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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ESSAYS

APPELLATE ADVOCACY AS ADULT EDUCATION

Christine Durham*

Since my early days as a trial judge, I have thought of judges as perpetual “students.” Our jobs require us to learn enough about every case to respond intelligently, perhaps even wisely, but at least competently to its demands. Those demands, of course, have become increasingly more complex. Nearly thirty years ago, then-Judge Shirley Hufstedler commented, in an address to the New York County Bar Association:

We expect courts to encompass every reach of the law, and we expect law to encircle us in our earthly sphere and to travel with us to the alien vastness of outer space. We want courts to sustain personal liberty, to end our racial tensions, to outlaw war, and to sweep contaminants from the globe. We ask courts to shield us from public wrong and private temptation, to penalize us for our transgressions and to restrain those who would transgress against us, to adjust our private differences, to resuscitate our moribund businesses, to protect us prenatally, to marry us, to divorce us, and, if not to bury us, at least to see to it that funeral expenses are paid.¹

* Justice, Utah Supreme Court.

1. Shirley Hufstedler, Charles Evans Hughes Address given to the New York County

Much has been added to this list in ensuing decades, and no one expects a reverse trend. The courts are constantly being asked to answer questions without precedent in human experience. Every appellate advocate thus undertakes the task of teaching as well as persuading. There is, therefore, a literal sense in which appellate advocates are “adult educators.” Notwithstanding this important dimension of their role, however, I submit that few appellate lawyers have spent much time thinking about its implications.

The scholarship in the field of adult education has identified numerous important principles in the past few years, but it is only very recently that those principles have begun to permeate the legal profession. In 1990, the State Justice Institute provided funding for the establishment of “The Leadership Institute in Judicial Education” (now known as “The Leadership Institute: Promoting Justice through Professional Education”) to bring experts in adult learning together with judges and judicial educators to foster what is known as “education for development” in the state judiciaries.² More than forty states have sent teams to the Institute since then, and the innovative and creative quality of the educational opportunities available to state judges reflects the widespread implementation of what we know about how adults learn and change.

More recently, The American Law Institute-American Bar Association (ALI-ABA) Committee on Continuing Professional Education sponsored an Adult Learning Study, chaired by ABA past-president Roberta Cooper Ramo. Two adult educators (Professors Clifford Baden of the Harvard Graduate School of Education and Lorraine Cavaliere of the Gwynedd-Mercy College School of Graduate Education) served as reporters for the Study, which issued a final report in April, 1999. In the first chapter of the report, the Study lists the following core concepts “to which virtually all adult educators subscribe”:

Adults are most willing to invest time and energy in learning something when they understand how it will be

Bar Association (1971).

2. See CHARLES S. CLAXTON & PATRICIA H. MURRELL, INFORMATION, AND TECHNOLOGY TRANSFER PROJECT, EDUCATION FOR DEVELOPMENT: PRINCIPLES AND PRACTICES IN JUDICIAL EDUCATION (1992).

useful to them. They prefer to learn those things that can help them do what they want to do.

Adults bring a lifetime of experience to every learning situation. This experience is a very rich resource for adults' learning. Good adult education takes advantage of this resource and creates opportunities for adults to reflect on and build on their experience.

Adults prefer to be self-directing. They do not like being talked down to or controlled. They do like participating actively in the planning and implementation of a learning activity. Therefore, an appropriate role for the teacher (or "facilitator") is to engage in a process of mutual inquiry with them, rather than simply transmit information to them and expect them to accept and conform to it.

Adults are different from each other in many ways, including how they learn best. Therefore, education of adults should acknowledge and provide for these differences.³

The foregoing core concepts support my suggestion that appellate judges may appropriately be viewed as adult learners. We certainly qualify as motivated; we need the technical information and the policy context that our "teachers"—appellate lawyers—bring to do our work. We do begin our assessment of every case with a "lifetime of experience," which is sometimes as much of an obstacle to learning as a benefit; clearly such life experience is an important consideration for advocates who may be asking us to change our ways of thinking. We also prefer to be "self directing" and dislike being talked down to. Finally, we all have preferred ways of "information processing, idea formation, and decisionmaking," and they are not all the same ways.⁴ The ALI-ABA Study Report discusses learning style theory and its relationship to personality types, with a view to understanding its implications for good adult legal education.

