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Advocating Altering Advocacy Academics: A Proposal to Change the Pedagogical Approach to Legal Advocacy

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ADVOCATING ALTERING ADVOCACY ACADEMICS: A PROPOSAL TO CHANGE THE PEDAGOGICAL APPROACH TO LEGAL ADVOCACY

C.J. Williams¹

TABLE OF CONTENTS

I. INTRODUCTION	204
II. HISTORY OF LAW SCHOOL ADVOCACY ACADEMICS	206
A. Development of Appellate Advocacy Programs	206
B. Development of Jury Trial Advocacy Programs	208
C. Advocacy Courses in Law Schools	209
III. THE EVOLVING TREND OF LITIGATION IN AMERICA	210
A. Vanishing Jury Trials	211
B. Increasingly Rare Appellate Oral Arguments	213
C. Increase in Motion Practice	213
D. Conflicting Timelines	214
IV. DIFFERENCES IN JUDGES, JURIES, AND APPELLATE COURTS	215
A. Differences in Context	217
1. Whether Advocacy is Written, Oral, or Both	217
2. Whether the Facts Are in Dispute	218
3. Whether the Rules of Evidence Apply	220
B. The Decision-Maker	225
1. Whether Group Decision-making Occurs	225
2. Whether There are Collateral Pressures on the Decision-maker	226
3. Whether the Decision-maker is Legally Trained	228
4. Whether the Decision-Maker is Knowable	229
5. Whether the Advocate Will Reappear Before the Decision-maker	230
6. Whether the Advocate and Decision-maker can Converse	231
V. DEVELOPING AN INTEGRATED APPROACH TO LEGAL ADVOCACY	233

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I. INTRODUCTION

Law schools are preparing students for a world of litigation that no longer exists. Gone are the days of frequent jury trials and appellate arguments. Yet, law schools persist in teaching these advocacy skills and largely ignore instruction on persuading district court judges.

Litigation involves persuasion, through written or oral advocacy, and sometimes, depending on the decision-maker, both. Law schools provide opportunities for students to learn the art of legal persuasion through trial and appellate advocacy classes. Trial advocacy programs are focused on teaching students the skills of presenting evidence to and persuading juries.² Appellate advocacy programs are focused on teaching students the skills of appellate brief writing and persuading a panel of judges in a timed and structured oral argument setting. Jury trial advocacy and appellate advocacy courses were created at a time when juries decided a large percentage of cases, and appellate courts entertained arguments in a high percentage of cases.³

Since then, jury trials have largely disappeared, and appellate oral arguments are disappearing. The number of jury trials occurring in practice has plummeted, as have the number of appellate oral arguments.⁴ At the same time, the number of pretrial motions has increased significantly.⁵ Thus, the focus of litigation has shifted to the pretrial stage. Nevertheless, law schools keep producing graduates who can try jury trials and conduct appellate arguments, but fewer graduates emerge from law school having learned anything about motion practice or arguing to district judges.⁶ Missing from law school curriculum are courses focused on teaching students how to persuade judges at the district level, whether it be in a bench trial or in hearings—a skill I will call judicial advocacy.⁷ It is time that we

² It is for this reason that I will refer to trial advocacy programs as jury trial advocacy programs.

³ See *infra* notes 18–38 and accompanying text.

⁴ See *infra* notes 39–60 and accompanying text.

⁵ See *infra* notes 61–68 and accompanying text.

⁶ See Peter Toll Hoffman, *Law Schools and the Changing Face of Practice*, 56 N.Y.L. SCH. L. REV. 203, 205–06 (2012) (noting that young lawyers are most likely to appear before and argue motions to district court judges, rather than handle jury trials).

⁷ Indeed, there is not even a term commonly used to refer to this type of advocacy. It is not trial advocacy, except when it is a bench trial, but it certainly is not appellate advocacy. In another article, the Honorable Leonard T. Strand and I have coined the term “judicial advocacy” to refer to this form of advocacy. See C.J. Williams & Leonard T. Strand, *Judicial Advocacy: How to*

shift the focus of legal advocacy education from the historic emphasis on jury trials and appellate court oral arguments to incorporate and emphasize instruction on judicial advocacy.⁸ As Bob Dylan famously predicted they would, the times have changed and the legal curriculum needs to change with the times.⁹

It is also important to understand that the skills learned in jury trial and appellate advocacy courses are not all transferrable to the trial court setting.¹⁰ Some of those skills can be ineffective with district judges, and others may actually be counterproductive.¹¹ The context of advocacy to

Advocate to a Judge (pending publication in the American Journal of Trial Advocacy 2020). Thus, I will use that term in the same fashion in this Article.

⁸ I hesitate to label judges at the district court level, like myself, as “trial judges” when, in fact, we preside over a decreasing number of trials each year. It is akin to the change in terminology adopted by many attorneys by moving away from calling themselves “trial attorneys,” and instead using the broader term “litigators.” See Mark W. Bennett, *Essay: The Grand Poobah and Gorillas in Our Midst: Enhancing Civil Justice in the Federal Courts—Swapping Discovery Procedures in the Federal Rules of Civil and Criminal Procedures and Other Reforms Like Trial by Agreement*, 15 NEV. L.J. 1293, 1308–10 (2015) (emphasizing how “vanishing” trials caused attorneys to no longer refer to themselves as trial attorneys); see also Robert P. Burns, *Advocacy in the Era of the Vanishing Trial*, 61 U. KAN. L. REV. 893, 893–94 (2013) (“It has often been remarked ruefully that ‘trial lawyers’ have almost all become ‘litigators.’”). Hence, I have chosen to refer in this Article to judges below the appellate level as simply “judges” or “district judges,” and include within the definition of this term all judicial officers below the appellate court level who decide matters, whether they are motions or bench trials, on their own and not as a member of a judicial panel with other judges.

⁹ See Hoffman, *supra* note 6, at 205, 208 (explaining change in practice of law and arguing that “law schools continue to be a ‘step behind’ in preparing students for the practice of law,” and concluding that “today’s students are being readied for yesterday’s legal practice”); see also John K. Larkins, Jr., *Oral Argument on Motions*, 23 No. 2 LITIG. 16, 16 (1997) (suggesting that arguing motions before judges “is far and away the most common form of oral advocacy, and often the most important.”). Nonetheless, motion practice has received the least amount of systematic thought or study. See Larkins, *supra* note 9, at 16. Jury advocacy and appellate advocacy garner the glamor of law school courses. *Id.* “Oral argument before a trial court and without a jury, which occurs much more frequently than jury or appellate arguments (even in these days of law clerks and briefs), is the blue-collar, day-in-day-out thing lawyers do routinely—and sometimes not very well.” *Id.*

¹⁰ Cheerleaders for moot court programs tend to believe that skills learned there prepares students to argue in any court. See Barbara Kritchevsky, *Judging: The Missing Piece of the Moot Court Puzzle*, 37 U. MEM. L. REV. 45, 47 (2006) (“Moot court give students a taste of real appellate work while teaching skills that will help both in law school and in all areas of practice.”); see also John T. Gaubatz, *Moot Court in the Modern Law School*, 31 J. LEGAL EDUC. 87, 87 (1981) (“The [appellate advocacy] experience has the corollary benefit of preparing counsel for the task of making legal arguments before any court, and in general strengthens persuasive skills.”). Although I believe appellate advocacy courses are very valuable, I disagree, for the reasons explained in this Article, that the skills learned in appellate advocacy courses equip students effectively to argue before any court.

¹¹ See *infra* Part IV.

district judges is different than that needed for juries and appellate courts.¹² District judges also hear and decide cases differently than jurors and juries and to some degree differently than appellate judges.¹³

Law schools need a new approach to teaching advocacy. Law schools need an approach that: (1) recognizes that there are differences in effective advocacy to judges, juries, and appellate courts; (2) identifies ways to make attorneys more effective with each decision-maker; and (3) develops advocacy programs that teach students how to be effective advocates in all three settings.

In this Article, I first review the history of advocacy programs in law schools.¹⁴ Next, I place the development of those programs in the context of the changing nature of litigation practice from the time these programs were developed to today.¹⁵ The penultimate section of the Article summarizes just some of the ways in which effective advocacy differs between judges, juries, and appellate courts.¹⁶ In conclusion, I propose the development of a single, more integrated legal advocacy program that incorporates advocacy to judges, juries, and appellate courts, in that order.¹⁷

II. HISTORY OF LAW SCHOOL ADVOCACY ACADEMICS

Law schools educate students about effective advocacy in two litigation settings: jury trials; and appeals. The focus on teaching students how to advocate to juries and appellate courts is the product of two developments in the history of legal education. Appellate advocacy training developed first as a result of the focus of modern legal education on appellate cases.¹⁸ A jury trial advocacy organization, on the other hand, spearheaded the start of jury trial advocacy programs.¹⁹

A. *Development of Appellate Advocacy Programs*

The modern law school education's use of the case method has been the dominant form of American legal education since Professor Christopher Columbus Langdell introduced the practice at Harvard Law School in

¹² See *infra* Section IV.A.

¹³ See *infra* Section IV.B.

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part III.

¹⁶ See *infra* Part IV.

¹⁷ See *infra* Part V.

¹⁸ See *infra* text accompanying notes 20–29.

¹⁹ See *infra* text accompanying notes 30–35.

1870.²⁰ This method focuses on the examination of appellate court decisions as a means of understanding the purpose, development, and meaning of the law.²¹ It is a scientific approach to the law divorced from a skills-based approach.²²

Moot court programs began in American law schools in the early 1800s. Harvard Law School started its moot court program in 1820, and the University of Virginia School of Law followed in the mid-1840s.²³ Moot court complemented and really became an extension of the case method of teaching in law school because both methods focused on appellate courts and opinions.²⁴ Moot court programs can also accurately be described as appellate advocacy programs because they invariably are set in a mock appellate court.²⁵ That means, of course, that the focus is on legal arguments, and not factual disputes, which are almost always the actual focus of a district court's ruling.²⁶ Today, most, if not all, law schools have moot court programs as part of their curriculum.²⁷ These moot court programs, and the national and international competitions that have arisen from them, involve students writing appellate briefs and making oral arguments in a mock

²⁰ See Hoffman, *supra* note 6, at 209 (highlighting history and development of case method of legal education).

²¹ See John T. Gaubatz, *Of Moots, Legal Process, and Learning to Learn the Law*, 37 U. MIAMI L. REV. 473, 481–82 (1983) (highlighting development of case method of legal education).

