

TRIAL ADVOCACY: THE USE OF TRIAL SKILLS IN NON-TRIAL EXPERIENCES*

Karen A. Williams**

The shortcoming of today's law graduate lies not in a deficient knowledge of law but that he has little, if any, training in dealing with facts or people — the stuff of which cases are really made. It is a rare graduate, for example, who knows how to ask questions — simple, single questions, one at a time, in order to develop facts in evidence either in interviewing a witness or examining him in a courtroom. And a lawyer who cannot do that cannot perform properly — in or out of court.¹

When one thinks of “trial advocacy,” perhaps the first image is that of great courtroom orators such as Clarence Darrow and Daniel Webster, flamboyant “preachers” of the law like Johnnie Cochran and Gerry Spence, or, my personal favorite, Atticus Finch in *To Kill a Mockingbird*. In reality, however, the “art” of trial advocacy is not limited to memorable courtroom performances, but rather lives and breathes in the day-to-day practice of law — from interviewing a prospective client to negotiating a multi-million dollar corporate merger. This Essay seeks to illustrate the application of skills learned through trial advocacy beyond the traditional courtroom setting.

I. WHAT IS TRIAL ADVOCACY?

Trial advocacy is the art of persuasion. More completely, trial advocacy is the “composition of fact extraction, legal reasoning, strategic judgment, and persuasive speech, structured by . . . the rules of professional responsibility, evidence, procedure and substantive

* © Karen A. Williams, 2000. All rights reserved.

** Trial Advocacy Fellow, Stetson University College of Law. B.S. with high honors, Florida State University; M.S., University of Central Florida; J.D. with honors, Stetson University College of Law. Professor Williams teaches Trial Advocacy and works with Stetson's Mock Trial Competition Team.

1. Warren E. Burger, *The Future of Legal Education*, in SELECTED READINGS IN CLINICAL EDUCATION 49, 53 (1973).

law.”² Cases are not won or lost merely by applying a particular principle of law or legal rule. Rather, these principles and rules become effective only in the hands of an advocate who supports them with a strong factual foundation and propounds them with persuasive argument.³

In addition to the importance of the “forensic skills” taught in typical trial advocacy classes — asking questions and making speeches — is the learning of how to develop a case theory, “the basic, underlying and comprehensive idea that accounts for and explains all of the [facts] . . . [in] a coherent and credible whole.”⁴ A skillful advocate is not merely a technician trained in the mechanics of courtroom skills and etiquette, but a lawyer who is able to extract the pertinent facts from a seeming maze of information, integrate those facts with legal principles, and present a reasoned argument. Accepting, then, that an advocate includes not only those lawyers who represent clients in court, but also includes every lawyer who advises or acts for his client in legal matters, it becomes easier to relate the skills taught in trial advocacy to nearly every conceivable aspect of the practice of law, both inside and outside the courtroom.

Clients often call upon a lawyer to persuade someone to take, or not take, a particular action. The real estate lawyer persuades the seller to consider new terms proposed by the buyer. The land use lawyer persuades the zoning commission to grant or deny a variance. The immigration lawyer persuades the Immigration and Naturalization Service to issue a visa. In each case, the lawyer must use his skills of persuasion, which are based on the following ten principles:⁵

1. Comprehensiveness;
2. Theme;
3. Consistency;
4. Plausibility;
5. Legal Structure;
6. Accountability;
7. Congeniality;

2. Edward Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMP. L. REV. 1, 26 (1993).

3. *See id.* at 2.

4. *Id.* at 4.

5. *See id.* at 18–23.

