

Advocacy in the Age of the Vanishing Trial

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Advocacy Under the Federal Rules of Civil Procedure After 75 Years¹⁵⁴
Friday, November 9, 2012

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Many recognize the problem

“Historically, public trials have been important sources of information ... for some of the most important public issues that have arisen in our history We would be the much poorer in our understanding of [certain] events without what we have learned from the public trials that illuminated them” -- Prof. Robert Burns

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Potential outcomes resulting from the disappearance of the trial include “potential loss of focus on the intent of the controlling law,” “ ‘private justice’ in a system designed to be public,” and “worrisome disconnect between trial and pre-trial phases.” -- Judge Patrick E. Higginbotham

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"[T]he great challenge of the law will always be to provide stability and yet to change to meet society's needs. Our goal should be to seek a proper balance for the work of the civil jury in order to enhance its viability." -- Judge Royal Furgeson

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"Juries ... provide a vital buffer between the all-powerful government and the individual before the court. Without juries, all decisions either imposing or relieving civil or criminal liability – whether from the executive, legislative, or judicial branch – come from people who are employees of governmental entities." – Judge Sam Sparks

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Many recognize the problem

"In a realm of ever-proliferating legal doctrine ... arguments and decisions become more detached from the texture of facts. Paradoxically, as legal doctrine becomes more voluminous and more elaborate, it becomes less determinative of the outcomes produced by legal institutions." -- Prof. Marc Galanter

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Lawyers must still be advocates

- Discovery
- Motion practice
- Hearings
- Depositions
- Settlement negotiations and mediation

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Learn the facts first

- Client and witness interviews
- Know the key documents
- Third party sources

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Application of law to facts

- Pay attention to authors of opinions
- Look for articles/briefs by opposing counsel
- Draft a jury charge

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Develop the theme of your case

- Identify “buckets” for your arguments
 - Guides how you frame everything afterwards
 - Be flexible
- Lens through which the case is viewed

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Advocacy in discovery

- Set up issues you can win
- Develop game plan
- Oral depositions — your best chance to be an advocate during discovery

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Advocacy with experts

- What experts (if any) do you need?
- How to prepare the expert
- 2010 amendments to FRCP 26

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Advocacy in motion practice

- Goal in filing motion
- Hearings
 - Quickly get to the key issue
 - Simplify
 - Don't just read or summarize the motion
 - Timing of filing

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Advocacy in settlement negotiations

- Know the case
- To mediate or not?
- Advocacy at mediation

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What Can a Young Lawyer Do?

- Observe
- Be proactive
- Find mentors
- Pro bono
- Attend trial academy programs

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