

ADVANCED TRIAL ADVOCACY: ONLINE ADVOCACY AND TECHNOLOGY IN TRIALS

SPRING 2023

CLASS MEETINGS: WEDNESDAYS 1:10 – 3:50 P.M.

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INTRODUCTION:

Advanced Trial Advocacy: Online Advocacy and Technology in Trials is a practical course designed to enrich students' understanding of different platforms of technology and the application of technology in a trial setting. Through a series of exercises, students develop the skills to advocate virtually.

The technology exercises will help students master advocating in an online format. Students will understand how different technologies or programs can be used to support their advocacy. Additionally, students will learn about the constraints of technology in trials and will come up with creative solutions to reconcile these issues.

LEARNING GOALS, OUTCOMES, & ASSESSMENTS:

GOALS	OUTCOMES	ASSESSMENTS
Students will develop an understanding of different online platforms that courts are using	Students will be able to understand and maneuver multiple online platforms with ease	Students will participate in simulation exercises using different online platforms to determine the similarities and differences
Students will be able to use different technologies to support their advocacy skills	Students will be comfortable using technology to share any exhibits during trial and presentations	Students will use exhibits and create PowerPoint presentations in performing selected roles for the week
Students will learn how to be an engaging advocate virtually	Students will be confident that their advocacy skills will not be diminished or less engaging because of the virtual platform	Students will do weekly drills and simulation exercises to practice their advocacy skills on an online platform
Students will understand the ethical obligations, constitutional issues, and challenges of online hearings	Students will be aware of the ethical rules of zealous representation of clients even in an online forum	Students will conduct a final trial to permit them to showcase and highlight the skills learned throughout the semester

GRADING & ASSESSMENTS:

There is no assigned textbook other than LUBET, MODERN TRIAL ADVOCACY from ITAP/ITA classes. All other reading assignments will be posted online in advance of each class. A casefile, Capitol Line Cinema v. Addison West, will be used throughout the entire semester. The casefile includes digital exhibits, videos, photographs, and other exhibits that will be used throughout the class. Students will be expected to read all material and come to class prepared to discuss the readings in detail. In addition, there will be periodic in-class exercises on witness interviewing and preparation, motions practice, direct and cross-examination, opening statement and closing argument. These practical exercises, along with in-class participation and a final trial will form the bases for student grades.

All student performances are recorded via Zoom, and review of these recordings by the students is an integral part of the course.

ATTENDANCE POLICY:

Because this is an experiential course, meaning that much learning will take place by participation in online platforms, class attendance is a fundamental component of this course. Accordingly, prepared attendance at, and participation in, all class sessions is required. Unplanned avoidable absences, for illness or family emergencies, or similar reasons, may be excused but will be subject to make-up requirements. Any unexcused absence will result in the reduction in the course grade by a one-half grade, in addition to not earning participation credit for any such class. You are expected to be able to participate fully for all class sessions, unless you notify the professor by email in advance of class you will be absent or unprepared.

CLASS STRUCTURE & WEEKLY ASSIGNMENTS:

Due to the emphasis on learning and using online platforms, this class will be conducted completely online. Communications with classmates should be conducted using an online platform and students will not be required to meet in person although there may be optional classes that do occur in person.

There will be three essential parts to each class:

- **Student Preparation:** Background reading will be assigned for each class. This reading will relate to the subject matter of the lecture.
- **Lecture/Discussion:** This will set the context, explain the application and strategy of the rules and tactics, and present for discussion key issues with respect to the topic for the day. Some classes will be enriched by invited judges and attorneys as guest lecturers.
- **Student Exercises:** Students will participate in mock sessions such as: preparation of witness for testimony, direct and cross-examination of witnesses online, presentation of exhibits, impeachment and refreshing recollection in an online platform, creation and use of visuals and, ultimately, a final trial.

A substantial amount of out-of-class preparation is required for in-class exercises. Grading is based on the following:

In class simulations, class participation, and assignments	65%
Final Trials	35%

SYLLABUS:

WEEK 1: AN INTRODUCTION TO ONLINE ADVOCACY

PRE-CLASS READING: Read the Capitol Line Cinema v. West Casefile; “Twenty-First-Century Software for Litigators” 46 No. 4 Litigation 13 (Summer, 2020); “Remote Oral Arguments in the Age of Coronavirus: a Blip on the Screen or a Permanent Fixture?” The Journal of Appellate Practice and Process Vol. 21, No. 1 (Winter 2021).

IN-CLASS DISCUSSION: Introduction to Technology in Trials Course. Discuss the different platforms students should sign-up for to use for the class, grading policy, and attendance policy. Additionally, this class will discuss optimizing WiFi connectivity, suggested technology for purposes of online hearings, and best practices for how to ensure a professional appearance online.