8. Simplicity;
9. Community;
10. Flexibility.

Briefly, “comprehensiveness” requires the advocate to develop a theory that “addresses both the strengths and weaknesses, consistencies and inconsistencies [of the case] . . . [to create] a story line on which all the pieces of the case are consonant.”⁶ The “theme” gives unity and “captures the most persuasive arguments on [the] pivotal issues.”⁷ “Consistency” avoids a misdirected and unfocused presentation — the proverbial “speaking out of both sides of the mouth.”⁸ A presentation is persuasive if it is “plausible” — consistent with the beliefs of the listener.⁹

The lawyer's presentation must comport with the “legal structure” within which the action taken or forsaken will be governed.¹⁰ To be persuasive, the advocate must also take “accountability” for any deficiencies or inadequacies, and explain them in an accurate and honest manner.¹¹ “Congeniality” suggests that the advocate present the least disagreeable explanation of the facts or select the least disagreeable potential outcome.¹² Regardless of the volume or complexity of the facts of the case, “simplicity” is key to successful persuasion. A skilled advocate will discard information that is not pertinent to the theory and will organize the remaining information in a succinct manner.¹³ A skilled advocate will also be aware of the “community” and its “social currents, mores, values, and public perceptions,” in which the decision will take place.¹⁴ Finally, the advocate will remain “flexible,” able to adjust to newly discovered information or a change in applicable laws or regulations.¹⁵

While trial advocacy training focuses on a student's ability to recognize, appreciate, and apply each of these ten principles of persuasion within the courtroom setting, such training readily transfers

6. *Id.* at 19.

7. *Id.*

8. Ohlbaum, *supra* note 2, at 20.

9. *See id.*

10. *See id.*

11. *See id.* at 21.

12. *See id.*

13. *See id.*

14. Ohlbaum, *supra* note 2, at 22.

15. *See id.*

to the broad spectrum of legal fora in which lawyers practice. It is for this reason that trial advocacy remains an integral part of the legal education experience.

II. THE CHANGING FACE OF LEGAL PRACTICE

If you talk to any recent law school graduate or seasoned litigator, you are likely to be told that fewer and fewer cases are being resolved in the courtroom. In fact, “[t]he statistical evidence [suggests] that jury trials occur in less than [three] percent of civil cases.”¹⁶ Well then, you may ask yourself, why should I take a class in trial advocacy if I seldom, if ever, will find myself in a courtroom as a practicing attorney? The answer to this question may seem unclear without first changing your perspective of what it means to be a “trial lawyer.”

A. The “Copernican Solution”¹⁷ to the Development of Trial Advocacy Skills

Your history teacher probably taught you that people once believed the earth to be the center of the universe. In 1513, Nicholas Copernicus first expounded the theory that the sun, not the earth, was the center of our universe.¹⁸ In 1543, the year of his death, Copernicus's theory was published and, for the first time, established the correct position of the sun among the planets.¹⁹ Yet, it was not until the mid-seventh century, when Copernicus's theory received support from Galileo and Newton's theory of universal gravitation, that it became fully accepted.²⁰

One of the most significant results of Copernicus's discovery was the resulting paradigm shift in the understanding and study of astronomy. The paradigm or model that the earth was the center of the universe changed, thereby requiring man to change his under-

16. Ronald J. Waicukauski, *Learning the Craft*, LITIGATION, Spring 1998, at 19.

17. *Id.* The credit for this concept goes entirely to Ronald J. Waicukauski of White & Rob in Indianapolis, Indiana, who published this idea in LITIGATION, the journal for the ABA Section of Litigation. *See id.*

18. *See* Polish American Journal, *When the Earth Moved — Nicholas Copernicus Changed the World*, POLISH AM. J. (Feb. 1993) <<http://www.polamjournal.com/library/copernicus.html>>.

19. *See id.*

20. *See id.*

standing of the world. Similarly, with the impact of alternative dispute resolution methodologies, the rising costs of jury trials, and the reluctance of businesses to place the ultimate decision in a jury's hand, the model of litigation has changed, and so must the litigator.

Historically, many have made the distinction between a “trial lawyer” and a “litigator” — the former being the one who is trying cases in the courtroom, while the latter is involved in non-courtroom matters, such as discovery, pretrial motions, or appellate practice. In either case, however, the practitioner requires and relies upon his or her skills as an advocate, as any “litigator” will tell you who has weathered rough discovery battles, withstood motions to dismiss, or successfully argued for reversal of a trial court's decision. It is a fact that cases are won every day in depositions where a key witness is destroyed or in mediation where impasse is avoided by creative problem-solving. I propose, therefore, as have others, that instead of a paradigm that focuses on “courtroom” lawyers, the present times call for a paradigm that focuses on the litigator as a “skilled advocate without reference to the forum in which the advocacy is practiced.”²¹ This paradigm shift dovetails with another trend in litigation toward more specialization. Litigators who write effectively and persuasively will be sought after for their appellate advocacy skills, while the remaining majority will apply their skills in fact analysis and legal integration to the pretrial practice area in taking depositions, arguing motions, and negotiating settlements.

