

Litigation

AMERICAN BAR ASSOCIATION

THE JOURNAL OF THE SECTION OF LITIGATION



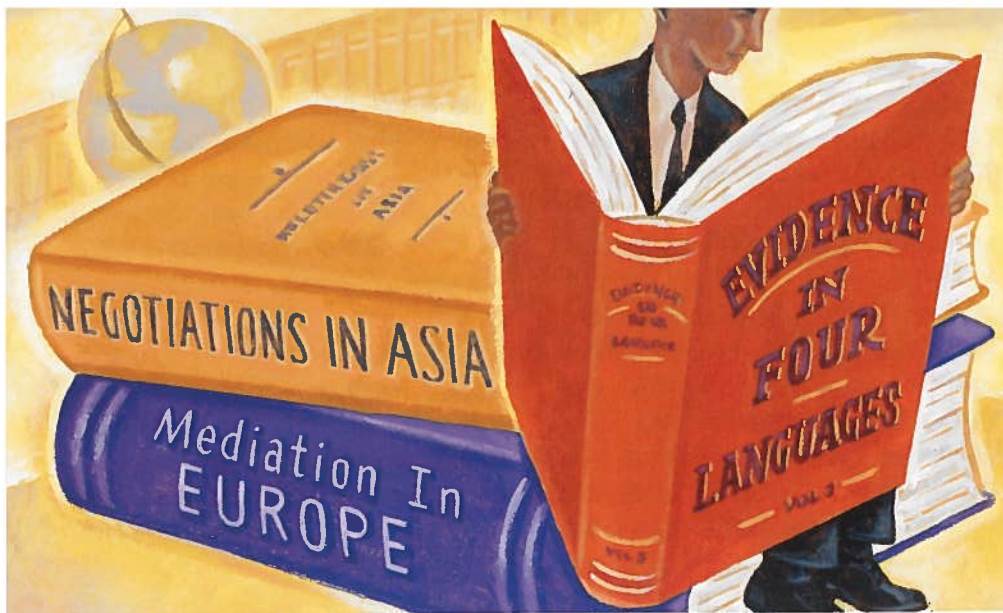
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abroad. They assist local lawyers or accompany U.S. witnesses who testify in foreign proceedings. They observe foreign proceedings to advise clients or gather information relating to U.S. clients and U.S. legal disputes. They conduct international arbitrations, mediations, or settlement negotiations. They meet with foreign witnesses and conduct investigations overseas.

Regardless of the task a U.S. lawyer performs, just as foreign lawyers working here must generally comply with the ethics rules of the relevant U.S. jurisdiction (Rule 8.5(b) of the ABA Model Rules of Professional Conduct), U.S. lawyers working abroad may be expected to meet the same professional expectations as local lawyers. These expectations may not be obvious. For example, litigators in the United States may prepare witnesses to testify, and ethical expectations and evidentiary rules make rehearsing testimony common. But what occurs here may be regarded as impermissible “witness proofing” elsewhere. In England, barristers may not coach witnesses or help them rehearse or practice their testimony, and the same is generally true for lawyers in civil law countries, where the tradition is for witnesses to testify in the form of a narrative.

In addition, clients may suffer if U.S. litigators do not understand the professional expectations of foreign legal

cultures and legal systems. For example, U.S. litigators build their practices around their understandings of the protections afforded by the attorney-client privilege and confidentiality rules under U.S. law. The extent to which information is shared with clients, co-counsel, or counsel for co-parties depends on whether the information will remain confidential. U.S. litigators must be careful about sharing otherwise confidential information with foreign clients and foreign lawyers because the other jurisdiction’s law may not adequately protect the information. Recognizing the benefits of cross-cultural interchange when it comes to legal ethics and practice, the International Association of Legal Ethics sponsors a biennial International Legal Ethics Conference. The next conference will take place at Fordham Law School in July 2016.

