

# PART I

---

---

---

---

# Trial Overview

<http://www.pbookshop.com>

## CHAPTER 1

---

---

---

# Trial Practice: A View from the Bench

*Joseph S. Kiefer*

As an attorney, I have had an opportunity to try numerous cases, both civil and criminal. I have served as a prosecutor, criminal defense counsel, and civil defense counsel. Consequently, I have had an opportunity to participate in trial practice in many different roles. Over the last several years, I have also had the opportunity to serve as a trial judge, adding another unique perspective on trial advocacy. This experience as a trial judge has allowed me to observe courtroom proceedings without the same pressures and constraints as the trial advocates. Without a stake in the outcome, other than serving justice, the experience has given me the chance to analyze what works and what doesn't, as I have the opportunity to serve as fact finder on a variety of issues. The sum total of these advocate and judicial experiences has taught me that different players involved in courtroom proceedings see the process in different ways. The trial advocate who understands these unique roles and perspectives is better prepared to satisfy the varied interests and complexities of courtroom advocacy.

For example, lawyers and fact finders often see evidence in different ways. What I thought was important as a trial advocate wasn't always what carried the day when I had the chance to obtain juror feedback. Additionally, as a judge, I sometimes have a different view of what is important and necessary to reach a decision than what I thought the judge would want to know when I was the trial attorney. Most often lawyers are very successful at identifying key issues, but presenting cases and arguments in the most effective way possible involves another level of advocacy.

The trial attorney generally evaluates evidence for how it fits into the legal structure of a case: what has to be proven, supported, disproven, or discredited. A fact finder, however, often operates on how evidence makes them feel. This is likely more true in jury cases than bench trials, but presenting matters persuasively involves more than just facts and elements. This is not to suggest that lawyers should ignore the legal requirements of their cases and play only to passion and emotion, but tying everything together into a digestible, understandable, and convincing framework is the key.

Throughout this book, accomplished advocates have shared various tools and techniques to assist trial practitioners in honing and refining their skills to reach the maximum level of persuasion. In this chapter, I offer five guidelines for successful trial practice: Be Prepared, Be Persuasive, Be Personable, Be Professional, and Be Persistent. Five simple yet effective recommendations that I believe allow trial attorneys to optimize their courtroom presentations and attain the highest level of advocacy. These recommendations are general in nature and provide a broad perspective on life as a trial practitioner. They are founded on hundreds of criminal and civil trial experiences in various roles capturing both the high and low points of trial practice. I don't profess that everything noted in the following pages is the gospel of trial advocacy. I know of no such gospel. Trial advocacy is an art, sculpted over time, and performed by many talented people with different skills and abilities. There is no single way to successfully try a case, but there are some basic principles that, if observed, will give you a solid foundation for truly outstanding trial work.

## BE PREPARED

“Este Paratus,” that famous Boy Scout motto “Be Prepared,” headlines the list of trial advocacy techniques. It almost goes without saying (but it is so important I’ll say it anyway) that success in virtually any endeavor is directly related to the preparation that went into the task. Some people seem to be able to “wing it” and achieve success with no apparent preparation, but I maintain that most often there has been some degree of preparation that went into that successful performance. Preparation, however, is not a one-size-fits-all proposition. “Preparation” conjures up visions of slaving over mountains of law books deep into the night, but it can actually come in many different forms. It may consist of arguing alone in the car while driving to work or mentally reviewing evidence while in the shower. It may be years of extemporaneous speaking in a variety of environments aside from the law that allows someone to perform without appearing to have prepared at all. The key to success is being prepared. The form of that preparation is many and varied.

But why is preparation so important? Certainly it leads to a keen understanding of the case, but I believe preparation leads to several ancillary benefits that are just as important as knowing the case. First, preparation creates a sense of confidence that allows you to perform at your best: “Self confidence is considered one of the most influential motivators and regulators of behavior in people’s everyday lives. A growing body of evidence suggests that one’s perception or self-confidence is the central mediating construct of achievement strivings.”<sup>1</sup> Consequently, to the extent confidence is a self-perception, you can convince yourself to be confident through preparation. Preparation will allow you to know the case well, and the comfort you derive from knowing the case leads to greater confidence.

