PROLOGUE

An Integrated Philosophy of Advocacy

What is a chapter on philosophy doing in a legal cookbook? Theory and practice, philosophy and practicality, overlap in litigation, though not perfectly. The theoretical is relevant in litigation for good reason: Unless lawyers have a philosophical foundation for their arguments, their work will be sterile even though they may be skilled technicians. A consistent philosophy of advocacy, based on professionalism and social ethics, is the foundation for courtroom wins and, more importantly, true success both in and out of the practice of law.

Lawyers do not create social truths; they simply help jurors rediscover them. When you help jurors understand why all parties are equal before the law, then you become a member of an elite group that includes John Locke, Thomas Jefferson, Abraham Lincoln, and many others.

Other chapters in this book focus on how to try psychological injury cases. Beyond developing technical skills, to try each case properly, lawyers must:

1. Articulate the social ethics that generate the theme of each case;
2. Understand why what we do as lawyers is important;
3. Know how to adjudicate a claim economically and efficiently; and
4. Confront the personal fears that limit us.

The first step to winning advocacy is to embrace a correct philosophy. Juries and judges quickly sense the inherent legitimacy and sincerity of the lawyer who understands why advocacy is important and how it furthers the ideals of our society.

These are some precepts of an integrated philosophy:

1. The world does not need more technicians; it needs lawyers who think of ethics and morality before their own interests. Trial lawyers serve as social engineers by effectively representing the aggrieved. The resulting jury verdicts help define the legal and social relationships of our society.

2. Our judicial system is predicated upon fault and accountability. The deterrent effect of significant verdicts in product liability and medical negligence cases promotes safety within our society through financial accountability.

3. Ours is a participatory democracy. Jury service gives citizens an opportunity to make a statement about what is important for the community. The ballot box and the jury box are where citizenship is fully exercised.

4. Our liberties, our loved ones, and our personal health are our most treasured possessions.

5. Lawyers are officers of the court with responsibilities to clients, to the judicial system, to the legal profession, and ultimately to themselves as ethical human beings.

6. Each lawyer is independently accountable for acting ethically. The shortcomings of a client or another lawyer can never excuse illegal or immoral conduct.

Each generation has a new opportunity to further refine the morality of its predecessors. Explain to the jury that we need not learn a new morality, but need only reawaken what our predecessors knew, and what we have half forgotten.

The fundamental concepts of morality embodied within the instructions the court will give are:

1. All parties are equal before the law.

2. Anyone who breaks the community's rules is fully responsible for the legally defined consequences of that misconduct.

3. A wrongdoer takes the victim "as is." Predisposition is no defense. This is a subdivision of our jurisprudential system's first and broadest concept, which is that all parties are equal before the law.

4. People and safety are more important than profit.

A significant verdict is legitimized when counsel anchors its basis to community values. Do not give the jury facts and self-interested arguments alone. Provide them with moral congruence. How does a verdict for the plaintiff both affirm and further moral quality-of-life choices?

Every case has a potential theme, a proposition that rises above the facts and provides the scaffolding for your arguments. You may find it in the plight of the plaintiff, in a lie by the defendant, or in the conduct of an indifferent defense lawyer. Quicken your sensitivity to what is right and decent.

Your side will not always be pure, but as an advocate you must choreograph the facts to support the most poignant, compelling, and redeeming aspects of your case.

Dealing with fear

We are all a host of inconsistencies, a mixture of brilliance, stupidity, bravery, cowardice, great vision, and blindness. The drive to excel is often a function of a motivation to avoid failure. Failure may be in the eyes of the client, of significant others—or in your own eyes.

To see how you view failure, think of yourself as: (1) who you think you are; (2) who others think you are; (3) who you want others to think you are; and finally (4) who the real you is. The first three exist; the last is only theoretical.

Most of us have difficulty reconciling who we want to be with who we believe we really are. We want to be great, but suspect that we are not, and doubt that we deserve to be. We feel scared, little, and impotent, yet we want others to see us as

confident, successful, and powerful. We try to reduce the difference between where we think we are and where we want to be.

