

Becoming a Trial Lawyer – Now and Then

November 16, 2018

I am going to talk to you this morning about Becoming a Trial Lawyer. For me, the seduction of the courtroom remains as strong as ever and, unlike a BB King, the thrill is NOT gone. I know I don't have to tell this group that being a trial lawyer is about as good as it gets (well maybe after good food, good wine, sports, music and well – probably several other things).

About 15 years ago, as President of the Society, I put in place an initiative to focus on what was then termed "the vanishing trial" – the concern about the decrease in the number of trials and how that would impact future litigators' opportunity to learn to become the next generation of trial lawyers. Indeed, I wondered if there would be another generation of trial lawyers. Well I guess I was wrong – many of you are the next generation

But at the risk of being like Chicken Little, it does seem to me that the challenge of becoming a trial lawyer in today's legal and litigation environment remains and, in fact, has become more acute.

The cost of litigation continues to spiral with all its attendant consequences among others, of (1) fewer motions, (2) less opportunity to attend in Court in a secondary role or as an observer and (3) the proliferation of mediation with the view, at least of some judges, that a trial means a failure of the justice system. Added to this is the ever demanding business of litigation, with its focus on and rewarding of billable hours, as well as the realization that having the appropriate balance in one's life is important.

Now there will always be trials and there will always be trial lawyers. But will the majority of litigation lawyers who want to become trial lawyers be able to do so? Will the delay in getting that experience result in a "fear of the courtroom" such that even when the opportunity presents itself, counsel will look for ways to avoid a trial process with which he or she is not particularly familiar and not particularly comfortable? Indeed, you can't be the best litigation lawyer you could be, without having trial experience and understanding how the pretrial process, from pleadings through discovery and through trial preparation, plays out in a courtroom.

My fundamental premise is that it an obligation of senior trial counsel to mentor, sponsor and train young lawyers and give them opportunities (1) so that they can get meaningful trial experience; and (2) so that they can get the same or at least

similar opportunities to those that many of us had as young lawyers who wanted to become trial lawyers. This has to happen notwithstanding the significant changes to our profession and the way we practice law. It is our obligation to work to create a skilled and diverse trial bar that is representative of the profession and of our society

I suggest to you that we have to do more in order to ensure that the trial remains a vibrant means of resolving disputes; we need independent and courageous trial lawyers, in order to have a justice system that pursues the truth and to counter potential abuses of that justice system and to counter abuse in society at large. We need more independent and courageous trial lawyers to ensure that the rule of law not only continues but flourishes. We need independent and courageous trial lawyers to ensure that our rules of justice not only continue but flourish.

As the Hon. Thomas Cromwell pointed out in his recent Dublin Lecture:

We have all heard many times the line uttered by Dick the Butcher in Shakespeare's Henry IV, Part II: "the first thing we do, let's kill all the lawyers." Often, however, the context is lost and this quotation is used as a swipe at lawyers. It is exactly the opposite.

Dick the Butcher was a follower of the rebel Jack Cade. He thought that if he disturbed law and order, he could become King. This passage recognizes the importance of [trial] lawyers in maintaining the rule of law: if someone wants to undermine the rule of law, he or she should start by getting rid of the

[trial] lawyers. And sadly, we see the truth of this in repressive regimes in our own time. So as you deal with the daily swirl of demanding clients, billing pressures and perhaps the occasional cantankerous judge, I hope that you never lose sight of the importance of advocacy – independent and courageous advocacy. This is not just what clients need; it is what civil society and the rule of law require. The advocate's calling is to provide it, every day, in every case.

Justice Cromwell goes on to refer to Lord Birkett who puts the point this way:

When men and women are brought into the civil or criminal courts, for whatever reason, they should be able to turn for assistance at what may be the critical moments of their lives to a trained body of advocates, independent and fearless, who are pledged to see that they are protected against injustice and that their rights are not wrongly invaded from any quarter. The vocation of the advocate calls for the nicest sense of honour and for a complete devotion to the ideals of justice, and I believe it to be a lofty and necessary calling which is vital for the maintenance of that way of life in which we have come to believe. To that great calling men and women might well

devote their greatest gifts and their highest powers.

Let me bring this discussion back to earth. You don't hear people say this very often, and indeed saying it in some crowds often provokes laughter, but to paraphrase something that Samantha Nutt, founder of War Child Canada, is fond of saying: "What the world needs is more trial lawyers."