B. Changes in Civil Jury Trials

Trial practice in civil jury trials has changed significantly over the past decade and will continue to change. Generally speaking, the number of civil trials that are tried before a jury is decreasing. RAND Corporation Institute for Civil Justice conducted a study of civil jury verdicts over the last decade for fifteen urban or suburban counties in six states.²² The results indicated that per capita civil jury trial rates were declining markedly in such cities as Los Angel-

21. Waicukauski, *supra* note 16, at 19.

22. See Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 *UCLA L. REV.* 1935, 1937 (1997) (citing Erik Moller, RAND Corporation Institute for Civil Justice, *Trends in Civil Jury Verdicts Since 1985* (1996)).

es, San Francisco, Seattle, and Manhattan.²³ “With the exception of St. Louis, and Harris County, Texas [where Houston is located], no jurisdiction in the study ended the decade with a civil jury trial rate greater than one per 10,000 people per year.”²⁴ “[I]n 1994, there were a total of 292 civil jury trials in Los Angeles . . . , 178 in Manhattan; 61 in King County (Seattle); . . . and 57 in San Francisco.”²⁵

Studies also reflect a trend toward an increase in bench trials, which are cases tried without a jury. More than fifty percent of all “federal [civil] trials are now conducted without juries, and the proportion is higher still in state courts.”²⁶ The reduced number of civil jury trials may also be associated with the cost of such trials and the inherent delay in reaching trial. The reality in many situations is that a defendant, whether a business, governmental entity, or insurance company, would rather “buy the finality” of a negotiated settlement, than roll the dice of uncertainty in a jury trial, especially when the issue is extremely complicated or the jury is inclined to be particularly sympathetic towards the plaintiff.

Similarly, the use of alternative dispute resolution (ADR) techniques, such as arbitration and mediation, has had, and will continue to have, an impact on the number of civil jury trials. “[T]he number of private arbitrations and mediations handled through the American Arbitration Association” numbered nearly 90,000 in 1998.²⁷ Many clients and attorneys find that mediation is an efficient and cost-effective method to resolve issues that otherwise would be tried in court. In fact, many state courts require mandatory mediation of certain matters prior to even scheduling such matters on the court calendar.²⁸ ADR methods have also found a place in

23. *See id.*

24. *Id.*

25. *Id.*

26. *Id.* at 1938 (citing Samuel R. Gross, *Settling for a Judge: A Comment on Clermont and Eisenberg*, 77 CORNELL L. REV. 1178 (1992)).

27. Carolyn Kleiner, *Wanted: Peacemakers*, U.S. NEWS & WORLD REP. (visited Jan. 2, 2000) <<http://usnews.com/usnews/edu/beyond/grad/gbadr.html>>.

28. For example, the Family Law Division of the Ninth Judicial Circuit Court in and for Orange County, Florida has adopted an administrative order requiring mandatory referral of all contested matters regarding parental responsibility, child residency, child support, distribution of property, payment of alimony, and child visitation to mediation prior to being heard by the court. Certain exceptions are granted based upon a history of domestic abuse, mental illness, alcoholism, drug addiction, or other factors which may make the case unsuitable for mediation. Administrative Order No. 07-96-01, July

the federal courts. Rule 16 of the Federal Rules of Civil Procedure authorizes federal courts to conduct pretrial conferences, including efforts to facilitate settlement of the case through arbitration or mediation. The federal courts for the Middle District of Florida require the parties to state their intentions in writing regarding alternative dispute resolution and provide a specific date upon which the parties will report to the court concerning prospective settlement or apply for an order involving mediation or arbitration.²⁹

Notwithstanding the various studies and trends, the skills learned and developed in trial advocacy remain critical tools for the practicing lawyer, and may become even more important in the face of diminishing trials. When the parties to a complex civil case are not able to resolve their dispute through settlement negotiations or mediation, the litigator must be prepared to refocus his advocacy skills towards a courtroom showdown, even though he may not have been in trial for several months or even years. An effective litigator will not draw a distinction between advocacy skills used outside the courtroom and those used within, but will recognize that such skills are, in fact, one and the same; it is only the stage upon which they are displayed that has changed.