The globalization of legal practice presents a potential challenge for all lawyers—litigators no less than business lawyers. It is hard to master one’s own professional rules and harder still to assimilate those of foreign legal cultures. No doubt, many law firms and individual lawyers already take steps on their own to acquire the necessary cross-cultural professional understandings. Ideally, in coming years, as international commerce grows and the world becomes even smaller, both law

schools and the bar will expand their support for lawyers’ efforts by devoting increasing resources to studying and teaching the ethics of global law practice. ■

TRIAL PRACTICE

Differentiating Yourself

CHIP BABCOCK

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Great trial lawyers are made by great clients. When you think about it, the two go hand in hand. You surely cannot become a great trial lawyer unless you have clients with challenging legal problems who put their fate in your hands and allow you to practice your trade.

Young lawyers and law students often ask how they can become a great lawyer. I tell them they have to differentiate themselves from all of the other lawyers who want this same thing they do. Different lawyers will give you different ideas on how to differentiate yourself.

My friend Dr. Phil, back when he was a trial consultant, said that you have to approach every trial on two levels, the law level (what the law is and how the judge will instruct) and the jury level (how ordinary people will solve the problem being presented). So you have to be book *and* street smart.

There are street-smart trial lawyers who tell you they don’t personally worry too much about the law. They have young associates propping them up, or they just wing it. But I think you can’t truly be great unless you have a constant curiosity about the law and take the time to study it. That starts in law school and should never end. One of my mentors always grouched that they passed the Rules of Civil Procedure in 1938, and he dutifully mastered them, but then they kept getting changed.

I couldn't help but notice that he was in the office most Saturday mornings studying the amendments and reading the advance sheets.

Street smart is harder than book smart. Many litigators just don't connect with juries. But no matter your personality, you can only be a great trial lawyer by understanding how a jury is going to problem-solve your case. A mock trial or focus group, properly executed, can go a long way in giving you that perspective. A good group of great friends will do in a pinch as well.

Street smart also means you must be fast on your feet. I vividly remember my first trial (a loss, reversed on appeal) and could not believe the pace of the case. My opponent asked a question. I thought: Is it hearsay? No. Ah, irrelevant? Yes. Is it important? Maybe. What will the jury think of me if I object? Is this question worth it? Of course, by the time I went through all that in my head, it was time for the morning recess. That taught me that if I want to be fast at trial, I need to decide ahead of time what evidence I really don't like, whether it's objectionable and what that

objection is likely to be, and whether it will be sustained.

Street smart also means that you must have an honest persona in the courtroom. Juries will spot a phony in a minute. But that doesn't mean you can't learn from others, even fictional lawyers. I confess to borrowing one or two mannerisms and speeches from *Boston Legal's* Alan Shore. Mostly, though, I learned from great trial lawyers in my firm.

One of my partners in particular taught me about defusing tense situations. In one case, tried to a judge, a union leader who was very hostile to us was testifying about something unrelated to his union activities. But the union had just struck our client, a major airline. My partner's first question was: "Got the strike settled yet?"

Everyone in the courtroom knew it was a joke, but the witnesses was so wound up that he went on for several minutes about strike issues and how awful our client was. Finally, the judge interrupted and said, "I think Mr. Chambers was just kidding." Oh.

So there are ways to become great, but you can't do it without clients. How do

you go about getting them? Sad to say that today one way is by having tried many jury cases, which brings me to the title of this article: differentiating yourself.

We have several young associates at our firm who understand that. They take advantage of a small case business docket, which my firm handles on a fixed-fee basis just so the young lawyers can get trial experience. Most of the cases are in justice of the peace court, where a jury may be demanded, the amounts in controversy are small, and there is the right of appeal de novo. So you and the client can't get hurt.

But some of our lawyers don't stop there. They choose to handle pro bono cases likely to be tried. They do criminal appointments, and they do it in their spare time. One young lawyer told me after putting in 200 hours over two months, "it's an investment in my career, and well worth it."

So you differentiate yourself by being able to try cases to a jury. What else? It helps if you build a subject matter expertise, be it labor and employment, intellectual property, environmental, or condemnation, or you can become proficient in an emerging niche trial practice. One of our lawyers recently took what she thought would be a heavily litigated statute and became an expert on all of its nuances. She even obtained a domain name and started to blog about the law.

Bottom line: You become a great trial lawyer through hard work and preparation, which give you the experience and ability to accept and win a significant assignment from clients when it comes your way. If you have successfully differentiated yourself from your peers, more great clients, with more great opportunities, will come your way. ■

