ARTICLE

GOOD HABITS AND BAD HABITS: THE RECYCLING OF COMPETITIVE DEBATERS INTO TRIAL LAWYERS

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Every year thousands of students compete in interscholastic debate at the high school and collegiate level.[1] Debate is generally acknowledged to increase speaking skills, academic standing, public policy knowledge, and retention rates amongst minority students.[2] Many students use the advocacy, research, and communication skills acquired in debate to become attorneys, usually as trial or appellate advocates.[3] This article discusses the transition from debater to lawyer from the perspective of the law student, the hiring partner, and clients who hire a former debater. Competitive debate teaches a broad array of skills that are useful to trial advocates, but leaves large gaps in training. Significant work and adjustment is required for the ex-debater to reach full potential as an attorney.

∗ Both authors were extensively involved in college and high school debate and made a successful transition to the practice of law.

1. For example, in just one debate league in Houston, Texas, nearly one thousand high school students compete each year. *Participating Schools*, HOUSTON URBAN DEBATE LEAGUE, http://houstonurbandebateleague.org/participating-schools/ (last visited Sept. 22, 2013). *See generally* Roland Burdett, *To Debate or Not to Debate – Is That the Question?*, EXCEPTIONAL MAG., http://www.exceptionalmag.com/articles/empowerment/debate_or_not.html (last updated Sept. 24, 2012).

2. Briana Mezuk et al., *Impact of Participating in a Policy Debate Program on Academic Achievement: Evidence from the Chicago Urban Debate League*, 6 EDUC. RES. & REVS. 622, 630–32 (2011), *available at* http://www.academicjournals.org/err/PDF/Pdf%202011/5Sep/Mezuk%20et%20al.pdf (last visited Sept. 24, 2013).

3. Some particularly famous former debaters include Erwin Chemerinsky, Justice Samuel Alito, and Justice Stephen Breyer. *See* Oliver Broudy, *Revenge of the Nerds*, MOTHER JONES, Nov.–Dec. 2006, at 72, 73, *available at* http://www.motherjones.com/politics/2006/11/revenge-nerds?page=1 (last visited Sept. 24, 2013).

THE STRUCTURE OF COMPETITIVE ACADEMIC DEBATE

Competitive debate takes several forms. From the 1960s through the end of the 1970s the sole form of debate dominating academic circles was referred to as "cross-ex" or NDT-style debate—so named for the National Debate Tournament. These competitions involved policy debates over issues such as: "Resolved, that the United States law enforcement agencies should be given significantly greater freedom in the investigation and/or prosecution of felony crime."[4] In recent years, topics alternate between domestic policy, international affairs, and legal controversies.[5] Each team is allocated a limited amount of time for constructive speeches, cross-examination and rebuttal speeches. At the high school level, a round typically involves eight minute constructive speeches, three minutes for cross-examination, and five minutes for rebuttal. In college, time limits are expanded to nine, three and six minutes respectively. Teams switch sides, alternating between the "affirmative" and "negative" side of the resolution during the preliminary "rounds." After preliminary rounds are completed, the teams with the best record and speaker points advance to a "seeded" single elimination bracket where sides are chosen by agreement or coin flip. Debate rounds are judged by coaches, teachers, former debaters hired as judges, or even parents conscripted into the role. A ballot announcing which team "won" is signed at the end of the round. A debate team wins or loses, but individual speakers are given speaker points and ranks. "Out" rounds—elimination rounds—are frequently judged by three person or even five person panels and continue until a winner is declared.

Competitive debate is just that—highly competitive. It tends to attract highly motivated students with an interest in speaking, research, argument, and public policy research. More important to this discussion, debate tends to attract type A individuals who are highly structured, motivated and intense, and for whom the competitive debate environment is a good outlet.[6] Because participants are rewarded with "ballots" and speaker points,

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4. For a complete list of NDT debate topics since 1947, see *National Debate Tournament Topics 1946-2012*, NAT'L DEBATE TOURNAMENT AM. FORENSIC ASS'N, http://groups.wfu.edu/NDT//HistoricalLists/topics.html (last updated Apr. 17, 2012).

5. *See Topic Rotation*, CROSS EXAMINATION DEBATE ASS'N (Nov. 19, 2011), http://cedadebate.org/node/977.

