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The Essence of Trying Cases

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1. INTRODUCTION: THE ART, CRAFT & SCIENCE OF THE TRIAL LAWYER

"It is the first great principle of growth that the thing is no mere aggregation."

"Integration means no part of anything is of any great value in itself except as it be an integrate part of the harmonious whole." Frank Lloyd Wright

The usual litigation seminars & articles present a variety of topics presented by a variety of lawyers with little cohesion between topics or speakers. Such seminars leave attendees with the difficult task of integrating the techniques into a cohesive trial presentation without the benefit of an explanation of how the discrete technique interrelates with the totality of the trial much less the entire litigation process.

Successful trial work is not a disjointed series of techniques. Rather, it reflects a global understanding and cohesive philosophy of both the litigation process and its end result: the trial, Law schools segregate the elements of litigation into separate courses: civil procedure, evidence and trial practice without teaching how they all are integral and more unfortunately without teaching how they all relate to persuasion. The result is too many *litigators* who understand only parts of the process and too few *trial lawyers* who understand not just the parts, but the whole process.

At its base, this article presents the foundation of litigation and trial work as an integral whole.

The emphasis is on the need for a global view of the process, a cohesive philosophy and how to think and act like a trial lawyer at all steps in the process.

But courtroom skill and a cohesive litigation/trial philosophy has never been enough and especially isn't sufficient in the time pressures and economic and technological demands of 2010. Skillful courtroom lawyers must also manage and administer their cases to not only provide efficient and economical services, but to provide themselves with the freedom to be creative and to really practice the art and craft of the trial lawyer. The articles that follow this one will attempt to draw together not just trial techniques with persuasion, evidence and procedure, but with case management and administration and tries to integrate all of that into a global and cohesive whole. But we start first with the advocate.

2. THE ATTRIBUTES OF THE TRIAL LAWYER

a. Introduction

The purpose of this section is to verbalize the traits that I've observed as essential to being a trial lawyer. This article is not meant to elevate the trial lawyer over other lawyers, rather it is an attempt to describe and define the psychology and traits that make for success in the courtroom as a specific niche and specialty area. One of the reasons for this attempt is to confirm for those embarking on a career as a trial lawyer what they are doing right and point out what they might not have discerned on their own. Another reason is to set out for those who do not enter the courtroom on a regular basis the abilities necessary for success there and perhaps help in their decision as to whether to call in counsel who does spend regular time in the courtroom and who possesses the necessary traits. Another reason is to set out for those who have not yet entered the courtroom the traits they need to develop as they decide whether to embark on a career as a trial lawyer. Lastly, this is written in hopes that others may write to refine and/or add to the description of traits set out herein.

b. The Top Ten Traits of Trial Lawyers

(1.) Intellect/Intelligence

A trial lawyer must possess the raw intelligence to appreciate what the case/trial is all about and to pull together the applicable law and reasoning and logic. All fields of the law require intelligence -- the type of intelligence in trial law is different. In most fields the intelligence necessary is that required to research and understand the law in a given area. In trial law it is the ability to understand not only the law, but also the substantive knowledge area associated with the facts of the case and the areas of the expertise of the witnesses and the knowledge of people: witnesses, judges and juries. It thus requires the desire and ability to learn anything -- not just what the lawyer is interested in. It is also the discipline which allows you to read the litigation literature, keep notes, index the advance sheets, and continually hone and advance your skills and abilities.

(2.) The Ability to Translate to the Jury: Skill in the Arts of Questioning & Communicating

Persuasiveness on three levels: real world common sense, raw undeniable logic and personal force. I've watched lawyers much more intelligent than me create wonderful questions absolutely right on point that would be dispositive on the facts and law for the most picayune appellate court. However, they have been absolutely worthless as questions to ask in front of a jury –while the expert could understand them and respond appropriately the answer would be worthless to a jury. I've looked also at transcripts of questions I've asked in trials where I know that those questions either put a

witness away on cross or were absolutely perfect re-direct questions completely making the point and defusing the cross and wondered how those questions in black and white could ever have been so powerfully persuasive in court. It's easy to say that you have to talk to the level of the jury -- but that's not very instructive -- it's also too shallow because on that jury you may have as I had recently a jury with a range of education and experience from a laboratory worker with a high school education to a full professor with a doctorate. It is not so much looking for a particular level of language as it is looking for commonly accepted language (and terms that you've taken the time to define for the jury early in the trial) and just making questions that have good single focus and which logically make the point.

Perhaps the best example of this is the outline of proof:

[a] This is a complete outline of the proof expected from each witness and much favored by the litigation departments of large law firms. It is many times combined with a risk analysis tree which attempts to quantify the risks at various decision points in the proof analysis (whether decision points for the jury on admissibility or law or for the jury on fact determinations).