²² See Hoffman, *supra* note 6, at 209 (“But Langdell’s new teaching method came with a price—its ‘scientific’ approach to the law and its exclusive focus on appellate court decisions caused legal education to become divorced of nearly all skills training except legal analysis, research, and writing.”).

²³ See LARRY L. TEPLY, *LAW SCHOOL COMPETITIONS IN A NUTSHELL* 19 (2003) (acknowledging moot court started at Harvard Law School and “spread quickly to other law schools”); see also Darby Dickerson, *In re Moot Court*, 29 STETSON L. REV. 1217, 1223 (2000) (citing *First-Year Ames Moot Court*, HARV. L. SCHOOL, <https://orgs.law.harvard.edu/bsa/11-ames/> (last visited Apr. 16, 2020), and JOHN RITCHIE, *THE FIRST HUNDRED YEARS: A SHORT HISTORY OF THE UNIVERSITY OF VIRGINIA FOR THE PERIOD 1826–1926* 34 (1978)) (recounting history of moot court programs as component of legal education).

²⁴ See Hoffman, *supra* note 6, at 209 (noting that appellate advocacy programs were largely an extension of writing aspect of case method); see also ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 229 n.88 (1983) (stating that by 1948 nearly all law schools had appellate moot court programs).

²⁵ See Eric E. Bergsten, *Experiential Education Through the Vis Moot*, 34 J. L. & COM. 1, 4 (2015) (explaining how “moot court” most typically refers to appellate, and not trial, advocacy).

²⁶ See *id.* (“The typical moot court is set in an appellate court, which means that only legal issues are available for argument, not the factual issues that probably dominated the case in the trial court.”).

²⁷ See Kritchevsky, *supra* note 10, at 45–46 (emphasizing that “virtually every law school has a moot court board that runs in-school competitions”); see also Gaubatz, *supra* note 10, at 87 (stating that in 1981, “most [law] schools have some moot court in their research and writing program”).

appellate court.²⁸ It is sometimes the only required law school component that teaches students anything about oral advocacy.²⁹

B. Development of Jury Trial Advocacy Programs

Although they are a half-century old now, jury trial advocacy courses are a more recent development. The first jury trial advocacy courses were offered in law schools in the 1970s.³⁰ Jury trial advocacy courses were the direct result of the founding of the National Institute for Trial Advocacy (NITA) in 1971.³¹ NITA offered its first jury trial advocacy course in the summer of 1972.³² Soon thereafter, law schools began somewhat reluctantly offering jury trial advocacy classes.³³ Nevertheless, the NITA methodology, which focused on jury trial advocacy, eventually became the model upon which all law school jury trial advocacy programs were based.³⁴ Today,

²⁸ See Gaubatz, *supra* note 10, at 89–90 (describing moot court program generally); see also Dickerson, *supra* note 23, at 1219–22 (detailing process of joining moot court team and what being on team entails).

²⁹ See Richard E. Finneran, *Wherefore Moot Court*, 53 WASH. U. J.L. & POL'Y 121, 125 (2017) ("For most law students, moot court serves as their singular introduction to the art of appellate advocacy during their time in law school. For some, it may be their sole orientation to oral advocacy altogether."); see also Jennifer Kruse Hanrahan, *Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools*, 2003 B.Y.U. EDUC. & L.J. 299, 305–06 (2003) (summarizing course offerings at major American law schools).

³⁰ See Hoffman, *supra* note 6, at 210 (discussing history of development of jury trial advocacy programs in law schools); see also Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMP. L. REV. 1, 1 (1993) ("Until the last quarter century, law schools did not [train students in jury trial advocacy.]"); James W. McElhaney, *Toward the Effective Teaching of Trial Advocacy*, 29 U. MIAMI L. REV. 198, 198 (1975) (stating that only since 1970s have law schools offered jury trial advocacy courses). There were, to be sure, earlier versions of skills-based courses offered in the mid-century, but they largely focused on legal analysis and the drafting of legal documents related to trial practice and bore little resemblance to the modern jury trial advocacy course. See STEVENS, *supra* note 24, at 214–15, 227 n.77–78 (describing training only tangentially mentioning "argumentative advocacy," and instead focusing on draftsmanship, research, and writing); see also Hoffman, *supra* note 6, at 210 (noting that mid-century skills-based training "bore scant resemblance to the trial advocacy courses of today").

³¹ See Hoffman, *supra* note 6, at 210 ("It was only with the founding of the National Institute for Trial Advocacy (NITA), in 1971, that things began to change and trial advocacy became an established part of the law school curriculum.").

³² See Terence F. MacCarthy, *The History of the Teaching of Trial Advocacy*, 38 STETSON L. REV. 115, 117 (2008) (discussing history of trial advocacy law classes).

³³ See *id.* at 123 (noting reluctance of law schools to embrace skills-based curriculum in academic setting).

³⁴ See Hoffman, *supra* note 6, at 211 (explaining how NITA methodology regarding trial advocacy was rapidly adopted by law schools).

“every law school in the country offers a course focused on building trial advocacy skills.”³⁵

C. Advocacy Courses in Law Schools

Law schools generally require first-year students to take an appellate advocacy class, which involves writing an appellate brief and making a corresponding oral argument.³⁶ The course is intended to provide basic research, writing, and oral advocacy skills thought to be of aid to every law student, even if a student later chose not to enter the litigation field. Trial advocacy and advanced appellate advocacy courses, which feed into competitions, are elective upper-level courses. The courses are not interconnected, meaning the factual record and legal issues in the trial and appellate advocacy courses are not the same. In other words, the appellate advocacy course does not involve an appeal of the case problem that was the subject of the trial advocacy course.

In recent decades, law schools have made some pedagogical changes in response to the increasing use of alternative dispute resolution (ADR), instead of trials, to resolve legal disputes. Scores of law schools offer classes on mediation or other forms of ADR, and law school ADR competitions have emerged as well.³⁷ NITA has also broadened its publication offerings in

³⁵ *Id.*

³⁶ See Dickerson, *supra* note 23, at 1218 (“Moot court—or appellate advocacy—skills are typically taught as part of the first-year research and writing curriculum and are sharpened in some upperlevel [sic] electives.”); see also Gaubatz, *supra* note 10, at 90 (explaining that moot court programs are normally “an integral part of the first-year program”).

³⁷ See Laurie A. Lewis, *Law Student Mediators Wear a Triple Crown: Skilled, Sellable, and Successful*, 50 U.S.F. L. REV. 165, 168 n.9 (2016) (“Approximately 185 U.S. law schools offer courses in ADR, twenty-three of which self-report as having ADR class requirements.”); Cynthia A. Savage, *Recommendations Regarding the Establishment of a Mediation Clinic*, 11 CARDOZO J. CONFLICT RESOL. 511, 512 (2010) (reporting number of mediation clinics in Canadian and American law schools); see also Joseph B. Stulberg, Donald C. Peter, Tracy L. Allen & Judith P. Myers, *Creating and Certifying the Professional Mediator-Education and Credentialing*, 28 AM. J. TRIAL ADVOC. 75, 78 (2004).

[Noting that a 2003 survey showed] 79, almost half of the 184 ABA approved law schools, offer a course focused on mediation Eighty-seven schools offer a course in negotiation. Nine schools now are offering a specific course in dispute resolution advocacy, which presumably includes mediation advocacy. One hundred forty-one schools offer a dispute resolution survey course, which presumably covers negotiation but may or may not cover mediation.

Peter, *supra* note 37, at 78. See Robert Robinson, *Of Grids and Gatekeepers: The Socioeconomics of Mediation*, 17 CARDOZO J. CONFLICT RESOL. 873, 904 (2016) (noting “American Bar Association sponsors a ‘Representation in Mediation Competition’ for law students”); see also

response to an increase in ADR use to include numerous volumes on mediation, arbitration, and litigation before administrative agencies.³⁸

Missing from the advocacy curriculum in law schools today are courses focused on teaching students the skills they are most likely to exercise in practice, such as persuading a judicial officer occupying the role of decision-maker. This is a skill of increasing importance. As explained in Part III of this Article, litigation has evolved in America, resulting in a decrease in the number of jury trials and appellate oral arguments, and leading to an increase in motions practice.

III. THE EVOLVING TREND OF LITIGATION IN AMERICA

“For the first one hundred years following the invention of the modern American law school in 1870, trials were common occurrences and were generally accepted as a primary method of resolving legal disputes in this country.”³⁹ No longer is this the case. Much has been written already about vanishing jury trials,⁴⁰ and at least some has been written, in passing, about vanishing appellate oral arguments.⁴¹ This Article does not intend to

Douglas Pilawa, *Sifting Through the Arbitrators for the Woman, the Minority, the Newcomer*, 51 CASE W. RES. J. INT’L L. 395, 401 (2019) (describing Willem C. Vis International Commercial Arbitration Moot competition as “an international arbitration competition with thousands of law school participants”).

³⁸ See NAT’L INST. FOR TRIAL ADVOC., <https://www.nita.org/publications/books-dvds> (last visited Mar. 24, 2020) (listing NITA’s book titles and descriptions). NITA offers courses on many topics, but none for motions practice appear on its 2020 calendar of courses. See *id.* (courses dropdown tab provides access to online courses as well as courses in twenty states).

³⁹ Hoffman, *supra* note 6, at 205.

⁴⁰ 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, 460 (2004) (“In some, perhaps most, forums, the absolute number of trials has undergone a sharp decline.”); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524? (2012) (discussing drastic decline in number of civil cases concluding at trial); Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2135 (2018) (discussing drastic decline in number of civil trials at state and federal levels); Graham K. Bryant & Kristopher R. McClellan, *The Disappearing Civil Trial: Implications for the Future of Law Practice*, 30 REGENT U. L. REV. 287, 287 (2018) (addressing “the widespread disappearance of traditional civil trials from state and federal courts across America”); Robert J. Conrad, Jr., & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 103 (2018) (noting from 2006 to 2016 that jury trial criminal cases declined forty-seven percent); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90–91, fig.1 (2005) (showing in 2002 that federal criminal trials occurred in 4.8% of cases).

⁴¹ See Galanter, *supra* note 41, at 529 (“Although the number of appeals has increased, the number subject to intensive full-dress review has declined. More appeals are decided on the basis of briefs alone, without oral argument.”); see also Nancy Winkelman, *Just a Brief Writer?*, 29 LITIG. 50, 51 (2003) (highlighting in 2002 how two-thirds of U.S. Courts of Appeals cases decided

add new data or insight into the causes for the marked decline. Rather, the point here is to take a more careful look at that data in relation to when law schools began providing trial and appellate advocacy classes. Here, I will summarize the findings regarding significant decreases in jury trials and appellate oral arguments, increases in motions practice, and then contrast the timeline of these events with the timeline of law schools offering jury trial advocacy and appellate advocacy courses.

