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EXPERT ADVICE

# Litigators v. Trial Lawyers: The Differences and Why They Matter

***The skills required of a bona fide trial lawyer differ profoundly from those required of a pre-trial litigator.***

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It seems odd that the skill set required of a lawyer would change substantially toward the end of litigation. After all, when a marathon runner nears the finish line, she is not required to grab a pair of boxing gloves and fight her way the last 50 yards. Or when a novelist comes to the end of his latest work, he is not then asked to finish his project by demonstrating fluency in calculus.

Yet when a lawsuit nears its conclusion, the capabilities required to handle the matter at hand are dramatically revised, and skills that were secondary if not completely unnecessary throughout the case suddenly become critical. This shift has a dramatic effect on how lawyers serve their clients.

## MANY LAWYERS AGGRESSIVELY AVOID TRIAL ... AND THEY SHOULD

I recently met with a friend of mine, the chief executive in a large organization. He told me about a lawsuit in which his organization was involved. I asked him about his lawyer. He said the lawyer had helped them on many cases in the past and had always settled them. This did not surprise me. Then he told me the lawyer bragged that in 25 years of practice he has never had to try a case. Never? No, he says, never. Do you mean that in every case he is unable to win via motion, that the other side took a reasonable settlement posture, allowing for a reasonable settlement? I don't know, the chief executive responded.

I do. I have seen enough litigation over the past two decades to know better. For a variety of reasons, some cases do not give rise to a reasonable settlement.

My friend's lawyer is not alone. I started private practice for an international megafirm. One day I asked my mentor there, now a federal judge, why we so infrequently went to trial. He said most of our litigators had little if any trial experience, and little if any confidence as trial lawyers as a result, and the risks were just too great: if you try a case and lose, you lose the client—and the client relationship probably belonged to another, more powerful partner at your firm—you don't get paid, and you probably get sued. Thus, he said, almost all of our lawyers push hard on their clients to settle their cases short of trial.

The truth is that most lawyers doing complex civil litigation do not try cases—and they probably should not try cases. They do not try them for institutional reasons, such as those described by my former mentor. They also do not try them because they lack trial experience, and that makes them uncomfortable in the courtroom, particularly before a jury. It is, of course, true that many litigators lack experience in trial and this lack of experience hampers their performances on those rare occasions that they manage to find themselves in front of a random panel of citizens who will decide the fate of their client.

As with practically any other endeavor, practice helps, and a lawyer trying his twentieth case is likely to be a better trial lawyer than he was trying his first.

At the same time, experience can be overestimated. LeBron James was a better basketball player in his first year in the NBA than 95% (probably more) of the veterans then in the league. Harper Lee's first novel was To Kill A Mockingbird. Michael Jackson was a better vocalist in elementary school than most professional singers ever will be. And experience does not guarantee competence; Ben Stein's character in Ferris Bueller's Day Off would still put his students into hour-long comas even with a few more years' experience.

Experience matters, but so does talent. The skills required of a trial lawyer differ profoundly from those required of a pre-trial litigator. For that reason alone, we should expect most pre-trial litigators to struggle at trial.

## THE SKILL SET OF A TRIAL LAWYER VERSUS A LITIGATOR

What is the necessary skill set of a trial lawyer?

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First, and primarily, an excellent trial lawyer can hold an audience's attention. What could be worse than being summoned from your home or office to spend days or weeks in an uncomfortable seat, hearing about events that have nothing to do with you and having to suffer through monotonous, boring speeches? Yet many would-be trial lawyers inflict this experience upon jurors nearly every day in every courthouse in America.

The ability to hold an audience's attention is not dependent upon any particular personality type or speaking style. David Letterman and Jim Carrey could not be more different in terms of personality and speaking style, but both are adept at capturing and holding an audience's attention. The extent to which this skill is the result of nature or nurture is an open question; some people seem naturally charismatic in front of an audience, but there is little question that the ability to capture and hold an audience's attention is subject to technique and can be improved with practice. There is also very little question that few litigators have mastered this skill, probably because it does not come naturally to most of us, and because it is possible to be a perfectly capable litigator and also be perfectly boring every time you open your mouth. An excellent trial lawyer does not have that luxury. You can spot a good trial lawyer by looking into the courtroom through a window without hearing anything; when the good trial lawyer stands up to speak, the jurors look up and lean forward. They expect something interesting to happen.

Second, a trial lawyer must have a quick mental processor. Pre-trial litigation work seldom requires split-second decisions. Indeed, some of the best litigators are very slow decision-makers,

weighing each and every decision carefully for maximum result. A trial lawyer does not have this luxury. A good trial lawyer does not exactly shoot from the hip; he or she prepares diligently, carefully crafting his or her trial theme, and learning the record inside and out.

But a trial lawyer who scripts every action at trial is a bad trial lawyer. Witnesses surprise; they say unexpected things, providing unexpected opportunities. They also say expected things but in unexpected ways, betraying weaknesses in their testimony. Opposing counsel makes unexpected moves, too—intentionally or otherwise. The good trial lawyer listens carefully, recognizes opportunity, and seizes it. And these decisions must be made on-the-fly.

