This anthology is about jury trials. Jury trials are a birthright of Americans. At times today they seem almost forgotten as the very touchstone of our democratic society. The United States Constitution begins:

We the People in order to form a more perfect union...

It goes on to forge, as part of that “perfect union,” constitutional rights to criminal and civil jury trials. America’s Founding Fathers believed in the importance, some said almost sacred importance, of jury trials.

Thomas Jefferson thought the right to a jury trial more important than the right to vote. He argued that a jury is “the school by which [the] people learn the exercise of civic duties as well as rights,” and that “[the jury acts] as the only anchor, ever imagined by man, by which a government can be held to the principles of [its] constitution.” 15 Thomas Jefferson, The Papers of Thomas Jefferson, 283. Inherent in his thinking was that the jury is an indispensable instrument of public justice. We believe that.

When the senior of us began to practice law more than fifty years ago, almost every lawyer knew his—and a very few her—way to the courthouse. From experience lawyers knew that cases, and the common law, began with people in courtrooms. Courthouses were filled with jurors, judges, lawyers, hangers on, beat reporters and spectators. In large law firms corporate and probate lawyers were routinely expected to try at least one jury case, to get the “feel” of the law.

Courthouse law still has the same “feel,” but lawyers as professionals are increasingly distant from it, as are business people, beat reporters, politicians and presidents. Trial lawyers, while not extinct, are becoming endangered as a species.

About thirty-five years ago the Litigation Section of the American Bar Association was founded from a concern that trial lawyers were losing their voice in America. The Litigation Journal was
created under the leadership of Charlie Wilson to preserve that voice. As Charlie wrote:

It is a journal for Lawyers who try cases and judges who decide them...

[Its] arena is the adversary system... which has as its goal, justice, best achieved by confronting issues from all sides rather than avoiding them.

Thirty-five volumes, 161 issues and thousands of articles later, that goal remains as wise and necessary as the day it was adopted.

This anthology assembles, from the Litigation Journal, articles about jury trials that are, “practical and concrete...lively and readable.” For those of us who do not try any jury cases they will be enlightening. In reading them you will better understand the processes by which cases are tried, decisions made, and justice arrived at in American courts. For lawyers who try only a few cases, you will gain from the years of courtroom experience of others. And for courtroom veterans, old trial skills will be reinforced, bad habits questioned and per force, new lessons learned. We hope enlightenment and entertainment will follow.

Fifty to seventy-five years ago lawyers dominated courtrooms. Edward Bennett Williams used his “stop the presses” style to have Joe Louis saunter into the courtroom to shake hands with James Hoffa. Joe Welch captivated early television viewers with his “At long last Senator, have you no sense of decency” retort to bring down Senator Joe McCarthy. In the Scopes Monkey Trial, Clarence Darrow brought life to the battle of science and religion. Over two hundred years ago, Daniel Webster fictionally debated the Devil and won.

Movies and television changed this, as courtroom dramatization replaced fact. The public sees more of lawyers than ever, but most often they are actors. One thing television did was make jurors discerning, demanding and skeptical. Trial lawyers today less often carry the day by personality alone. In court, a lawyer’s “truth” must be supported with interesting witnesses, good science and sound technology, all presented simply and sympathetically. A considerable amount of learning is required to do this well.
Preface

A jury trial lawyer’s education must be framed by the audience of “judges” the trial lawyer practices before. That audience is wonderfully described by C.K. Chesterton:

Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. When it wishes for light upon that awful matter, it asks men who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity. (See Tremendous Trifles, reprint published by Dodd, Mead & Coin, 1909).

The jury, the scorekeeper of justice, is the best judge of how good a lawyer is. And just as fifty, and two hundred and more years ago, some lawyers win more than others. There is no formula to explain winning. Experience helps—your own and that of others. This book was put together with that in mind. Reading it will not make you Daniel Webster, but you can learn from its stories of successes and failures in the courtroom. We hope these articles help to hone these skills.