[b] It is tailored to the legal elements and shows the sources of the required proof.

[c] While such outlines are valuable for a host of other reasons, they are worthless in terms of the actual questioning outline.

Questioning outlines come from the facts themselves. They are designed to present proof in the most persuasive way. They must be built as the questioner goes over the transcripts, statements of witnesses, documents of the witness, the "paper" of the case, et cetera.

[a] To develop questioning outlines you must focus on the specific witness.

[b] Set up a folder just for that witness and as questions occur, throw them into the folder.

[c] Put whatever exhibits might be used with that witness in the folder.

[d] Put their statements and deposition transcripts in there. (Have the transcript summarized for fast skimming at least a month before trial.)

[e] Go through every part of the ring binders and source materials pulling off questioning for each witness first.

[f] Then with just the single witness' folder on the table organize and develop the lines of questioning that occurred from the review of the source materials.

1. Look at the portion of the proof outline relative to this witness and see if those areas are already covered in the questions in the folder.
2. Now do "blank sheet of paper" thinking for this witness. Consider without looking at any source materials, depositions, et cetera, what can be done with this witness, how they fit into the larger theme of the case, what psychology you will use with them.
3. Lastly, layout all the scraps of paper, ideas, et cetera, and put them in an order that makes sense with the witness that starts on a high note and ends with a high note and puts the chancy areas in the middle -- you have to give each area a name/title/subject to do this.
4. Now put the subjects together in an outline and see if it makes sense and flow and if so, order the questions and depending on the amount of time available rewrite or type or dictate the questions -- but leave room to add, subtract or remold.

The facts and the non-facts are molded and presented in indisputable fashion, i.e., that your facts cannot be contested or impeached. (See Diagrams, pp. 9-10.)

When preparing, the process has four parts:

[a] Legally what do I have to do.

- start with instructions and verdict form

- elements of case

[b] Focus by getting rid of file "stuff" and getting to just one individual trial segment.

[c] But then do blank sheet of paper thinking

[d] Back yourself out and away from the microscope and see the big picture.

The ability to understand and discern that you don't have to question on everything or prove everything — the absence of proof in your opponent's case can give you the "proof" or inferences you and the jury need. Similarly, you need not ask everything at a deposition. There are things that you know the witness cannot deny when asked at trial.

3. Force of Personality

It's not always the same. It's not necessarily physical domination. It's rare that really soft spokeness works. It's "you are the message". It has to be used at the right time -- e.g., not usually on direct.

Conviction:

[a] I've seen silk purses made out of sow's ears.

[b] You have to watch out for the disadvantages of putting the blinders on, however, sometimes you just flat out have to put them on.

4. Sense of Body/Stage Presence

True trial lawyers know their “stage”. They are always sensitive to where they are in the courtroom relative to the witness, jury and judge and always cognizant of the “sight lines”.

5. The Inclination and Ability for Preparation

Preparation is absolute drudgery. Especially in comparison to the thrill of the actual trial: cross-exam and closings! There is the ability to prepare which is unique. There is the inclination to prepare which may wax and wane as one's skills in the courtroom increase giving rise to the temptation to "wing it".

6. Organization and Management

A system that makes the right things happen at the right time — to provide for the right decisions, compliance with the rules and deadlines, and the right instinctive "moves" when there is not enough time to "think it out" and to do what has to be done with the greatest efficiency. The obvious analogies are to sports and the military. Troops and teams are drilled and trained on the "basics" until they are second nature and done without conscious thought so that the conscious thinking has the luxury of being unimpeded with the mundane or basic.

Cases years ago could be handled without any particular management talents on the part of the trial lawyer. While the best trial lawyers had management instincts the art of trial work could cover over management and organizational deficiencies.

Today that isn't possible with the major cases that go to trial. Organization and management can never replace the art of courtroom skills, however, to maximize courtroom skills there must be superior organization and management of the case. In addition, clients’ today demand that the legal services be delivered in a cost effective and efficient manner that only organization and management can provide. Organization and management -- a

systematic manner of handling cases — provides the luxury of time to the trial lawyer to be able to concentrate on the creative and the art of trial work rather than the drudgery of detail at the time it is most needed: the final preparation for trial and in the trial itself.

7. Experience

The ability to seize the moment — thinking on your feet -- the ability to improvise -- the ability to "smell" -to sense the vibrations -- to know when you can go for the kill -- how far you can push the witness. Experience that allows you to make the right motions, decisions, lines of questioning because of the vibrations you feel, the smell and the feel of the situation. And the ability to understand human beings and their emotions -- empathy -- finding the essence of a case — knowing what you have to admit and where you can win the case -- finding the right issues not from a legal sense but from the human sense.

