2012

The Practical Use of the Trial Advocacy Course in Today's Legal Education Curriculum

A. Michael Gianantonio

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Legal Education Commons

Recommended Citation
Available at: https://dsc.duq.edu/dlr/vol50/iss3/4

This Article is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.
The Practical Use of the Trial Advocacy Course in Today’s Legal Education Curriculum

A. Michael Gianantonio*

I. INTRODUCTION .............................................................. 485
II. THE DEATH OF THE TRIAL ........................................... 487
III. THE NEED FOR EXPERIENTIAL LEARNING ................... 491
IV. THE PRACTICAL LESSONS OF TRIAL ADVOCACY
    IN THE DEVELOPMENT OF A YOUNG LAWYER ............... 493
    A. The Trial Advocacy Class ...................................... 496
    B. The Effect of Procedural Rules on the
       Foundational Elements of Trial Practice ............. 497
    C. Application of Substantive Doctrinal
       Learning .......................................................... 498
    D. The Ethical Component of Advocacy ...................... 499
V. CONCLUSION .............................................................. 500

I. INTRODUCTION

The disappearance of the trial and, as a matter of course, the trial lawyer, is a topic that has received intense scrutiny over the past decade.¹ While recent data suggests that the number of court filings in American courts is growing at an exponential rate,² the same is not equally true for the number of cases that are ultimately decided by a trial verdict.³ Instead, and in stark contrast to the increase in civil filings and criminal matters, the number of trials

* Mr. Gianantonio is an Adjunct Professor of Trial Advocacy at the Duquesne University School of Law, where he teaches trial advocacy and coaches several of the law school’s national trial competition teams. He is also of counsel with the law firm of Archina-co/Bracken where he maintains a general civil litigation practice.

¹ See, e.g., Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). Most specifically, the empirical data supporting this conclusion was synthesized in this study commissioned by the American Bar Association and authored by Marc Galanter, supra.


³ See Galanter, supra note 1, at 459.
that occur today is dwindling to the point that they are simply be-
coming a blip on the radar screen of most modern litigants.

Although there are certainly numerous theories, explanations,
and beliefs as to the drastic decrease in legal matters that will be
resolved by a jury or judge at trial, the question remains: is pre-
paring law students through the use of a trial advocacy curricu-

lum, which teaches the ability to successfully navigate the trial
procedure, still necessary? Put simply, lawyers just do not try
cases anymore.4 The statistical evidence5 portends that there ex-
ists an entire generation of lawyers who may never be required to
try a case.

While the objective data suggests that trial advocacy courses are
rapidly becoming obsolete because of the dearth of cases that go to
trial, such a proposition ignores the recent recommendation that
American law schools prepare their students for practice.6 Fur-
ther, the emphasis on the word “trial” in trial advocacy is mis-
placed. Although the fundamental purpose of these classes is to
ostensibly train law students on the proper methods of presenting
their evidence if ever faced with a trial in practice, there is much
more to a trial advocacy class than most students, and even some-
times the instructors, recognize.

Through these classes, the law student, in addition to learning
how to prepare and present a trial from beginning to end, must
learn and apply procedural, substantive, and ethical rules of law.
A first-year contracts class teaches the law student to look for con-
sideration and a torts class provides instructions on the elements
of negligence; however, in a trial advocacy setting, law students
are given the opportunity to take the lessons learned in their sub-
stantive classes and apply them in a manner that is necessary to
actually prove or defend a cause of action. When faced with the
constrictions of procedural rules, such as the rules of civil proce-
dure or evidence, students witness firsthand the interplay be-
tween the various aspects of the laws they have learned in sepa-
rate and distinct classes.

4. Id. Objective, empirical data gathered, synthesized, and reported by Mr. Galanter
reveals that the number of cases going to trial in today's legal society is clearly on the de-
cline. Id. Although discussed at length, infra, Mr. Galanter's article, and an independent
review of the statistical evidence published since, clearly demonstrates that the trial as the
ultimate form of legal dispute resolution is quickly becoming a thing of legend and stories.
5. Id.
6. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE
PRACTICE OF LAW 87 (2007).
II. THE DEATH OF THE TRIAL

As Homer Simpson said, “people can come up with statistics to prove anything. 14% of people know that.” Though Mr. Simpson’s quote aptly and succinctly demonstrates the manner in which society is able to cannibalize raw data to suit the needs of a proposed agenda, empirical data is still an important venue of information. The available data clearly demonstrates that the trial, whether before judge or jury, is rapidly receding from its place in the center of the legal universe. When considering the concerns threatening the trial’s continued viability as the ultimate resolution of a legal dispute, there is no better place to turn than to University of Wisconsin Professor Marc Galanter’s landmark study entitled The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts.

