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# COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

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**Fifth Edition**

**Volume 4C**

**ROBERT L. HAIG**  
*Editor-in-Chief*

**Chapters 78 to 95**

**2020**



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## Chapter 81

# Teaching Litigation Skills

by James M. Wicks

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### Research References

#### *Westlaw Databases*

Business and Commercial Litigation in Federal Courts (4th ed.)  
(BUSCOMLIT)

#### *Treatises and Practice Aids*

Haig, Business and Commercial Litigation in Federal Courts §§ 71:1 et  
seq. (4th ed.)

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

### § 81:1 Scope note

The focus of this chapter is to help those who are in a position

to teach litigation skills. The chapter provides tools to aid the teaching of litigation skills generally, and in particular, to successfully practice in New York's Commercial Division.

The New York Court of Appeals adopted Rule 520.18 of the Court's Rules for the Admission of Attorneys and Counselors at Law, which requires applicants to the bar to demonstrate that they "possess[ ] the skills and values necessary to provide effective, ethical and responsible legal services in this State." The Rule further mandates that law schools identify and incorporate into curricula, the "skills and values" required to demonstrate the graduates' basic competence in the legal profession. As a result, law schools have changed and adopted curricula to better teach skills to students. But that's only the beginning of learning how to litigate. Litigation skills must be learned, honed and developed throughout one's career. The goal is not only to learn the skills, but get better at them. Consistent, regular practice and repetition, like developing any skill, helps create "muscle memory" even of litigation skills.

There are many skills of a litigator. This chapter provides tools, guidance and insight to assist those teaching these essential litigation skills. Although there are many specific, identifiable skills, they fall within one of three main areas: oral advocacy,<sup>1</sup> written advocacy<sup>2</sup> and witness examinations.<sup>3</sup> For example, interviewing,<sup>4</sup> arguing motions or appeals—each an act of "oral advocacy," but indeed separate skills. Same holds true for written advocacy: drafting pleadings,<sup>5</sup> internal memoranda analyzing legal issues<sup>6</sup> or the appellate brief.<sup>7</sup> This chapter is divided into three general areas which are the hallmark of a litigator's skills, namely, oral advocacy, written advocacy, and witness examinations.

### **§ 81:2 Strategy, objectives and preliminary considerations**

Lawyers in practice must learn the skills of the trade to successfully represent clients and develop professional skills and identity. Mentoring or shadowing programs certainly help one

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#### **[Section 81:1]**

<sup>1</sup>See §§ 81:4 to 81:7.

<sup>2</sup>See §§ 81:8 to 81:12.

<sup>3</sup>See §§ 81:13 to 81:16.

<sup>4</sup>See § 81:11.

<sup>5</sup>See § 81:9.

<sup>6</sup>See § 81:8.

<sup>7</sup>See §§ 81:10 to 81:12.

develop as a lawyer.<sup>1</sup> But, the phrase “litigation skills” embodies a wide range of characteristics with which a “litigating” lawyer must be familiar and have at least some basic competence or know-how. *So how do we teach litigation skills?*

It is incumbent on legal organizations, whether private law firm, government or in-house legal department, to educate and train those among its ranks.<sup>2</sup> The range of the type of training is wide.<sup>3</sup> In-house training or continuing legal education (“CLE”) programs can be formal, accredited courses and programs;<sup>4</sup> breakfast or lunch and learn series; formal mentoring programs; or simply one-on-one mentoring or shadowing. No matter the format, training subordinates with skills is essential to the success of not only that individual, but the organization. Arguably, we are under an ethical duty to train subordinates as we are ultimately responsible for their acts and conduct under our Rules of Professional Conduct.<sup>5</sup> Those you train are likely to train those behind them the same way.

Teaching skills must include addressing the general areas of oral<sup>6</sup> and written advocacy.<sup>7</sup> But teaching litigation skills does not end there. There are skills particular to each area of the litigation practice spectrum that must be first identified. These include intake, client and witness interviewing, fact investiga-

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**[Section 81:2]**

<sup>1</sup>See Chapter 82, “Career and Practice Development” (§§ 82: 1 et seq.).

<sup>2</sup>The New York State Judicial Institute of Professionalism in the Law recently published a guide outlining the skills and values expected of lawyers. See Saunders, Legal Skills and Professional Values: A Handbook, 7 J. of the N.Y. State Jud. Institute on Professionalism in the Law 1 (Fall 2019). In the Forward, Chief Judge Janet DiFiore expressed “hope that this Handbook will be useful” in preparing new lawyers to practice law and learning the skills of the profession. The Handbook is a good reference for anyone in the position of teaching litigation skills and it has been recommended that it be distributed to all new lawyers.

<sup>3</sup>See Frank Ramos, Training Your Law Firm Associates (DRI 2017) (good source for firms of all sizes seeking to develop lawyer training programs).

<sup>4</sup>Organizations seeking to teach litigation skills can and should apply to become certified “CLE providers” in New York. See New York State CLE Board, Regulations & Guidelines: New York State Mandatory Continuing Legal Education (June 1, 2018), found at <https://ww2.nycourts.gov/attorneys/cle/regulationsandguidelines.pdf>.

<sup>5</sup>New York’s Rules of Professional Conduct (“RPC”) mandate that law firms “make reasonable efforts” to ensure that the lawyers within the firm conform to the RPC, see RPC 5.1, which includes “competence” under Rule 1.1. See also RPC 1.1, cmt. 8 (“maintain requisite knowledge and skill”).

<sup>6</sup>See §§ 81:4 to 81:7.