6. *See, e.g.* Broudy, *supra* note 3, at 72–73; Melissa Maxcy Wade, *The Case for Urban Debate Leagues, 19* CONTEMP. ARGUMENTATION & DEBATE 60, 62–64 (1998), *available at* http://www.cedadebate.org/cad/index.php/CAD/article/download/225/209 (last visited Sept. 24, 2013).

they must adapt to the rules of the activity and learn the skills and arguments necessary for success.

Cross-examination debate, which is structured on a single policy topic announced annually, involves enormous amounts of research into academic journals as well as the public press. Successful teams prepare well in advance of the competition with written briefs explaining and evidencing their positions. Over the past several decades, the research required for briefing has changed radically with the advent of internet search engines. Hours formerly spent in the library rifling through the Index to Periodic Literature and walking the "stacks" have been replaced by web-based research, often using the same search engines regularly utilized by attorneys (such as LexisNexis™). Though a debate ballot typically asks the judge to determine which team "did the better job of debating," in cross-examination debate this query has been widely translated into "which team won on the policy arguments?"

Because time limits are placed on each speech or examination period, and competitors are penalized for "dropping" (failing to answer) an opponent's arguments, competitive debaters frequently try to make as many arguments as possible in these limited periods.[7] Unlike public forum debate, competitive debaters speak rapid fire (as quickly as six words a second, over 300 words per minute) to ensure that the largest possible number of arguments can be made within the allotted time. As the round progresses to rebuttals, time limits become much tighter, and the competitive debater must make strategic decisions about where to focus her argument and what positions to extend within the limited time she has available. One byproduct of the rules is that cross-examination in debate counts far less than it does in a trial. A determined trial advocate equipped with time—limited only by the judge's ruling or jury's interest level—can do a great deal for his client. But in debate, little headway can be made against a determined and prepared opponent (who is encountering the same process and subject-matter round after round) in a three-minute cross-examination cycle. As a result, cross-examination in debate usually covers a few very narrow points deemed essential for either clarification or to secure narrow concessions.

The manner in which competitive debate is conducted and judged produces certain common attributes amongst competitive debaters. For example:

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7. For a fair example of the rate at which NDT-style speech is conducted see Jay Caspian Kang, *High School Debate at 350 WPM,* WIRED MAG. (Jan. 20, 2012), http://www.wired.com/magazine/2012/01/ff_debateteam/.

Debaters tend to focus on logical argument as the means to a "win," downplaying empathy or sympathy as a means of persuading;

Successful debaters develop immediate audience recognition skills as they often must debate in front of judges previously unknown to them, and they must read that judge's feedback quickly to prevail;

Debaters tend to *analyze*—breaking a problem into minute component parts—rather than *synthesize* a holistic explanation, or story, for their position, although advanced debaters must effectively use meta-level overviews to persuade the judge;

The activity strongly favors creativity. What passed as a "squirrel" case in scholastic debate becomes a new angle on liability or damages that could save or make millions for a client. Similarly, the concept of "turning" an opponent's argument continues to be quite useful as an opponent's experts, for instance, can be turned against her;

Debate tends to reward very high impact but low probability outcomes, such as famine, nuclear war, species extinction, and so on, with a focus on extreme, high magnitude events, rather than what is probable to result;[8]

The debater's speaking style, inflection, emphasis and polish are far less important than the ability to quickly and clearly communicate ideas and to locate and prepare winning arguments;[9]

Because debate demands long work hours and frequent weekend long-distance travel, the debate team tends to become the competitive debater's social circle;

Debaters are used to receiving immediate feedback and criticism. Judges may disclose their ballots after a round and each ballot is distributed to team members at the end of the tournament. Thus, debaters get an immediate "win" or "loss" accompanied by a fairly extensive explanation for the decision.

Towards the end of the 1970s, several leaders in academic circles reacted very negatively to the highly charged, rapid-fire delivery and policy-intense nature of NDT debate. They decided to develop alternative forms of debate that would emphasize the more classic use of debate in philosophical discussion and as a

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8. Debaters have long claimed, with some justification, that the rapid fire delivery and references to apocalyptic outcomes in R.E.M.'s "*It's the End of the World as we Know it (And I Feel Fine)*" stem from the band's high school debate background. *E.g.*, Michael Canter, *Misunderstood Lyrics: It's The End Of The World As We Know It (And I Feel Fine)*, JIVEWIRED (October 16, 2010), http://blog.jivewired.com/2010/10/misunderstood-lyrics-its-end-of-world.html (quoting R.E.M., *It's the End of the World as we Know it (And I Feel Fine)*, *on* DOCUMENT (I.R.S. Records 1987).