Some people are naturally self-confident and can leverage that self-confidence in court. Others develop self-confidence through years of practice and experience, which gives them a strong basis to believe in themselves. Preparation can also generate self-confidence. It can serve as that experience even when you haven’t tried tens or hundreds of cases. The extent to which you know the case, have anticipated what may occur at trial, and evaluated those scenarios in planning all serve as quasi-experience—the idea being that you have been there and done that before. To be honest, even the most confident people can experience self-doubt in new and demanding environments, but preparation helps takes the edge off the nerves and allows you to function at optimal levels. Confidence allows your mind to focus on the matters at hand and not become overwhelmed with worry about what you may not know. In this mental state, you are best prepared to respond to the demands of trial. While confidence is certainly a benefit that comes from preparation, guard against overconfidence. As noted, confidence to a large extent is a self-perception. Consequently, it is possible to fool yourself, at least on the surface. Additionally, a false sense of confidence can cause you to prepare less as you mistakenly believe you have everything under control.

By providing confidence and freeing your mind, preparation also allows you to remain flexible during trial. Don’t confuse “preparation” with “plan.” While preparing often leads to the development of a plan, the real benefit of preparation is the ability to respond quickly to changing environments. Football teams prepare all week to face an opponent. Sometimes the game plays out consistent with the plan, and teams perform consistent with their past tendencies. Other times, however, the opponent reveals new approaches that were unanticipated. The more you know about your case and the more productive work you have done in the pretrial stage allows you to better respond to the myriad of unexpected issues that inevitably arise.

I once tried a sentence rehearing in a truly tragic baby-death case. A young woman had amazingly hidden her pregnancy from co-workers and friends for several months. One evening she presented to the emergency room with stomach pains. At some point while at the hospital, she went into a restroom, delivered the baby on her own, and left the baby in a wastebasket. The baby was later found dead. The original trial ended in a verdict of guilty to premeditated murder. After three trips up and down the appellate courts, however, the case was ultimately affirmed as a negligent homicide. Based on the maximum sentence available for that offense, as compared to the actual sentence adjudged for the original murder conviction, the case required a sentence rehearing. Given the passage of time in the appellate process, this rehearing occurred nearly three years after the original trial. There were numerous issues related to the presentation of evidence in front of a completely new jury (this jurisdiction had jury sentencing at the election of the defendant with evidence presentation). My co-counsel and I spent hours researching case law, reviewing the previous trial record, tracking down witnesses, and refining our sentencing presentation. At the time of the rehearing, the defense lodged numerous objections to various types of evidence we had developed. We lost some of those motions, but our preparation allowed us to very quickly and efficiently transition to alternate means of

---

<sup>1</sup>. DANIEL DRUCKMAN & ROBERT BJORK, *LEARNING, REMEMBERING, BELIEVING: ENHANCING HUMAN PERFORMANCE* 173 (1994).

evidence presentation. The preparation we had undertaken provided a high degree of flexibility and an ability to respond effectively to a rapidly changing evidentiary environment.

Finally, preparation helps prepare you for the next case. In my early days as a trial practitioner, I researched and reviewed every issue I thought could reasonably come up during trial—evidentiary objections, motion issues, witness impeachment, jury instructions. Not just the obvious, but even tangential matters. This was a time before extensive use of computers in court, and consequently, I had stacks of cases and outlines neatly arrayed around counsel table at the ready to address whatever might arise. These stacks were incredibly unwieldy, but they gave me comfort. The stacks I used during trial represented the issues I properly anticipated and prepared to address. The stacks I didn't use represented the matters I knew I could handle if needed. They reassured me that I had been thorough in my trial preparation. Over time the stacks dwindled. Digital media took their place, thankfully, but also my baseline of knowledge increased with each case I tried. Both the used and unused stacks served as my head start in preparing for the next case. The moral of the story isn't to research every theoretical possibility that may arise at trial; you have to use some common sense and conform your preparation to the relevant issues in the case. But preparation elevates your knowledge base each time you prepare. This is to some extent true even with the cases that never make it to trial.