Professor Galanter’s study is inundated with empirical data generated over the past several decades, and even the most cursory look at the statistics reveals one glaring truth: while every other facet of the American legal system continues to grow, i.e., today we are faced with more laws, statutes, regulations, administrative agencies, scholarship, and lawyers, the use of an actual trial to finally resolve legal disputes has rapidly declined.

At first blush, the numbers do not seem all that concerning. In 1962, there were 5802 trials in the federal court system. In comparison, that number fell to 4569 in 2002. Recent statistics reveal similar trends. For the reporting period ranging from April 1, 2010 to March 31, 2011, the number of civil trials declined further to 3216. Accordingly, there were 2586 fewer trials last year than just fifty years ago.

8. See Galanter, supra note 1, at 523.
9. Id. at 459. Professor Galanter notes that this study was prepared for use by the American Bar Association Litigation Section’s symposium on the same subject. Id. In particular, Mr. Galanter relies upon data collected from the Administrative Office of the U.S. Courts from 1962 to 2002. See id. at 460 & n.3.
10. Id. at 522-23.
11. Id. at 461.
12. Id. at 461. The last statistical year used for purposes of the article was 2002, although the 2003 statistics were represented in a footnote, indicating that they were available after the preparation of the article. Id. Those statistics show that the number of civil trials fell to 4206. Id. at 460 n.3.
However, these numbers become truly relevant (and astonishing) when they are compared to the number of actual dispositions of all pending civil matters. In 1962, approximately 50,000 cases reached disposition in the federal system, thus meaning that 11.5% reached trial.\textsuperscript{15} In 2011, of the 322,840 disposed civil cases, only 1% reached trial.\textsuperscript{16} While dispositions increased by a factor of five between 1962 and 2004, the percent of cases reaching a civil trial fell by over 91% between 1962 and 2011\textsuperscript{17} Mr. Galanter's article similarly reported a decline in the percentage of criminal cases disposed of by trial as compared to an increase in criminal filings.\textsuperscript{18}

Although the data for state courts is not as concrete or organized as the information available through the Administrative Office of the U.S. Courts, there are studies that demonstrate a similar decline of trials at the state and local level.\textsuperscript{19} To demonstrate this point, Mr. Galanter relies on a study performed by the National Center for State Courts, which catalogued the trial activity in state courts of general jurisdiction for the seventy-five most populated counties in 1992, 1996, and 2001.\textsuperscript{20} These results mimicked those of the federal courts insofar as there were 22,451 trials in these counties in 1992 and only 11,908 reported trials in 2001.\textsuperscript{21}

Mr. Galanter's work, commissioned by the American Bar Association, was the underpinning of what that organization's litigation section termed the "largest single initiative the Section has
ever funded.\textsuperscript{22} The results reveal a demonstrable concern for the future of the trial lawyer, and they surely did not go unnoticed. In his seminal lecture on the topic, Judge Patrick E. Higginbotham\textsuperscript{23} of the United States Court of Appeals for the Fifth Circuit noted that the role of judges in his district was changing; judges were spending more time on matters other than trials, while the mediation and alternative dispute resolution businesses grew and prospered.\textsuperscript{24} In his essay entitled \textit{Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?}, Judge Higginbotham did not address empirical evidence in the same fashion as Mr. Galanter.\textsuperscript{25} Rather, he astutely noted that “[l]acking a provable etiology, the changes are most easily described as a syndrome with two conspicuous symptoms: the decline in trials, and the nigh parallel surge in private dispute resolution.”\textsuperscript{26}

In fact, Judge Higginbotham expressed his belief that both judges and parties actually approach civil filings with the presumption and understanding that the matter will eventually be resolved through settlement without the need for trial.\textsuperscript{27} This trend is reinforced by a “new class of lawyers” without any substantial trial experience, who instead refer to themselves as litigators.\textsuperscript{28} To that end, many attorneys have a clear interest in avoiding trial: the litigation model involving private dispute resolution does not require knowledge of how to conduct a trial.\textsuperscript{29} Therefore, the avoidance of the trial is a self-fulfilling prophecy propagated by

