

Basic Outline of the Course: The Art of Advocacy, we will focus on the "art" of advocacy in both criminal and civil trials. In order to give the course focus and to get beyond the abstractions of law review articles and trial advocacy manuals, we will pursue the art of advocacy as taught (outlined)(and persuasively argued) by Gerry Spence in his book, *Win Your Case* (New York: St. Martin's Press, 2005). We will learn more about Gerry Spence's life and his trials as he presents them in one of his early books, *Gunning for Justice* (Garden City, New York: Doubleday & Co., 1982)(co-authored with Anthony Polk).

Six evening class sessions (running from March 10 to April 21) will consist of small-group, student presentations.

The first presentation will be based on your reading of Sam Schrager's *The Trial Lawyer's Art* (Philadelphia: Temple University Press, 1999)(one of the few contemporary books by a non-lawyer written about the craft/art of legal advocacy). Your first small group presentation will be based on one of the four main themes in Schrager's book: 1—Drama, 2—Style, 3—Identity, 4—Deception and Truth. (The first small-group presentation will be scheduled for 30 minutes. All four of the Schrager group presentations will be given at one afternoon's class.)

Your second small-group presentation will be drawn from Gerry Spence's *Win Your Case* and will focus on a specific element of a trial: 1—Opening Statement, 2—Direct Examination, 3—Cross-Examination, 4—Closing Statement. (Spence, in *Win Your Case*, devotes a chapter of the book to voir dire, and then, to each of these four basic aspects of a trial.)

Your third, and final small-group presentation will be based on your survey/reading of four books in which Gerry Spence provides extended accounts of trials (one of the books is a novel): 1—*Trial by Fire* (New York: William Morrow and Co., 1986), 2—*Of Murder and Madness* (New York: St. Martin's, 1995), 3—*The Smoking Gun* (New York: Scribner, 1999), 4—*Half-Moon and Empty Stars* (New York: Scribner, 2001).

Purpose and Goal of the Course: The purpose of the course is to explore lawyer advocacy not only as a method and set of techniques but as an "art." In legal education, you are steeped in the legal abstractions offered in appellate court opinions but you are rarely asked to read or review a trial court transcript. You are asked to learn law abstracted from the stories and the courtroom dynamics of the trial. (There may be a brief hint of a story in the statement of facts in an appellate court opinion, but its at best the synopsis of a story, a story told in the dry logic of a judicial opinion. You see virtually nothing of the lawyers and how they have tried the case in an appellate opinion—unless of course the lawyer committed some kind of error that has been made part of the appeal.) Other than trial advocacy courses, and the clinic, you are not, in Gerry Spence's words, being trained as a "warrior," the kind of warrior you will need to be to represent your client. In the "Art of Advocacy" you will not be trained as a warrior, but you will be asked to make a small down-payment on exactly what this training might entail.

In this course, we will work, not with the legal abstractions found in judicial opinions, law reviews, and trial advocacy manuals, but with one lawyer's life, one lawyer's exploration of the "art" of lawyering, one lawyer's explanation of what can (and should not) happen in the trial of a case. Basically, in this course, we're going to look at advocacy, from the "bottom-up" rather than in the more typical "top-down" approach, focusing on the lawyer and not judicial opinions.

The goal is to present a new perspective on a subject of substantial professional interest to lawyers, and students of law. Advocacy is, in some fashion, an implicit subject in throughout the law school curriculum. In this perspective course, we'll explore the "art of advocacy" from the perspective of the life, the trials, and the writing of Gerry Spence, a Wyoming lawyer|writer|poet|photographer, who has been stunningly successful as a trial lawyer. We'll explore: Gerry Spence's trials (as portrayed in his books and in the writings of others), his life (by way of Spence's first memoir, *Gunning for Justice*), his poetry and photography (as found in *Gerry Spence's Wyoming Landscape: Photographs and Photography*), his trial strategies and techniques (by way of his book, *Win Your Case* and various audio and video tapes of Spence and his approach to advocacy).

Method: The course will follow, basically, a "workshop" method. Your teacher will not be lecturing on advocacy. What you learn about advocacy in this course, you will learn from your exploration of Gerry Spence's writings (and other assigned texts), from your interaction with your colleagues in preparing class presentations, and from class presentations given by your colleagues.

Enrollment: Enrollment in the course is limited to 16 students.