But I am ever the optimist. I believe we can do it. We can have generation after generation of trial lawyers and in doing so perform a service to our society. We must commit to carry out our professional obligations in this regard. There are two aspects to this. The first is that younger lawyers need the opportunities to develop their oral advocacy skills in the Courts. Senior trial lawyers need to embrace with generosity this

mentoring and sponsorship process. The second is that younger lawyers need to take initiative in seeking out opportunities to get into Court and to develop their own client base, with all the professional and social skills that are entailed. I recognize that we are all more accountable to our firms and ourselves for our financial performance and that clients are increasingly demanding with the current accepted standard being 24/7 access.

I implore those of more advanced years to take up the challenge to find ways to give our younger colleagues more opportunities in Court and more opportunities to develop their practices and have contact with clients. It can and must be done. Our firms, our justice system, our community and our country will be better for it. We will never turn back the clock to the "good old days" and probably that's just as well. But we have to take our role as teachers, sponsors, mentors and colleagues more seriously. If

we do not do this, those who want to become trial lawyers are at risk of developing the "fear factor" that I spoke of earlier; they will become demoralized; they will become frustrated; and they will just plain give up. We have to break out of this spiraling effect so that when opportunity knocks younger lawyers will have the confidence to take advantage of it.

Of course, we have always been doing something. The Advocates' Society for over 20 years has been at the forefront of skills training programs so that younger lawyers can "learn by doing". Similarly, The Advocates' Society has been involved for many years in assisting with student trial competitions and is now, with the American College of Trial Lawyers, the organization responsible for the Sopinka Cup Student Trial Competition. But we need to do more, both within our firms and outside our firms.

For example, *The Lawyers Daily* recently reported on John Rosen being awarded the Criminal Lawyers Association's prestigious G. Arthur Martin Criminal Justice Medal. In the context of this current discussion, this is so appropriate. I had the privilege of clerking for Justice Martin and I can tell you that he took very seriously the obligation to teach young lawyers advocacy skills. While it was not his way to insist, he would, in his "gently" persuasive manner, encourage us as clerks to sit in the courtroom and observe outstanding counsel argue appeals. Perhaps that resulted in our having to work a little, or a lot, late. But I can tell you it was fundamental to my education in learning how to be an effective advocate and in developing the skills and the passion required to be a trial lawyer.

In an interview, Mr. Rosen refers to teaching a "courtroom skill set" – to take a case apart and teach skills associated with each

step in defending and prosecuting a criminal case.

He developed a course called "Critical Thinking for Cross Examination" which he ran out of his boardroom. In that course he walks attendees through each step of the process from meeting the client to preparing for trial:

Nobody ever taught me how to prepare for trial. Nobody ever says what you do. They talk about 'prepare, prepare, prepare,' but nobody actually says these are the nuts and bolts. So, we talk about how to do it. It's not about one size fits all. There are different cases, different problems. There's the way different lawyers work, but they should at least be exposed to a variety of options.

More of us need to undertake similar ventures for the benefit of younger lawyers.

But this is not a one-way process. Younger advocates must take up the challenge as well. You can't be shy. You have to seek out opportunities to get into court yourself for as the saying goes, "if you don't shoot you don't score". You need to prevail on senior lawyers to give you the chance. And by the way, based on my experience I believe that clients will support giving such opportunities to younger trial lawyers if it's done in the appropriate way. Senior lawyers have to get over their sense of self-importance – that they are the only ones that can bring home the victory. And the fact is that judges actually like the idea of participation by younger lawyers. As the Hon. Dennis O'Connor recently said in an interview:

Having seen both as a lawyer and as a judge, lawyers who have given the second chair an opportunity to participate, I've never seen a case where the outcome has been lost because the younger lawyer took part in doing it. In fact, we at the Court of Appeal love to see a younger lawyer there and that they would be making an argument. We particularly liked it on the rare occasion when the younger lawyer was actually better than the [senior counsel].

To assist in this quest to train future generations of trial lawyers the American College of Trial Lawyers has recently created a Task Force on Mentoring to study the issue and to develop a paper on best practices to promote mentoring and sponsorship.

The College has also created a Task Force for its "Boot Camp Trial Training Programs" to expand the work being undertaken by the College in teaching young lawyers trial skills through practical training. And you shouldn't forget The Advocates' Society's own publication "Principles of Mentoring" which followed from its prior, and perhaps more renowned publication, "Principles of Civility".

Let me come back to younger trial lawyers. At the same time as you are looking for opportunities to develop your trial skills in and outside of the courtroom, it is important for you to look for ways to build your own brand in order to develop a practice and a reputation that will promote your career as a trial lawyer. The two go hand in hand.