\footnotesize{\begin{itemize}
\item \textsuperscript{22} Patricia Lee Refo, \textit{The Vanishing Trial}, \textit{LITIG.}, Winter 2004, 1, 1 (2004). Specifically, Mr. Galanter notes that his work was prepared as a working paper for the American Bar Association’s Litigation Section’s Symposium on the “Vanishing Trial.” Galanter, supra note 1, at 459.
\item \textsuperscript{23} Judge Higginbotham is presently a senior judge on the United States Court of Appeals for the Fifth Circuit. \textit{Higginbotham, Patrick Errol, Biographical Directory of Federal Judges}, \textit{FED. JUD. CENTER}, http://www.fjc.gov/servlet/nGetInfo?jid=1040&cid=999&ctype=na&instate=na (last visited Oct. 20, 2011). Originally appointed as a District Judge for the Northern District of Texas by President Ford in 1975, he ascended to the Court of Appeals for the Fifth Circuit in 1982 when appointed by President Reagan. \textit{Id.}
\item \textsuperscript{24} Patrick E. Higginbotham, \textit{Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?}, 55 SMU L. REV. 1405, 1405 (2002).
\item \textit{Id.}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id. at 1407.}
\item \textsuperscript{27} \textit{Id. at 1417.}
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} Patrick E. Higginbotham, \textit{Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?}, 55 SMU L. REV. 1405, 1420 (2002).
\end{itemize}}
this new breed of lawyer that relies on avoiding the courthouse at all possible costs.

The American College of Trial Attorneys (“College”) has also taken notice of this recent trend in its 2004 publication entitled The Vanishing Trial: The College, the Profession, the Civil Justice System. This committee report voiced concern that judges have placed a greater emphasis on their roles as case managers as opposed to adjudicators and that the decrease in the disposition of matters by trial demonstrates a failure of the system. Citing to Yale Professor Judith Resnik’s article entitled Trial as Error; Jurisdiction as Inquiry: Transforming the Meaning of Article III, the College noted that the federal judiciary seems to have adopted an “anti-adjudication and pro-settlement agenda.”

This avoidance of the courthouse is often facilitated in part by the expanding nature of the discovery process. Discovery has become a cumbersome entity unto itself that is separate and apart from the trial mechanism. As Judge Higginbotham noted, discovery is almost an entirely private matter, involving only the parties, and is usually proliferated by attorneys who feel the need to over prepare for a trial that they have very little experience in.

30. AM. COLL. OF TRIAL LAWYERS, THE “VANISHING TRIAL:” THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM (2004). The American College of Trial Lawyers was founded in 1950 and formed from members of the trial bar, both from the United States and Canada. Id. at i. It is an invitation only group made up of selected lawyers who have a minimum of fifteen years of experience as an attorney. Id. The stated mission of the College is “to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.” Id.

31. Id. at 11.

32. Id. at 12 (citing Judith Resnik, Trial as Error; Jurisdiction as Inquiry: Transforming the Meaning of Article III, 113 HARV. L. REV. 924, 995 (2001)). The College also refers to Harvard Law School Professor Arthur Miller's article, which seems to concur with Professor Resnick's conclusion that the effect of the Federal Rules of Civil Procedure has been to modify the role of the federal trial judge. The College states that “[t]he effect of Federal Rule of Civil Procedure 16, in conjunction with other contemporary changes in practice, has been to transform the presiding judge's role from that of neutral arbiter to case supervisor.” Id. at 12 (citing Arthur R. Miller, The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982, 1004-05 (2003)).

33. David W. Elrod & Worthy Walker, Fact or Fiction: Are There Less Jury Trials & Trial Lawyers? If So, What Do We Do About It?, LITIG. COMMENT. & REV. June/July 2010, available at http://litigationcommentary.org/2010-June/July/good-reads-david-elrod.html (“It almost goes without question that discovery can be the most costly feature of civil litigation . . . there is almost no question that discovery is more expensive today than in the past. This is, in large part, because of expanded discovery process, discovery disputes and the often extreme cost of electronic discovery.”) Similarly, in an article published in Litigation Online, Patricia Lee Refo, then Chair for the Litigation Section of the American Bar Association, stated that she believes that the discovery process has become too broad, too expensive, and too time consuming. Refo, supra note 22, at 2.
conducting. It seems that lawyers are more focused on chasing the ghost of the smoking gun, rather than sorting through the documentation at their disposal to truly parse the issues into a readily defined trial strategy.