Preparation is a hallmark of an effective trial advocate. While the amount of time spent preparing may decrease the more cases you try, it doesn't mean you are not preparing. Some of the preparation was simply done in the context of previous cases. Seemingly winging it may work for an issues or case here or there, but in the long run you will have forfeited the opportunity to create a broad foundation of substantive and practical knowledge that can be activated in each case you try. Eventually, lack of preparation will catch up in the more complex and difficult cases down the road. Even though I have been involved in hundreds of trials as an attorney and judge, I can honestly say I have learned something about the substantive law or trial practice in each experience.

## **BE PERSUASIVE**

I know it sounds obvious, but I continually come across counsel who perform the mechanics of the trial process—voir dire, opening, witness examinations, argument—but never really get to persuading. They argue with passion. They have mastered the art of voice inflection and body movement to enhance their presentation. But they never seem to get to the heart of why certain facts really matter.

For example, many younger counsel, well schooled in the art of oral recitation, have great command of prepared arguments—but if they are asked a question during a motion hearing about why a particular fact is important to an issue, the wheels begin to come off. When I serve as a trial advocacy instructor, I often employ an exercise to emphasize the need to really highlight what is important in a case. I will take a witness examination or argument and walk through it question by question or point by point and ask counsel why a particular fact, statement, question, or comment is important. It is not that every single word spoken at trial needs to be the silver bullet that wins the case. It is more a matter of forcing advocates to really break down what matters.

One of the dangers for advocates comes from the preparation phase of trial work described above. Attorneys generally live with their cases for many months or years, especially the bigger cases. Over time, the attorney evaluates all of the angles and issues and makes a determination as to what to present and what to discard. The attorney then shows up for trial and faces motions that further limit the evidence he or she intends to present. By the time the matter is tried to a fact finder, the evidence is merely a subset of everything the attorney knows about the case. The attorney, however, often fails to make this adjustment. Consequently, when it comes time to argue a motion or the merits, advocates will sometimes shortchange the “why” of particular facts and make assumptions about what the fact finder knows. The “why” is more apparent to the attorney who has worked with the case for months or years than to the judge or juror who only has a subset of the total facts and has only experienced them over a period of days or maybe weeks. Trial practitioners must master the ability to tell the story from a limited set of facts and really emphasize why things matter, without being condescending.

Once you have evaluated the various aspects of your trial presentation, be it a witness examination, opening statement, or argument, and have considered the “why” of each piece, you still need to test it for the desired impact. Chapter 6 in this book is dedicated to mock juries and focus groups, which are great ways to test one's case, but not everyone has the means to employ these methods or a case type that justifies it. Testing, however, can come in many forms. It can take place within the trial team, with other attorneys or even nonattorneys in the firm, and, where appropriate considering confidentiality issues, even with others outside the firm. Give a few people a snapshot of your examination and find out what

they took from it. Through this process, themes that resonate with the audience will emerge and can serve as the overall framework for your presentation.

Consequently, once you have the information gathered and evaluated for persuasion, you still need to optimize your organization for effect. Convincing someone to accept your position is about the information you present as well as how you present it. Typically lawyers identify what the law requires them to prove or disprove, and they then set out to fit pieces of evidence neatly into the elements. For many years, research indicated that is how jurors went about reaching verdicts. More recent studies, however, have uncovered the importance that themes play at trial. It is not simply whether facts A, B, and C fit into elements 1, 2, and 3. According to the more recent “story model,” “jurors use episode schemata—generic knowledge structures abstracted from prior experience—to remember and organize trial evidence into a plausible story.”<sup>2</sup> This is particularly true as trials have grown more complex and dependent on scientific and technical information, but any case can benefit from the effective use of themes.