A. *Vanishing Jury Trials*

In the 1930s, a fifth of all civil cases filed in federal courts were resolved at trial.⁴² In a very real sense, “[c]ivil practice was still [then] in significant measure a trial practice.”⁴³ In 1962, 11.5 percent of civil cases proceeded to trial.⁴⁴ In 1972—around the time law schools started offering jury trial advocacy courses⁴⁵—about nine percent of federal civil cases went to trial.⁴⁶ By 2002, the number of federal civil cases proceeding to trial dropped to 1.8 percent.⁴⁷ By 2016, a mere one percent of federal civil cases were resolved at trial.⁴⁸ Two years later, that number slipped below one percent.⁴⁹ The number of civil cases proceeding to trial in state court, where

without oral argument); Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. STATE L. J. 1489, 1544–45 (2012) (showing trend among federal circuit courts of appeal toward holding fewer oral arguments); Finneran, *supra* note 29, at 121 (“Appellate argument is in decline.”).

⁴² See Langbein, *supra* note 40, at 524 (citing Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 185 n.9 (2001), in turn citing Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 633 n.3 (1994), in turn citing a 1938 report by the Attorney General)); see also Galanter, *supra* note 40, at 464 (explaining 18.9% of civil cases were terminated by trial in 1938).

⁴³ See Langbein, *supra* note 40, at 524; see also Bryant, *supra* note 40, at 295 (noting civil trials made up 19.9% of all case dispositions in 1938).

⁴⁴ See Galanter, *supra* note 40, at 461 (examining disproportionate increase in total dispositions compared to decrease in trial dispositions).

⁴⁵ See MacCarthy, *supra* note 32, at 123 (relating history of trial advocacy courses in law schools).

⁴⁶ See Langbein, *supra* note 40, at 524 (denoting consistent decline in cases tried over decades).

⁴⁷ See Galanter, *supra* note 40, at 461.

⁴⁸ See Bryant, *supra* note 40, at 295.

⁴⁹ See *Judicial Business of the United States Courts 2018*, ADMIN. OFF. U.S. CTS. (U.S. COURTS), <http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts> (last visited Mar. 20, 2020). There is reason to believe that even these numbers overstate the percentage of federal cases that actually go to “trial” in the common understanding of that term (when either a judge or a jury renders a verdict after presentation of evidence). That is because what the Administrative Office of the United States Courts counts as “trials” include “all

most cases are filed,⁵⁰ has also dropped precipitously. Between 1976 and 2002, the percentage of state civil cases proceeding to jury trial dropped from 1.8 percent to .06 percent, and the number of civil cases proceeding to bench trials dropped from 34.3 percent to 15.2 percent.⁵¹ From 1992 to 2002, there was an even more pronounced forty-four percent drop of the number of state civil cases proceeding to jury trial, and bench trials dropped twenty-one percent.⁵²

The number of criminal cases proceeding to jury trial has also dropped precipitously. In 1962—again shortly before law schools began teaching jury trial advocacy—approximately fifteen percent of federal criminal cases went to trial.⁵³ By 2002, that number dropped to under five percent.⁵⁴ By 2018, the number of defendants tried by a jury fell to two percent.⁵⁵ The drop was similar in state criminal cases in 2002, going from 8.5 percent proceeding to trial in 1976 to 3.3 percent proceeding to trial.⁵⁶ In short, “we have gone from a world in which trials, typically jury trials, were routine, to a world in which trials have become ‘vanishingly rare.’”⁵⁷

contested proceeding[s] at which evidence is introduced.” See Engstrom, *supra* note 40, at 2139 (internal quotations omitted).

⁵⁰ See Galanter, *supra* note 40, at 506 (“The great preponderance of trials, both civil and criminal, take place in the state courts.”).

⁵¹ See *id.* at 506–07; see also Bryant, *supra* note 40, at 297–98 (noting civil bench and jury trials declined from 36% in 1976 to under 16% in 2002). It is important to note that from 1976 to 2002, far more state cases were resolved by bench trial than by jury trial. See Bryant, *supra* note 40, at 298 (observing that the number of civil jury trials “never approach[] the number of civil bench trials.”). Yet law schools have focused on teaching students how to try jury trials instead of bench trials. See John N. Sharifi, *Approaching the Bench: Trial Techniques for Defense Counsel in Criminal Bench Trials*, 28 AM. J. TRIAL ADVOC. 687, 687 (2005) (observing that “training in trial advocacy almost universally focuses only on the jury trial. Rarely, if ever, are trial advocacy techniques taught in the context of bench trials.”). A glance at texts on trial advocacy reveal the same focus on jury trials. See generally STEVEN LUBERT & J.C. LORE, MODERN TRIAL ADVOCACY: ANALYSIS & PRACTICE (5th ed. 2015); THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS (10th ed. 2017). The National Institute for Trial Advocacy text, *Modern Trial Advocacy*, only references bench trials in passing in three places. Professor Thomas A. Mauet’s *Trial Techniques* addresses the topic in a final chapter, which is nineteen pages in a 619-page text.

⁵² See Galanter, *supra* note 40, at 508 (noting “an even more pronounced 44 percent drop in the absolute number of jury trials” from 1992 to 2002).

⁵³ See *id.* at 493.

⁵⁴ See *id.*

⁵⁵ See U.S. COURTS, *supra* note 49 (showing how another .3 percent were tried in a bench trial).

⁵⁶ See Galanter, *supra* note 40, at 510.

⁵⁷ See Langbein, *supra* note 40, at 524. It is also interesting—and relevant to the importance of training law students about judicial advocacy as opposed to jury trial advocacy—that the few trials occurring each year are also getting shorter. See generally Engstrom, *supra* note 40, at 2133 (“[T]rials are not only vanishing. The few that remain also appear to be shrinking . . . trials seem to

B. Increasingly Rare Appellate Oral Arguments

The number of cases proceeding to appeal and oral argument has also declined significantly in the last century. With the decline in cases going to trial, there is a corresponding decline in the number of cases appealed because many cases were resolved by settlement or guilty plea.⁵⁸ More importantly, fewer appeals result in oral arguments. Between 1997 and 2007, federal appeals courts went from hearing oral arguments in forty percent of all cases to twenty-seven percent on average—a stark thirty-three percent decline.⁵⁹ The latest data from the U.S. Courts for the fiscal year ending September 2018 shows that oral arguments were granted in only slightly more than twenty percent of all appeals terminated on the merits.⁶⁰

C. Increase in Motion Practice

In contrast to the sharp decline in jury trials and appellate oral arguments, the number of motions heard and decided by district court judges has increased.⁶¹ In civil cases, district court judges can enter orders that are dispositive as to all or some of a party's claims in ruling on motions to dismiss or motions for summary judgment.⁶² In federal courts, the development of civil discovery, combined with the adoption of the summary judgment rule (Federal Rule of Civil Procedure 56) in 1937 and the Supreme Court's broad interpretation of Rule 56 in a trilogy of cases in 1986,⁶³ has

be undergoing a subtle metamorphosis: becoming shorter, more regimented, subject to less party control, and more affected by particular judicial whims.”).

⁵⁸ See Galanter, *supra* note 40, at 505 (noting federal cases are appealed four times more than cases terminated without trials, “[a]nd as the proportion of tried cases falls, the portion of concluded appeals that are from trials falls and so does the absolute number of appellate decisions in tried cases”); see also Bryant, *supra* note 40, at 314 (discussing “[t]he most obvious—and most important—consequence of fewer civil trials on appellate courts is that there are fewer appeals.”).

⁵⁹ See Marder, *supra* note 41, at 1545; see also Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeal Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 916 (1995) (noting in 1995 “between 40% and 50% of the appeals decided on the merits by [federal] courts of appeals in recent years are being decided without oral argument.”).

⁶⁰ See U.S. COURTS, *supra* note 49.

⁶¹ See Engstrom, *supra* note 40, at 2136 (explaining that “. . . over the years, we have seen an uptick in pretrial motions practice (both motions to dismiss and motions for summary judgment).”).

⁶² See FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 56.

⁶³ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324–25 (1986) (ruling Rule 56 did not require party to support motion with affidavits or similar materials); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252–56 (1986) (specifying evidentiary standards apply when ruling on motions for summary judgment); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–88 (1986) (dictating standards courts of appeal use to evaluate district courts' motions for summary judgment decisions).

led to an increase in the number of cases disposed of by district judges.⁶⁴ Although reliable empirical evidence on the percentage increase in cases disposed of by summary judgment as a result of these developments is lacking,⁶⁵ the evidence clearly shows that the numbers have increased by as little as six percent to as much as seventy-three percent in some types of cases.⁶⁶ In short, “we have moved from a world in which dispositions by summary judgment were equal to a small fraction of dispositions by trial into a new era in which dispositions by summary judgment are a magnitude several times greater than the number of trials.”⁶⁷ Regardless of the number of times district judges disposed of cases on summary judgment, it is important to note that they have the power to do so and parties are increasingly filing motions for summary judgment where effective judicial advocacy is crucial to whether the case survives for jury trial. Similarly, in criminal cases, district judges can make dispositive rulings on motions to dismiss and to suppress.⁶⁸

D. *Conflicting Timelines*

Tracing the history of legal advocacy education and the history of jury trials/appellate oral arguments allows us to compare them and recognize how they once matched and no longer do. In summary, when law schools adopted appellate advocacy programs approximately 20 percent of civil cases proceeded to trial—many of which led to appellate oral arguments.⁶⁹ Today, less than one percent of all federal civil cases proceed to trial,⁷⁰ resulting in far fewer appeals; when cases are appealed, oral argument is

⁶⁴ See Langbein, *supra* note 40, at 567–68 (discussing impact of adoption of civil discovery rules and Rule 56 on motions practice increase); see also Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 883 (2007) (“Over the 25-year period [from 1975 to 2000], the percentage of cases with one or more summary judgment motions granted in whole or in part doubled from 6 percent to 12 percent.”).

⁶⁵ See Langbein, *supra* note 40, at 568 (“Reliable empirical evidence regarding the percentage of cases resolved on summary judgment has proved difficult to obtain.”).