Yet despite this steady decline in the number of cases that actually go to trial, the trial advocacy class still has a place in the modern law school. As is explained below, the American legal education is going through somewhat of a renaissance in that experiential classes are becoming recognized as an important part of the curriculum.

III. THE NEED FOR EXPERIENTIAL LEARNING

In its recent landmark study of the American legal education system, the Carnegie Foundation found that traditionally, the primary focus of legal education has been the art of teaching a student to think like a lawyer. Teaching proper legal analysis, however, does not always convey the skills required of a practicing lawyer, and the transition to the practice of law has indeed become a secondary focus of the modern legal education. As noted in Educating Lawyers: Preparation for the Practice of Law, published by the Carnegie Foundation for the Advancement of Teaching ("Carnegie Report"), "it remains controversial within legal education to argue that law schools should undertake responsibility for initiating and fostering this phase of legal preparation."

One of the most concerning trends discussed in the Carnegie Report is the fact that, while law schools teach the cases, they rarely teach students how to interact with clients. In turn, this method often gives the student the impression that their role as a

34. Higginbotham, supra note 24, at 1417.
35. SULLIVAN ET AL., supra note 6, at 87. The stated purpose of the Carnegie Report was an effort to understand legal education by focusing on the daily practices of teaching and learning. Id. at 1-2. These practices were then compared to education practices in other professions. Id. at 2.
36. Id. at 87.
37. Id.
38. Id. at 56. In fact, some have compared legal education to other professional trades with respect to preparation for the real world application of their respective skills. See id. at 80-81. For instance, engineers have laboratories in which they are afforded the opportunity to see the theory in practice. Id. at 80. Similarly, medical students often receive instruction through medical care of patients. Id. at 81. Through the traditional case dialogue method of teaching students, i.e., the Socratic Method, there is really no corollary. Law students are traditionally not given the opportunity to apply the case law learned so diligently.
lawyer will be a distant observer as opposed to an interested participant in the proceedings.  

Although there are classes dedicated to imparting practice skills to students in the modern law school curriculum, many of these classes are electives and are not required. Another aspect of these courses is that non-tenured members of the faculty most often teach them. This problem is exacerbated by the current culture of legal education that involves a self-replicating pattern shaped by the “elite” legal institutions. Many students believe that tenured members of the faculty view those practical classes taught by adjunct faculty as having secondary importance.

The authors of the Carnegie Report described this pattern as though it is almost a self-protective control intentionally built into the system to prevent the advent of new ideas and new thoughts as to the approach to legal education. Specifically, the authors noted that most faculty members are derived from those lawyers who, after graduating from the more prestigious law schools, follow a rather predictable career path. This, in turn, leads to a lack of diversity of thought among legal faculty.

Initially, this may not seem to establish any concern. However, it must be remembered that the legal education institution, and not the practicing bar, controls the admission standards for students and the lessons upon which they are instructed. Essentially, this means that the vast majority of lawyers who are in practice have little control over the manner in which new members to the field will be selected and instructed.

In 2005, in an effort to modify the manner in which law students are instructed, the American Bar Association, when providing its guidelines for the accreditation of law schools, included a specific standard that required “live-client or other real life prac-

39. Id. at 57.
40. SULLIVAN ET AL., supra note 6, at 87.
41. Id. at 88. The authors note that “[i]n many of the schools we visited, students commented that faculty view courses directly oriented to practice as of secondary intellectual value and importance.” Id.
42. Id. at 89.
43. Id. at 88. In fact, when speaking of the school’s legal clinic, an unnamed professor from an unnamed institution commented, “our clinical program is not a good use of resources . . . . It is a side show in which the central faculty and students are not interested.” Id. at 101.
44. Id. at 89-90.
45. SULLIVAN ET AL., supra note 6, at 89-90.
46. Id.
47. Id. at 90.
tice experiences” to be provided to law students. Often, however, these classes are not available until the second or third year of a student’s instruction and in most instances, are electives that are not required.

IV. THE PRACTICAL LESSONS OF TRIAL ADVOCACY IN THE DEVELOPMENT OF A YOUNG LAWYER

The first year of law school teaches the student to think like a lawyer. Through use of the Socratic Method and case analysis, students are instructed in the ways of finding the issue, finding the law, and then determining how they relate to the facts of the case. The importance of these lessons cannot be stressed enough. Without this fundamental understanding of the manner in which the legal process is to be conducted, growth as a lawyer will be non-existent.

