

Law School

Advice for the Next Generation of Trial Lawyers

*Contributed by
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There is a need for trial lawyers today like no other, and the future will require great trial lawyers even more than the present as fewer and fewer lawyers these days are given the opportunity to try cases.

Some decry there are too many lawsuits, but in many ways there are too few. Where individuals do not feel that their grievances will be heard fairly by the court system, there can be a tendency to take matters into one's own hands, often with unfortunate results. The American court system, and the trial lawyers who lead it, are necessary to ensure that all who have been aggrieved will be confident that, win or lose, the court system and the advocates who preside over it will adjudicate their claims and defenses fairly.

Anyone Can Be a Trial Lawyer

Jurors will never know (or likely care) where you went to law school, what your class rank was, or whether you were editor of the law review. They will only know what they see in front of them. Anyone who puts enough time and effort into it can become a great trial lawyer.

Start Trying Cases Early

There is a certain mystique about trials. Those who do not try cases see them as a world of secret handshakes, codes and inner workings behind some illusive curtain. However, it does not take many trials for a lawyer to quickly get past this and become a "real" trial lawyer ready to take on any case. After two or three trials, the mystique of being on your feet in a courtroom will wear off. You can do this. But you have to start early. The vast majority of litigation partners at big

firms have never talked to a jury, and they cannot start 30 years out of law school charging the client \$700 an hour to get their feet wet. No one will fault the junior lawyer if he or she needs a little guidance to get through the first trial or two, but a client (and judge) definitely will fault the senior partner taking a flyer on one.

Pick a Firm That Tries Cases

This may seem obvious, but if you want to try cases, go to work for a firm that tries cases. These days every firm's website says the firm has experience with every conceivable type of law. I am not saying that the firm is being disingenuous by so stating. If a firm says that it has experience in a certain area, it undoubtedly at one time had some lawyer who handled at least one matter in that subject area. But that does not mean that every area listed is its bread-and-butter. And this is certainly true with regard to trying cases.

The fact that a firm has a "litigation" department means nothing about the frequency of cases it takes to trial, if ever. On TV and in the movies all lawyers are litigators and they are always in trial. This is far from the truth in real practice. The vast majority of lawyers, including the vast majority of litigators, will never first chair a trial. When interviewing a firm, ask specific and pointed questions regarding how many cases it has taken to trial in the last twelve months, including jury verdicts, judge verdicts (bench trials) and binding arbitration awards. Lawyers at firms that try cases will know instantly which cases are going to trial, when and where and who in the firm is handling them. (Trials get people's attention.) If they have trouble responding without having to get back to you, that is a sign that this may not be your firm.

Better Yet, Pick a Firm Where Associates Try Cases

Simply because a firm tries cases, and perhaps tries many cases, does not necessarily mean that there are opportunities for newer lawyers to get in the courtroom. Some firms, well known for their courtroom

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proWess, have designated go-to partners who try their cases. As an associate at such a firm you may be no closer to standing on your feet in front of a jury than if you were at a firm that never tries cases.

During the interview ask specific and pointed questions (particularly of associates) regarding associate involvement in trying cases. This does not necessarily mean that the firm will have dozens of examples of first-year associates first-chairing trials, but if associates are actively involved in witness preparation, helping argue pre-trial motions and motions in limine, and/or putting on a witness or two during the main event, this will tell a lot about your potential opportunities in the courtroom.

Find Out Which Cases in Your Firm Are Getting Set for Trial and Ask if you Can Help

Once you are at a firm that tries cases, the simplest way to get experience is to ask. Do not assume that the senior partners know you want to try cases. Many lawyers do not. Tell the partners in the firm you want to work on the upcoming trial or some other trials off in the distance. They will appreciate your offer and hopefully will allow you as much responsibility as you are willing to take with the guidance of the more senior lawyer assisting you.

Forget About Having a 9-to-5 Job

The courtroom may have set hours when it hears trials, but trial lawyering is not a 9-to-5, Monday-through-Friday job. Trial lawyers work late into the night and on weekends. If you want a 9-to-5 job, trial lawyering is probably not for you. If, on the other hand, you thrive with the excitement of late night preparations for the next morning's examinations, here you go.

Spend as Much Time in the Courtroom as Possible, Whether You Have Anything to do with the Case or Not

A seasoned trial lawyer once gave me a valuable piece of advice when I was a first-year associate: He recommended that I go to court once a week and spend two hours observing four different trials (30 minutes each), which I did. I would simply walk up and down the hallways until I found one random case after another which I could observe. It did not take long to see a variety of different trial circumstances. Most significantly, I began to realize that I too could do this.

When you head over to court for a status conference or discovery motion, do not be in a hurry to get out of the building. Stay as long as your workload back at the office will permit, even if it means bringing plenty of work with you to perform as you sit in the gallery watching one of these trials.