III. TRIAL SKILLS IN NON-COURTROOM SETTINGS

In 1992, the ABA Section of Legal Education and Admissions to the Bar prepared a task force report titled *Legal Education and Professional Development — An Educational Continuum*, which is generally referred to as the “MacCrate Report.”³⁰ In the MacCrate Report, the task force recognized ten fundamental lawyering skills: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.³¹ Every course in trial advocacy touches upon each of these

11, 1996. (Copies of this Administrative Order may be obtained from the Clerk of the Court for the Ninth Judicial Circuit Court in Orlando, Florida).

29. See U.S. DIST. CT. M.D. FLA. R. 3.05(c)(2)(C)(v). The Middle District encompasses 35 counties in Florida, from Jacksonville to Naples.

30. See ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOL AND THE PROFESSION: NARROWING THE GAP, REPORT ON LEGAL EDUC. AND PROF'L DEV. — AN EDUCATIONAL CONTINUUM (1992).

31. See *id.* at 138–40.

skills to some degree. For example, students must review and analyze depositions, witness statements, and incident reports to extract the pertinent facts, develop a cohesive and effective theory of the case, conduct legal research to support their arguments, address ethical issues in preparing the direct and cross examination of witnesses, and organize the most effective presentation of the evidence and testimony at trial.

The interplay of these fundamental lawyering skills and the art of trial advocacy does not end with graduation from law school. The lawyer who never tries a case still has a great need to understand trial mechanics. Much of pretrial practice — case evaluation, discovery,³² motions,³³ and settlement discussions — demands and depends upon an understanding of what may happen at trial. It is axiomatic that you can't argue something at trial if you didn't ask for it in discovery. But, you won't ask for it in discovery if you don't know that you are going to argue it at trial.³⁴

Even realizing that the case may never come to trial, a litigator must formulate an overall plan for prosecuting or defending a case early in the representation of the client.³⁵ At some point in the development of this plan, the lawyer must assess whether the discovery should be geared toward preparing for trial, settling the case, or supporting a motion for summary judgment.³⁶ Since the discovery plan is initially formulated in the early stages of the case, it is often necessary to reassess and reformulate the discovery plan as the process develops.

Failure to understand and appreciate the trial process often results in unfocused and unnecessary discovery. As noted by attorney Theodore M. Becker in *How to Limit Discovery Without Costing*

32. "Discovery" is a "pretrial device[] . . . used by one party to obtain facts and information about the case from the other party . . . to assist the party's preparation [of its case] for trial." BLACK'S LAW DICTIONARY 466 (6th ed. 1990).

33. A "motion" is a written or oral "application made to a court . . . for [the] purpose of obtaining a rule or order directing some act to be done in favor of the applicant." *Id.* at 1013.

34. See Steven Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123, 135 (1987).

35. See Jonathan M. Stern, *The Discovery Plan*, LITIGATION, Spring 1998, at 34, 37.

36. See *id.* at 38. "Summary judgment" is a "[p]rocedural device available [to dispose of a matter] . . . without trial when there is no dispute as to . . . [a] material fact, or . . ." when it only involves a question of law which can be decided by the court. BLACK'S LAW DICTIONARY 1435 (6th ed. 1990).