However, in the two years (or three if attending a part-time program) that follow the student’s baptism into the legal thought process, these lessons are often repeated and reinforced. There is no question that the student will gain insight into the various subjects being taught; however, sheer retention of the lessons learned in law school is not what makes a lawyer. With the amount of case law and statutory authority being published in ever increas-

(a) A law school shall require that each student receive substantial instruction in:
(1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
(2) legal analysis and reasoning, legal research, problem solving, and oral communication;
(3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
(4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
(5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.
(b) A law school shall offer substantial opportunities for:
(1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence;
(2) student participation in pro bono activities; and
(3) small group work through seminars, directed research, small classes, or collaborative work.

Id.
ing frequency, it would be a near impossible feat for today's lawyer to know the black letter law for each and every situation they will face.\textsuperscript{49} Rather, what makes the lawyer successful today is the ability to listen to a client's problem, distinguish between the facts that are relevant and those that are not, find the applicable law, and synthesize it all into a coherent and supportable argument on behalf of the client.

The simple truth to be taken from the commentaries referenced above is that fewer trials necessarily equates to fewer judges and lawyers who understand trial mechanics. If trials are in such rapid decline, both numerically and percentage wise, the important question that remains is why are trial advocacy classes still in the curriculum of the modern American law school? If the numbers are correct and only one percent of the cases disposed of each year will even see the inside of the courtroom,\textsuperscript{50} then why teach the class at all?

Perhaps the answer lies in Judge Higginbotham's well-reasoned observation that the lack of trials necessarily implicates the lack of lawyers who know how to actually try a case.\textsuperscript{51} This concern is dire. If the trial is to survive, a difficult road lies ahead. Fewer attorneys trying fewer cases on a yearly basis, combined with the rise in actual case filings, means an ever dwindling pool of attorneys with confidence to take a matter to verdict.

In fact, the American College of Trial Lawyers noted this issue to be of immediate concern. Specifically, the question posed by young lawyers who are so inclined to ask has changed from "when will I get into the courtroom?" to "will I get into the courtroom?."\textsuperscript{52} In turn, this could lead to an eventual avoidance of the courtroom by young lawyers, because without the necessary experience to conduct a trial, many lawyers will instead focus on alternative methods of dispute resolution, thus further compounding the lack of trials in the future.\textsuperscript{53}

It is dangerous to assume that trial advocacy classes are meant only to instruct students on how to try cases. Without having actually taken a trial advocacy class, most in the legal profession do not realize just how important these classes are to the development of the young legal mind. First and foremost, there is no

\textsuperscript{49} See Galanter, \textit{supra} note 1, at 522-23.
\textsuperscript{50} See \textit{ADMIN. OFFICE OF U.S. COURTS}, \textit{supra} note 13, at 55.
\textsuperscript{51} Higginbotham, \textit{supra} note 24, at 1417.
\textsuperscript{52} \textit{AM. COLL. OF TRIAL LAWYERS}, \textit{supra} note 30, at 22.
\textsuperscript{53} Id.
question that the dominant purpose of a trial advocacy course is to provide law students with a fundamental understanding of the manner and mode of proof during a trial.\textsuperscript{54} Although a doctrinal course may teach students what is and is not permitted during a trial, it generally does not provide the student with guidance on the manner in which they conduct themselves and how their conduct is perceived and received by the observers.\textsuperscript{55} Essentially, good advocacy can be learned only through practice, observation, and selection of appropriate techniques, all while paying heed to the rules of law and procedure. In fact, good advocacy requires learning the science of the skill, such as using proper questioning techniques, understanding the rules of evidence, and knowing the substantive law underlying the theory of the case. Good advocacy also requires learning the art of the skill, such as understanding the most effective forms of persuasion.\textsuperscript{56} While a trial is only one part of the entire legal process, it is the foundation upon which all else is based—the pleadings, motions, and pre-trial discovery are all conducted before the trial begins in an effort to favorably mold and shape the trial into a manageable and winnable event.\textsuperscript{57}