Discussion and general overview of the court systems and what platforms courts are using.

- Skype
- Zoom
- WebEx
- Go To Meetings
- Other online platforms

WEEK 2: THE IMPORTANCE OF CREATING AND MAINTAINING A DIGITAL TRIAL BINDER

PRE-CLASS READING: Lubet, Chapter Eleven: Electronic Visuals; The Trial Notebook

IN-CLASS DISCUSSION: Discussion of how to organize a case file electronically, including creating bookmarks in a PDF document to ensure ease of screen sharing as well as stamping exhibits electronically and delivering exhibits to the court, counsel, and witnesses throughout a hearing or trial.

ASSIGNMENT: Students compile a digital trial binder of the Capitol Line Cinema v. West Casefile and email the digital trial binder to the professor for feedback.

WEEK 3: AUTHENTICATION, ADMISSIBILITY, AND PUBLICATION OF EXHIBITS

PRE-CLASS READING: Modern Trial Advocacy-Analysis and Practice, Chapter 10: Foundations & Exhibits; Excerpt from Remote Advocacy A Guide to Survive and Thrive: Chapter 10 Exhibits in a World of Remote Advocacy; Courts and Lawyers Struggle with Real Deepfakes

IN-CLASS DISCUSSION: Identification of and discussion about best practices for laying the foundation to admit exhibits electronically. Once admitted, best practices for publishing exhibits electronically and maximizing the impact of an exhibit.

IN-CLASS DEMONSTRATION: Professors will demonstrate ways to lay the foundation to admit exhibits and publish them in an online format.

ASSIGNMENT: Students must prepare to introduce and publish an exhibit from the Capitol Line Cinema v. West casefile.

WEEK 4: ADMITTING AND USING EXHIBITS

PRE-CLASS READING: Austrian, “From the Frying Pan into the Fire: Electronic Case Management in the Digital World.” Eric Scigliano, May 2021 Issue “Zoom Court is Changing How Justice is Served: For Better, for Worse, and Possibly Forever.” Images with Impact, Chapter 1 – 3. All readings posted on Canvas.

IN-CLASS EXERCISE: Each student practices admitting an exhibit into evidence, asking for permission to screen share, and publishing the exhibit. After publishing the exhibit, students practice asking appropriate questions about the exhibit to highlight the importance of the exhibits.

WEEK 5: THE IMPORTANCE OF AND BEST PRACTICES TO CREATE VISUALS, POWERPOINTS, TIMELINES, AND OTHER USE OF TECHNOLOGY

PRE-CLASS READING: Images with Impact, Chapters 9-11. Students create a 4-5 slide PowerPoint for use during week 6.

IN-CLASS DISCUSSION: Lecture about the importance of visual presentations during trial. Workshop for best practices how to create PowerPoints and Timelines.

ASSIGNMENT: Students prepare an opening statement for either side of the Capitol Line Cinema v. West casefile and create a PowerPoint to use during the opening statement implementing the skills learned during week 6.

WEEK 6: OPENING STATEMENTS USING VISUALS

PRE-CLASS READING: Lubet, Chapter 12 Opening Statements.

IN-CLASS EXERCISE: Each student gives a 5-7 minute opening statement utilizing their PowerPoints to show exhibits throughout their opening statement. Students receive individualized feedback and critique.

WEEK 7: WITNESS PREPARATION AND ETHICS OF ONLINE TESTIMONY

PRE-CLASS READING: “Witness Preparation: Regulating the Profession’s ‘Dirty Little Secret’” 38 Hastings Const. L.Q. 1007; “A Critical Analysis of the Online Court” 39 U. Pa. J. Int’l. L. 921; ABA Model Rules of Professional Conducts Rules 1.1 – 1.4

IN-CLASS DISCUSSION: Identification of and discussion about best practices for preparing a witness to testify in an online format. Open conversation about some of the challenges facing witnesses for testifying online. Analysis of ethical quandaries that are unique to online hearings.

IN-CLASS DEMONSTRATION: Professors demonstrate a client interview and witness preparation for an online hearing.

ASSIGNMENT: Students are assigned a witness from the Capitol Line Cinema v. West casefile and must come to the next class ready to conduct witness preparation of the witness for an online hearing.

WEEK 8: WITNESS PREPARATION AND TESTIMONY

PRE-CLASS READING: “Law and Language: an Empirically-Based Model for the Opening Moments of Client Interviews” 4 Clinical L. Rev. 321; “The Ethics of Preparing a Witness” 39 Corp. Counsl. Rev. 23 (May, 2020).