1. Look for ways to develop your own profile through

- (a) Social media
- (b) Writing articles
- (c) Speaking at conferences

2. Be visible and be involved

- (a) Get out of your office – see and be seen.
- (b) Attend events in the legal community.
- (c) Get to the courthouse even if it involves relatively minor and inconsequential tasks like adjournments.
- (d) And don't put your robes on in your office – go to the robing room and engage in the pre- and post-court banter that occurs.

- (e) And most significantly – become active and make contributions to legal organizations and to the profession.

3. Be civil – you will garner the respect of your colleagues and the court and create a favourable persona.
4. Engage in "random acts of kindness" as former Chief Justice Winkler has said – help out someone in need of advice whether in the general community or among your colleagues at the bar – help without seeking anything in return – that has its own satisfaction and may well have the added plus of helping to build your practice.

I am going to develop some thoughts on how to make this happen. In doing so, I have relied in part on a recent presentation by the Hon. Eleanore Cronk to the 2018 Leadership Workshop of the American College. What follows is a mixture of her ideas and mine: So here are our top 20:

1. Find ways to get into a courtroom and observe. Make it part of your regular routine. See the best trial lawyers in action. Our firms need to learn to encourage this as part of the learning process of becoming a trial lawyer. This should become an essential part of the trial lawyer's education. Certainly it was in the past.

2. Senior trial lawyers have to become more generous and share the FUN of being a trial lawyer – after all,

what can be more fun than long hours, preparation, hard work, unpredictability, stress and the occasional or more than occasional loss.) Don't listen to me – it is FUN. Senior lawyers have to learn to share witnesses, arguments and motions, even if this is done at no cost to the client. As indicated in the quote from Justice O'Connor, "many judges encourage this. They allow counsel to split argument (sometimes giving the senior counsel an opportunity to supplement the junior counsel's argument if necessary)".

3. Similarly, some judges invite counsel to involve their junior counsel (and in the United States, this may be done by assuring an oral hearing on motions if the argument is made by the junior lawyer on the case). Some judges allow more lawyers to participate in

various aspects of the trial if to do so will result in giving opportunities to younger lawyers (such as splitting an examination in chief or even a cross examination). Some judges may ask questions directly of junior counsel (recognizing they may know the file better than their senior). We need to encourage more judges to do so.

4. Seek out and take advantage of whatever pro bono opportunities you can find that have the potential to get you into Court.
5. Give younger lawyers the opportunity to take "flyers" – to take on what might be termed dare-devil and fool-hardy missions at reduced rates or for free. And to the younger lawyers – do it. It only hurts for a

while. And those who never lose have never gone to Court.

6. Many judges will now look to senior counsel to provide younger counsel to act for self-represented litigants on matters before the Court. We need to encourage judges to do so.
7. Use retired judges and senior counsel to get advice and to "learn how to do it" – engage in mock demonstrations with role playing.
8. While arbitrations are not trials, they can be a fertile training ground for young trial lawyers. It is sometimes easier to take on a minor or even a major role in an arbitration, including argument and cross-examination

9. We need more pro bono duty counsel and amicus programs and more court-based help centers to create opportunities for both learning how to deal with clients and opening up the possibility of getting into court.
10. Don't shy away from the "difficult client" if it might present you an opportunity to get into court. You can learn a lot from dealing with difficult clients. Having had that experience, dealing with the less difficult clients becomes a piece of cake.
11. We need to establish shadowing programs to give younger lawyers the opportunity to shadow senior counsel both outside and inside the courtroom.

12. We need more mock trials where, although not in court, junior counsel can have the opportunity to play out how a pending trial might go in advance of the trial.
13. While The Advocates' Society has done an excellent job of sponsoring "mentoring programs" we need to expand those programs so that there is a regular opportunity, on a daily or weekly basis, for younger counsel to discuss issues with senior counsel.
14. We need to allow younger counsel to take on summary trials even if it is on a non-economic basis.
15. Similarly, we need to allow younger trial lawyers to take on small, possibly non-profitable, retainers if they present the opportunity to get into Court.

16. While it's not exactly trial experience, we need to give younger lawyers more speaking opportunities and more opportunities to participate in the pretrial phases of the process such as discoveries.
17. We need more to look for more opportunities to allow younger trial lawyers to be seconded to offices, both governmental and non-governmental, where they have more chances to observe proceedings, to participate in proceedings and to conduct proceedings on their own.
18. At the risk of creating a monster, we have to create more opportunities to expose younger trial lawyers to the "war stories" of senior trial lawyers, told not for the purpose of self-aggrandizement but for the purpose

of using those stories to educate on trial skills, trial strategies and trial process.