3. ALI-ABA ADULT LEARNING STUDY COMM'N, *TEACHING FOR BETTER LEARNING: ADULT EDUCATION IN CLE* (1999).

4. CLAXTON & MURRELL, *supra* note 2; David H. Kalsbeek, *Linking Learning Style Theory with Retention Research: The TRAILS Project*, 32 ASS'N FOR INSTITUTIONAL RESEARCH 1 (1989).

One well-known body of work on learning style theory illustrates what some of those implications might be.⁵ Kolb's Model of Experiential Learning suggests that adults learn best not just by reading or listening, thinking, or doing something new, but by a combination of all of these methods.⁶ Kolb's theory posits the four-stage process of learning and problem-solving as a dynamic cycle of (1) concrete experience; (2) observation and reflection; (3) the formation of abstract concepts and generalizations; and (4) the development of hypotheses to be tested by further concrete experience.⁷ As the ALI-ABA Report concludes:

Kolb's theories have several implications for [adult educators], beyond the reminder that all adults develop particular strengths or preferences in the way they learn:

As far as possible, [learning experiences] should be structured to allow learners to experience multiple modes of learning. Ideally, each program would include opportunities for lawyers to *experience* a situation, problem, or dilemma; to *reflect* on it; to *make some generalizations* (based on their observations and reflections); and to *plan* for how they will incorporate these new insights in their practice.

Such an approach would enable *all* lawyers to demonstrate their learning strengths. No single learning mode would receive all the attention.

This approach would also help each lawyer develop the ability to function in the other three learning modes. Since each of the four learning modes develops different abilities, adopting this model could make it possible for lawyers to master many more of the wide variety of competencies they need in practice.⁸

5. See DAVID A. KOLB, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT (1984).

6. See *id.*

7. *Id.*

8. ALI-ABA REPORT, *supra* note 3; see also Cynthia Ann Kelley, *Education for Lawyer Competency: A Proposal for Curricular Reform*, 18 NEW ENG. L. REV. 607, 621 (1983).

The rather rigid design of our appellate advocacy system—written briefs, time-limited oral argument (and sometimes no oral argument at all)—creates arbitrary restrictions on the teaching techniques available to the appellate advocate. Attention to Kolb's learning cycle, however, can be paid even in the most limited of contexts. The facts of a dispute, for example, or graphic demonstration of them by charts, photographs or other visual means, will often supply a surrogate "concrete experience" for the appellate judge, enabling her to engage with the case in an active way. "Observation and reflection" should be invited by the analytical portions of every brief and by the discussion designed for oral argument. I have often urged appellate lawyers to focus their advocacy on **WHAT** they want the court to do, **WHY** it should do it, and **HOW** it can within the limits of applicable law, language, policy, and precedent. Since encountering Kolb's model, I understand that my advice was in fact anticipating at least the last two phases of the learning cycle—the formulation of organizing theory and of hypotheses (i.e., dispositions) that might work to resolve a present case and apply to future ones.

The goal of such advocacy is quite straightforward: The advocate/teacher wants the judge/learner to travel a problem-solving path, or perhaps more accurately to work around the learning cycle in a way that brings the learner to a point of richer, more complex understanding of both the problem and the best way out. I suppose there are cases where an advocate's goal is to obscure and limit understanding; but I candidly confess that when I don't understand a lawyer's point, I tend to assume that it is the argument that has problems. Deliberate obfuscation is always a high-risk undertaking.

One other characteristic of appellate judges as adult learners is worth mentioning, having to do with the logistics of our jobs. For the most part, we function in busy, frequently high-volume courts. We read huge stacks of briefs and listen to many hours of oral argument every month. To the extent that advocates ignore these circumstances and inflict on us over-long, poorly organized or badly written briefs, and unfocused or unhelpful arguments, they minimize their chances of engaging us with their material, teaching us what it is about, and convincing us to do what they need done. Some lawyers, for

example, resent or are intimidated by active questioning from the bench at oral argument. Yet everything we know about adult learners suggests that the passive listener may be the least likely to be traveling around the learning cycle and thus the least likely to be responding to the lawyers' arguments. Some judges really do use oral argument to learn—particularly to test theories and examine hypotheticals.

The relationship between teacher and student is long recognized and honored by human society. Much might be added to our sense of common endeavor, civility, and collegiality in appellate practice if we were more often aware—more mindful—of the values and uses of that relationship between lawyer and judge.