Your Client the Case,³⁷ an effective discovery plan begins in reverse:

In many cases, lawyers dive headfirst into extensive discovery without the foggiest notion of how they will try the case. . . . No discovery should be taken before the lawyer has prepared a discovery plan, and the discovery plan should be grounded in a solid preliminary trial plan. . . . The preliminary trial plan should be formed with the ultimate trial in mind. Working backward, the lawyer should identify the evidence that needs to be presented at trial, taking into consideration the elements of each cause of action to be proved, the potential defenses, and the jury instructions or law the judge will apply. . . .³⁸

A carefully formulated discovery plan, well-grounded in a thorough understanding of the substantive law, evidentiary rules, and trial techniques, is likely to produce better results for the client whether at trial, when arguing motions, or in settlement negotiations. This same sense of advance planning should also be applied to the development of an overall motion strategy. An effective and timely motion for partial summary judgment may leave the opponent's case so weakened that the probability of a favorable settlement increases.

This concept of “working backwards” from trial also applies to those areas of the law not traditionally considered within the scope of “trial advocacy.” A transactional lawyer is well-advised to know and appreciate such matters as how courts address internal inconsistencies in contract provisions and whether the parole evidence rule will be applied to bar certain testimony or other evidence. Similarly, the work of an appellate attorney is inextricably tied to an understanding of the trial process. It is not uncommon for trial lawyers to engage the services of an appellate attorney during the course of a trial, to advise on whether certain testimony is necessary to adequately “make the record” or what steps are necessary at trial to preserve an issue on appeal. As a former litigator, nothing was more frustrating than to write an appellate brief for another attorney who neglected to ask that “one more question” on direct or cross-examination that would have illuminated a particular issue in the

37. Theodore M. Becker, *How to Limit Discovery Without Costing Your Client the Case*, ILL. LEGAL TIMES, May 1997, at 13.

38. *Id.*

record for the purposes of appeal.

Conversely, successful mediators and arbitrators utilize a “forward-looking” approach in their advocacy skills, by understanding the relative strengths and weaknesses of the parties' positions should the dispute end up in the courtroom. A mediator who is not experienced in the nuances of trial advocacy cannot be as effective as one who has participated in the courtroom battles himself or herself. Not only must the mediator be cognizant of the trial process itself, but also must appreciate the various steps required to prepare for trial. For example, is there sufficient time and money to conduct the additional discovery that might be required, are key witnesses available, and is the dispute at issue one that can effectively be presented to a jury of laypersons?

In fact, it is difficult to conceive of any type of legal practice that does not benefit from a thorough understanding and training in trial advocacy skills, if nothing more than to provide the practitioner with a sense of confidence in his ability to persuasively present himself in any context.

IV. MAKING THE MOST OF YOUR LAW SCHOOL EXPERIENCE

An effective litigator never stops learning. Attorney F. Lee Bailey accurately observed that “most respected and successful trial lawyers usually attain that status in their mid-forties and flourish for the next twenty years or so.”³⁹ The majority of that learning will occur after graduation from law school through the “trial by fire” method — or “here you go, Young Ms. Associate, handle this hearing for me!” To succeed, it is important to demonstrate a “can do-will do” attitude and maximize every opportunity now to prepare for these challenges.

You may already have an interest in trial practice; in fact, that interest may have influenced the law schools to which you applied. Many students come to law school having been complimented on their oratorical skills, powers of persuasion, and analytical insight. Couple those talents with the influence of popular TV series such as

39. Waicukauski, *supra* note 16, at 68.

Perry Mason,⁴⁰ *Law & Order*,⁴¹ *The Practice*,⁴² and even *Ally McBeal*,⁴³ and you have a trial lawyer in the making. Law school offers a diverse curriculum to develop and enhance your advocacy skills. The most obvious opportunity is, of course, Trial Advocacy, in which the student develops skills in a simulated courtroom setting. This interactive method of teaching incorporates instruction with individual performance; the professor acts as trial judge, while fellow students serve as witnesses and opposing counsel. This experiential form of training is further enhanced by the use of videotaping, allowing the student to “see as he is seen.” Both the interactive courtroom setting and videotape review allow for individualized feedback from experienced lawyers. In addition to Trial Advocacy classes, advocacy skills are also taught in Interviewing, Counseling and Negotiation, Pretrial Practice, Appellate Advocacy, and Alternative Dispute Resolution, to name just a few.