9. In the words of our day: "Speed above all else. Speed above comprehension, speed above recognition—raw speed."

training ground for public speaking. For example, Cross-Examination Debate Association (CEDA), Lincoln-Douglas Debate, Parliamentary Debate, and Worlds Debate were largely adopted so that single individuals could debate propositions of philosophy rather than policy, and they supply participants with topics that were changed frequently enough so that students could not over-focus on policy based research. It is unclear whether these new alternative forms of debate have curbed some of the excesses of NDT-style debate.[10]

SUCCESSFULLY RE-ENGINEERING COMPETITIVE DEBATERS

For the client, the employer, or the debater, a significant investment of time and re-conditioning is needed to become an effective trial or appellate advocate. What causes a "win" in debate is very different from a "win" with a trial judge, jury, or arbitration panel—and most importantly, a client.

The most common piece of de-programming for debaters is to adapt their speaking style and argument selection strategies to new forums. Every debater who has gone into the practice of law has heard from a judge, arbitrator, or court reporter that he or she should *slow down*. While audiences can actually process much more rapid speech than occurs in ordinary conversation, they don't enjoy it or necessarily remember it.

But the change process is certainly not limited to 'the debater's rate of speed. The debater must re-learn changes in emphasis, volume, inflection and language to bring home the point. Moreover, in competitive debate, participants are taught to question every assumption of their opponent. In a debate, each "dropped" argument is often given full weight, even though its intrinsic merit might be quite limited. As a result, a large quantity of arguments are commonly made but subsequently abandoned. But precisely the opposite rule applies in the real-world legal setting. Not only is there no premium for "spreading" the opposition by making numerous arguments, it is detrimental to do so for at least two reasons. First, judges and juries are pressed by the duties of life—other cases on the judge's docket, or family obligations in the case of the jury. They need brevity and focus. Further, in legal advocacy the inclusion of weaker arguments can be seen as a sign of weakness because it tends to send the signal to the

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10. Indeed, one common criticism is that these "new" styles of debate have simply morphed into minor variations of "traditional" cross-ex debate. The most obvious example of this morphing involves CEDA, which largely rejected its initial design when it officially merged with the National Debate Tournament some years after its creation.

judge or jury that the advocate doesn't believe in her stronger arguments and must "hedge" them by making weak ones. In the trial advocacy world very low probability arguments are invariably cast aside for the more bread and butter discussions that are central to a case. As a result, debaters must recalibrate to choose their best arguments early and invest enough time and effort in them to ensure that they are successful.

Finally, 'adjustments are also needed to raise the minimum quality of proof used in a dispute. In scholastic debate, evidence frequently is taken from popular publications or even from websites prepared by advocates within a given controversy. But in trial, by virtue of *Daubert* challenges and the pace at which trials are conducted, much greater focus is placed upon the quality of 'the evidence and witnesses.

The analytical skills used in competitive debate remain extremely useful and will be the foundation of much work the debater-lawyer does, but the ability to synthesize arguments, a skill which tends to atrophy during competitive debate, must be enhanced. Debate rounds do not require extensive synthesis: a negative team may win the round on any one of a series of "voting issues" and thus, the need to develop a synergistic defense to an affirmative team's case is minimal. But juries rarely reward lawyers who simply throw out a large number of disparate arguments, no matter how well each has been developed. Moreover, the requirement that competitive debaters take both the pro and con side of the proposition makes debaters extremely resilient (some would say stubborn) opponents. The debater is taught that there is *always* an argument against the proposition and that she just has to look hard enough to find it.[11] But jury research has consistently indicated that juries tend to develop a unified, if somewhat simplified view of a trial dispute and then fit evidence and argument they hear into that outlook.[12] A premium exists on determining what "worldview" a jury is likely to take, understanding the place the facts of your case occupy in that worldview, and then taking the best path to obtain the jury's agreement. This, even more than needed changes in speaking

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11. For example, in the 1970s the seemingly unchallenged proposition that it is a good idea to feed the world's poor was confronted with opposition via the "Malthusian Nightmare," i.e. that each person saved in the effort would reproduce, leading to an order of greater magnitude deaths in the future when we could no longer feed our burgeoning population. *See* Paul Ehrlich & Anne Ehrlich, THE POPULATION BOMB 131–35 (1968).

