# In Defense of Trial Lawyers

by Robert A. Klingler, Esq.

"[A] successful advocate's fame is always written in the sand…"

— *Luck and Opportunity,* Francis L. Wellman

*CBA member Robert A. Klingler is a board-certified trial advocate. He practices civil litigation, concentrating on employment litigation, with his colleagues at Robert A. Klingler Co. LPA.*

The venerable art of trying civil cases to juries is under attack. The number of civil trials in federal and state courts is declining. The emphasis in recent years on ADR (alternative dispute resolution) has removed many cases from the courtroom. Tort reform has made the risk and expense of trial less palatable to plaintiffs and their lawyers. "Trial lawyers"—as that term is too narrowly used to mean plaintiff personal injury lawyers—are regularly savaged by politicians and in talk shows. The "McDonald's coffee case" is code for the proposition that juries are irrational and not to be trusted. The forbidding expense of litigation has certainly encouraged the trend away from jury trials. And the hostility of some courts to jury trials, motivated by crowded dockets and a belief that "a bad settlement is better than a good trial," has also played a role. Lawyers who became lawyers to try cases bemoan the dearth of opportunities to practice their craft. Is the civil trial headed for extinction?

## Trial Advocacy: A Craft Worth Preserving

Although trials are expensive and risky, those of us who try civil cases should not be apologetic about the need for trials to resolve some disputes. I do not agree with the sentiment occasionally expressed that a trial is the result of a failure of the system—that something has gone wrong if a dispute has not settled short of trial. Some disputes will not be settled because the parties have fundamentally different perceptions of the truth, the law, or justice, and cannot be persuaded to alter those perceptions enough to reach a compromise. Whether these differing perceptions are caused by the divergent backgrounds and circumstances of the parties, by different value systems, or by character flaws, they result in different realities that the parties are unable to reconcile.

While we can all agree with Lincoln's admonition that lawyers should discourage litigation, there are cases that need to be brought and tried. A bad settlement is not always better than a good trial. The public vindication of a verdict of peers is sometimes infinitely more valuable than the quiet exchange of a confidential sum with the stipulation that no wrongdoing is implied. Even a loss before a jury can be salutary—at least one had one's day in court.

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When a lawyer has done his or her best to achieve a just settlement of a case without success, there is no more honorable and worthy a role for the lawyer than that of zealous trial advocate. Our profession should continue to nurture and develop trial skills in those lawyers who are willing to assume the burden of the courtroom advocate, and to encourage and sustain those who have devoted their careers thus far to that important role.

## Why Be a Trial Advocate?

With the number of trials declining and the social utility of trials and trial lawyers increasingly questioned, why should any lawyer pursue a career in trial work? There are several good reasons.

First, there will continue to be civil trials as long as the Seventh Amendment exists. The fact that fewer cases go to trial today than in the past makes it more difficult for lawyers to learn and hone their trial skills, but those skills become all the more valuable as they become harder to obtain. I was once involved as local counsel in a trademark case—an area of law about which I know very little. After the motions for summary judgment were overruled, the out-of-town trademark litigation counsel revealed that she had never actually tried a case and asked me to be lead trial counsel. Although I had no expertise in trademark law, she saw her lack of trial experience as an even bigger detriment.

Many of us have had similar experiences, and we will have more of them as fewer lawyers are able to gain trial experience. Trial skills increase in value by virtue of their increasing scarcity.

Moreover, trial skills are transferable to other dispute resolution processes. An effective mediator must help the parties assess the likelihood of success or failure before a binding fact-finder, whether judge, jury, or arbitrator. This requires that the mediator and lawyers have familiarity with the rules of evidence and the psychology of persuasion.

That great "engine of truth," cross-examination, is the same in trial as in arbitration, and the ability to effectively open and close is essential in either venue.

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And of course trial skills are crucial in assessing a case's strengths and weaknesses to effectively negotiate a settlement or advise a client. A miscalculation of the value of a piece of evidence or of reaction to the personalities of witnesses can have surprisingly devastating consequences if the faulty analysis leads to a choice of trial over settlement. On the other hand, a lopsided and unjust settlement may result if one party badly underestimates the strength of its own position and chooses to settle rather than press forward.

As with any profession, the judgment that comes with experience is one of the most valuable qualities the trial advocate offers to clients. But with trial experience becoming harder to obtain, how can that judgment be gained?

## Become a Student of the Craft

In their opportunities to train for and practice their craft, trial lawyers are more like military officers than like, say, knee surgeons. A surgeon practices the craft daily, performing dozens or hundreds of surgeries in a year. Dwight D. Eisenhower had no combat experience and little experience with troops when he was named commanding general of the European Theater in the Second World War. How does the officer who does not regularly lead battles learn his craft and become an expert able to win a major battle or a world war? Primarily through study. Eisenhower studied all aspects of the art of war, and he read philosophers from Plato to Nietzche, under the tutelage of his Army mentor. He read Clausewitz's *On War* three times. He diligently studied and prepared during years when no war was on the horizon and the need for a standing army was being questioned.

