

Living without feedback

By: F. Dennis Saylor IV and Daniel I. Small October 29, 2015



If author Ken Blanchard is right when he says, “feedback is the breakfast of champions,” then trial lawyers are going hungry.

As a trial lawyer, you may get plenty of advice, but you’ll get surprisingly little direct substantive feedback on your actual performance in the courtroom. To develop your skills, you have to be creative, even a little aggressive, in seeking out the constructive feedback you need. Without it, many attorneys, even experienced ones, often fail to recognize and learn from their

mistakes.

For a lawyer trying a case in open court, it would be easy to assume that there are plenty of sources of feedback. In fact, that is not true. As a practical matter, most trial lawyers get very little useful commentary about their in-court performances.

One obvious source of feedback (and a great one, when you can get it) is the jury. However, jurors often don’t want to give it to you. They want to go home. And in many states (including Massachusetts, up until July of this year), it’s improper to contact them, even after the trial, except under the supervision of the judge. There is no harm in asking the judge, but you may not succeed. That’s one reason that mock juries can be so helpful, whether done formally through a consultant, or informally through friends, colleagues or office staff.

What about the judge? Wandering the halls of a small federal courthouse in the South, waiting for a verdict after a month-long trial, Dan heard a noise come from the tiny library room. He opened the door and saw the judge, clerk and court reporter playing cards. Dan started to close the door, but the judge told him to come in. The next four hours were filled with bad card-playing, good bourbon, and some of the most extraordinary, perceptive, step-by-step feedback one could ever hope for — from a team of professional court-watchers.

That likely won’t happen in a Boston courthouse, or just about anywhere else in this part of the country. The unfortunate truth is the judge probably won’t give you feedback. Judges are busy, they’re not accustomed to it, and they don’t want to create a ground for appeal. Most judges would dismiss the notion out of hand if it were suggested to them. Most lawyers are afraid to ask for it, anyway.

The client is a poor source of feedback. Clients often are emotionally involved in the case, which affects their judgment. During trial, for example, clients may want to see their lawyers conduct an aggressive cross-examination, or be very aggressive overall, whether that makes sense or not. Clients also tend to be over-focused on minor inconsistencies and other details.

The verdict is a form of feedback, but it isn’t a very reliable one. It’s not normally a vote on the lawyer’s performance but rather a vote on the merits. Bad lawyers win cases all the time, just as good lawyers lose them.

Edward Bennett Williams, the legendary trial lawyer, supposedly said that 80 percent of cases are won or lost on the facts, regardless of the lawyer’s performance. That means the lawyer makes a difference only 20 percent of the time. Whatever you think about the percentages, the basic concept is correct. And when bad lawyers win cases, the feedback they get is that they’re doing things right.

So trial lawyers need to reach out for constructive criticism wherever they can find it. One way is to practice your arguments in front of your family, friends or colleagues. Even the mirror might give you some useful feedback.

Another is to ask for it. Ask people to come to court to watch you, ask people who are already there, ask people who have watched you before. Make it clear that you don't want a cheerleader; no one is going to help you by being too nice or too gentle.

All of this puts a premium on being self-aware and self-critical. Those are difficult qualities for most human beings to master under any circumstances, must less for courtroom lawyers.

Age and experience, too, play roles. It is particularly difficult for people to keep trying to improve their skills once they have reached a certain level of competence and success. But if you are living in a world with little real feedback, you're not likely to improve without the ability to think clearly about your own abilities and performance.

The essence of trial advocacy is communication. To improve as a trial lawyer, you need to try to obtain constructive criticism and you need to listen to any amount you receive. The challenges are finding ways to get feedback, making sure that it is honest and direct, and then disciplining yourself to ignore your ego so you can listen and learn.

It may be the hardest challenge that faces any trial lawyer.

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