IN-CLASS EXERCISE: Each student conducts a witness preparation session. Each student receives detailed feedback and constructive criticism about their preparation session.

WEEK 9: ADVANCED WITNESS QUESTIONING TECHNIQUES: REFRESHING RECOLLECTION AND IMPEACHMENT

PRE-CLASS READING: Lubet, Chapter Four: Refreshing Recollection; Lubet, Chapter Six: Impeachment. Federal Rule of Evidence 613, 801(d)(1).

IN-CLASS DISCUSSION: Impeachment of a witness in an online hearing. Utilizing the snippet tool for purposes of showing a witness and screen sharing the prior inconsistent statement. Refreshing recollection in an online forum.

IN-CLASS DEMONSTRATION: Professors demonstrate an impeachment by prior inconsistent statement and refreshing the recollection of a witness in an online forum.

ASSIGNMENT: Students must come to class 9 prepared to impeach and refresh a witness in the Capitol Line Cinema v. West case.

WEEK 10: IMPEACHMENT AND REFRESHING RECOLLECTION CONTINUED

PRE-CLASS READING: “Eight Ways to Use Depositions at Trial” 66 No. 4 Prac. Law. 15 (August, 2020).

IN-CLASS EXERCISE: Each student conducts a refreshing recollection and impeachment of a witness from the Capitol Line Cinema v. West casefile.

WEEK 11: PROTECTING CONFIDENTIALITY IN AN ONLINE FORUM YET IDENTIFYING ALTERNATIVE MODES OF COMMUNICATION

PRE-CLASS READING: ABA Model Rule of Professional Conduct 1.6; A New Model for Online Procedures, 38 Alternatives to High Cost Litig. 86 (June, 2020); Remote Advocacy: A Silver Lining on the New Abnormal, 54-Jul Prosecutor 30 (July, 2020); Ethical Issues in Working Remotely, 62-AUG Orange County Law, 49 (August 2020); Arbitration Privacy and Confidentiality in the Age of (Coronavirus) Technology, 38 Alternatives to High Cost Litig. 107 (July/August 2020).

IN-CLASS DISCUSSION: Security of online hearings and ensuring confidentiality of client information in an online forum. Identifying who is privy to any argument or conversation online. Students will learn how to redact confidential information from PDF documents and exhibits.

ASSIGNMENT: Prepare a Direct Examination of one of the witnesses in the Capitol Line Cinema v. West casefile and be prepared to redact confidential information contained in exhibits.

WEEK 12: LEGAL ISSUES IN ONLINE ADVOCACY

PRE-CLASS READING: NACDL readings on challenges to virtual trials; National Center on State Courts: <https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/unmasking-the-issues-with-face-masks> ; <https://thehill.com/blogs/congress-blog/technology/443336-race-and-the-digital-divide-why-broadband-access-is-more-than>; Susan A. Bandes and Neil Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, Buffalo Law Review; *Deception and Lie Detection in the Courtroom: The Effect of Defendants Wearing Medical Face Masks*, Journal of Applied Research in Memory and Cognition.

IN-CLASS EXERCISE: Students conduct 3 – 5 minutes of a direct examination involving confidential information contained in an exhibit. Students must first redact the information contained therein.

IN-CLASS DISCUSSION: Legal and constitutional issues in virtual trials and legal issues in accessing/presenting social media evidence including the problem of racial and class disparities and access to justice.

ASSIGNMENT: Students will draft and argue motions relating to the distinct problems arising in/from online litigation such as confrontation clause issues, the right to present a defense, and issues pertaining to witness credibility.

WEEK 13: LITIGATION STRATEGIES AND MOTIONS PRACTICE – ADDRESSING EVIDENCE AND PROCEDURAL ISSUES IN VIRTUAL LITIGATION

PRE-CLASS READING: Lubet, Chapter Nine: Objections.

IN-CLASS EXERCISE: Students draft, present, and argue motions relating to the distinct problems arising in/from online litigation.

WEEK 14: MEDIATION, SETTLEMENT CONFERENCES AND ONLINE ADVOCACY

PRE-CLASS READING: articles on mediation in an online environment:
<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUId=CEB54377-412E-40F2-8328-533902295BD8>; <https://www.mediate.com/articles/ali-online-mediation.cfm>

IN-CLASS DISCUSSION: The goals of mediation and settlement conferences; mediation and settlement conferences conducted online; the tools to use platforms effectively; and the mechanisms for presenting a case persuasively and emotionally in a two-dimensional setting. Guest speakers – panel of litigators, mediator and judge/magistrate judge.

WEEK 15: FINAL TRIALS