By way of example, I tried a criminal matter as defense counsel a number of years ago. The case involved illegal steroid trafficking and use by a military member. It was the kind of case that could possibly have been disposed of through nonjudicial proceedings, but the senior rank of the defendant caused the government to pursue a criminal prosecution. At trial, I extensively used a theme from Shakespeare’s play *The Merchant of Venice*, arguing repeatedly that the government went overboard in its pursuit of my client and was blindly seeking its “pound of flesh.” This theme was highlighted in various ways throughout the presentation of evidence. In argument, I described the scene from the play that references the “pound of flesh” without giving the ultimate conclusion in Shakespeare’s work. (In part because I wanted to leave them hanging just a bit, and in part because Antonio is essentially freed on a legal technicality discovered by the wise and clever Portia.) In the end, my client was vindicated. Following the proceeding, two of the jurors tracked me down to find out how the play ended. I had uncovered a theme that resonated with them personally and impacted how they viewed the case.

The fact finder in many respects is seeking to create order from chaos. The attorney has lived with the case for months or years, but the jury is receiving the information for the first time, in an unfamiliar environment, with many rules and strictures. The attorney understands the nuances and implications of the evidence, but the jury will likely require organization and highlighting to fit everything together. Themes play an effective role in this process. If you have truly evaluated and prepared for the case, you will be able to see the matter from many different perspectives and identify the themes that can be used to most effectively present your case. Investigating facts and fitting them into elements of a crime or claim is one level of advocacy. It is another level to create a comprehensive presentation that incorporates the facts into a narrative story that grabs and convinces people.

## BE PERSONABLE

Given the suggestion of being personable in courtroom proceedings, I know some people will want to stop reading at this point. Countless war stories champion the scathing cross-examination of the other side’s key witness. People often credit this type of approach with winning the case and creating their flawless trial record. What if, however, you could conduct that scathing cross-examination the whole time with a smile on your face? Oxford Dictionaries offers the following synonyms for “personable”: “pleasant, likable, amiable, engaging.” While these adjectives don’t seem synonymous with what we commonly think of as successful trial advocates, I submit that the personable trial lawyer can achieve outstanding results. The lawyer archetypes we see on television, in movies, and in literature reinforce the concept of the brash, loud, and aggressive advocate. I am not suggesting that you refrain from working aggressively and passionately for your client, but all too often we take or make things *personal* in the courtroom, which at times keeps us from fully engaging everyone involved in the trial process. I believe if we strive to be personable, it will make us better trial advocates and professionals.

There are a few ways to be personable. First and foremost, be genuine. But what if you are brash, loud, and aggressive by nature? That’s OK. You may need to smooth some edges, just like a more genteel advocate may need to be more direct at times. The point is to not stray too far from who you really are because people will sense it. Find ways to accentuate your positives and deemphasize your weaknesses. As Shakespeare wrote, “to thine own self be true,” but many forget the rest of the passage, “and it must follow, as the night the day, thou canst not then be false to any man.”<sup>3</sup> The latter half of the quote is

<sup>2</sup> Robert J. MacCoun, *Experimental Research on Jury Decision-Making*, 30 JURIMETRICS J. 223, 226 (1989).

<sup>3</sup> WILLIAM SHAKESPEARE, *HAMLET* act 1 sc. 3.

what is really important for trial practice because in trial settings advocates are seeking to be believed and trusted. Certainly you want to be true to yourself, but through this genuineness you can convey credibility and trust to others. At the same time, anything forced is just that, forced. All the trial advocacy tips in the world can't change who you are and attempting to copy someone else's trial demeanor will likely lead to frustration and disappointment.