⁶⁶ See *id.* at 568–69 (presenting empirical findings of summary judgment adjudication). Stephen Burbank’s 2004 study concluded that, between 1960 and 2000, the number of federal civil cases disposed of by summary judgment order increased from 1.8 percent to 7.7 percent. *Id.* More recent data shows that courts granted summary judgment motions in 70 percent of civil rights cases and 73 percent of employment discrimination cases. *Id.*

⁶⁷ Galanter, *supra* note 40, at 484.

⁶⁸ See U.S. COURTS, *supra* note 49 (indicating criminal disposition steady between seven to eight percent from 1997 to 2018).

⁶⁹ See *supra* notes 42–57 and accompanying text.

⁷⁰ See U.S. COURTS, *supra* note 49.

granted in less than 20 percent of the cases.⁷¹ Similarly, when jury trial advocacy courses were introduced into American law schools in the 1970s, approximately one in ten civil cases still proceeded to jury trial.⁷² Today, less than one in a hundred federal civil cases proceed to jury trial.⁷³ The numbers are not significantly better for criminal jury trials and appellate arguments. In the meantime, the number of motions filed and decided by district judges have increased significantly since law schools began teaching jury trial advocacy. In particular, this includes the number of cases in which judges make dispositive decisions affecting the survival of claims that could end up before a jury. As to the extent American law schools are teaching legal advocacy skills today, they are teaching skills that were once dominant in a bygone litigation era and are failing to teach the skills modern litigators increasingly use every day in courtrooms across America: advocating to district judges.

IV. DIFFERENCES IN JUDGES, JURIES, AND APPELLATE COURTS

Some supporters of jury trial advocacy and appellate advocacy programs argue that they have value in preparing students to argue in any type of legal setting.⁷⁴ That may be true to a degree but there has been little thought given to the difference between arguing to a jury or appellate bench in comparison to arguing to a district judge.⁷⁵ As it turns out, there are significant differences in the context in which the argument is made and the nature of the decision-maker whom the advocate is attempting to persuade. Thus, the skills learned in jury trial advocacy that focus on persuading a jury

⁷¹ See *id.*

⁷² See *supra* notes 45–46 and accompanying text.

⁷³ See U.S. COURTS, *supra* note 49.

⁷⁴ See Kritchevsky, *supra* note 10, at 47 (“Moot court is an established part of law school life because it teaches valuable lessons that the rest of the curriculum leaves largely uncovered[.] . . . teaching skills that will help both in law school and in all areas of practice.”) see also Finneran, *supra* note 29, at 126–28 (arguing that appellate advocacy and jury trial advocacy courses teach “the very skills that law students will need as future lawyers” and provide “exceptional preparation” for other litigation tasks such as covering motion hearings).

⁷⁵ See Roger S. Haydock, David F. Herr & Jeffery W. Stempel, *FUNDAMENTALS OF PRETRIAL LITIGATION* 637–89 (10th ed. 2016). There is very little in the literature on advocacy to district judges and how it differs from arguing to a jury or an appellate panel. In “Fundamentals of Pretrial Litigation”, the authors devote a chapter to courtroom advocacy. See *id.* The focus, however, is largely on written advocacy. See *id.* Although the book identifies some differences between arguing to a judge and arguing to an appellate panel of judges, it does not contrast it to arguing to a jury. See *id.*; see also MAUET, *supra* note 51, at 374. In his book on pretrial litigation, Professor Mauet, the Director of Trial Advocacy at the University of Arizona Law School, makes only passing references to and provides little advice for advocating to judges during hearings. See MAUET, *supra* note 51, at 374.

and the skills in appellate advocacy that focus on persuading an appellate panel of judges are not wholly transferable to persuading a district judge. Indeed, as I will discuss, some jury advocacy methods may not only be inappropriate, inapplicable, or even ineffective when trying to advocate to a judge.

There are many differences in advocating to juries, to a court of appeals, and to judges, but primary differences generally fall into two broad categories: context and the decision-maker. Within the context category, there are differences in whether: (1) advocacy is written and oral, or only oral; (2) facts are in dispute; and (3) evidence rules apply. Within the decision-maker category, there are differences in whether: (1) group decision-making occurs; (2) there are collateral pressures on the decision-maker; (3) the decision-maker is legally trained; (4) the decision-maker is knowable; (5) the advocate will reappear before the decision-maker; and (6) the advocate and decision-maker can converse. Charting out these differences helps illustrate where they occur.

Factor	Jury	Appeals Court	District Judge
Written & oral advocacy	No	Yes	Yes
Facts in dispute	Yes	No	Often
Rules of evidence apply	Yes	No	Sometimes
Group decision-making	Yes	Yes	No
Collateral pressures on decision-maker	No	No	Yes
Decision-maker trained in legal reasoning	No	Yes	Yes
Decision-maker knowable	Limited	Yes	Yes
Reappear before decision-maker	No	Maybe	Yes
Conversation possible	No	Limited	Yes

I will discuss each of these differences in more detail below.

A. *Differences In Context*

1. Whether Advocacy is Written, Oral, or Both

When attorneys advocate to judges, they often use both written and oral advocacy. Unlike jurors, judges make decisions based not just on what is presented in the courtroom, in evidence, or during oral argument. Rather, they also consider the written submissions of the parties in the form of motions, responses, proposed findings of fact, and/or conclusions of law. Attorneys file briefs or memoranda summarizing the relevant facts, setting out the legal standards, and arguing why their clients should prevail. When attorneys advocate to an appeals court, they always do so in writing and sometimes (but as we have seen, decreasingly) orally. Frequently, both district judges and appellate judges have reviewed the attorneys' briefs prior to oral argument and—if they have not—they do so after oral argument. Thus, unlike jurors, judges begin to form their views and opinions about cases as a result of reading written submissions by the parties before the attorneys make any courtroom presentation. Indeed, when judges read the briefs in advance of argument, they may enter the hearings or oral arguments already having a fair idea of how they will likely rule.⁷⁶

Compare these advocacy practices to jury trials. Juries do not have the benefit of reading written briefs summarizing the facts, stating the law, or setting out the parties' arguments. Rather, they learn the facts and hear the arguments through oral presentation only. Although judges instruct juries on the law, instructions are to be neutral and not a form of attorney advocacy.⁷⁷

Consider, then, how this difference can affect legal advocacy. It is well-known that people—including judges—comprehend and remember

⁷⁶ See Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman's The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 633, 634 (1996) (recognizing that judges "may form an early impression about a case" from briefing). See generally Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159 (2004) (discussing development and influence of writing-centered American legal system compared to oral-centered English legal system).

⁷⁷ See, e.g., *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1246 (10th Cir. 2002) ("Rather than merely restating counsel's argument, jury instructions should be a neutral statement of the law."); *United States v. Martin*, 274 F.3d 1208, 1210 (8th Cir. 2001) (approving jury instruction because it was "accurate, clear, neutral, and non-prejudicial."); *Bolden v. Beaupre*, No. 07-4702 ADM/JSM, 2010 WL 2130858, at *4 (D. Minn. May 24, 2010) (noting that "jury instructions are to be neutral.").

things better when provided with both written and oral explanations.⁷⁸ Therefore, repetition may be a more important part of advocacy to jurors and less necessary when judges are the decisionmakers. On the other hand—when attorneys advocate both written and orally—they must determine the best way to weave those methods together. Attorneys who merely repeat what they wrote in their briefs in oral argument are ineffective.⁷⁹ Attorneys must also consider the possibility that the judges may have already partially made up their minds about the way they may rule based on the written briefs. Therefore, attorneys must learn: (1) the skill of discerning what judges are thinking; and (2) how to persuade judges to change their minds.

2. Whether the Facts are in Dispute

The content and nature of an attorney's advocacy depends significantly on whether the decision maker is also a fact-finder. Juries are always fact-finders, and judges often play the role of fact-finder as well.⁸⁰ On the contrary, appellate court judges never act as fact-finders.

There is a fundamental difference in advocacy when facts are in dispute versus when the facts are contained in a cold record. When attorneys are advocating that a decision-maker find certain facts, it calls upon all of the skills of rhetoric using pathos, ethos, and logos.⁸¹ Effective advocates either intentionally or intuitively incorporate all three elements into their arguments

⁷⁸ See, e.g., John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1211 (2002) (emphasizing increase in comprehension and retention when oral delivery is supplemented by written materials); Robert F. Forsten, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. REV. 601, 609–10, 619–20, 631–33 (1975); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 626 (1997). Cronan opines that it is unrealistic to expect jurors—who are unfamiliar with the law—to comprehend and remember what they only hear orally. Cronan, *supra* note 78, at 1200, 1244.

⁷⁹ See ALAN D. HORNSTEIN, *APPELLATE ADVOCACY IN A NUTSHELL* 245–46 (1998) (explaining why reading directly from brief is ineffective advocacy); see also William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1024 (1984) (“The Supreme Court gets more advocates than it should who regard oral argument as a ‘brief with gestures.’”).

⁸⁰ District judges often preside over evidentiary hearings in various forms. Occasionally, they preside over hearings involving some form of fact-finding, such as motions for summary judgement, where the parties provide the court with supposedly uncontested facts. In some cases, a district judge may preside over hearings that do not involve any fact-finding, such as in motions to dismiss, where the judge is bound by the four corners of the complaint.

⁸¹ See Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 86 (1994) (“Roman rhetoricians and lawyers like Cicero and Quintilian, relying on Aristotle’s rhetorical analyses, divided persuasive discourse, and legal arguments in particular, into three categories: logical argument (*logos*), emotional argument (*pathos*), and ethical appeal or credibility (*ethos*).”).

to some degree when striving to persuade a fact-finder.⁸² The most talented attorneys, however, recognize that the focus and emphasis on the elements should vary, depending on the nature of the case. In some cases, logic is the most compelling aspect of the argument, while in others, an appeal to emotion is more likely to succeed. Hence, the familiar saying: “If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell.”⁸³ Attorneys must persuade the fact-finder to find the facts favorable to their parties, and then explain how those facts support their legal positions. Sometimes attorneys must use their rhetorical and reasoning skills to persuade fact-finders that they should prevail even when fact-finders do not find the facts to be as claimed.

On the other hand, attorneys argue to a court of appeals on a cold record; this calls upon very different advocacy skills.⁸⁴ Sometimes attorneys must use their rhetorical skills to bring the cold record to life, and attorneys usually focus on the logos part of rhetoric to persuade appellate courts that they should prevail as a matter of legal reasoning based on the facts developed below.⁸⁵ Even when facts are in dispute, how attorneys advocate should change depending on whether the fact-finder is a jury or is a judge, as will be explained in Section VI.B below.