In his book, \textit{The Trial Process: Law, Tactics and Ethics}, J. Alexander Tanford noted that, unlike other courses in law school that are broken down into discrete subjects, a trial advocacy class permits the student to observe that the law is a "seamless web," where all of the lessons learned are applied in a singular place.\textsuperscript{58} Students are not only offered the opportunity to learn how to examine a witness or introduce evidence, but are also, whether they realize it or not, given broad insight into the interplay between the application of substantive, procedural, and ethical doctrines that are traditionally handled one subject at a time, without the student ever actually seeing the integrated application of these doc-

\begin{footnotesize}
\begin{enumerate}
\item See \textsc{Steven Lubet, Modern Trial Advocacy} (3d ed. 2010). Too often, trials are considered games or spectacles in which the most cunning adversary will be rewarded with success. Lost in this belief is the fact that attorneys are, first and foremost, officers of the Court and the truth is the ultimate goal. It must be remembered that a trial “is truly something more than a soap opera or a sporting match. Most of all, a trial is a contest of ideas, a process in which the law is applied to the facts.” \textit{Id.} at 1. Without fully appreciating these concepts, the trial lawyer will run the risk of turning a court proceeding into a spectacle, which in turn has the propensity to not only embarrass the advocate, but also the entire adversarial system itself.
\item J. ALEXANDER TANFORD, \textsc{THE TRIAL PROCESS: LAW, TACTICS & ETHICS} § 1.01 (3d ed. 2002).
\item L. TIMOTHY PERRIN \textsc{et al., The Art & Science of Trial Advocacy} 2 (2d ed. 2011).
\item TANFORD, \textsc{supra} note 55, at 2.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
This point synthesizes the overarching lessons that are taught in such classes. Students are not simply “playing lawyer;” rather, they are presented with a situation in which they are able to observe firsthand how decisions that appear to be meaningless early in the litigation process have a lasting effect on the end product of their work at trial.

A. The Trial Advocacy Class

The bread and butter of any trial advocacy course is the instruction of the nuts and bolts of the trial. Ranging from jury selection to closing arguments, students must learn the what, why, and how of the trial process. 59 Each year U.S News and World Report publishes a list of the top ten trial advocacy programs in the nation. 60 Among the schools found on this list, there is a striking similarity in their descriptions of what is expected during a trial advocacy course.

For instance, the trial advocacy program ranked first in 2011, at Stetson University College of Law, describes its trial advocacy class as “[t]he systematic development of and active student participation in the techniques involved in the trial of cases.” 61 The Illinois Institute of Technology Chicago-Kent College of Law provides a near identical description, 62 as does the University of Akron School of Law. 63 Essentially, those schools identified in the

59. For instance, at Duquesne University School of Law, the trial advocacy course is a year long, five credit course. Each three-hour session, taught weekly for three credit hours, is broken into a singular objective over the first semester. Each class focuses on a different aspect of the trial process, requiring students to present, for instance, a direct examination in front of the other members of the class. The instructor then identifies an error or misstep in the student's performance, provides the reason for the error or misstep, and then explains the best method for correction.


62. Course Descriptions: Litigation and Practice Skills: Trial Advocacy 1 (Law 555), IIT CHICAGO-KENT COLLEGE OF LAW, http://www.kentlaw.iit.edu/academics/jd-program/curriculum/course-descriptions/litigation-and-skills-training (last visited Oct. 20, 2011). Specifically, the course description for trial advocacy reads: “[a]n introduction to litigation taught by leading trial attorneys and judges. The course uses hypothetical cases to teach the student trial preparation, strategy, and conduct in a courtroom setting. Although the instructor will demonstrate from time to time, the primary teaching method is student participation with instructor critique.” Id.

63. See Course Descriptions - (Courses L-Z): Trial Advocacy 1, AKRON LAW, http://www.uakron.edu/law/curriculum/courseLZ.dot (last visited Dec. 3, 2011). The entire-
top tier of trial advocacy understand and expound the import and necessity of student participation in trial advocacy classes.

B. The Effect of Procedural Rules on the Foundational Elements of Trial Practice

The basics of trial advocacy are not, in and of themselves, entirely difficult. Regardless of the type of case, the manner and modes of proof generally remain the same. A lawyer obtains favorable evidence from a friendly witness through the use of the direct examination, the structure of which, with minor tweaking, will generally remain the same for most types of witnesses. Substantive points needed for closing argument are gained through the narrow strictures of cross-examination, where an advocate must learn to confine questions to small-scoped, leading inquiries that give the witnesses little room to expound on their answers.