Learn Everything You Can About Trial Logistics

Trials are stressful. Even seasoned trial lawyers get nervous in trial because they are invested in their client's plight. But there is another form of nervousness that comes from the fear of being embarrassed. This is a very normal and rational fear for a newer lawyer trying his or her first case or two. How to examine witnesses, how to cross-examine witnesses, how to make arguments, etc. are an artform and not mechanical and thus in many ways can only be mastered through experience. Much else of what happens in a trial is easily learned before one steps foot in court for the first time.

Learn everything you can learn about where you sit in the courtroom (e.g., the plaintiff always sits closer to the jury), where you stand in the courtroom, how close you can be to the witness and the jury, and who goes first in jury selection, opening statements, witness examinations, and closing arguments. You can learn all of this and much more from any number of books. By doing so you can reduce the nervousness that comes from the fear the judge will yell at you for doing the wrong thing so you can focus your nervousness on the substance of your client's case instead.

Learn the Law, Especially the Rules of Evidence

Read the Evidence Code cover to cover. A couple of months later, read it again. Similarly, take every opportunity you can to read articles, treatises and books regarding trial tactics, evidentiary rules and the like. I probably read James McElhaney's Trial Notebook 10 times cover to cover in my first several years of practice, reading it before every case set for trial. And that is only one of the numerous writings available for newer trial lawyers.

Become an Expert in a Substantive Area of Law Where Cases Go To Trial

It is far more likely that someone will allow a newer lawyer to take part in a trial if that lawyer is seen as an expert in the underlying section of law. There are many areas of law that go to trial. Find one that interests you and learn everything you can about it, and if it requires self-study on evenings and weekends, so be it. The trial team will welcome your input if they view you as an expert on the law even if your trial skills are less than seasoned.

Take Small Personal Injury Cases with "On-Board" Clients

Personal injury cases are good for a lawyer's first trial or two (or more). First, there are lots of them. Second, they are almost impossible to defeat on summary judgment so they can get in front of juries if you (and the client) are not too eager to settle.

Most personal injury cases, like most cases in general, end up settling and that is as it should be. However, you do not have to be too eager to settle. Tell the client at the outset: "Although your injury is by no means insignificant, your medical bills, lost wages

and other damages are not big enough for a lot of other personal injury firms and more experienced lawyers among them to take your case. Instead, a lawyer taking your case will probably put a minimal amount of effort into it and attempt to settle it as soon as possible. I, on the other hand, will work extra hard to prepare your case for trial, but you need to be on board with me to let me try this case. Absent an exceptional settlement offer from the other side (which will be unlikely), I want your commitment not to take whatever they offer simply to get it over with. We're in this together. Let's plan to try this case."

At the end of the day, it is your client's life and resolving the case advantageously for him or her is more important than your trial development. If a settlement offer is made that is in the client's best interest and the client wants to accept it, you should be supportive of that decision. However, one of the greatest disservices lawyers do to their clients is when they, perhaps without even realizing they are doing so, gently coerce the client into taking a settlement offer because the lawyer is afraid to try the case. If you are not afraid of the trial process, you will be better able to advise the client about whether settlement is advantageous.

Simply Because You Are a Newer Lawyer Does Not Mean That You Cannot Create Great Theories to Win Your Case

Never get discouraged by someone telling you "you can't do it this way." I had a case recently that settled on the eve of trial which I was handling with one of our most junior associates. It was a plaintiff's personal injury case involving alcohol consumption by the defendant, and the associate came up with a theory I told him would never work. He refused to take no for an answer, and proceeded to win every discovery motion along the way up to and including convincing the judge that at trial he should be allowed to present his creative theory. The experienced defense lawyer on the other side, who throughout the case had belittled our associate for not being a "real lawyer," not knowing "how these cases work," etc., ultimately capitulated on the eve of trial and essentially quadrupled his settlement offer when he realized that our associate's theory was about to be put before the jury. The defendant's lawyer and I had roughly 50 years more experience than our associate. But our associate was right. A smart, hard-working junior associate can single-handedly win the case if he or she works hard, thinks creatively and refuses to take no for an answer.

Prepare, Prepare, Prepare (And Then Prepare Some More)

When the time comes for your first trial (or any trial, for that matter), there is no substitute for preparation. Just because you are a newer lawyer does not mean you cannot know every document, every fact, and every witness better than anyone else involved with the case – lawyers, parties or otherwise. Preparation allows

you to frame the case in the most advantageous way, but also allows you to change course when needed, improvise and adjust (especially during cross-examination).

Always, Always Be Courteous, Civil and Professional

First, it is the right thing to do. Period. But if this is not enough of an incentive, juries will resent (rightfully so) any lawyer they perceive as being unprofessional, and will especially resent a lawyer who acts professionally to other lawyers in the courtroom but is less so to the court reporter, bailiff and/or clerk.

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