Trial Practice Is Better Than Trying to Practice

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This article memorializes her time with Boies Schiller Flexner LLP, Washington, D.C.

"I don't love the law," I used to whine to myself in law school before dutifully pressing Play on yet another Supreme Court podcast.

"You know, I don't love the law," I would confess to my co-clerks, hoping I'd displayed some knack for legal philosophy to which they could point in contradicting me.

The love letters from law firms that trickled in to recruit clerks depressed me. I told myself that law would be a stopgap until I found something I actually loved.

Then last year I went to trial. More accurately, I went to trials. Multiple trials. There were four of them. And everything changed for me. Everything. Completely.

The first came to my attention about seven weeks after I started with the firm, when an associate I barely knew stopped in to say goodbye. She would be out of the office until February, she said—a happy combination of her well-timed vacation and trial. I looked up from a primer on equitable defenses that I'd been revising since I'd started with the firm, blinking. Trial? That sounded good.

The same day, I approached the partner responsible for scheduling and asked if I could attend. I was thanked for my enthusiasm and assured there would be future trials. That was fair. The associates who had been with the case for years had dibs. A few weeks later, the partner stopped by my office. An associate was coming home from that trial. Was I still interested?

Yes, I was!

The Perfect First and Second Trials

It was—for me—the perfect first trial. It wasn't really *ours*. It had facts that substantially overlapped with our case, which was scheduled for trial a few months later. The cases were close enough that it made sense to get the lay of the land, assess the experts common to both of them, and see how each side's facts looked as they came into evidence. We were there to observe, which gave me the luxury of watching what was essentially my case unfold without the distraction of doing anything at all to support it.

Here's what I saw.

Each day, an associate would arrive early to sit near an evidence screen with a view of the jury and take notes on the testimony and rulings. At the end of each day's proceedings, like clockwork, lead counsel for our twin trial would announce that he was done for the day and invite the team to meet him for a nightcap. The group would reconvene at the hotel, where conversation would flit between case predictions and war stories. This trial—though not all I observed—was trial-lite.

Winter ticked to spring. Our trial came up to bat. Our client had requested that associates alternate working remotely in shifts. I was scheduled to attend the first 12 days and the last nine. Those of us taking first shift would be in close quarters; our hotel rooms and the trial team war room would be attached by

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a lobby. Partners who'd weathered their share of trials assured me of the convenience.

The same partners warned of the possible toxicity of working with lawyers from other firms, as we would do. We were aligned with two other firms—one as co-counsel, the other representing friendly third parties. The partners assured me that little sleep and less patience risked tribal behavior beyond anything I'd seen on email. An associate had similar things to say.

There are two ways to mitigate disaster, she told me, her eyebrows raised. One is to give the other firms their own territory; the second is to provide meals on a regular schedule. Around the time I booked my flight, I learned that, in the name of bonding, the client had scrambled seat assignments so that attorneys would be intermingled in our rented office space. I prayed for quality catering.

Eight days before trial, I roamed around the maze-like war room looking for my desk. At the bottom of a Post-it, taped to a doorframe, I found my name scrawled beneath the names of five partners. A paralegal elbowed me: "You better hope the partners have their own printing access."

Our office, by far the largest, was the natural choice for summits between lead trial counsel on the case. I was not invited to those discussions or to the meet-and-confers in the adjacent broom closet—nor was I asked to leave. And that is how, from my quiet corner, I became an apprentice in learning from a handful of masters how to try a case.

I heard the reasons behind the final witness lineup while I worked on witness outlines. I learned approaches to opening arguments as I cite-checked the slides. I learned of the lines drawn in the sand with opposing counsel, the tenor of client discussions, and the evolving tactics we were taking long before any of this was distilled and shared with our team.

Still, I was blindsided when we settled. The night before opening arguments, lead trial counsel came into our office before heading to bed. Two associates and I were poring over deposition

Illustration by Colleen O'Hara

transcripts. "Go to sleep. Trial is a marathon, not a sprint," the partner said.