However, complications arise when an advocate is forced to proceed down these paths within the strictures of the procedural rules in place. For instance, a witness's testimony is bound by the rules of relevancy. While the advocate may want the fact finder to hear a beneficial portion of testimony, the question (and answer) may be limited by the rules of evidence. Hearsay is a rule easily stated, but proper application typically evades the law student. While these rules are often explored in an evidence class, the use of the rules in an adversarial setting brings those lessons to life, frequently connecting the dots for a student who may not have otherwise fully understood the rules by reading case law alone.

Mastery of trial evidence teaches students to think very quickly and react without pause. Although the likelihood of actually participating in a trial is in rapid decline, this is a lesson that is universally applied. Students will eventually become active practitioners who, although they may not choose a litigation-oriented career path, will at some point likely be required to offer some sort of presentation, whether it be to members of the firm, a potential client, or in some sort of quasi-judicial forum. Having faced the proverbial firing squad in past situations will provide an invaluable foundation for young lawyers to rapidly respond to an unexpected inquiry without looking as though the answer is wholly outside of their reach.

ty of the class description reads as follows: "Fundamental techniques of trial preparation, direct examination, cross examination, introduction of exhibits, objections, opening statements and closing arguments." Id.
Application of the rules of civil procedure to a trial advocacy class is truly no different. While the law student learns the basis of personal and subject matter jurisdiction in their various civil procedure classes, the rules will actually spring to life when a student is confronted with the actual purposes behind all of the provisions in the rule book concerning discovery. While it may be one thing to learn what a proper interrogatory and response is, it is another thing entirely to see the interplay between a well-crafted set of discovery requests and their subsequent use in a trial.

C. Application of Substantive Doctrinal Learning

Any first year law student should be able to recite the elements required to state a prima facie case of negligence without hesitation. By the end of the school year, this task should be as reflexive as breathing. In order to ascertain a student’s fundamental knowledge in torts or any other subject, law faculty traditionally rely upon a three-hour examination at the end of the academic year, which has become the hallmark of modern legal education.\(^64\) While these examinations demonstrate a student’s ability to synthesize the rules of law in that particular subject, the essay examination does not give the student an opportunity to see the application of the law to a client who may, or may not, reveal all of the details of her case. This is where a trial advocacy class excels.

This point may be emphasized by reference to the fact pattern utilized by the American Association for Justice (“AAJ”) in the 2011 Student Trial Advocacy Competition (“STAC”).\(^65\) That fact

---

\(^{64}\) SULLIVAN ET AL., supra note 6, at 162. The authors note that the decisive assessment of student progress at the end of the first year is the set of essays that follows each course. \textit{Id.} They state that “[t]he end-of-semester essay examination holds a privileged, virtually iconic place in legal education.” \textit{Id.} at 164. However, the end of the semester essay examination rarely permits a student to improve his position in that class. Instead, the results are final and the grades are unchangeable, with no opportunity for students to learn from their shortcomings.

\(^{65}\) See Student Trial Advocacy Competition (STAC), AM. ASS’N FOR JUSTICE, http://www.justice.org/cps/rde/justice/hs.xsi/1734.htm (last visited Oct. 20, 2011). The American Association for Justice (“AAJ”) holds the Student Trial Advocacy Competition (“STAC”) annually. \textit{Id.} AAJ states that the purposes of the STAC is “to inspire excellence in trial advocacy through training and education for both law students and practicing attorneys.” \textit{Id.} The association accomplishes this goal in part by sponsoring the National Student Trial Advocacy Competition, an annual nationwide mock trial competition. \textit{Id.} The website notes that “[t]he competition is an exceptional opportunity for law students to develop and practice their trial advocacy skills before distinguished members of the bar and bench.” \textit{Id.} The competition is broken into fourteen regions across the country, where sixteen teams compete to win each region. Student Trial Advocacy Competition (STAC),
pattern involved a motor vehicle accident between a car driven by an elderly widow and a tractor-trailer driven by a slightly less than reputable truck driver. In this fact pattern, the plaintiff stated that the defendant truck driver tried to pass her on a rural road with a limited line of sight, while the defendant argued that the plaintiff widow suddenly, and without warning, pulled in front of him, forcing him to take evasive maneuvers.