During one of my early product-liability cases, I had the task of cross-examining one of the key experts for the opposing side. I had conducted numerous direct and cross-examinations of experts over the years in criminal cases, but I was still relatively new to civil practice and my law firm. That shouldn't have made much of a difference, but it was just enough to leave me slightly unsettled. Taking my lead from a senior partner who instructed me to "really go after" the expert on cross, at one point I was on the tips of my toes leaned forward nearly yelling a full octave higher than my normal voice. "A" for effort, but "F" for execution. I understood the strategies commonly used to "go after" experts and really test them. I had done it many times before with great success. Nonetheless, in this instance, when I tried to assume a persona not my own, my performance became forced and unnatural. When I tried to incorporate my perception of someone else's style or expectation, my natural abilities and past experiences were overcome by the facade I was presenting. At some point, I realized how over the top I had become and salvaged what I could of the examination. The moral of the story is that there is no single trial demeanor that works for everyone in every circumstance. The art of trial work is understanding your strengths and developing the ability to maximize those attributes in the context of the trial process.

The principle of genuineness is also important for those who serve in supervisory roles. Over time in the courtroom we all develop the way we like to try a case, from motion practice to presentation of evidence to cross-examination of witnesses and objections. Usually these traits are founded on past positive experiences, and often they are the product of what someone taught us. Through time and experience, however, we have had the opportunity to refine these skills and adapt them to our own demeanor and style. Consequently, when you ask younger attorneys to approach things in a certain way, consider whether you have accurately assessed their ability to pull it off. Do they have the demeanor to assume the approach you've recommended, and have you clearly explained your expectations? Many things are subject to interpretation such as "go after" this witness on cross or really hit this point in argument.

Being personable also incorporates the concept of reasonableness. The old adage "you can catch more flies with honey than vinegar" is great advice if your objective is catching flies. If we change the quote to catching "allies" and honey and vinegar become metaphors for reasonableness and unreasonableness, the principle becomes more applicable to trial work. People will believe those they trust, and people will trust those they view as reasonable. Reasonableness allows the advocate to look neutral while they are aggressively advocating for their client.

During one of my early cases as a senior prosecutor, a senior defense counsel approached me during a recess and said, "You are the most dangerous kind of prosecutor—the reasonable prosecutor." We have the notion of the prosecutor who bangs on the desk and demands justice. In fact, there is an old adage that roughly states, "If you have the facts, pound the facts; if you have the law, pound the law; and if you have neither, pound the table." There is a time and place for all things, and when it is time to advocate strongly on behalf of your client, I encourage you to do so with zeal. From my perspective, however, if you yell and scream and waive your arms at every turn, at some point the audience will begin to tune you out. There is an art to finding just the right balance of fervor and reasonableness, and while no one can tell you the exact combination for every situation, recognizing the need to modulate your tone and expression is the first step in mastering the art.

Finally, don't be afraid to concede an issue when it makes sense to do so. It is truly refreshing when counsel agree or compromise on an issue. It is not necessarily the advocate's job to make the judge's life easier, but it is incredibly time consuming and draining to have to adjudicate every single issue that comes up during trial. It leads to numerous inefficiencies and takes energy away from the things that really matter. There is no doubt that our trial system is adversarial, and each side is responsible for identifying its key issues that need resolution by the court. There are also many issues, however, that arise during trial that at the end of the day simply don't have a great impact on the ultimate result. I once had a counsel who wanted to brief how much time I would allow for a lunch break. In fairness to him, we were in the middle of a key witness's testimony. I had tried to go as long as I could to complete the examination, but it simply got too late, and we needed a lunch break. It was just one of those cases where every single issue was a dog fight. After the case, I had a chance to meet with the counsel, and I simply asked his view of the import of some of the points he contested. About three issues into this exercise, the light seemed to click on that maybe every issue was not critical to or even supportive of his case theme and theory. Through our discussion, he seemed to realize that adversarial didn't necessarily

---

mean there had to be a fight every time someone opened his or her mouth, and he could be more selective in choosing his battles for maximum effect.