Having heard that before, we kept working. At the settlement party the next night, I ribbed the partner, thanking him for the heads-up. He chuckled. "Just so you know, a trial that isn't going to settle is *always* a sprint."

I came home and repacked my bags for vacation. Everyone on the trial team had made it clear they'd be off-line for a few weeks and suggested that I do the same. The imminent post-trial reset was expected and encouraged, they assured me.

As we descended from the clouds, I switched my phone off airplane mode. It pinged immediately. "If we were to go to trial in June, hypothetically, would you be interested?"

June? It already was May. "I would be extremely interested," I responded, "hypothetically speaking."

Straight into Trials Three and Four

By Monday, the time for hypotheticals had passed. The client, reeling from a mock trial with crushing jury verdicts, asked us to jump aboard. We had a month to prepare.

Within a week, we'd reviewed the key documents, testimony, and law, and constructed a new narrative of the case—our "Basic Truths." Our winning narrative, though, presented its own challenges. We couldn't use key depositions peppered with "I don't knows" and "I can't recalls." We prodded, pleaded, and pushed to add over 40 documents to a trial exhibit list that had already been served. We begged witnesses who had been overlooked to give us their testimony. All of this was done in a tightrope act of professional courtesy with co-counsel who hadn't expected us to be there at all.

> I learned that for the same reasons I disliked law in the abstract, I relished practicing it.

Because time was short and our team was lean, I played an outsized role for someone who had never even met a witness. I attended every client witness prep session. And so I watched the partners help people find their voices, stoke flames for hot documents, and breathe life into cold ones. After those very witnesses and their trial testimony saved our client over $750 million in liability, I would glow for months, content in the knowledge that I had been in the room where it happened.

The last week of trial, I received an email from a partner back at the office. "How's it going? Would you have any interest in coming to trial in September?"

I stared at my screen. I was exhausted, but this was fun. "Yes please, I would love that," I shot back. "First," she responded, "I'll see if you have approval for another trial this year." Somehow I did.

I showed up to our Brooklyn trial with a hotspot, a four-to-one ratio of sweaters to blazers, a bottle of vitamin C, five single-sided copies of every exhibit, and a check for the first week of expedited transcripts. For the first time, I felt that I had a handle on what the coming weeks would bring.

The partners on the case had run it from inception, largely without associate support. The only other associate was three months from making partner. I assumed that my junior status, my late onboarding, and my consequent loose handle on the facts meant I would be providing trial support from the war room.

Instead, the small case presented great opportunity. I managed our exhibit list. I sat at counsel table every day. I stood up and argued the admission of 11 exhibits. (At night, I made lots and lots of binders.) With one foot in the well and the other in associate land, I lived the absurd contrast of a cool, collected courtroom demeanor while experiencing the constant crisis—documents, witnesses, impeachments—roiling under the surface.

The case settled the morning after we rested, and at our celebration lunch, I swallowed the selfish part of me that wished we had taken it to verdict.

Lessons Learned

With that flurry of initial trials behind me, I'm learning to appreciate the humdrum of discovery. My steadier schedule has given me time to consider what I learned last year. The lessons come from a mixed bag of moments frozen in time.

Plenty of these moments are mistakes imprinted on my brain.

There was the time we overprepared our witness. On the stand, opposing counsel asked why the corporation had made certain expenditures on behalf of workers. The question was intended to highlight that the witness's former company—our client—had benefited from making such payments. It was not particularly damaging inquiry and was, therefore, a point to concede.

Our witness responded that yes, the company had benefited insofar as the payments had "endeared" workers to the company. I cringed. The response reminded me of an interviewee admitting that his greatest weakness is caring too much. The court later found that this witness testified credibly, but we had failed to calibrate the preparation to the witness. That witness, brilliant on her own, would have done better with less prep from us.

Some of my mistakes were rookie mistakes; others were clerical and stemmed from neglect of self. I averaged five hours of sleep during trial. The average for one trial dipped below four. I could see my performance lagging, but still stubbornly, slowly, hacked away at tasks. My dermatologist and I agree: The next trial must incorporate a more thoughtful nighttime routine, one that involves a pillow. My contributions (and my complexion) were uncontestably better when I was not in a sleep-deprived fugue.

