

## Who Will Try the Civil Jury Cases of the Future?

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Over the course of the last century, the landscape of civil litigation in the United States changed fairly dramatically. Fewer cases go to trial compared to the number of disputes that arise, and one consequence is that there are fewer opportunities for young lawyers to develop trial skills.

As we begin the second decade of the new century, how has the practice of handling civil trials changed? What cases will be tried in the future, and who will try them? And, finally, how will those future trial lawyers gain the experience necessary to make the civil judicial system work efficiently and fairly while effectively representing their clients? These questions frame the challenges for the next several generations of future trial lawyers.

This article will look at how the trajectory of a trial lawyer's professional development has changed, and most importantly, how young lawyers today can ensure that they will be sufficiently prepared to advocate for clients when a case does go to trial.

### *America's Tradition of Great Trial Lawyers*

While America's system of jurisprudence evolved from England's, our country has had no difficulty in developing our own great trial lawyers. In the early to mid-nineteenth century, Rufus Choate and Abraham Lincoln handled many cases in the courts and gained reputations as being outstanding trial law-

yers. They learned their skills by working under practicing lawyers and trying cases. In the late nineteenth to early twentieth centuries, two of the greatest trial lawyers of the era were Earl Rogers and Clarence Darrow. Each handled high-profile cases that garnered national attention. (Author Erle Stanley Gardner patterned his famous creation of Perry Mason after Rogers and his career; many accounts have been written about Darrow and the great social causes of the day that were represented by his cases.)

In the mid-twentieth century, two of the outstanding trial lawyers of the day were Lloyd Paul Stryker and Louis Nizer. Both not only had successful law practices but also wrote about the practice of trial advocacy, as well as many of the significant trials of the day. (Stryker wrote a seminal book called *The Art of Advocacy*, while Nizer had two best sellers in *My Life in Court* and *The Jury Returns*.)

In the mid- to late twentieth century, one of the most innovative and successful trial lawyers was Melvin Belli. Known as "the King of Torts," Belli not only represented an array of well-known and famous clients but also became a great innovator in the courtroom, particularly in the area of demonstrative evidence.

Each of these lawyers, and hundreds more like them, learned their skills and profession from appearing in courtrooms and representing real clients

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with real problems. In representing their clients, they became adept at refining the art of persuasion.

### *The Problem Today*

For most of these noted trial lawyers, the early years were spent in courtrooms trying cases that neither had great public interest nor were of import beyond the litigants themselves. Lincoln handled many cases for “plain folks” before developing a reputation as a great advocate; Clarence Darrow handled many cases on behalf of the railroad before becoming the lightning rod in cases involving the death penalty, evolution, and the role of unions in the United States.

But where will the trial lawyers of the future gain the practical experience to become the next great advocates? Many of the avenues of learning the profession have been eroded or removed altogether. In short, there are fewer opportunities today for a young lawyer to gain courtroom experience, especially in civil cases, making it difficult to hone the skills necessary to become a great trial attorney.

Enactment of no-fault auto insurance legislation in some states has eliminated many of the cases that had heretofore been a training ground for generations of trial lawyers. Relatively simple cases—Who had the right of way? Who was speeding?—could be tried in one to three days, providing a young advocate the opportunity to select a jury, give an opening statement, examine and cross-examine witnesses, argue evidentiary issues, and give a closing argument. Usually, the amount in controversy was modest, so that even an adverse verdict would not be devastating to the client or insurance company.

Alternative dispute resolution has also diminished opportunities for the young lawyer to gain trial experience. Arbitration is viewed as an inexpensive way to resolve disputes. No jury is drawn, the rules of evidence are rarely followed or enforced, and

cases can be handled in hours instead of days or weeks.

Many courts not only encourage mediation, but also mandate it. Typically, a well-qualified mediator will shuttle Kissinger-like between the parties, carrying messages and signals in an attempt to resolve the case before it gets to trial. The mediator's efforts are often successful. For many of today's litigants, the risk and the cost of a trial is simply too high and too expensive. A mediated settlement that represents a compromise between the parties is often a more prudent business decision than running the risk of obtaining an undesirable jury verdict.

Finally, the courts themselves encourage solutions short of trial. Government cutbacks have reduced courts' staff, administrative personnel, and judicial law clerks. Civil juries that were once comprised of twelve citizens now consist of eight, seven, or even six jurors. Settlement conferences conducted by the courts often become sessions of leverage, using tactics to frighten both sides concerning the risks of allowing the dispute to be settled by total strangers.

Courts are feeling the pressure not only of reduced budgets, but also of reduced time. Criminal cases typically crowd the court dockets. Civil cases are invariably pushed back and delayed because of the need for courts to provide speedy trials to those accused and incarcerated. Parties will often settle rather than endure further delay and escalating attorneys' fees.

### *The Solution*

How can an aspiring trial lawyer still gain the necessary skills and experience to advocate successfully and effectively in today's courtrooms? There are still many opportunities to learn the profession and to perfect the skills needed for trial advocacy.