Instead of composing a three hour essay on the elements of negligence, the trial advocacy class requires students to sift through various depositions, witness statements, expert reports, and exhibits to find the facts that support a cause of action for negligence, or alternatively, the facts demonstrating due care. Next, those facts must be interwoven to present a cohesive and persuasive story that is meant to convince a jury to render a favorable verdict. In the midst of deciphering this substantive morass, the student must be mindful of the mechanics and applicability of the rules of evidence when ascertaining the admissibility of the desired evidence. Utilization of this method of instruction involves greater complexity than the false perception that some may have of the trial advocacy class as being a place where a student is taught only sound questioning or arguing techniques.

D. The Ethical Component of Advocacy

The concept of ethics in the legal arena, at times, appears to be a contradictory notion. In a system premised upon the concept of adversarial justice, the lawyer must at all times remember that in addition to her obligation to the client, there remains an obligation to the system itself—after all, the lawyer is a sworn officer of the court. A law student’s knowledge of the rules of ethics is ultimate.
mately tested by the Multistate Professional Responsibility Exam ("MPRE").69

The MPRE is designed to measure a student's knowledge and understanding of established standards related to a lawyer's professional conduct.70 According to the National Conference of Bar Examiner's website, "[t]he MPRE is developed by a six-member drafting committee composed of recognized experts in the area of professional responsibility."71 Essentially, this means that a future member of the bar's understanding of the ethical rules of conduct associated with being an attorney is determined by their ability to successfully pass a two-hour long multiple-choice examination.

V. CONCLUSION

By now, several things are clear. The utilization of the trial in the American judicial system is in a steady decline.72 Fewer trial attorneys, all with less trial experience, translates into a weakened desire to go to trial. Attorneys are now steering their clients to alternative means of dispute resolution, such as arbitration and mediation.73 The cumbersome nature of the discovery process has, essentially, turned the pretrial procedure into a bleeding contest between adversaries.

All of this, however, does not, and should not, mean the death of the trial advocacy class. It is clear that the authors of the Carnegie Report recognize the value of such experiential learning classes and are advocating on their behalf.74 These types of classes provide the learning experiences that help transition law students into law practitioners. While the fundamental purpose of a law student's doctrinal classes is to teach and enforce legal reasoning and analysis, the experiential class takes these lessons to the next

69. The MPRE, NAT'L CONF. OF BAR EXAMINERS, http://www.ncbex.org/multistate-tests/mpre/ (last visited Oct. 20, 2011). The MPRE "is a 60-question, two-hour-and-five-minute, multiple-choice examination administered three times per year" and "is required for admission to the bars of all but four U.S. jurisdictions." Id.
70. Id. The MPRE is based on the American Bar Association ("ABA") Model Rules of Professional Conduct, the ABA Model Code of Judicial Conduct, and "controlling constitutional decisions and generally accepted principles established in leading federal and state cases and in procedural and evidentiary rules." Id.
72. See Galanter, supra note 1.
73. AM. COLL. OF TRIAL LAWYERS, supra note 30, at 22.
74. See generally SULLIVAN ET AL., supra note 6.
logical step—forcing the student to be the lawyer. Without a form of internship or residency to ease the transition into actual practice, these classes are essential tools for instructing students on what they should expect when they are admitted to the practice of law.

Moreover, the fundamental lessons provided in a trial advocacy class tend to weave together the doctrinal education that provides the foundation for the law student’s ability to practice. Students are forced to consider the individual lessons they have learned up to that point and then apply these unique individual lessons simultaneously. Students are no longer limited to reading carefully edited appellate opinions, but rather are able to witness and appreciate the interplay between several areas of law at one time.

These lessons do not even need to be confined to future trial practice. As explained above, more often than not, a case will be resolved through some form of dispute resolution process other than a trial. The skills learned in the trial advocacy classroom apply equally to the future lawyer’s ability to successfully prepare and advocate for her client in these alternative forums. Students leave law school understanding that they can take discovery of their opposition’s client through interrogatories and depositions, but after trial advocacy, they understand the fundamental goals and purposes of the discovery process and the reasons for seeking certain information while turning away from other evidence.

With the unique advantages that it brings to a legal education, it is unmistakable that the trial advocacy class is an invaluable part of any law school curriculum. The opportunities presented in these classes afford the law student an opportunity that would not otherwise be available until the student transitions to actual practice. Accordingly, the trial advocacy class, and other such experiential classes, should be elevated to a place of greater prominence in the law school curriculum.