⁸² See generally Hanrahan, *supra* note 29, at 329 (arguing that good attorneys use classical rhetorical devices to make effective arguments).

⁸³ See CARL SANDBURG, *THE PEOPLE, YES* 181 (1937) (“‘If the law is against you, talk about the evidence,’ said a battered barrister. ‘If the evidence is against you, talk about the law, and, since you ask me, if the law and the evidence are both against you, then pound on the table and yell like hell.’”). Interestingly, this saying has some variations. See David M. Wilson, *Working Toward a Common Goal: Are You One of Us?*, 48 No. 3 DRI FOR DEF. 14, 14 (2006) (“Lore has it that Abraham Lincoln, while lecturing a group of young lawyers, advised that ‘If the facts are against you, argue the law. If the law is against you, argue the facts. If the facts and the law are against you, attack your opponent.’”).

⁸⁴ See Mary Beth Beazley, *Writing for a Mind at Work: Appellate Advocacy and the Science of Digital Reading*, 54 DUQ. L. REV. 415, 419 (2016) (“Appellate judges, of course, must ‘solve the problem’ of the appeal by reviewing those attorney arguments as they appear in written briefs, and by reading the relevant case law and the ‘cold record.’”); see also Samuel V. Schoonmaker IV & Kenneth J. Bartschi, *Fast Forward Effective Family Law Appeals*, 28 FAM. ADVOC. 6, 6 (2006) (noting that “although trial court judges have a great deal of latitude to do what they believe is fair and equitable, appellate judges review cases based on a cold record and employ formal standards of review, such as the abuse of discretion standard. Arguments that might succeed in the trial court may be doomed to failure in the appellate court.”).

⁸⁵ See Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEG. WRITING 127, 162 (2008) (noting “tendency of appellate brief writers to focus on the logos at the expense of the pathos.”).

3. Whether the Rules of Evidence Apply

Although both jurors and judges serve as fact-finders, they do so with different restrictions. When jurors serve as fact-finders, the rules of evidence apply. Indeed, the purpose of evidence rules is to protect jurors from unreliable evidence.⁸⁶ This purpose is reflected in Federal Rule of Evidence 104(c), which requires judges to conduct hearings regarding the admissibility of evidence “so that the jury cannot hear it” under certain circumstances or when “justice so requires.”⁸⁷ Consequently, effective advocacy to juries involves presenting evidence that is admissible under the rules and objecting to inadmissible evidence. Understandably then, a significant amount of time in trial advocacy courses is spent working on skills tied to getting evidence admitted under the rules of evidence.

In stark contrast, when judges serve as fact-finders, the rules of evidence often do not apply at all, and even when they do apply, they apply in a “relaxed” manner.⁸⁸ Because it is understood that the Federal Rules of Evidence were designed to protect unsophisticated jurors from unreliable evidence and the chicanery of clever counsel, it is not surprising that the Federal Rules of Evidence would not generally apply when judges serve as fact-finders. In theory, trained judges are experienced in analyzing evidence and are familiar with the chicanery of counsel; therefore, they do not need the protection that evidence rules provide to laypersons. Thus, it makes sense, for instance, that in making evidentiary rulings, judges are not bound by any of the Federal Rules of Evidence “except those on privilege.”⁸⁹ Similarly, Rule 1101(d) states that the Federal Rules do not apply in many proceedings when judges act as fact-finders, particularly in criminal cases.⁹⁰

⁸⁶ See LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 266 (2002) (“It is thanks almost entirely to the jury that we have a huge, lumbering body of doctrine and practice called the law of evidence.”). As Professor Wigmore, a famous expert on the rules of evidence, once explained, the rules of evidence are “based on the purpose of saving the jurors from being misled” due to jurors’ “inexperience in analyzing evidence, and their unfamiliarity with the chicanery of counsel.” 1 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* 125 (2d ed. 1923); see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 135 (1st ed. 1973) (noting that American law distrusts jurors because “[t]he jury only hears part of the story; that part which the law of evidence allows.”).

⁸⁷ FED. R. EVID. 104(c).

⁸⁸ See sources cited *infra* notes 89–103 and accompanying text.

⁸⁹ FED. R. EVID. 104(a) (“The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. *In so deciding, the court is not bound by evidence rules, except those on privilege.*” (emphasis added)).

⁹⁰ See FED. R. EVID. 1101(d) (stating Federal Rules of Evidence, “except for those on privilege” do not apply to “miscellaneous proceedings”). These miscellaneous proceedings include: (1) extradition or rendition; (2) issuing an arrest warrant, criminal summons, or search

The Federal Rules of Evidence do not apply in detention hearings,⁹¹ suppression hearings,⁹² or sentencing hearings, for example.⁹³

Thus, attorneys advocating to judges in hearings where the rules of evidence do not apply should consider the implications. Evidence that would be inadmissible under the rules is admissible when the rules do not apply. Attorneys cannot object to the admission of evidence by invoking evidence rules that do not apply. That is not to say, however, that evidence rules are irrelevant even in hearings where they do not apply. Judges are trained in the rules of evidence and will be more skeptical of evidence that would not be admissible under the applicable evidence rules. Knowing this, effective attorneys should still strive to present evidence that would be admissible under the rules. Alternatively, attorneys should present evidence in a way that would bolster the reliability of the evidence, even if the evidence would not comply with the rules of evidence. Also, in argument, attorneys should acknowledge such evidence, understand the reasons for the various rules, and use these reasons to persuade the judge about what weight to give the evidence.⁹⁴

warrant; (3) preliminary examination in a criminal case; (4) sentencing hearings; (5) probation and revocation hearings; and (6) detention hearings. *See id.* at 1101(d)(3).

⁹¹ *See* FED. R. EVID. 1101(d)(3) (“The rules (other than with respect to privileges) do not apply in the following situations: . . . proceedings with respect to release on bail or otherwise.”).

⁹² *See* *United States v. Matlock*, 415 U.S. 164, 172–73 (1974); *see also* 3A CHARLES ALAN WRIGHT, ANDREW D. LEIPOLD, PETER J. HENNING, SARAH N. WELLING, *FEDERAL PRACTICE & PROCEDURE* § 689 (4th ed. 2010) (citing *Matlock*, 415 U.S. at 172–73) (“The rules of evidence do not apply in a suppression hearing and hearsay is admissible.”).

⁹³ *See* 18 U.S.C. § 3661; *see also* *United States v. Watts*, 519 U.S. 148, 154 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court’s consideration of acquitted conduct); *see also* *Witte v. United States*, 515 U.S. 389, 399–401 (1995) (noting that sentencing court traditionally considered range of information including criminal conduct and subsequent prosecution); *Nichols v. United States*, 511 U.S. 738, 747–48 (1994) (noting district courts considered defendant’s prior criminal conduct even when it did not result in conviction).

⁹⁴ For instance, Federal Rule of Evidence 404(a) prohibits admission of character evidence to prove a person acted in conformity with that character because the rule drafters believed a person’s character is a poor predictor of behavior. *See* FED. R. EVID. 404(a)(1); *see also* C.J. Williams & Dasha Ternavska, *A Series of Unfortunate Events: The Admissibility of “Other Fires” Evidence in Arson Cases*, 48 CONN. L. REV. 685, 697–98 (2016) (explaining rationale behind Rule 404(a)(1)). On the other hand, Rule 406 permits admission of habit evidence for the purpose of showing a person acted on a particular occasion consistent with that habit because of the belief that a habit is a good predictor of behavior. *See* FED. R. EVID. 406 advisory committee’s note (noting general consensus that “the uniformity of one’s response to habit is far greater than the consistency with which one’s conduct conforms to character or disposition”). In other instances, the Federal Rules of Evidence prohibit admission of evidence for policy reasons. For example, Federal Rule of Evidence 407 bars admission of evidence of subsequent remedial measures because we, as a society, want people or companies to take remedial measures to prevent future harms. *See* FED. R. EVID. 407 advisory committee’s note (stating that Rule 407 rests in part on “a social policy of encouraging people to take, or at least not discourage them from taking, steps in furtherance of

The Federal Rules of Evidence do apply in some settings, such as in all bench trials, when judges serve as fact-finders.⁹⁵ Even then, though, not all of the Federal Rules of Evidence apply when a judge is a fact-finder in a bench trial, or at least do not apply to the same degree as they do when a jury is the fact-finder. For example, Rule 403 provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”⁹⁶

Courts have held, however, that Rule 403 is either unnecessary or “relaxed significantly” when a judge is the fact-finder.⁹⁷ The same is true of Rule 404(b).⁹⁸ Courts reason that a judge “can hear relevant evidence, weigh its probative value and reject any improper inferences.”⁹⁹ Similarly, there is little need in bench trials for so-called *Daubert* motions to bar admission of expert testimony because “[t]he main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony.”¹⁰⁰ Indeed, courts have held that all evidence rules are generally relaxed when a

added safety”). The point is that attorneys need to understand the reasoning underlying each rule to effectively advocate to a judge, even when the rules of evidence do not apply.

⁹⁵ See *Broad. Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 238 (5th Cir. 1988) (“The district court erred when it admitted this evidence on the ground that hearsay is admissible in a bench trial; it is not.”).

⁹⁶ FED. R. EVID. 403 (“Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons”).

⁹⁷ See *United States v. Musleh*, 106 F. App’x 850, 856 (4th Cir. 2004); see also *United States v. Hall*, No. 98-6421, 2000 WL 32010, at *2 (6th Cir. 2000) (stating Rule 403 has little or no application during bench trial); *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) (“Adopting the position taken in *Gulf States*, we hold that in the context of a bench trial, evidence should not be excluded under 403 on the ground that it is unfairly prejudicial.”); *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981) (excluding relevant evidence in a bench trial on basis of unfair prejudice is useless and illogical). Courts have also acknowledged that judges have more “leeway” in receiving questionable evidence (including expert witness evidence) during a bench trial. See, e.g., *Attorney Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 780 (10th Cir. 2009) (“[A] judge conducting a bench trial maintains greater leeway in admitting questionable evidence, weighing its persuasive value upon presentation.”); *Rogers v. Air Line Pilots Ass’n, Int’l*, 988 F.2d 607, 612 (5th Cir. 1993) (“In a bench trial . . . the district court has more leeway in evaluating the admissibility of evidence since it is both the arbiter of admissibility and the finder of fact.”); *Thames v. Evanston Ins. Co.*, No. 13-CV-425-PJC, 2015 WL 3398147, at *2 (N.D. Okla. May 26, 2015) (“When set for bench trial, the Court has more leeway in its gatekeeper role, but it still must consider whether expert evidence or testimony is admissible.”).