19. We need to enlist enlightened corporate counsel to accept their obligation to allow younger lawyers to participate in trials on their behalf. They need to understand how it can be in the corporation's self-interest to do so.
20. Senior Lawyers need to use opportunities to teach younger counsel (not necessarily their own juniors) in Court in a friendly and non-threatening way, whether during or after a proceeding, be generous in sharing a few comments or criticisms as a result of your observations

A word of caution. Don't forget civility. We need to teach civility to younger lawyers so that it becomes ingrained in the litigation process and the trial process. Senior lawyers need to lead by example. All trial lawyers need to "call it when we see it", and not just ignore uncivil conduct. Again, in court senior lawyers might come to the aid of younger lawyers and/or suggest an appropriate way to deal with an issue in a civil way, including, responding to uncivil conduct from another lawyer or dare I say, a judge. This too is part of the courtroom as class room.

One important point – the fact is that the practice of law is different for diverse lawyers – women, lawyers of colour, radicalized lawyers and members of the LGBTQ community. We need to be sensitive to this and develop unique ways to deal with the differences in their experience.

Finally, let me practice what I preach. Yesterday I had the opportunity to participate in a panel and speak at the Jere F. White, Jr. Trial Advocacy Institute, an all-day seminar in Birmingham, Alabama put on by the American College of Trial Lawyers. As part of that program a video is shown of Mr. White who was a down-to-earth, superb trial lawyer, addressing the associates in his law firm, Lightfoot, Franklin and White on the 10 characteristics of a great trial lawyer. They are as follows:

1. **Great trial lawyers have a passion for the practice of law.** They enjoy what they do. Although the work is tough, they can't imagine what they'd do if they had to have a "real job." They have intensity, a fire-in-the-belly, without which, they'd be lost.

2. **Great trial lawyers hate losing.** It's not so much that they love winning, but great lawyers aren't afraid to step into the batter's box. A Hall of Famer with a .300 batting average loses 70% of the time.
3. **Great trial lawyers take responsibility and ownership of their cases.** They aren't so task-or assignment-oriented that they rely solely on a checklist. If it's their case, they remember that it's not against the rules to think; it's not against the rules to be creative.
4. **Great trial lawyers possess integrity and credibility.** They are honest, never misleading the judge, the jury or opposing counsel. Their names mean something. They possess total knowledge of

their subject matter. They don't fake it. They are facilitators of the truth, and they present the truth in an honest, understandable and persuasive manner. They present information that assists the decision-maker. They do the right thing. Let me add – you can't win if you lose your credibility.

5. **Great trial lawyers show empathy.** They don't go through life with blinders on. They know that their side isn't the only side of a case. They try out the other side's case and from it, they often learn ways to answer and best deal with the issues. They work hard at showing respect for their adversaries, both inside and outside the courtroom.

6. **Great trial lawyers know the law.** They don't rely

solely on the younger lawyers in their firms. They

know the law inside and out. And as good story-

tellers, they know how to present the law.

7. **Great trial lawyers don't take matters personally**

and don't get personal. Their faith isn't shaken by

someone's belief that they aren't capable of taking on a

specific case. They don't lower their standards by

taking cheap shots; they remain professional.

8. **Great trial lawyers are curious and are prodigious**

readers. They are by nature nosey; they're gossips;

they can't stand it when someone knows something

they don't know. They read everything they can get

their hands on, whether newspapers, magazines,

novels or non-fiction; they have an insatiable curiosity for information.

9. **Great trial lawyers have good work habits.** They realize there are many demands on their time and that life can often be difficult. They realize that they must manage and learn what is and what is not important. They are able to set priorities.

10. **Great trial lawyers learn from other great trial lawyers.** They identify other great trial lawyers; they ask to be taken under another great trial lawyer's wing. They do what they can to learn from great trial lawyers.

There are two other observations:

1. In court – you never get a second chance to make a first impression; and
2. It's not about you – leave your ego outside the courtroom, but be yourself.

We can and must work together to support the next generation of trial lawyers. So that they too get the thrill of the challenges involved in a trial; so that they too get the sense of achievement from persuading a judge or getting a good result for a client; so that they too get to develop and use their skills in examining and cross-examining; so that they too will have the excitement of influencing the direction that a witness' evidence takes; so that they too can be a part of a play – a play without a script – as actor director producer and writer; so that they too can have fun; and so that they too can relive their glorious victories and

ONLY their victories and have stories to tell for years to come that get better and better and better with each telling.

I believe in the trial process as the ultimate means of dispute resolution, as the best means for seeking out the truth and for obtaining fair and just results. I believe in being a dreamer and making dreams come true or in the words of John Lennon, "You may say that I'm a dreamer, but I'm not the only one."