The most powerful method to learn a skill is through performance. You may remember the story about the visitor to New York who inquired, “How do you get to Carnegie Hall?” The response was: “Practice, practice, practice!” The development of a skillful advocate requires the same commitment. In addition to classes, law school offers students the opportunity to participate in “real-life” situations through various clinics and internships, such as working with the Public Defender's Office, State Attorney's Office, county and city governmental offices, or interning with federal or state judges.

Law school also offers the unique opportunity to practice advocacy skills through a variety of regional, state, and national competitions. Such competitions include “mock trials,” which promote training in trial advocacy by providing students with a forum to exercise and demonstrate their skills and knowledge of evidence, trial techniques, and strategy. Each competition consists of a fact pattern involving either a criminal or civil issue. Utilizing the fact pattern, students prepare for and conduct a simulated trial from pretrial motions through closing arguments. Practicing lawyers and judges serve as the presiding trial judge and jury, and score students' performances on such criteria as whether the student-

40. *Perry Mason* (CBS 1957–1966) (television series).

41. *Law & Order* (NBC 1990–present) (television series).

42. *The Practice* (ABC 1997–present) (television series).

43. *Ally McBeal* (Fox Broadcasting Co. 1998–present) (television series).

team presented a cohesive theory of the case, developed direct examination testimony in an interesting and coherent fashion, effectively controlled the witness on cross-examination, exhibited knowledge of evidentiary rules in making or meeting objections, and expressed such knowledge in a clear and succinct manner.

Like many law schools, Stetson University College of Law sponsors a trial competition team that consists of students selected through intramural competitions. These students participate in competitions sponsored by such entities as the American Bar Association, the National Institute for Trial Advocacy, the Association of Trial Lawyers of America, the National Association of Criminal Defense Lawyers, and The Florida Bar. As a result of Stetson's successful performance at these various competitions, *U.S. News and World Report* ranked Stetson as the number one law school in Trial Advocacy in 1995 and 1996, and included Stetson in its "top ten" rankings ever since.⁴⁴

The opportunity to demonstrate and develop advocacy skills is not limited to mock trial competition programs, but also includes Moot Court, in which students write an appellate brief to either a U.S. Court of Appeals or to the U.S. Supreme Court, based upon a hypothetical set of facts and lower court decisions.⁴⁵ The team then participates in oral argument competition against other teams before a panel of attorneys and judges. In Client Counseling Competition, law students interview a "client" who has a potential legal problem, determining the nature and extent of the problem, and then counsel the "client" on various methods to address the problem. A "post-consultation period" follows the client interview, in which the students confer privately then make an oral presentation to the judges regarding the nature and scope of the legal work proposed as a result of the consultation. Finally, students who participate in the ABA Negotiation Skills Competition are given a set of facts known to both sides, and a separate set of confidential facts and confidential instructions from their client. The participants then negotiate before a group of attorneys acting as judges in an attempt to reach a solution to the problem. The students are judged on their negotia-

44. See U.S. News and World Report, *2000 Graduate Rankings: Trial Advocacy*, U.S. NEWS ONLINE (visited Mar. 2, 2000) <<http://www.usnews.edu/beyond/gradrank/gblawsp7.html>>.

45. See Darby Dickerson, *In re Moot Court*, 29 STETSON L. REV. 1217 (2000).

tion style, skills, and strategy.⁴⁶

V. CONCLUSION

Legal advocacy is an art that transcends the courtroom walls. It is difficult to conceive of a legal practitioner who does not, in some way and at some time, utilize the skills of advocacy — fact analysis, legal integration, and persuasive presentation — as taught in a trial advocacy course. Even the technical “forensic skills” of trial advocacy, such as courtroom etiquette and demeanor, learning how to phrase questions to elicit a favorable response, and making an effective oral presentation, transfer readily to a wide range of applications within both the legal and business worlds. Law school courses in trial advocacy provide the student with practical and immediately usable skills upon graduation — the ability to deal with facts and people.

46. See American Bar Association, *Competitions*, LAW STUDENT DIVISION (visited Mar. 2, 2000) <<http://www.abanet.org/lzd/home.html>>.