8. Passion

A controlled passion or anger or indignation or belief that your cause is just one and that makes you want to win and to be willing to take off the gloves and not stand aloof.

9. Courage

Too frequently all that research and preparation fades as the trial dates nears. It takes courage to go to trial:

[a] Everything is set up to push towards settlement

(1) Judges

(2) Clients

(3) Your lifestyle.

[b] Your analysis and judgment might appear to be proven wrong

1. No one likes to be second-guessed.
2. No one likes to be wrong.

10. Common Sense

At the end of the day, forget about the prestige of your law school, your law school training, where you ranked in class, what you scored on your LSAT. Follow your common sense and you will rarely go wrong.

c. Conclusion

The strong suit of most large litigation department lawyers is the intelligence, logic and writing ability to make all the necessary arguments to be able to win on an intellectual plane. Most PI plaintiff and defense lawyers have as their strengths controlled anger, experience, ability to mold facts and common sense argument ability. The lawyer that can draw the best of each of those ends of the spectrum is the trial lawyer that we each would want to represent us if we were in litigation. The core of the philosophy of this article is distilled in a memo I wrote to an associate some years ago trying to instill the lessons of what being prepared for trial really meant.

AVOIDING "SETTLITIS": A MEMO TO AN ASSOCIATE

FROM: J. Ric Gass TO: Associate

Your comment about our opponent wanting to settle (now that we are two weeks from trial and yet have substantial discovery left) is very instructive, not just for this case, but in general.

First, in this case, what you need to do now with both our client and our opponent is to keep a menu of settlement choices out there that they can select from -- so it is not whether to settle but "which one should I choose?"

Granted in this case we want it to settle as much as our opponent, but this is instructive in that this happens to most attorneys as they face a trial date and if not them, then their clients or a combination of both. Not many rational people really want to go to trial -it's hard work and it involves substantial second guessing of yourself, your prior decisions in the case, your judgment, your ability in court, as well as the great imponderable of what a jury will do.

It's instructive not so much in the sense that this is something that only happens to other attorneys and that it won't happen to attorneys like us who can beat on their chests like "Tarzan". I don't particularly want to go to trial next week either – there are new interesting cases to start work on, I would like to go up to the cabin, there's a paper that needs to get written for an upcoming seminar, I have tons of work to do on the program I'm running at the end of the month, et cetera, et cetera, et cetera. What makes this instructive is that this psychological pressure to settle that builds as a trial date approaches is on the one hand a unique opportunity for a *trial* lawyer to force a settlement on their terms, if the pressure on the opponent can be turned up in the right way as well as from a self-defense standpoint, the trial lawyer needs to build in a protection so that it does not happen to them.

This is why a case management system and especially the 100 Days to Trial System is so crucial. From our standpoint, that system will alleviate much of the second-guessing of ourselves because we will be on the offensive and generating positive feelings about the case at the same time that we are turning up the heat gradually on the opponent. When the week before trial comes, the opponent realizes what a box they are in at the same time that the psychological pressure to settle has built to the highest point, This case is an excellent example: as we neared trial, you were on the offensive against not just the plaintiff, but the co-defendant as well, and we felt we were controlling much of what was going on and could stand pat. The pressure to cave was on the plaintiff and the co-defendant and not us. I don't think that the reason why this is so is that increased activity distracts you from or allows you not to think about the various possibilities because that is just the naturally increase in workload as you get to the week before trial. Rather, I think it occurs because when you are on the offense leading up to trial, you are in control and you are making things happen rather than reacting to another's agenda.

I also don't think that the degree of control and offense has to be on every nitty gritty detail. In some cases you may have only very few control points and the heat is increasing purely because of particular issues that we just won't move on.

Two other factors increase the pressure to settle. The reverse side of "there's too little time to prepare" (because the attorney hasn't budgeted sufficient time) is the mind-set that believes that every case must be perfectly prepared. Watch for the perfectionist. They will never have enough time to prepare for trial and can be very vulnerable for settlement.

The last type of personality to watch for that is prone to settlement is the person suffering from "imposter syndrome". They have achieved everything they were "supposed to" achieve in life: schools, honor societies, et cetera. The last thing they can afford to do is not win. They are particularly vulnerable and posturing a settlement offer in a way they think they have "won" can be very effective.

Statistics tell us that well over 90 percent of all claims and lawsuits settle before trial. What statistics don't tell us is what percentage are favorable or unfavorable to the defense.

All attorneys have experienced the exhilaration of the opponent's offer free falling/or accelerating until their offer is accepted. Unfortunately, the agony of imminent trial requests for increased authority by counsel and adverse trial results.

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