The moral is to be an advocate, fight for your client, contest those issues that need to be contested, and ensure you have an appellate record for matters that may need to be reviewed. I'll even give you to err on the safe side and argue maybe just a little more than you need. At some point, however, be willing to see the forest for the trees. Remember as noted above that trials are more often about themes than individual discrete facts and figure out how to get from A to B persuasively and reasonably.

## BE PROFESSIONAL

Our society today is filled with caricatures of legal professionals. I use the term "caricature" because for dramatic effect they tend toward extreme exaggerations of the best and worst qualities of what we expect lawyers to be. Television, movies, and books portray lawyers as either the most intelligent, eloquent, organized individuals on the planet or narcissistic, dependent, bumbling fools. Every so often we find a character more toward the realistic center of the spectrum.

One time as a younger practitioner, I met with an older woman client to prepare a will. Just before finishing the appointment, she looked at me with all seriousness and noted that none of the people in the office looked like the people on the television show *JAG*. After scooping my pride off the floor, I humbly apologized that we were not all TV or movie stars. This lighthearted moment helps reinforce an aspect of our current legal and social environment—perception can be reality or at least create expectations for those involved in the process.

The challenge for "real" trial attorneys is finding the balance between meeting these public expectations while at the same time remaining true to the tenets of the law and ethics. How do we achieve impassioned advocacy without overly playing to the masses? I have provided some suggestions in this regard in my recommendation of being genuine and reasonable. Make no mistake, there are times in the trial process where attorneys need to pull at the heart strings of the fact finder and hammer themes that resonate with the audience. Skillfully moderating and maximizing this effect separates the true trial professionals.

As all trial practitioners know, trials are not scripted. While we work to plan and prepare for every eventuality, unexpected issues will inevitably arise. No director sits off to the side and tells us to cut and do it again when we make a mistake in argument or fail to really drive a point home in cross-examination. Despite our general recognition that real courtrooms are not fictional screen sets, many lawyers nonetheless play the part and play to the crowd.

Impassioned advocacy, persuasive techniques, and convincing fact finders to accept your theory of the case are all elements of successful trial practice. There are even times when demonstrating resolve to your client has its place, but not to the detriment of the legal process. At times lawyers fall into the trap of treating real-world courtrooms like movie or television sets, but really, who can blame them? Many courtrooms have become sets.

I sat as the judge in a sexual-assault jury trial last summer. During closing argument, the defense counsel unexpectedly turned to me and very demonstratively asked me to admonish the alleged victim, who was sitting in the gallery. The defense counsel claimed the alleged victim had "flipped [him] the middle finger." Needless to say this was an unusual and ill-advised comment in front of the jury. Determining whether the event actually occurred was almost impossible. I couldn't help but think there was an element of gamesmanship at work, that this was a parting shot at the government's key witness. After excusing the jury, I first addressed the defense counsel's decision to comment on the issue, true or not, in front of the jury. I then reminded the gallery of the proper decorum for courtroom proceedings, whether or not the incident had occurred. After tying up additional legal issues, such as an instruction to the jury (neither side requested a mistrial), we proceeded with the case to verdict. The takeaway is to certainly try your cases with passion and use the means at your disposal to achieve a positive result, but remember that you are an officer of the court and expected to conduct yourself professionally at all times.

Most often these types of situations arise when someone is "forcing" drama in the courtroom. Our society applauds the shocking, extreme, and outrageous, and sometimes real-world court cases lack the sensationalism expected by the public. In some situations, trial attorneys play to the public expectation. I say avoid the temptation. Use impassioned advocacy to make your point, but recognize that a legal proceeding is a real-world matter and not a made-for-TV movie (despite media coverage of several cases in recent years).

Being professional not only corresponds to courtroom demeanor but also time constraints. Respect the court's, jury's, and

other parties' time. From a judge's perspective, while every effort is made to provide a full and fair hearing on each issue, the reality of trial practice is that there is limited time to complete tasks. Judges will generally allow presentation of matters within reasonable limits, but if every issue in the case is treated like the crime of the century, something has to give. The judge at some point has to start moving through the issues making judgments about what is important.