Assigned Reading: Gerry Spence, *Win Your Case: How to Present, Persuade, Prevail--Every Place, Every Time* (New York: St. Martin's Press, 2005); Gerry Spence & Anthony Polk, *Gunning for Justice* (Doubleday & Co., 1982); Gerry Spence, *Trial by Fire* (New York: William Morrow and Co., 1986); Gerry Spence, *Of Murder and Madness* (New York: St. Martin's, 1995); Gerry Spence, *The Smoking Gun* (New York: Scribner, 1999); Gerry Spence, *Half-Moon and Empty Stars* (New York: Scribner, 2001)

Recommended Reading: Gerry Spence, *The Making of a Country Lawyer* (New York: St. Martin's Press, 1996); Gerry Spence, *Gerry Spence's Wyoming: The Landscape: Photographs and Poetry* (New York: St. Martin's Press, 2000)

Background Reading: Gerry Spence, *With Justice for None: Destroying an American Myth* (New York: Times Books, 1989); Gerry Spence, *From Freedom to Slavery: The Rebirth of Tyranny in America* (New York: St. Martin's Press, 1993); Gerry Spence, *O.J.: The Last Word* (New York: St. Martin's Press, 1997); Gerry Spence, *Seven Simple Steps to Personal Freedom: An Owner's Manual for Life* (New York: St. Martin's Press, 2001)

Course Evaluation and Grading: One-half your grade for the course will be based on the small-group class presentations and a jointly-authored paper by the members of the small group. The small-group paper must be at least 10 pages. (There are no maximum pages for the small-group writing project.) The small-group paper may focus on any, or all, of the three small-group presentations, or on any other aspect of the course that you may mutually determine to be important to your education as an advocate and trial lawyer.

One-half of your grade for the course will be based on an individual paper. This paper must be no less than 10 pages in length. The paper may consist of a “traditional” research paper or as an essay in which you write, in a reflective fashion about the course or some aspect of the course. You might think of this essay as an effort to “write the course.”

The “write the course” option is not designed to confuse or to mystify. It is basically, and most simply put, a way to get you to *choose*: First, you must choose some of importance to you, something of real significance that has been suggested by our work in the course (or something that you brought with you to the course that you have used the course to mull over). Second, you must choose how you are going to write about this matter of importance (and how you will present this writing to your teacher). You must choose the style, tone, and voice in which your “thinking” will be conveyed. And, perhaps, unwittingly (unconsciously), you must choose how introspective, how reflective, you are going to be (just how honest about yourself and the course you will be).

The "write the course" option, as I describe it for students in “lawyers and literature”

is at once a rather simple idea but rather tricky to define. It is simple in that instead of picking out a single topic or subject for a paper, you write about the course and your engagement with the readings (or some selected part of the readings). Writing the course is tricky in this sense: you must try to write the course in a meaningful, engaging, literary way. There are, obviously, many ways of going about such a writing. Some students seem to have an intuitive grasp for "writing the course," while others are tone deaf to the possibilities entailed in this kind of writing.

I will try to provide additional information about the "write the course" option as the course progresses. I hope, that you will find, during the course of the semester, all kinds of things to write about.

Your papers, small-group and individual, in the "Art of Advocacy" will be evaluated on the basis of the following criteria: 1) nature, complexity, and development of the ideas you present in the writing; 2) your engagement with the assigned books (or some selected sub-set of them)(and, of course, any other materials beyond those assigned that you may wish to discuss); 3) the soundness, appropriateness, and creativity of the "structure" you adopt for your writing; 4) depth and range of your thinking about Spence’s (and your own) theories of advocacy; 5) soundness

and quality of the writing itself.

I am available for consultation and advice on any of your writing (for the course and beyond), and will read (and evaluate in a manner you may proscribe) whatever you might want me to read during the course (and beyond).

Background: In the spring, 2006, I taught a course called Advanced Criminal Law at the College of Law, West Virginia University. The focus of that course was the jury instructions used in homicide cases in West Virginia. The course was taught as a "workshop." Students in the course worked in teams, researched the legal doctrines reflected in West Virginia's current "proposed" jury instructions and presented proposals for revisions. A substantial part of the course was based on class presentations by students.[The work that emerged from that case resulted in a revised set of jury instructions for use in West Virginia homicide cases. See: West Virginia Homicide Jury Instructions Project]

In the spring semester, 2007, I taught a second version of Advanced Criminal Law focusing on the 1979 murder trial of Jeffrey MacDonald. MacDonald was convicted of killing his wife and two children in the morning hours of February 17, 1970. MacDonald was, at the time of the death of his wife and children, a physician, and a captain in the Army Special Forces (then known as the "Green Berets"). MacDonald, now incarcerated at the Federal Correctional Institute, at Cumberland, Maryland, has continued to assert his innocence and a new trial.

For this new version of Advanced Lawyering, I call the course, the Art of Advocacy. We will focus on the "art" of advocacy in both criminal and civil trials. In order to give the course more focus and to get beyond the abstractions of law review articles and trial advocacy manuals, we will pursue the art of advocacy as taught (and outlined) by Gerry Spence in his book, *Win Your Case* (New York: St. Martin's Press, 2005), and the introduction to his trials presented in one of his early books, *Gunning for Justice* (Garden City, New York: Doubleday & Co., 1982) (co-authored with Anthony Polk). We will compare and contrast Spence's approach/style/art with the art of advocacy explored in Sam Schrager's *The Trial Lawyer's Art* (Philadelphia: Temple University Press, 1999).

[Note: This course website version of the syllabus contains material that was originally published as part of the original course website. *James R. Elkins – January 29, 2008*]