⁹⁸ See *United States v. Hassanzadeh*, 271 F.3d 574, 578 (4th Cir. 2001) (holding admission of evidence in bench trial did not violate Rule 404(b), but noting a judge can “separate the emotional impact from the probative value of this potentially prejudicial evidence.”).

⁹⁹ *Schultz*, 24 F.3d at 632 (stating intent of Rule 403 and ability of judges to implement it).

¹⁰⁰ *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)) (outlining purpose of *Daubert* motion).

judge is the fact-finder.¹⁰¹ For that reason, judges are “entitled to greater latitude in evidentiary rulings,” when they are fact-finders and will be reversed “only where they affect a substantial right of the complaining party.”¹⁰² Thus, judges often prefer to err on the side of caution by admitting evidence when they serve as fact-finders, even if the evidence may be inadmissible under a strict adherence to the Federal Rules of Evidence, because judges are able to afford the evidence appropriate weight.¹⁰³

In general, then, judges are generally expected to apply the rules of evidence in bench trials and bar inadmissible evidence. In ruling on the admissibility of the evidence, however, judges must necessarily see or hear the evidence to rule on its admissibility. This conundrum requires judges to exercise mental discipline to disregard and ignore evidence they just saw, and that may be very difficult to do in some instances.¹⁰⁴ Judges are assumed

¹⁰¹ See *Null v. Wainwright*, 508 F.2d 340, 344 (5th Cir. 1975) (“Strict evidentiary rules of admissibility are generally relaxed in bench trials”); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (“ . . . the nonmoving party [need not] produce evidence in a form that would be admissible at trial in order to avoid summary judgment.”); *United States v. Raymond*, 697 F.3d 32, 39 n.6 (1st Cir. 2012) (“It is at least arguable that, in a bench trial, a district court has wider latitude in the admission of Rule 404(b) evidence.” (dictum)); *U.S. Dep’t of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Virginia, Inc.*, 64 F.3d 920, 926 n.8 (4th Cir. 1995) (noting that although inadmissible evidence is “ordinarily an inadequate basis for summary judgment,” the rule is “not unfailingly rigid.”); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980) (“[T]he strict rules of evidence do not apply in an administrative context.”). But see *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 164 (3d Cir. 1999) (Becker, J., dissenting) (“The Federal Rules of Evidence apply with full force to bench trials.” (citing FED. R. EVID. 1101(b) and 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2411 (2d ed. 1995) (“In theory, the Federal Rules of Evidence apply equally in court trials and jury trials.”))). It should be noted that Rule 1101(b) does not say anything about bench trials. See FED. R. EVID. 1101(b).

¹⁰² *James Corp. of Opelousas v. Tangie Const. Co., Inc.*, No. 93-4828, 1993 WL 413912, at *3 (5th Cir. Oct. 12, 1993) (citations omitted) (identifying appropriate standard of review for challenges to evidentiary rulings); see *BIC Corp. v. Far Eastern Source Corp.*, 23 F. App’x 36, 39 (2d Cir. 2001) (“[T]he admission of evidence in a bench trial is rarely ground for reversal, for the trial judge is presumed to be able to exclude improper inferences from his or her own decisional analysis.”).

¹⁰³ See *In re Unisys*, 173 F.3d at 172 (Becker, J., dissenting) (“In nonjury cases the district court can commit reversible error by excluding evidence but it is almost impossible for it to do so by admitting evidence.” (quoting WRIGHT & MILLER, *supra* note 101, at § 2885)); see also *Van Alen v. Dominick & Dominick, Inc.*, 560 F.2d 547, 552 (2d Cir. 1977) (noting that, although trial judge ruled otherwise, “ordinarily it may be the more prudent course in a bench trial to admit into evidence doubtfully admissible records”); *Dreyfus Ashby, Inc. v. S/S “Rouen,”* No. 88 CIV. 2890 (MBM), 1989 WL 151685, at *2 (S.D.N.Y. Dec. 12, 1989) (stating that “all doubts at a bench trial should be resolved in favor of admissibility, [but] that cannot mean that standards are out the window entirely.”).

¹⁰⁴ See RALPH ADAM FINE, *THE HOW-TO-WIN TRIAL MANUAL: A NO-HOLDS-BARRED SURE-FIRE WAY TO WIN* 578 (6th Ed. 2015) (opining that for “bench trial judge to ignore the evidence that he or she has excluded from the trial requires ‘a mental gymnastic which is beyond,

to have the mental discipline to disregard inadmissible evidence. Nevertheless, attorneys must recognize the conundrum and address this issue if they want to effectively advocate to a judge as a fact-finder.

Attorneys can raise evidentiary issues before trial by filing motions in limine, or during the trial by objecting.¹⁰⁵ The purpose of a motion in limine is to allow a judge to rule in advance of trial on the admissibility of certain forecasted evidence so as to prevent a jury from being exposed to unreliable evidence.¹⁰⁶ Thus, motions in limine further a judge's gatekeeping responsibility to eliminate from consideration evidence that should not be presented to the jury because it would not be admissible for any purpose.¹⁰⁷ When a judge is the fact-finder, though, the motions in limine are generally inappropriate.¹⁰⁸

In short, the way attorneys advocate is greatly impacted by whether evidence rules apply, and whether and how they apply depends on whether the fact-finder is a jury or a judge.

not only [the judge's] powers, but anybody's" (quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932)).

¹⁰⁵ *Motion in Limine*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a motion in limine as "[a] pretrial request that certain inadmissible evidence not be referenced to or offered at trial" and noting that attorneys typically make these motions because the evidence is so highly prejudicial that waiting to object at trial is may cause a mistrial).

¹⁰⁶ See *Luce v. U.S.*, 469 U.S. 38, 41 n.4 (1984) ("Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials.").

¹⁰⁷ See *Jonasson v. Lutheran Child and Family Serv.*, 115 F.3d 436, 440 (7th Cir. 1997).

The motion in limine is an important tool available to the trial judge to ensure the expeditious and evenhanded management of the trial proceedings. It performs a gatekeeping function and permits the trial judge to eliminate from further consideration evidentiary submissions that clearly ought not be presented to the jury because they clearly would be inadmissible for any purpose. The prudent use of the in limine motion sharpens the focus of later trial proceedings and permits the parties to focus their preparation on those matters that will be considered by the jury.

Id.

¹⁰⁸ See Randy Wilson, *From My Side of the Bench*, 47 THE ADVOC. (TEXAS) 92 (2009) ("[A]lthough you'd think it goes without saying, a motion in limine doesn't work with a bench trial. I wish I could say I've never seen one before in a bench trial; unfortunately, I cannot."). The only exception might be when an order granting a motion in limine would significantly impact the trial, such as by eliminating a witness. See *United States v. Tokash*, 282 F.3d 962, 968 (7th Cir. 2002) ("Motions in limine are well-established devices that streamline trials and settle evidentiary disputes in advance, so that trials are not interrupted mid-course for the consideration of lengthy and complex evidentiary issues.").

B. The Decision-Maker

1. Whether Group Decision-making Occurs

As decisionmakers, individual judges differ much more significantly from juries than they do from individual jurors. Judges comprehend and retain information in the same manner as jurors. They learn from hearing and seeing, in response to aural and visual stimuli. In short, judges employ similar cognitive processes, subject to the same limitations, as any other human.¹⁰⁹

In hearings and bench trials, though, judges are juries of one. Gone are both the negative and positive attributes of group decision-making.¹¹⁰ The danger of group-think is absent. Judges do not face the peer pressure influencing their decisions during the judges' internal mental deliberations. Also missing, however, are the advantages of the exchange of multiple viewpoints and different perspectives, the pooling of memories, and the dynamics that occur in group decision-making.¹¹¹ The benefits of sounding out ideas, bouncing around possible solutions, debating points, and brainstorming are unavailable when a judge alone must reach a decision.¹¹²

¹⁰⁹ See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 13, 29 (2007) (explaining that judges employ intuition subconsciously to make decisions); see also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1251, 1292 (2005) (concluding that judges are unable to avoid being influenced by inadmissible information); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778, 786 (2001) (stating that judges are just as susceptible to making errors in judgment as lay people).

¹¹⁰ See IRVING L. JANIS, *GROUPTHINK* 7, 270–71 (2d ed. 1972) (discussing group think among jurors); see also Jill M. Cochran, Note, *Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing*, 38 VAL. U. L. REV. 1399, 1447 (2004) (discussing negative effects of group think among jurors, particularly in death penalty cases).

¹¹¹ See Joe S. Cecil, Valerie P. Hans, & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 749–50 (1991) (discussing benefits of group decision-making by jurors).

¹¹² See *id.* (describing benefits of group decision-making by jurors). In some instances, judges may talk out decisions with law clerks. See FED. JUDICIAL CTR., *LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES* 1 (Sylvan A. Sobel ed., 2d ed. 2007) (“Many judges discuss pending cases with their law clerks and confer with them about decisions.”); Judge William E. Smith, *Reflections on Judicial Merit Selection, the Rhode Island Experience and Some Modest Proposals for Reform and Improvement*, 15 ROGER WILLIAMS U. L. REV. 664, 697 (2010) (discussing benefits of elbow law clerk with whom judges can “bounce ideas off”). A law clerk may have been present during the hearing or trial and may have seen the same evidence the judge saw. Even then, though, the group dynamic is significantly different not only because of the fewer

Unlike district judges, but like juries, appellate judges engage in a form of group decision-making. Appellate judges discuss and debate cases before them, and are influenced both positively and negatively by the input of their fellow judges.¹¹³ Like district judges, but unlike juries, however, appellate judges ultimately reach individual decisions and are not bound to reach a unanimous decision. An appellate judge may always issue a concurring or a dissenting opinion; jurors cannot.

2. Whether There are Collateral Pressures on the Decision-maker

Judges have significant responsibilities that come with their power, and those responsibilities can influence how they make decisions. Many of these responsibilities are unique to district judges and are not present with appellate judges. Judges must listen to testimony, consider evidence, and hear attorneys' arguments, but judges are also responsible to ensure that witnesses are treated with respect and that attorneys conduct themselves in a professional and ethical manner.¹¹⁴ While a district judge may be trying to concentrate on the case at hand, the judge is simultaneously responsible for watching the clock and thinking of other cases and other litigants so as to

number of people involved but also because of the disparate power relationship between a judge and a law clerk.