Here are a number of suggestions for developing those skills:

### 1. Go to work for a firm that actually tries cases.

While this may seem obvious, there are many firms (and lawyers) who say they are trial lawyers. While they may actually have trials scheduled from time to time, trial lawyers try cases, not just settle cases. Inquire about the number of cases the firm and its lawyers have tried in the past several years.

Having an actual trial lawyer as a mentor will be the best way to learn how to become a trial lawyer. Watching how advocacy is performed ethically, vigorously, and effectively can be invaluable to a young lawyer's career. Grab any second chair (or third or fourth!) opportunities that become available.

In addition, working with a trial firm or group will usually present other opportunities for developing trial skills. Taking depositions forces you to learn how to prepare properly and to develop the skill of cross-examination; arguing contested motions gives you actual courtroom experience "under fire."

### 2. Enroll in an advocacy program.

There are national programs, such as the National Institute of Trial Advocacy (NITA) that offer programs specifically designed to teach trial skills. These programs emphasize the hands-on approach of actually preparing for and conducting the trial against another student.

Most states offer continuing legal education (CLE) programs that will periodically conduct a trial advocacy course, or at least a segment of a trial (opening statements, direct examination of a doctor, etc.). These courses are often taught by experienced and well-known trial lawyers who have a great wealth of knowledge to share.

Law schools also offer trial advocacy courses. Many times they are taught, at least in part, by former trial lawyers, prosecutors, or current practicing trial lawyers. Again, an instructor with real courtroom

experience can enrich a course beyond merely understanding the rules of evidence or learning when to make an objection.

### 3. Try the small case.

Accept any opportunity to try a case, however small. Advocacy is not defined by how many millions of dollars may be at risk; many minor cases also require the same skill in representing a client. Whether the client has a small claims matter involving failure to pay a bill or a traffic court matter concerning a confusing intersection, there will always be an opportunity to advocate. While the size of the case will usually dictate the effort that can be expended in terms of dollars, witnesses, and exhibits, in truth, small cases should be prepared the same way large cases are prepared. Choosing the theme of the case, giving an opening and a closing, and examining witnesses on both direct and cross-examination occurs in every trial, regardless of size or potential outcome.

### 4. Consider judicial clerkships.

Especially in a tight job market when law firm positions are less plentiful, judicial clerkships can be an excellent learning experience for aspiring trial attorneys.

The chance to be in a courtroom every day with a judge provides a unique front row seat to both good advocacy and bad. A judicial clerk has the chance to observe different trial techniques and to assess what works (and doesn't). Furthermore, clerks, through their judge, often hear from jurors themselves as to what they thought was important or significant during the trial. Most trial lawyers do not receive the unvarnished feedback that can be available to a judicial clerk.

### 5. Study the great ones.

Courtroom skills can also be learned from studying the trials and techniques of proven, accomplished

lawyers. Many books have been written by trial lawyers regarding the great cases of the day. Studying the cases of those lawyers will help the young lawyer to gain knowledge and insight into the thinking of successful litigators. One particularly helpful book is the classic *The Art of Cross-Examination* by Francis L. Wellman—in the opinion of this author, required reading for the young trial lawyer and re-reading by the experienced trial lawyer.

Obtaining transcripts of famous trials, locally or nationally, is also a way to learn necessary skills. In addition, there are publications that reprint the closing arguments of great attorneys of the past, such as *Attorney for the Damned*, edited by Arthur Weinberg. Many of Clarence Darrow's closing arguments from his most famous cases are published in this book, and they are both enlightening and thought-provoking.

Finally, attending significant or interesting trials in your own community is a way to learn. The courts are generally open to the public, and observing at least a portion of a trial involving good lawyers can be instructive.

### *The Future*

As fewer civil cases are tried, the concern is who will try them professionally and efficiently. Certainly there will always be trial work for prosecuting attorneys, criminal defense attorneys, and public defenders. However, the challenge will be greater for civil trial lawyers to gain the courtroom experience available to their criminal counterparts.

Perhaps the U.S. will evolve to a British system of barristers and solicitors: the courtroom lawyer and the office lawyer. In some respects, the U.S. has been quietly moving in that direction. For years, the American Bar Association has had a civil litigation section. Many states also have a civil litigation certification process, usually supervised by the State Bar Association. The National Board of Trial Advocacy (NBTA) provides a national certification for those

who have demonstrated the necessary skills to warrant such recognition. These certifying agencies could well define and identify those lawyers who are experienced and qualified to argue cases in the courts. Just as in England, there will be a smaller number of lawyers who are certified to try cases—other lawyers will partner with the trial lawyer, working in subordinate roles.

As we proceed into the twenty-first century, it is clear that we need to preserve the right of our citizens to resolve their disputes through a jury of their peers. This right was long envisioned by the founding fathers of the country and, despite the erosion that has taken place over the years, still remains at the foundation of our freedom. So, too, it is clear that we will need to continue to develop thoughtful, effective advocates who will use their skills for the benefit of their clients as well as the good of our society.

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