Introduction

I learned how to try cases in the courtrooms of New Hampshire. On my first day of work in August, 1972, I was given several files by partners with years of trial experience. Over the months we prepared those cases for trial and tried some of them. My mentors carefully watched and corrected my initial forays in giving pre-view statements, arguing jury instructions in chambers, and handling the courtroom examinations of what a trial lawyer friend used to call “The Little People”—the nurses, friends of the plaintiff, the ambulance driver, the police officer—the witnesses who helped the storytelling of the case, but presented no great risk to a novice. Cases went to trial frequently and with wide variety—personal injury plaintiff cases, restrictive employment covenants, construction claims, teacher discharge cases, each offering opportunities for a young lawyer to present a case in a courtroom. Now, forty-three years and scores of trials later, the opportunities for the exceptionally talented young lawyers I mentor to gain trial experience are less common. When trials occur, they tend to last longer, and the financial and personal stakes for the individuals and companies we represent are often immense. The rules of court, expansion of discovery, proliferation of experts, and pretrial labyrinth of dispositive motions, motions in limine, and electronic discovery and evidence, all present a highly complex and dynamic playing field as the trial event approaches.

I have been fortunate not only in trying a large number of cases, but in the wide variety and different venues of those cases. As I began to try cases on my own in the late 1970s, without the safety net of the senior partner sitting at counsel table, the
cases continually increased in complexity. Medical negligence and product liability claims for plaintiffs became a steady diet, providing the most demanding standards of pretrial organization and coordination. Commercial and business cases, often with multiple parties and rapidly escalating stakes, brought with them new technology, cost, and the management of extensive document discovery. Technology also presented the more experienced trial lawyer with new tools and techniques—video depositions, trial presentation software, exciting animation of accidents, and the use of Internet resources in preparing for expert cross-examinations and jury research.

The volume and complexity of the trials also reflected a change in nature of the cases. New opportunities arose to represent defendants in product liability cases, toxic tort environmental claims, and a wide array of claims for environmental clean-up costs among responsible parties and insurance carriers. Trials expanded to multi-week events focused on scientific proof, elaborate demonstrative evidence, and expert witnesses of every conceivable discipline and profession. The stage expanded from New Hampshire to courtrooms in Missouri, New York, Connecticut, Massachusetts, South Carolina—collectively described in our parochial New Hampshire view as “Away.”

The goal of this handbook is to attempt to provide the inexperienced trial lawyer with the benefit of some of the things learned along the way, focusing on precise methods, procedures, techniques, best practices, and tricks that I believe are helpful in successfully preparing a case for trial. The commentary and technique represented here will be detailed and opinionated. This is a how-to handbook. We all know preparation is the key to success as a trial lawyer. This handbook will share my experiences, and what I have learned from others far more gifted, and to assemble these tips and approaches into a time-sensitive and flexible model that can be adapted to almost any type of trial. It goes without saying that a generalized approach to a discipline that is dependent on local court rules, customs, and
practices in different states, federal versus state forums, and civil versus criminal cases, runs the risk of being contradicted by the specific practices or requirements of the forum. You will figure that out—I am convinced after my experience trying cases in various jurisdictions and with fine trial lawyers from “Away” that the basic steps and organizational demands have a high degree of consistency. Often the local trial lawyer’s admonition that “Bruce, we don’t do it that way here. . . .” translates into a recognition that he or she has not thought about doing it differently. Nevertheless, I will try wherever possible to identify important variations of which I am aware, and I caution you to check every suggestion and recommendation against the requirements of your applicable rules and the body of law in the courts where you practice.

It is important, as you review the suggestions that I offer for trial preparation, that you are mindful of the rapid change technology is bringing to the trial of cases. In my firm’s litigation department, we have a team of trial lawyers and paralegals working with enhanced use of computers in the courtroom. This goes beyond trial presentation or trial projection tools, which are already commonly used, but now includes iPads and other tablets, which provide file storage, note taking, and even witness outlines and related presentation aids. It is likely that those devices will evolve into a primary platform for trial work, and, eventually, be overtaken by something else that is newer, faster, better . . . .

I know some lawyers who have already mastered or are testing the limits of those devices and there is no doubt that the devices will proliferate and be highly valuable. As I write in this handbook about trial notes, notebooks, and “three ring binders,” being tools deployed in the courtroom, we know the mechanics will change within a few years to a more electronic format. My deployment of electronics in the courtroom is heavily focused on presentation aids, and accessing discovery information or case data. The flexibility, visibility, and nature of
witness outlines and organized advocacy notes can be deployed on a tablet, but I have not yet mastered this skill. Technical changes will unquestionably impact courtroom advocacy, but that process of innovation will itself be transitory. The use of new devices and platforms will continue to grow. However, the key organizational criteria and lightning fast flexibility demanded of a lawyer in the crucible of trial will remain.

There is something else important to say about the purpose of this book. Too often experienced trial lawyers are seen by those just learning their trial skills as calm, self-confident, masters of the craft. These are folks who deftly arise and enter the courtroom with an even heartbeat, a clear eye, and a precise plan for the commencing trial. I have met such people, but they are very few, and this book is not for them, or those of you who have been given such gifts. The first day of trial, or at least the predawn hours before the battle is joined, is always a time of terrible self-doubt, drained emotional resources, building tension, and disorganization, and—in truth—a sometimes desperate wish to be almost anywhere else, far from a hotel room thinking through the trial about to start and watching the illuminated watch dial as it counts down to the 5:00 a.m. wake up call. The fear and emotional demands of trial become more manageable with experience, but are always with you.

The acceptance and harnessing of that emotional power, even fear, into passionate and articulate advocacy, quick responses on your feet, reversal of tactics when plans fall flat, and the setting of an internal stopwatch as a cross-examiner who sets up the final and critical question of the witness for 4:27 p.m., is enabled and assured by meticulous, exhaustive preparation. Preparation simply gets you through. All the things you can plan, anticipate, mitigate, and implement with your able and hardworking team provide you the energy and confidence to help manage the stress, confusion, mistakes, and constant professional tension that comes with demanding trials. There is a reason we use this word “trial,” defining a dispute resolution
event or process in our courts, but also as a term defining a testing, a suffering, or experiencing of a hardship. Trials are hard, but remain a supreme test of our skills.

Finally, a point about perspective. Preparation will not only enable you to withstand the pressure, stress, and exhaustion of the process, it will sustain you in those times when you lose. Trial lawyers do enjoy and celebrate their victories—but few in my experience savor the victory or celebrate the win with the intensity, duration, or constant flashback that comes with a crushing defeat. Those darker moments are managed best with the assurance that you did the absolute best you could do. Doing the best you can is assured when you have a plan, a system, a method, and a discipline to turn that goal of excellence into effective performance.

I am hopeful that the methods and tactics I will describe here, learned in my trials, will make your experiences more successful and satisfying.