12. Serena Chen, David Shechter & Shelly Chaiken, *Getting at the Truth or Getting Along: Accuracy- Versus Impression- Motivated Heuristic and Systematic Processing*, 71 J. PERSONALITY AND SOC. PSYCHOL. 262, 266–69 (1996).

style, is perhaps the most significant change competitive debaters need to make to become effective trial practitioners.[13]

Finally there are some skills that academic debate does not teach at all. While debate does a superb job of honing research and analytical skills, it has no means of fostering the skills of compromise which decide most legal disputes. Good deals are about recognizing the intrinsic worth of a client's position and capitalizing on it. In competitive debate, judges are often pre-selected (in preliminary rounds) or chosen by the parties (in elimination rounds) and aside from mutual preference ranking of judges, there is little emphasis in the activity to teach audience selection such as that involved in *voir dire*. The ex-debater must develop the skills needed to identify and select favorable jurors. Though the ability to "read" a listener will help in this task, it is just a beginning.

From both the former debater and client's perspective, it is also necessary to rapidly move away from the concept of a "ballot" as a "win." Ex-debaters who focus solely upon decisions by the trial or appellate court as "ballots" may fall prey to the error of regarding such decisions as the only part of the advocacy process that truly matters. In fact, part of what draws debaters to the trial practice is this very possibility of having outcomes—jury verdicts, summary judgments, or dismissals or reversals on appeal—because they are metrics by which a competition-dependent person can claim success. But judging whether the client has obtained a win solely by a verdict is often incomplete because clients may define their win differently. Typically, the client cares not whether or not his case goes to trial or a summary judgment hearing so long as it is resolved "favorably" as compared to expected outcomes. When several hundred thousand dollars are spent in defense of a $50,000 claim with no significant precedential value to the client, the result is a loss whether the final decision favors the client or not. The client wants a problem resolved at minimum expense and dislocation to her business, none of which are *automatically* dependent on whether or not the trial lawyer secures another pelt. The ex-debater/lawyer must re-learn that the client is the judge: his ballot is filled out with a "win" only if she is assigned the client's next case.

Over the years, both authors have witnessed successful and unsuccessful transitions by former NDT debaters into the trial

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13. *See* Herb Friedman, *Variable Speech*, CREATIVE COMPUTING, July 1983, at 122, *available at* http://www.atarimagazines.com/creative/v9n7/122_Variable_speech.php (last visited Sept. 24, 2013) (noting that the human brain has the capacity to comprehend speech at nearly twice the speed of ordinary speech). Of course, the question is not how quickly a jury *can* process speech but rather how quickly it *wants* to process it.

practice. Successful adaptation is usually correlated to the presence of a mentor who takes steps to nurture needed skills. The chief advantages that employers gain from hiring ex-debaters are their work ethic, analytical skills, stubbornness and resiliency from a loss. Because former debaters are used to expending long hours in research, analysis and writing, they will stubbornly pursue the win as they perceive it. But because trial practice does not produce immediate win/loss gratification with the frequency of competitive debate, the ex-debater may become frustrated by the slow pace of the trial process and by the absence of clear outcomes in settled cases. The mentor can mitigate these tendencies by communicating to the young lawyer whether she is doing well or poorly and clearly identifying both the source of success or failure and the "win." The tendency of debaters to define an outcome as a win or loss without regard to the client's perspective on the issue must also be countered with clear identification of the case objective. Finally, the mentor would be well served to push the new lawyer to work on skills that atrophy or are not fully developed by competitive debate such as managing client expectations and relationships, developing synthesis from analysis, and selecting the jury.

One constant that must be maintained in the practice is integrity. The debate circuit is a closely knit group of individuals who meet and confront one another several times a year. The misuse (or outright fraudulent creation) of evidence haunts the party misusing it for years. Similarly, the attorney who knowingly withholds relevant evidence, or worse, *creates* evidence or knowingly misleads the Court on law issues, soon becomes a pariah. Judges and lawyers, like debaters, talk and communicate issues they have encountered related to integrity. Further, debate is a highly collegial activity. Long gaps between debate rounds create the opportunity for almost limitless exchange of ideas. While the practice of law does not offer this level of social networking, maintaining positive relationships with clients, co-counsel and opposing counsel makes the practice infinitely more enjoyable and usually more remunerative as well.

CONCLUSION

The pool of former high level competitive debaters is a wonderfully intelligent, intense, narrowly-focused, somewhat quirky and success-driven cult. They share common experiences, lore and approaches to the problems they face, and with a little tinkering they become extremely successful practitioners. They left academic debate, but it turns out not to be the end of the world as they know it after all.