I blame my then-disintegrating state of mind for the time I lost the only copy of the outline a name-partner had written. I had ported his lovely, blue-ink script into my computer, then promptly misplaced the original. When the partner later appeared at the associates' office requesting his notes, I had nothing to give him. I couldn't find them.

That, of course, sent me into a two-hour spiral of unavailing desperation, sifting through Redwelds and recycling bins. Finally, I gave up hope. I confessed to the partner that under my watch, his handiwork had permanently disappeared. Without looking up, he graciously absolved. "Well . . . [long pause]," he said, "I suppose . . . that's not the worst thing in the world."

And how can I forget the time the court admitted the exhibit I'd been arguing, "but not for the truth" of the point being asserted. I was certain there was an applicable exception to hearsay, so without hesitation I asked to be heard. The court, utterly uninterested in what I thought was a fair point, mercifully stopped me. "Didn't you just win?" asked the judge. I forced a smile, nodded, shut up, and sat down.

A perk of trial is that it leaves no time to lick wounds. Before I could dwell on the prior day's mistakes, we'd have a win in court. Many of those wins are enshrined in the stash of daily transcripts I keep in my office.

In one case, our client alleged that three larger competitors had conspired to exclude it from the market. Opposing counsel sought to admit a document to elicit testimony about reasons third parties had chosen not to do business with our client. At sidebar, after being reminded by the court that he'd successfully kept out third-party evidence for weeks, opposing counsel withdrew the exhibit and headed back to the podium.

But then he resumed, as if he hadn't just withdrawn it, with a remarkable outcome:

> Opposing Counsel: May I publish it to the jury, Your Honor?
> The Court: No. It is not in evidence. Not without opening the door that we discussed.
> Opposing Counsel: I do not choose to, Your Honor.
> Opposing Counsel to Dr. Expert: When you saw this email describing that—
> Counsel: Objection, Your Honor.
> The Court: Hang on. Stop. The door is being opened. Using the exhibit or quoting from the exhibit, it doesn't matter. Once you go into this area, the door's been opened.
> Opposing Counsel: I will offer the exhibit.
> The Court: Any objection to the exhibit?
> Counsel: Not as long as the door is open, Your Honor.
> The Court: It is open. Received.

He'd withdrawn the exhibit, then proceeded as if he hadn't, then been warned that he was opening the very door he'd tried to keep shut, and then, flustered, proceeded to pull it wide open.

The paralegals texted me: "Why is everyone at counsel table smiling?"

We were pleased that opposing counsel, determined to make his point, had made a choice that effectively ensured we could rebut his entire case. I'd also enjoyed watching the jurors try to make sense of why heretofore lucid and intelligent men were engaging in a back-and-forth about why and whether some nonexistent "door" was ajar for one or both sides.

Just as often, the meaningful moments happened outside the courtroom. My thoughtless quip to lead counsel—that he couldn't find a turkey sandwich without support staff—confirmed my sense that people appreciate when their subordinates treat them like, well, people. Hapless witnesses and bizarre exchanges with opposing counsel lead to inside jokes, mentorships, and friendships. My late-night summits with hardworking staff yielded an oral history of the firm that proved invaluable to my understanding of my workplace and what inspires loyalty there.

These are a handful of the lessons I learned. There are many more. How making the ask can lead to real opportunity. How profoundly decisions made early in the life of a case affect the chances of success at trial. How watching superiors craft their cases provides an invaluable education. How partners are sometimes willing to place the fate of a case in the hands of junior colleagues, even when you've never done what they're asking you to do.

And this: How trial experience begets trial experience, which begets trial experience.

There is a particular lesson, though, that I hold most dear, given from where I began. There is a big difference between the practice of law and practicing law. For years, I feared that I'd chosen the wrong profession. Now, four experiences of unrelenting, strategic, competitive, and at times terrifying intellectual theater have changed all that. I learned that for the same reasons I disliked law in the abstract, I relished practicing it.

I just had to try it. ■