A similar attitude toward study would benefit trial advocates. The days of a civil trial every few weeks are long gone for most of us. Lawyers today cannot wait for actual trial experience to learn the art of trying cases. Law school trial advocacy courses, the Inns of Courts, NITA (National Institute of Trial Advocacy) and trial practice seminars are all crucial training opportunities, but they are not sufficient. The aspiring novice and the serious seasoned trial lawyer must study their craft by reading widely, by observing trials whenever possible, and by recognizing that everyday pre-trial practice affords opportunities to hone trial skills.

There is an abundance of written material that can instruct and inspire today's trial advocate. One of the most valuable resources is *Litigation*, the journal of the ABA's Section of Litigation—"a journal for lawyers who go to court and the judges who hear their cases." I am aware of no better periodical for instructing advocates in all aspects of trial and pre-trial practice. Books by famous trial lawyers of the past can be instructive and inspiring, if somewhat quaint and dated. *The Art of Cross Examination* and other books by Francis Wellman contain worthwhile lessons, although the style of advocacy and the absence of pre-trial discovery are from a by-gone era. Louis Nizer's *My Life in Court* and his other books suffer from the same datedness, but include many insights and dramatic courtroom moments. More recent books like Jonathan Harr's *A Civil Action*, and even works of pure fiction by real trial lawyers like Scott Turow, are worthwhile reading for the student of trial advocacy. Compilations of portions of famous trials, such as *In the Interest of Justice: Great Opening and Closing Arguments of the Last 100 Years* by Joel J. Seidemann, are instructive. Lincoln's speeches are all masterpieces of persuasive communication. You may have your own list of favorites, which should be shared and supplemented. The trial advocate should learn as much as possible from the rich literature of the craft.

Observing live trials is time consuming and difficult to fit into busy schedules, but much can be learned from watching lawyers at work in the courtroom. Watching a good lawyer examine a witness, argue a motion, or open or close, is time well spent for the student of advocacy. We do far too little of this as a profession, it seems to me. Trial advocates, young and old, should seek out opportunities to watch their colleagues at work and learn from them. »

The trial advocate should also recognize that the daily grind of pretrial work can be used to hone trial skills. This is most true with depositions. A deposition is a wide-ranging cross-examination. Of course, the purpose of a deposition generally is to uncover as much information as possible, while cross-examination at trial must be directed toward eliciting specific and limited information. But if approached correctly, every deposition affords the opportunity to practice and deepen our ability to effectively extract concessions from a witness.

Less obvious is the connection between trial work and our day-to-day encounters with people. Gerry Spence talks about conversing with the waitress in the diner and considering how he might approach persuading this particular personality that his client should prevail if she were a juror. Only a dedicated student of human nature and persuasion will think in these terms, but it is an example of the richness of opportunity to learn and advance that is available to the serious student of the craft.

## What is the Value of a Trial?

Although the practical purpose of a civil trial is the orderly end of a dispute, a trial has value that goes beyond the removal of the case from the court's docket. A trial to verdict is a vindication, not an indictment, of our system of civil justice. Like all human institutions, it is imperfect. But civil jury trials are in general the best and fairest way to resolve disputes that parties cannot resolve themselves.

The U.S. Constitution does not enshrine dispute resolution by a panel of arbitrators, or by experts, or by judges, but by a jury of ordinary citizens. That is a remarkable statement of faith in the fairness and intelligence of laypersons—but no more remarkable than the principle of democracy itself. We do not place our faith in philosopher kings, or technocrats, or panels of "experts," and we should not succumb to the fear that things are now too complex for ordinary jurors to understand. A verdict can be unfair, but most judges will tell you they think juries generally get it right. Most trial lawyers will tell you, win or lose, that juries usually deal out a justice that is fundamentally fair, even if they occasionally miss a legal nicety the lawyers were advancing. And most jurors will tell you that, despite the inconvenience, boredom, or emotional turmoil, they feel good about their participation in the system.

A jury trial is not a failure of the system. If it signifies a failure of anything, it is the failure of imperfect human beings to solve their disagreements between themselves. But that is why we have a justice system—because people are imperfect. A jury verdict represents the closest approximation to fairness, to justice, and to truth that we have devised in a contentious and imperfect society.

The trial advocate should take pride in his or her participation in this noble process. Young lawyers should know that they will be trained, respected, and needed if they commit to trial work. Experienced trial advocates should know that their skills are of increasing value, their experience and judgment of more vital worth, even as the actual number of trials decreases. It is a profession worthy of a lifetime of study, practice, and commitment.

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