Consequently, be reasonable about the number of contested issues and matters filed and help narrow the field to what really counts. Motions in limine provide but one example of overlitigating. It is not uncommon these days in more complex civil cases for the parties to submit 50 or more motions in limine. In fact, because of this practice many courts have started to limit the number of motions that may be filed. Most of these motions can be resolved by meet-and-confer sessions between the parties. Nonetheless, they are frequently filed anyway, and the court is only notified of any agreements at the last minute before trial.

The motion in limine issue presents collateral effects throughout the trial. As the number of motions in limine increase, so does the likelihood that the judge will simply defer them to trial. It becomes too inefficient to take evidence and argument on 50-plus motions in a pretrial hearing only to have to readdress the issues at trial when there is more context to the case. If a more manageable set of motions is submitted pretrial, however, the court will be in a better position to resolve or at least provide helpful insight on these limited, manageable issues. In this way, the parties have a better sense of what to expect at trial and can better prepare their presentations.

Please don't take this to mean judges give short shrift to certain contested issues, but the practicalities of a system with limited time and resources is that some matters receive more attention than others. Also, I encourage you to preserve matters for appeal where necessary and create records as needed, but be discerning about what falls into that category.

As a final matter on professionalism, please be responsive. In a 2008 ethics study, lawyer neglect and lack of communication was the number one issue noted by respondents.<sup>4</sup> It leads to a greater number of bar complaints and discipline than almost any other issue. Responsiveness, however, doesn't begin and end with client contacts. Attorney responsiveness is also an issue with the court and opposing counsel. Be respectful of all involved in the process, both in and out of court, especially with deadlines. I ask you to guard against the following common tendency, which I myself have unfortunately practiced at times over the years. A deadline is set and is months away. Like anyone, we tend to do what must be done today and leave for another day the things that we can. As the deadline approaches, the parties get together and seek an extension. Often the court grants the extension trusting that the parties need what they ask for and will be diligent in moving the case forward through whatever claimed obstacle necessitated the delay in the first place. As soon as the extension is granted, the parties put the case aside and move on to something else. It happens over and over again in a vicious cycle of procrastination. Often the extension has been granted because some circumstance arose that needed to be addressed, and that process was going to take time. Yet it is all too common that little or no work occurs on the case immediately after the extension is granted. It is as if we breathe a sigh of relief, but then forget to keep breathing further life into the case and instead ignore things until the next deadline has to be moved.

I am not opposed to extensions as either a trial advocate or judge. Take them when you need them. Unexpected events routinely arise in litigation and trial practice. Our failing is more in how we respond after the extension than the need for the extension in the first place. Our response of putting the file aside for months is often what leads to the second and third extensions. Many people involved in our court system complain about the time it takes to get cases to trial, but most often we are our own worst enemy in that regard. Professionalism comes from serving many entities in the trial process, including clients, the court, the public, and even the opposition, and from being considerate of people's time, expense, and circumstances.

## **BE PERSISTENT**

The key to many of the issues outlined above is experience. Recognizing and understanding the proper balance of zealousness and reason comes from time spent making those decisions and then evaluating the outcomes. Consequently, it is imperative to be aggressive in seeking trial opportunities. Job selection can have a significant impact on the number of cases available for trial. Those filling positions in prosecutor or public defender roles will likely have more chances for trial work, but those jobs may not be the ideal environment for every would-be trial advocate. Even large- and small-firm

---

<sup>4</sup> Charles M. Kidd & Kevin P. McGoff, *Top Ten Ethics Problems for Lawyers*, U. MONT. L.R. (2008).

attorneys need chances to develop and practice their craft. Circumstances for newer attorneys in private settings, however, vary widely based on firm structure, mentorship, case type, and client desires.