Third, a good trial lawyer is a showman. I don't mean that he or she plays a character. To the contrary, nothing is more off-putting to a jury (really any audience) than a phony facade. But a trial lawyer knows how to build suspense and deliver in ways that leave the jury with a lasting impression.

This is not the same as the ability to get and keep the audience's attention. A quality actor can do that, probably better than most good trial lawyers. But the trial lawyer must be able to build suspense and deliver a payoff. An impeachment document, for example, can be used successfully so the jurors are still talking about in during deliberations or it can fall completely flat depending on the skill of the trial lawyer. Again, there are techniques to impeachment that a lawyer can learn. But most litigators have not learned them, and some of the skills of the showman come naturally to some and are impossible for others to master.

Most litigators are not trial lawyers. Most will never be, either because they do not devote the time required to develop the skills, or because they cannot develop the skills, or both. But this fact has consequences—or should have—for how we practice.

## WHAT SHOULD BE DONE?

In most cases, it simply does not matter that the highly skilled litigators handling a given case are not also highly skilled trial lawyers. For in most matters—and certainly in most complex business disputes—settlement is possible and is the best option for both parties.

But what about those cases where a reasonable settlement is not available? This is where the institutional and personal reasons that drive so many litigators to aggressively avoid trial can harm clients.

At the most basic level, litigators who are not trial lawyers should not be responsible for trial. A non-trial lawyer cannot serve his client effectively once reasonable settlement negotiations have broken down, because he or she cannot reasonably pursue all of the client's available options; after all, sometimes the client needs to fight when the other side is outrageous in its demands.

The fact is, a non-trial lawyer will not feel sufficiently comfortable to turn down bad settlement offers if it means ending up in front of a jury. And a non-trial lawyer should not take his client's fate in front of the jury if he or she lacks the skill set to be successful. Litigators are comfortable telling clients to use M&A lawyers or tax lawyers when those subjects are beyond their expertise; they must also be willing to tell their clients to use a skilled trial lawyer when trial practice is beyond their expertise.

A skilled trial lawyer should be brought into a case anytime the dispute has a reasonable likelihood of going to trial. Having a true trial lawyer involved may even help settle the case. The litigator and client on the other side may very well be nervous about the presence of a quality trial lawyer showing up for the opposition.

At larger firms, it should be easier to follow this advice. While it is true that few of the firm's litigators will have well-developed trial skills, at a large firm it is likely that somebody does. Yet experience suggests that large firms frequently fail to utilize their best resources and get their (relatively few) trials lawyers involved. To some extent this might be due to the egos of the "litigators" who have handled the case from the outset.

But more frequently, it may be a client-relations problem; the client may be unhappy that a new lawyer has to be brought up-to-speed and surprised to find out that the lawyer he hired is not a "trial lawyer." But such concerns can be dealt with at the front end, if clients are told that the firm has a trial department with highly skilled trial lawyers who can be called on if necessary.

At a smaller firm, getting a qualified trial lawyer involved is not necessarily as easy. This is particularly true where the lawsuit involves subject matter where there are fewer skilled trial lawyers. It is much easier to find a skilled trial lawyer with experience in personal injury or criminal cases, for example, than in my line of work: intellectual property. But qualified trial lawyers exist in any specialty, and they can add significant value to a case, especially if called upon early enough.

As the economics usually change closer to trial, hiring specialized trial counsel should be feasible in most cases. Many contingency agreements contain a step-up in percentages as trial approaches, and this increased percentage can make it easier for the litigator handling the case from the beginning to give up some of his or her fee. Besides, a skilled trial lawyer can add value to the case, making the loss of some percentage much more manageable. In addition, even on hourly matters it is common for the workload to increase dramatically and for new lawyers to be brought on-board or the existing lawyers to work many more hours. Given these realities, there is no reason that the new trial lawyer should be considered an unacceptable expense.

Finally, a trial lawyer should be brought into a case when trial seems plausible, and preferably before the end of discovery. A trial lawyer is in the best position to develop the factual record for trial; he or she knows best how documents and testimony will be used in front of the court or jury. Ideally, the trial lawyer will be involved when there is still time to identify, disclose, and possibly depose third-party witnesses, who are often under-valued during pre-trial proceedings (it is easier to create a triable issue of fact with a party witness, who you already have a relationship with and control) but critical at trial (as juries are more apt to believe a third party with no stake in the outcome). And the trial lawyer is often the best person to take the key depositions of the other side's key witnesses, another reason why getting the trial lawyer involved early is critical.

As lawyers, our job is to represent our clients effectively. Few of us are willing to stray into areas where we have no experience, because we know we put our client's interests at-risk. Yet litigators frequently do exactly that as their cases approach a trial date, resulting in undue pressure to accept bad settlements or worse, a trial presentation that does not put the client's case in its best light.

We can, and should, do better.

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