say should—be devoted to developing legal analysis and teaching doctrine. In litigation courses that are based on the concepts of theory and theme, every class session should advert to the concepts and thus become another opportunity to develop and exercise professional judgment.[134] Law schools should graduate students qualified to serve as counselors at law.[135] The schools will discharge that duty far more effectively when litigation courses finally realize their potential for developing students' prudential judgment.

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131. *See generally* D. BINDER & S. PRICE, *supra* note 47; A. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELLING PROCESS 151 (1976) ("lawyer's counselling activity necessitates that he state some opinion").

132. R. KEETON, *supra* note 10, § 1.4.

133. *See, e.g.*, D. VERNON, CONTRACTS: THEORY AND PRACTICE § 1.04 (1980).

134. *See generally* D. BINDER & S. PRICE, *supra* note 47.

135. A. WATSON, *supra* note 131, at vii (a purpose of studying interviewing and counseling is to help law students increase sensitivity to themselves and to client).