PERFORMANCE - CRITIQUE

The NITA Way

Performance

The performance is the most important component of the NITA method because it allows students to actually practice or “do” the skill. Learning by doing works best if the classroom takes on the aura of a courtroom and if the students consistently stay “in role.”

To learn a particular skill, the student need not complete an entire performance. For example, even though a student may have prepared an entire direct examination, a four to six minute performance is all that is necessary for the student to get experience in “doing” the skill and the teachers to select a topic(s) for critique. Teachers should inform students of the performance’s duration at the beginning of class. It is equally important to tell students that a “snapshot” of the performance is all that is required to accomplish the teaching and learning goals; and that they may be asked to perform a “snapshot” from the beginning, middle, or end of the examination.

The Critique

To most, the word “critique” has the negative connotation of “criticism.” As used in the NITA method, however, a critique is not meant to be criticism. The Oxford University Press Dictionary defines “critique” as “a detailed analysis and assessment.” This definition embodies the true meaning of the NITA critique.

The Four Elements of a NITA Critique: Headline, Playback, Fix, and Rationale

Teachers must use the NITA method during the small group and video sessions. The NITA Method recommends the use of headline, playback, fix, and rationale – in this order.

Students learning trial skills often expect consistency, uniformity, and predictability. The four-component NITA critique helps teachers meet these expectations. This tremendously successful approach is not meant to stifle a teacher’s creativity, but is simply a conceptual framework that has withstood the test of time.

Headline

A proper headline focuses a student who has just completed a performance and tells her what will be addressed. A headline also focuses the teacher’s critique and the attention of all other students in the room. As in witness examination, think of your headline as the conversation starter.

A headline should be concise, specific and attention getting. It should not be complex, compound, or pedantic. An enthusiastic and energized delivery is tremendously important. Examples of effective headlines follow:
“The use of open-ended questions in cross-examination may be dangerous.”

“I want to talk with you about asking leading questions in direct examination.”

“Let’s focus on what could happen when you argue in opening statement.”

“At the beginning of a closing argument, you need to grab the attention of the fact-finder.”

“Using a diagram will make the witness testimony clear.”

“Let’s discuss the importance of relating your questions to your case theory.”

**Playback**

Playback is arguably the most difficult and most important aspect of the NITA critique. In a playback, the teacher repeats word for word a snapshot of the student’s performance that is the subject of the critique. Many teachers find the playback difficult because it requires a rapid transcription of the student’s performance while listening for a proper subject for critique. The playback’s effectiveness more than compensates for its difficulty, however, because it leaves no doubt about what the student actually said and focuses the student’s attention on what the teacher is about to say.

**Fix**

The Fix changes a student’s behavior by informing her how to perform a skill differently or correctly. An inability to suggest a “fix” damages a teacher’s credibility. For this reason, the critique must focus on something that the teacher is able to fix. Examples of effective prescriptions follow:

To avoid asking leading questions on direct examination, try starting each question with one of the following words: who, what where, why, how, explain, or describe. For instance, “Why did you give Walter Watkins a field sobriety test?”

Using tag lines such as “Didn’t she . . ?” “Isn’t that correct?” or “Aren’t you ...?” prevent the examiner from phrasing questions declaratively. It is more effective to ask questions like “You saw him from the shoulders up?” “Advertisement covered the windows?” “You could not see Mr. Watkins’s hands?”
Rationale

The rationale lends credibility to the fix and is the “why” of the critique. Students must be given a reason for changing their behavior. Examples follow.

Using leading questions on direct examination takes the focus away from the witness. Also, since the Rules of Evidence prohibit leading questions on direct examination, you may draw an objection during your questioning.

Using headlines or signposts during the direct examination helps the fact-finder understand the organization of your questioning. It also directs the witness and the fact-finder to the topic you are about to cover.

The Full Critique – An Example

Following is a portion of a student’s performance of the direct examination of James Bier:

“You watched Walter Watkins stumble and stagger as he crossed the street?”

“After crossing the street, what did he do?”

“What did you see him do after going in the store?”

“There were advertisements covering the window?”

“Because of the advertisements, you could only see Walter Watkins from the shoulder up?”

The full critique of the student’s performance follows:

“I want to talk with you about the use of leading questions in direct examination. During your direct examination of James Bier you asked the following questions:

“You watched Walter Watkins stumble and stagger as he crossed the street?”

“There were advertisements covering the window?”

“Because of the advertisements, you could only see Walter Watkins from the shoulder up?”
These are all leading questions. A leading question suggests the answer and puts your words into the mouth of the witness. On direct examination, you can avoid asking leading questions by starting each question with words such as who, what, when, where, why, how, explain, or describe. Thus, instead of asking “You watched Walter Watkins stumble and stagger as he crossed the street?” you could have asked, “Describe how Watkins crossed the street.”

Instead of asking, “There were advertisements covering the window?” you could have asked, “Tell us what you could see inside the store.”

There are several reasons to avoid asking leading questions on direct examination. First, during direct examination the focus is on what the witness is saying. Second, the rules of evidence require that non-leading questions be asked on direct examination. Thus, a leading question may draw an objection from opposing counsel.”