¹¹³ See William L. Reynolds & William M. Richman, *Justice and More Judges*, 15 J.L. & POL. 559, 563 (1999) ("[A] collegiality of judges who know one another well enough to think alike and through that group think to achieve a coherent and stable body of law."); see also Chrisje Brants, *Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands*, 80 U. CIN. L. REV. 1069, 1111–12 (2012) (concluding analysis on pitfalls of judicial system).

One of the more troubling aspects of a career judiciary, however, is that experience can degenerate into routine, so that panels of judges feel no need to explain to each other what the strength or weakness of the case are as all will understand them, and that in general a process of group-think governs deliberations.

Brants, *supra* note 113, at 1111–12.

¹¹⁴ See CODE OF CONDUCT FOR U.S. JUDGES, Canon 3(A)(2) (JUD. CONF. 2019) (stating that judges "should maintain order and decorum in all judicial proceedings."); see also *id.* at Canon 3(A)(3) (continuing list of judicial responsibilities).

A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

Id. See FED. R. EVID. 611 ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.").

remain mindful of limited judicial resources. Judges struggle to find the proper balance between permitting the parties the full benefit and duration of their day in court against the need to allow time for every other litigant to have the same opportunity. Judges are aware that additional briefing, evidence, and argument will cost the parties more in attorneys' fees and expenses while delaying disposition. Judges recognize they need to reach reasoned and thoughtful decisions, but also feel the pressure of the need for a speedy resolution of every case, knowing that parties need and deserve timely decisions.¹¹⁵ All of these practical considerations that are a product of a judge's responsibility affect the manner in which judges consider and decide cases.

Jurors, in contrast, generally do not consider any of these practical and collateral matters when they are asked to reach decisions. Nor do appellate judges face these issues when, on appeal, time constraints are largely absent. There are no equivalent statutes or rules that compel or urge appellate judges to reach speedy resolutions of appeals.

The presence of collateral pressures can impact effective advocacy. Attorneys should be alert to whether collateral pressures are affecting a judge's ability to concentrate on the evidence or argument. Attorneys should also endeavor to be more concise with judges than they are with jurors. Attorneys need to ensure they are timely with written pleadings because

¹¹⁵ See Darryl K. Brown, *Defense Counsel, Trial Judges, and Evidence Production Protocols*, 45 TEX. TECH. L. REV. 133, 145 (2012) ("[J]udges often face significant pressure to move their dockets efficiently."). The need for efficient litigation is compelled in federal criminal cases by the Speedy Trial Act. See 18 U.S.C. § 3161 (2008) (requiring that cases proceed "at the earliest practicable time."). In federal civil cases, Rule 1 of the Federal Rules of Civil Procedure urge rapid resolution of cases by requiring judges to construe, administer, and employ them in such a manner that "secure[s] the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1; see also CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(5) (JUD. CONF. 2019) ("A judge should dispose promptly of the business of the court."). The commentary to Canon 3A(5) elaborates on this duty and reflects the tension between a judge's need to give parties their days in court and the limited number of days in a year. CODE OF CONDUCT FOR U.S. JUDGES cmt. Canon 3A(5) (JUD. CONF. 2019).

In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court personnel, litigants, and their lawyers cooperate with the judge to that end.

Id.

delays in filing may impact the judge's ability to focus and give sufficient time to the matter.

3. Whether the Decision-maker is Legally Trained

Judges, like jurors, are human. Judges have emotions (perhaps some more than others) and thus can have emotional responses to evidence. Judges also have their fair share of biases, preconceptions, and presumptions as a result of their backgrounds, histories, and experiences. Judges are different from jurors, however, because of their legal training.

As students in law school, judges were required to master deductive reasoning. Then, through their experience as attorneys, they honed their analytical skills and disciplined their minds to focus on material facts and issues. Like doctors, judges, through their education and experience, developed the ability to wall themselves off emotionally from cases and to approach cases with something akin to clinical detachment.¹¹⁶ As attorneys, and even more so after obtaining a spot on the bench, judges focus on facts that have legal significance and disregard facts that do not. Judges are also members of the same social and professional class as attorneys, sharing the same language, having similar formative experiences, and being bound by similar core rules of ethics and values.¹¹⁷ When attorneys are talking to judges, then, they are talking to one of their own. This is very dissimilar to attorneys talking to jurors.

Because judges are legally trained and mentally disciplined to make dispassionate decisions based on reason and logic, appeals to emotion, the pathos part of classical rhetoric, not only find little purchase with judges but may be seen as insulting by suggesting that judges would make a decision based on emotion.¹¹⁸ On the other hand, when jurors are fact-finders,

¹¹⁶ See Terry A. Maroney, *Emotional and Judicial Behavior*, 99 CAL. L. REV. 1485, 1494 (2011) ("Many judges will, over the course of their careers, develop sound and flexible strategies for coping with emotion."). Some debate exists in academic circles about whether judges should, or even really do, separate their decision-making from their emotions. See Bruce A. Green & Rebecca Roiphea, *Judicial Activism in Trial Courts*, 74 N.Y.U. ANN. SURV. AM. L. 365, 379–84 (2019) ("[I]f achievable, it is questionable whether impersonal justice in this sense is desirable.").

¹¹⁷ See Paul Holland, *Sharing Stories: Narrative Lawyering in Bench Trials*, 16 CLINICAL L. REV. 195, 268 (2009) (noting that bench trials are different from jury trials because as "[m]embers of the same profession, judges and lawyers share a vocabulary, a code of ethics, certain formative experiences (such as law school and the bar exam) and a responsibility for justice.").

¹¹⁸ See Hon. David J. Newblatt, *How to Convince the Judge on Motion Day in Family Court*, 85 MICH. B.J. 16, 17 (2006) ("Judges are trained and experienced. Judges will not be persuaded by gratuitous personal attacks. Hyperbole lost its effect long ago. We can tell baloney from substance and can tell whether you know the law and the facts. Talk to the judge at the judge's level."); Larkins, *supra* note 9, at 17 ("Although a judge, like a jury, wants to understand where justice lies

attorneys may want to emphasize the emotional appeal of their position over a logical argument. Thus, when arguing to judges, attorneys should usually focus on the law and the facts. Although attorneys should be emphatic on important points, they should leave drama and theatrics for juries. Judges are not persuaded by such displays; indeed, vociferous oral advocacy may have just the opposite effect.¹¹⁹ Judges expect attorneys to speak to them on an intellectual level, with an emphasis on reasoning and common sense and not on emotions. In short, attorneys should emphasize logos over pathos.

4. Whether the Decision-maker is Knowable

A fundamental tenet of effective public speaking is to know one's audience. There is a tremendous difference between what attorneys can know about jurors and what attorneys can know about judges. Voir dire enables attorneys to learn limited information about prospective jurors in order for attorneys to make more informed for-cause challenges and to exercise peremptory strikes.¹²⁰ Juror questionnaires,¹²¹ private investigation of prospective jurors,¹²² and jury consultants¹²³ can supplement voir dire to provide attorneys with more information about prospective jurors. In the end, however, the information trial attorneys have about individual jurors is limited and imperfect, restricted by access, time, and money.

in the case, a judge will rarely have a favorable reaction to an emotional or inflammatory appeal. In fact, the judge's usual reaction to such "jury argument" is to be professionally offended.").

¹¹⁹ See Brian Wice, *Oral Argument in Criminal Cases: 10 Tips for Winning the Moot Court Round*, 69 TEX. B.J. 224, 225 (2006) ("Remember that your forum is an appellate court, not a trial court, and that your audience is composed not of jurors but of appellate judges. Some of the most talented criminal trial lawyers are far from stellar when they take on the mantle of appellate warrior. Why? Because they are unable or unwilling to recognize that the same table-pounding argument and incendiary prose that may carry the day in the trial court will be laughed at by the appellate judges whom they hold hostage for 20 minutes. It is logic, not emotion, that is the foundation of a compelling oral argument.").

¹²⁰ See *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) (explaining that jury voir dire enables courts to select impartial juries and assists attorneys in exercising peremptory strikes). Effective trial attorneys also use that information to tailor the presentation of their evidence and argument to the particular audience of jury ultimately selected.

¹²¹ See Rachael A. Ream, *Limited Voir Dire: Why it Fails to Detect Juror Bias*, 23 CRIM. JUST. 22, 26 (2009) (discussing role of written questionnaires in jury selection).

¹²² See generally Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. KAN. L. REV. 611, 616–18 (2012) (discussing history of jury research and use of private investigators conducting "field investigations" on prospective jurors).

¹²³ See generally Katherine Allen, *The Jury: Modern Day Investigation and Consultation*, 34 REV. LITIG. 529, 538–41 (2015) (discussing use of jury consultants in researching prospective jurors and assisting in jury selection).

Judges, on the other hand, are more of an open book. As public officials, much is known about judges and attorneys can learn even more with a little effort. There is a treasure trove of information about judges in the public domain, particularly for federal judges whose lengthy and detailed Senate Judicial Questionnaires are publicly filed. Many judges also provide information about their preferences and practices on court websites. Judges often speak publicly at conferences about their preferences and practices or publish articles in bar journals or law reviews. Hearings and trials take place in open court, so anyone can observe judges' practices and procedures. Finally, other attorneys are an available source of information about judges' past practices and procedures.

Of course, the important thing is what trial attorneys do with the information that they have about decision-makers. All too often trial attorneys use the limited information they know about prospective jurors only to decide whom to challenge for cause or remove using a peremptory strike. Trial attorneys often fail to consider juror information in tailoring the presentation of their cases to the jurors. Instead of adjusting and modifying the presentation of the evidence and their arguments to better appeal to the background, abilities, and views of the jurors, trial attorneys simply present their cases as if all jurors and juries are the same. Similarly, trial attorneys all too often present their cases to judges in hearings and bench trials as if all judges were alike. Instead, attorneys should adjust their presentations based on the judge's experience and familiarity with the subject matter and law of the particular case.¹²⁴ To be effective advocates to judges, attorneys should find out what the judge knows about the subject matter and the legal issues. How an attorney advocates can be affected by how familiar the judge is with the case based on handling similar issues in prior cases.