<sup>7</sup>See §§ 81:8 to 81:12.

tion,<sup>8</sup> legal analysis and reasoning, communication (with court, adversary and client), negotiation,<sup>9</sup> drafting of pleadings<sup>10</sup> and discovery demands, taking and defending depositions,<sup>11</sup> motion practice<sup>12</sup> and appeals,<sup>13</sup> trial preparation and trial practice.<sup>14</sup> Each of those areas are dealt with in other topical chapters within this treatise. *How* to teach those skills, including teaching tools and tips, is the limited scope of this chapter.

Teaching litigation skills also goes hand-in-hand with teaching good, ethical behavior. In each of the areas of litigation skills there exists a minefield of ethical dilemmas litigators face. This chapter provides ways that ethics can be easily incorporated into teaching litigation skills to lawyers. Chapter 85 addresses those specific ethical issues arising in commercial cases.<sup>15</sup> In this chapter, we suggest ways to incorporate ethics into teaching skills.

Teaching the incorporation of technology to assist in litigation is critical. The litigator's goal is ultimately to persuade. Understanding available technology to determine when to (or not) use is critical and necessary in modern commercial litigation in the Commercial Division. Technology at trial is covered elsewhere, and provides ample guidance on what to do at trial.<sup>16</sup>

Finally, teaching litigation skills must impart the importance of *collaboration* with others. Creating exercises that require teamwork and brainstorming enable litigators to experience first-hand the benefits of a group dynamic. It teaches how the input and effort of several oftentimes results in a better decision and work product. Remember, three of the most important inventions of our time were created out of collaboration, not by one person independently: computers, the microchip and the Internet.<sup>17</sup>

### § 81:3 How to teach advocacy effectively

We learn from history. We learn from others. We learn from

<sup>8</sup>See generally Chapter 4, “Investigation of the Case” (§§ 4:1 et seq.).

<sup>9</sup>See generally Chapter 67, “Negotiations” (§§ 67:1 et seq.).

<sup>10</sup>See generally Chapter 7, “The Complaint” (§§ 7:1 et seq.) and Chapter 8, “Responses to Complaints” (§§ 8:1 et seq.).

<sup>11</sup>See generally Chapter 29, “Depositions” (§§ 29:1 et seq.).

<sup>12</sup>See generally Chapter 34, “Motion Practice” (§§ 34:1 et seq.).

<sup>13</sup>See generally Chapter 64, “Appeals to the Appellate Division” (§§ 64:1 et seq.) and Chapter 65, “Appeals to the Court of Appeals” (§§ 65:1 et seq.).

<sup>14</sup>See Chapter 44, “Trials” (§§ 44:1 et seq.).

<sup>15</sup>See Chapter 85, “Ethical Issues in Commercial Cases” (§§ 85:1 et seq.).

<sup>16</sup>See Chapter 78, “Litigation Technology” (§§ 78:1 et seq.).

<sup>17</sup>Walter Isaacson, *The Innovators: How a Group of Hackers, Geniuses, and Geeks Created the Digital Revolution* (2015).

mistakes. But what have we learned from the Great Mentors of the past that can be applied when teaching litigation skills?

Studies have shown, time and time again, that the lecture, without more, is an ineffective teaching method.<sup>1</sup> Even more so when teaching “skills” as opposed to imparting “knowledge.” Teaching is not simply “checking the box” of imparting knowledge to another. That’s only the first stage of teaching. What follows that is the obligation to ensure that it was communicated effectively in such a way that it was *understood*, and not just heard. This fundamental principle of teaching is not new:

*What I hear, I forget. What I see, I remember. What I do, I understand.*<sup>2</sup>

This astute observation of human learning is centuries old, yet remains current thinking. We learn by doing. This theory of teaching and learning was espoused by American philosopher John Dewey, who advocated for “hand-on” or experiential education.<sup>3</sup> Indeed, studies have shown that we need to engage *all* of the senses to promote effective learning.<sup>4</sup>

“Teaching” isn’t simply “checking the box” of topics or issues that the teacher must impart. Rather, effective, meaningful teaching ensures that the “student” is learning. By learning, we mean the person has an understanding of the concepts. Active engagement is likely to result in true learning.

So what are the traits or characteristics that makes one an effective teacher? Professor Robert J. Walker, who studied the issue for 15 years, has identified 12.<sup>5</sup> These apply directly to teaching litigation skills as well. The 12 are:

1. *Being Prepared.* Don’t waste time; be ready for the teaching session.

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**[Section 81:3]**

<sup>1</sup>Aleszu Bajak, Lectures Aren’t Just Boring, They’re Ineffective, Too, Study Finds, Science Mag (2015), <https://www.sciencemag.org/news/2014/05/lectures-arent-just-boring-theyre-ineffective-too-study-finds>, citing the Proceedings of the National Academy of Sciences of the United State of America, “Active Learning Increases Student Performance in Science, Engineering and Mathematics” (May 12, 2014).

<sup>2</sup>Xunzi (340-245 BC). Xun Kuang, also widely known as Xunzi, was a Chinese Confucian philosopher. Benjamin Franklin’s view was similar: “Tell me and I forget. Teach me and I remember. Involve me and I learn.”

<sup>3</sup>J. Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (WLC Books 2009) (original work published 1916).

<sup>4</sup>A. Mattson, *In One Ear and Out the Other*, Iowa Now (2014) <https://now.uiowa.edu/2014/02/one-ear-and-out-the-other>.

<sup>5</sup>Walker, *Twelve Characteristics of an Effective Teacher: A Longitudinal, Qualitative, Quasi-Research Study of In-Service and Pre-Service Teachers’ Opinions*, *Educational Horizons* 61 (Fall 2008).