Market forces are also a factor significantly impacting trial opportunities. The current environment is marked by steady declines in the number of cases being tried with increases in total lawyers in the bar. Over the period 1990–2008, for example, U.S. district court cases decreased nearly 50 percent<sup>5</sup> while at the same time the number of lawyers in the United States rose 53 percent.<sup>6</sup> Those numbers include, as well, senior counsel who have a history of trying multiple cases a year and want to continue in that mode, even with the shrinking total number of cases. Factor in the rising costs of litigation, and there is even less incentive to take cases to trial or staff them in ways that will provide training for junior lawyers. Consequently, only the truly committed and aggressive advocates will find their fair share of trial opportunities.

Younger attorneys must be steadfast in their commitment to trial practice and seek out trial opportunities in a variety of ways. One such vehicle is pro bono work. The problem is that all too often lawyers take on pro bono cases to meet firm requirements or expectations without really leveraging the practical experience those cases can offer. Again the key is aggressiveness in your efforts. One or two pro bono cases likely won't generate the type of trial experience necessary to help you develop as an advocate. Like most endeavors in life, you will have to be diligent in your efforts to reap real benefits.

In addition to being persistent in seeking trial opportunities, also be aggressive in seeking feedback, and seek it from those that will be constructive but honest. There aren't always good opportunities for real trial feedback. In my judicial practice in the Air Force Trial Judiciary, judges meet with counsel after cases to provide constructive feedback on advocacy techniques and methods. Care is exercised to avoid discussing deliberations, but the process provides an opportunity for candid review of counsel performance. Most civilian legal systems don't have the time or opportunity for this type of feedback.

When you have the chance to perform in a trial setting, jurors may be a source of feedback. Rules differ greatly on what constitutes appropriate and inappropriate communications with jurors after a case has finished, so consult your state and local bar rules. In instances where posttrial contact with jurors is permitted, however, it can be a good source of information on what worked and what did not.

Senior attorneys involved in the case can also be a good source of feedback, but again you may have to be aggressive to get it. With the decline in the number of trials, even those serving in the capacity of a senior or "first chair" lawyer may have less experience than their counterpart of 10 or 20 years ago. Consequently, they may not have the same foundation of knowledge from which to mentor you or they may be less comfortable evaluating your performance given their level of experience. Nonetheless even a frank discussion about the case and your role in it may help both you and the senior counsel further develop trial skills.

Finally, use self-reflection to evaluate your trial performance. Feedback in the trial process is different from many other professions. Certainly you want to "win," and a successful outcome provides some measure of feedback on how you did. But given the myriad of dynamics involved in trials, it can be difficult to take too much from the result alone. People define win and success in different ways, and there simply may have been factors outside of your control that had an impact on the ultimate result. You need to be able to break down your role in the case and analyze what you did, how it seemed to work within the context of the case, and what could be improved upon the next time.

## CONCLUSION

At the end of the day, trial practice is more art than science. Some are born with a natural ability to tell a story through witnesses and evidence and persuade others to reach a desired result. Time and experience, however, can improve a person's capacity to succeed at trial. Following the suggestions above and otherwise noted in this book will help to develop and optimize trial skills to achieve favorable outcomes for your clients. Seek out as much constructive feedback as you can find. Get as many perspectives on trial practice as are available. Recognize that there is no single way to try a case. Identify opportunities to attempt something new, without assuming too much risk. Use one case as preparation for the next and always continue to try and further develop your substantive and practical experience. Trial work may not always turn out like the myriad

---

<sup>5</sup>. Brandon Gee, *As Jury Cases Decline, So Does Art of Trial Lawyers*, USA TODAY, Feb. 5, 2011.

<sup>6</sup>. Am. Bar Ass'n, *Legal Profession Statistics, Demographics*, [http://www.americanbar.org/resources\\_for\\_lawyers/profession\\_statistics.html](http://www.americanbar.org/resources_for_lawyers/profession_statistics.html) (click on Total National Lawyer Counts).

Worden ch01-10

of TV and movie dramas we are bombarded with daily and alternative dispute resolution formats are certainly on the rise, but trial work is still an extremely important and unique aspect of our American judicial system.

<http://www.pbookshop.com>