**Fifteen Elements of a Good Critique**

1. **Length of Critique**

   Good critiques are brief. The four components of the NITA critique, if used well, allow critiques to be brief. Longer critiques overload the student. There is no specific time limit for a good critique. Some teachers use a 4:1 ratio as a guide – if the performance lasts four minutes, the critique would last about one minute.

2. **Number of points**

   Generally, no more than one point should be covered in each critique, especially for a student’s first two or three performances. In the classes this semester, there will be six students and two teachers are in one performance room. Assuming that each student receives one critique from each of the two teachers, students will hear eight to twelve different critiques in a single performance session. More experienced teachers learn that as a course progresses, some students are able to listen and adapt to two critique points.

   Recognize there is a commonality of mistakes. Chances are good that another student may make the same mistake in their performance, and you can teach the group at that time.

3. **Avoid Confrontational Questions**

   A student may feel a sense of relief and a great deal of anxiety after finishing a performance. Confrontational questions such as, “Why did you do that?” or, “What were you hoping to accomplish?” may place a student on the defensive and negatively influence her perception of the critique.
4. **Delivery of Critique**

Each critique must be supportive, enthusiastic, respectful, and honest. In giving the critique, the teacher must model appropriate courtroom behavior. A teacher who slouches in her chair during the critique does not model proper and confident courtroom behavior. If a teacher finds that a critique given earlier to one student must be repeated to another student, she may creatively find an alternative way to deliver the same critique. Obviously, if students are not responding to critiques, the teacher must attempt a different approach to the critique.

5. **Be Forward-Looking, Not Performance Specific**

A critique of a student’s performance of the opening statement in the *Bier* case must address the fundamentals of any opening statement. A critique specific to the *Bier* case file would not be applicable to the next opening the student will perform. A critique of “argument” during the opening statement in *Bier*, however, would apply to any future case. Teachers must teach students how to become better advocates, not how to win the hypothetical teaching case.

6. **Focus on the Student’s Level**

In each group, students will be at different skill and comfort levels. Teachers must tailor critiques to each student’s level. The focus of the critique for a nervous, inexperienced student might be different than that for a more confident and experienced student.

7. **Teach the Group as well as the Particular Student**

Although a critique focuses on a specific student’s performance, the NITA method requires the teacher to teach the entire class as well as the immediate student. The teacher must direct the headline and playback to the student while directing the prescription and rationale to the entire class. To maintain focus and interest, the teacher must make eye contact with the entire class while giving a critique to a particular student. If the teacher is successful, then a student’s mistake in one performance will not be repeated by other students in future performances.

8. **Critique the Performance, Not the Person**

Each critique should focus on the content of the student’s performance, not on her personal characteristics. A teacher cannot tell a student, “If you were shorter, you would be less intimidating and therefore more persuasive.”
9. **Pick Something You Can Fix**

Occasionally, a teacher may notice a problem in a performance that is easy to diagnose, but difficult to fix. The most prominent example is a student’s use of nervous filler such as “and” or “OK” after each witness answer. The teacher readily spots the problem but may not know how to suggest how the student can change her behavior. Telling the student to “stop doing that” does not prescribe how to fix the use of the nervous filler.

10. **Avoid Disagreements When Team Teaching**

If a teacher disagrees with the advice given by another teacher during a critique, she should not say that the advice was wrong or that she disagrees with her colleague. An open disagreement forces the students to choose between the competing teachers and may destroy at least one teacher’s credibility. Generally, disagreements arise because advocacy is part art and part science, and there is more than one way to solve a problem or perform a skill. A teacher might express a difference of opinion by suggesting an alternative approach.

11. **Use Mini-Demos**

Sometimes it is easier to show the prescription then to tell it, especially when critiquing style (movement, eye contact, etc.) and when repeated critiques have proved unsuccessful. A teacher may use a mini-demo to model a particular courtroom skill.

12. **Critiquing the “Good” Performance**

A teacher may positively critique a superb performance as a means of teaching the entire class. It is also appropriate to give a positive critique to a student who experienced difficulty in the past but has demonstrated marked improvement. In such situations it is important to still use the four-part teaching method by highlighting what was done well, playing back the language used, talking about why it worked, and giving a reason why it worked.

13. **Avoid Telling War Stories**

War stories have their place, but they are limited in the student-centered NITA teaching method. Generally, war stories are not sufficiently skill-specific to be an effective teaching tool. More importantly, war stories take time away from performances and critiques.

14. **Minimize Use of the Word “I” in the Critique**

When a teacher remarks, “I would do it this way,” or “I believe this is the best way to do it,” the critique becomes judgmental and teacher-centered. The NITA method focuses on teaching students how the very best trial lawyers employ fundamental advocacy skills.
15. *Avoid Sugarcoating*

There is no need to begin a critique with false praise. If the critique is positive and constructive, there is no need to sugar coat it with comments such as, “I really liked your voice modulation, but . . .” Such gratuitous comments are not constructive and may diminish the teacher’s credibility.