MASSACHUSETTS LAWYERS WEEKLY

This extraordinary process called 'trials'

By: F. Dennis Saylor IV and Daniel I. Small September 3, 2015

"Trial" is an ancient word and concept, apparently with origins in the French "triet": to try, or to test. Like any significant test, it requires hard work, study and experience to learn the necessary skills. And while honing those skills is a lifetime endeavor, they can help in all phases of the litigation process, not just in court.

A lawyer can learn how to try cases in many ways, such as reading books on the subject, observing others in action, seeking advice from experienced trial lawyers, practicing outside the courtroom and even by conducting trials as an arbitrator or judge. Both of us have been very fortunate in our careers to have learned in each of those ways — and more. We have developed some clear ideas about the right and wrong ways to try a case effectively and persuasively.

Let's start with two general thoughts about the never-ending process of learning how to try cases.

First, there is no monolithic, one-size-fits-all method of trying a case. It can vary widely based on the lawyer (personality, style and experience); the case (type, length, merits, etc.); the court (judges, jurisdictions and areas of the country); and other factors.

You have to adapt and be adaptable. At the same time, many of the basics remain the same even if the details vary. While you certainly need to adapt to local practices, you don't have to accept them in their entirety. Many bad practices have persisted for no other reason than "that's the way I learned to do it."

Put simply, much of this is subjective. For many situations, there is no easy answer. Some of this, though, falls under the heading of simple common sense. Sometimes it might seem like things are obvious. But lawyers lose cases all the time because they don't exercise common sense in the courtroom.

In fact, maybe that ought to be Rule No. 1: When in doubt, use your common sense. It won't solve every problem, but it will give you a head-start.

Second, much of the standard advice about how you learn to try cases is just wrong. A common refrain in programs on trial advocacy — normally offered by a senior lawyer, a grizzled veteran of multiple trials — goes something like this:

You can't learn how to try cases by reading a book. You can't learn anything by watching other people. You need to get up and do it yourself. The only way to learn is to get knocked around — to fall down, get up, and do it again.

There are multiple fallacies buried in that argument, as well as a significant kernel of truth.

The first fallacy is the notion that because you can't learn everything from a book, you can't learn anything. That, of course, is untrue. We all can learn from the experience of others, whether spoken or written.

The second is the notion that you can't learn anything by watching other lawyers. That, too, is untrue. Watching other lawyers (both good and bad) is a critical component of the learning process. You should take care, however, not to imitate something without questioning whether it makes sense. Many of the worst faults of lawyers are perpetuated from generation to generation because new lawyers assume (or are taught) that "that's how it's done." Just because something sounds impressive, or lawyerly, it may not be a good idea. In fact, if it sounds lawyerly, you probably ought to avoid it.

The third is that the lessons learned from experience are always the right ones. They aren't. Lawyers are constantly learning the wrong lessons, most notably when they get away with doing things badly, which happens far too often. Or worse still, when they win a case, despite a poor performance.

The fourth fallacy is the implicit suggestion that courtroom experience is an option that is there for the taking. It's not. Courtroom experience is an increasingly rare commodity, and it's foolish to pretend otherwise. Of course, hands-on experience matters a great deal. No one can learn everything he needs to know from a book, or by watching others, or in a clinical classroom. But you have to make do as best you can with what is available. In today's world, that almost always means making do with limited hands-on experience.

We have no magic wands. The best we can offer is years of different perspectives on, and fascination with, this extraordinary process called "trials." We hope — and believe — it will be helpful at all levels.

All trial lawyers learn from each other, and in that spirit we welcome your feedback and thoughts. We will start from the beginning and, every other week, methodically work our way through to the end. Join us on the journey.

Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to taking the bench in 2004, he was a federal prosecutor and an attorney in private practice. He teaches trial advocacy at Boston University School of Law. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. A former federal prosecutor, he is the author of "Preparing Witnesses" (ABA, 4th Edition, 2014), and teaches CLE programs around the country. He can be contacted at dan.small@hklaw.com.