5. Whether the Advocate Will Reappear Before the Decision-maker

Juries are comprised of individuals gathered together based on very few basic criteria and then whittled down through an empanelment process. This results in each jury being unique. Thus, attorneys will never appear again before the same jury. Indeed, most courts excuse jurors from further

¹²⁴ See Sara Klco & Francisco Armada, *Tips for Young Lawyers*, 37 No. 3 TRIAL ADVOC. Q. 13, 13 (2018) (urging young lawyers arguing cases before district judges to “[k]now your audience. Consider your judge’s background and experience handling the issue you are asking him or her to address and tailor your pleadings and arguments based on that background and experience.”).

service for some period of time once they have served, so it is highly likely that attorneys will never again see even an individual juror again.

Appellate panels are somewhat similar in that they are typically comprised of three appellate judges randomly assigned to the case. It is possible, depending on the nature of an attorney's practice and the frequency of appearing in the court of appeals, that an attorney could appear before the same panel more than once on different cases. It is likely that any attorney with a regular appellate practice will appear before the same appellate judges repeatedly, albeit on different panels.

Except in the largest districts with scores of judges, in contrast, attorneys will regularly appear before the same district judges over and over again. Whether an attorney will reappear before a decision-maker can affect advocacy. Attorneys need not worry about future consequences with juries. Attorneys can take inconsistent positions from one jury to the next; they can engage in sharp practices before a jury without worrying about how it may affect them in the future in other cases; they can exaggerate and bluff without being concerned that it could affect their future credibility. Not so with judges, whether they be district or appellate judges. Attorneys must always consider the reputation they form with judges before whom they may or will reappear.¹²⁵ Moreover, attorneys are bound by ethical rules to be candid with the court.¹²⁶ And judges have power over attorneys, who are officers of the court and answerable to judges for misconduct. Judges and attorneys recognize that what judges say and how judges render their decisions can, in some cases, impact attorneys' careers for better or worse.

6. Whether the Advocate and Decision-maker Can Converse

Judges differ significantly from juries as decision-makers because judges have the ability to, and often do, ask questions of witnesses and attorneys. Jurors cannot ask questions of attorneys and in most cases, jurors remain mute observers.¹²⁷ This difference significantly alters how attorneys

¹²⁵ See Larkins, *supra* note 9, at 70 ("Every appearance before a judge inevitably affects every case the lawyer or his firm has or will have before that judge."); J. Thomas Greene, *Oral Argument in the District Court*, 26 LITIG. 3, 59 (2000) ("Remember, you may lose the particular motion, but the outcome of any case seldom turns on a single decision. Continued civility coupled with meticulous preparation inevitably will carry the day (and the judge)—if not in this case, then in the next.").

¹²⁶ See MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2019) ("A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal . . .").

¹²⁷ See Peter B. Krupp, *When Jurors Speak: A Practical Guide to Jurors Questioning Witnesses in Massachusetts*, 45 BOS. BAR J. 12, 12 (2001) ("For most of this country's history, jurors have sat through trials as mute lay observers of an oftentimes technical dialogue between

advocate to jurors and how they advocate to judges. Attorneys and judges can have a conversation and through that conversation achieve a level of understanding that cannot occur when attorneys are talking at jurors. Attorneys can ask judges if their arguments are understood, and inquire of judges about what questions or concerns judges have about the evidence or argument. Although a judge may ultimately disagree with an attorney's position, through conversation it can at least be certain that the judge understands the attorney's position.

The opportunity for a true conversation is greater with district judges that it is in an appellate setting. Appellate arguments are rigid and timed with even the longest of them seldom exceeding a half-hour per side (and most often are limited to ten or fifteen minutes per side). Appellate arguments have the tone and appearance of formal debates. To the extent there is an exchange, it resembles much more an interrogation than a conversation, with only one side asking questions.¹²⁸ Although district judges have time pressures unlike appellate judges, most district judges do not impose arbitrary and short deadlines to arguments. Thus, with district judges there is a real opportunity for a more full and informal exchange to take place. Advocacy to a district judge, then, assumes a very different tone and can become much more of a conversation than a formal appellate presentation.

In summary, there are important differences in effective advocacy to judges, juries, and appellate courts. In this Part, I have only touched upon the most obvious and significant differences to highlight the need to recognize that all advocacy is not the same. Teaching effective advocacy skills to law students requires identifying the differences in advocacy skills necessary to persuade different decision-makers and tailoring the skills training to address those differences. When combined with Part III of this Article, which emphasized the dramatic drop in the number of jury trials and appellate arguments, and with the perspective from Part II of the article that points out that law schools have been focusing advocacy education on a bygone era of litigation, the need to change the pedagogical approach to

lawyers, judges and witnesses.”). Some judges do permit jurors to ask questions of witnesses, at least after the questions are screened by the judge. My former colleague, Judge Mark W. Bennett, a true judicial innovator, was among those who engaged in the practice and advocated for it. See generally Hon. Justice Thomas D. Waterman, Hon. Judge Mark W. Bennett, & David C. Waterman, *A Fresh Look at Jurors Questioning Witnesses: A Review of Eighth Circuit and Iowa Appellate Precedents and an Empirical Analysis of Federal and State Trial Judges and Trial Lawyers*, 64 *DRAKE L. REV.* 485, 488, 525 (2016) (noting advantages of allowing jurors to ask witnesses questions).

¹²⁸ See HORNSTEIN, *supra* note 79, at 242 (“Finally, and perhaps most important, questions initiated by the advocate to the court are simply inappropriate.”).

advocacy becomes crystal clear. In the final Part of this Article, I will suggest how I believe we should structure law school advocacy education to meet the changing world of litigation in America.

V. DEVELOPING AN INTEGRATED APPROACH TO LEGAL ADVOCACY

Traditional courses on jury trial and appellate advocacy remain valuable despite the decrease in the number of cases that result in jury trials or appellate oral arguments. Indeed, teaching these skills in law school is, perhaps, even more critical because young attorneys will get so little practical experience in real courts. These courses teach students how to research, reason, and write; how to identify and present admissible evidence; and how to formulate and make coherent and persuasive arguments. To respond to the evolving litigation landscape then, the solution lies not in eliminating these courses but in supplementing and altering the courses.

One major flaw in the jury trial advocacy and appellate advocacy programs offered at law schools today is that they are not integrated. No thought is given or instruction provided to students about how advocacy skills should be adapted and changed depending on the context and the decision-maker. Similarly, the appellate advocacy courses do not flow out of or are an extension of the trial advocacy courses. Appeals in the real-world flow from trials in the lower courts; thus, appellate advocacy courses should as well. The ideal advocacy program, then, would address the stages of advocacy in the order in which they occur in litigation. This would help students understand the differences and comprehend how decisions and developments at one stage of litigation directly affects later stages of litigation.

What I propose is a series of three one-semester, interconnected courses that would take students from pretrial litigation, through jury trial, and onto appeal using the same case problem. The first course would be on pretrial litigation and would (1) have students draft a motion and opposition to a motion and (2) argue that motion to a district judge in a mock hearing. The title of this course should appropriately be Judicial Advocacy. The Judicial Advocacy course should be a mandatory course and replace the role of the required appellate advocacy course in teaching students the basics of research, writing, and oral advocacy.¹²⁹ Indeed, a Judiciary Advocacy course

¹²⁹ See Hanrahan, *supra* note 29, at 300 (“Increasingly, judges have complained of the lack of talented and skilled orators that argue in their courtrooms[,]” and noting that “[u]nfortunately, most

makes far more sense as a basic required course as far more law students will, in practice, find themselves filing motions and making arguments before district judges, administrative law judges, and other judicial officers than will ever find themselves in front of a jury or panel of appellate judges.¹³⁰

The motion could involve either a civil motion, like a motion for summary judgment, or a criminal motion, like a motion to suppress. Ideally, though, the case problem should be based on a criminal prosecution and involve a motion to suppress evidence. Students would then learn the difference in advocacy in a setting where the rules of evidence do not apply.¹³¹ In civil cases, it is less common for judges to hear evidence except in certain motions, such as a motion for a preliminary injunction, and other procedural postures that would not be as amenable to a first-year law school mock setting.

The second course on Trial Advocacy would be an elective upper level course offered to 2Ls or 3Ls in the fall semester. This course would largely be identical to the trial advocacy courses now offered in law schools, involving a mock jury trial at the end, with two proposed alterations. First, the case problem would be the same one used in the first-year Judicial Advocacy class. Students would now be taking to trial the very problem on which they previously litigated pretrial motions. In doing so, students could develop a better understanding of how pretrial litigation can directly affect the posture of the case at trial. The second alteration would be a greater emphasis on the differences between a jury trial and a bench trial. Although the mock trial should still be before a jury, the course instruction should include more discussion about how advocacy would be different were the fact-finder a judge and not a jury.

The third course on Appellate Advocacy would also be an elective upper-level course offered to 2Ls or 3Ls in the spring semester. This course would largely be identical to the appellate advocacy courses now offered in law schools, involving brief writing and mock appellate oral arguments, but with two alterations again. First, the case problem would be the same one

law students have only one experience with oral argument (the first-year moot court competition), and even less receive actual training in oral argument during law school.”).

¹³⁰ See Hoffman, *supra* note 6, at 207 (arguing that law schools offer far too little instruction on handling pretrial motions even though such pretrial motions are “precisely the tasks newly admitted lawyers [are] likely to confront during their first years of practice.”); Finneran, *supra* note 29, at 127–28 (noting that new attorneys rarely get to question witnesses during jury trials and are much more likely to cover motion hearings); Greene, *supra* note 125, at 4 (“[O]ral argument is of equal if not greater importance in the district courts than it is in the courts of appeals.”).

¹³¹ FED. R. EVID. 1101 (“These rules . . . do not apply to . . . the court’s determination . . . on a preliminary question of fact governing admissibility.”).

used in the Judicial Advocacy and Trial Advocacy courses. By arguing and maneuvering the same case through this entire course series, the students will develop a better understanding of how pretrial rulings and the record made at trial directly impact the posture of the case on appeal. Second, the trial advocacy course should be a prerequisite for the appellate advocacy course. Learning appellate advocacy without first having a foundation of pretrial and trial litigation presents the subject in an artificial and detached setting.

The three-course advocacy-track program would address the issues identified in this Article. A first-year required course on judicial advocacy recognizes and would prepare students for a world of litigation where jury trials and appellate oral arguments are becoming increasingly rare, while the need to effectively advocate to judges is increasingly important. An upper-level, two-course interconnected program of trial and appellate advocacy would, in combination with the first-year course on judicial advocacy, provide students with an understanding of how effective advocacy is different based on the context and the decision-maker. The mission of the course series would be to better equip students with the knowledge and skills needed to make them effective in today's courtrooms, regardless of who the decisionmaker might be.