Real success is measured by effort and commitment. Contrast this with the world's scoreboard, which measures wins and losses in the number and size of successful verdicts. Placing courtroom wins in their correct perspective means acknowledging that lawyers cannot sell wins, only effort and skills.

No matter what, it is unlikely that you will win all your cases. Keep the challenge of being a trial lawyer in perspective, thus enhancing your chances for good mental health. Courtroom wins are not everything. They mean a lot. They may mean everything to your client. But you are not the client. Too much emphasis on fighting and winning hurts everyone, even those who "win."

Trials have two ingredients: effort and results. These two components produce four combinations:

Win/Best Effort	Win/Less than Best Effort
No Win/Best Effort	No Win/Less than Best Effort

The preferred combination is your best effort and a win. You may extend your best effort and lose. You may give less than your best effort and still win. You are only accountable for what you can control, and that is your effort. It is easy to live with wins. I work hard partly so that I can live with the losses; they are acceptable only if I have done my best.

Litigation is inherently pressure-ridden. Uncertainty is part of the process. What will the jury panel be like? Who is the judge? Will all the witnesses show up on time? How will the court rule on a crucial evidentiary question or a particular instruction? The best a lawyer can offer is a prediction within a range of probabilities that a particular event will occur. People's lives, liberties, and fortunes are at risk. There are enough external anxieties without unnecessarily burdening yourself with accountability for what you cannot control. Make the effort. Do your best. Then move on.

Starting off right

The first interview is a good time to introduce your philosophy to the client: Explain the distinction between effort and results, and define what you can offer in exchange for a fee. Clients want a lawyer who is on their side and who personally agrees with their position. This desire for alliance should not dilute your objectivity or prevent you from educating the client with a heavy dose of reality about litigation, including the time it will take, the costs to be advanced, and the risks of losing, even with favorable facts.

Don't be so hungry for business that you fail to make the problems and pitfalls plain to clients at your first meeting. Remind them periodically thereafter. You

cannot and do not sell results; you sell only effort and skills, and these do not necessarily result in wins.

The reality is that lawyers who do not win often enough will not be thought of as good lawyers; economics will ultimately drive such lawyers out of practice generally or litigation specifically. The marketplace is harsh to lawyers who lose because they have accepted cases beyond their skill, or have exercised poor judgment by accepting claims with marginal facts. Effort without skill in case evaluation and selection is a recipe for financial failure—and properly so.

Nothing produces a winning track record quite like having good facts. If you are just starting to practice, and do not have the luxury of picking from several prospective claims, consider referring your large cases to a lawyer who has the necessary experience. Apprentice yourself to the senior lawyer. The case will probably be worth more and you will learn more. This is less important, however, than the opportunity you will have to learn and become better prepared to handle the next large case that comes your way.

During your first few years, look for a job that will provide you with maximum opportunities to acquire experience. Work as a deputy district attorney or an associate in a litigation firm. If you are on your own, represent the indigent, watch experienced lawyers try cases, attend seminars, and aggressively litigate the inventory of cases you do have.

It is OK to feel scared and impotent. We all feel that way at times. Bravery does not mean you are not afraid; only fools have no fear. The real test is how you deal with these feelings. Do you permit fear to dominate you? Or do you accept it as a natural and generally healthy reaction? These inevitable emotions may be an ally; after all, who doesn't run fastest when being chased?

Your intrinsic value as a person has nothing to do with courtroom wins and losses. Assuming reasonable skill in case screening, you will win in the courtroom more often by realizing you can only sell effort and skills, not wins. Focus on quality professional service as an end in itself. If you do the right thing for the right reasons, the wins will take care of themselves.

If you work efficiently to provide quality professional services, you are a success right now. The process of becoming as competent professionally as you can is an end unto itself. Courtroom wins are not mileposts along the road, but only part of the passing landscape.

Our society affords great privileges and deference to lawyers. Transcending the physical violence of such older forms of dispute resolution as dueling, society has developed nonviolent systems for dispute resolution. The mechanisms by which a particular nation resolves its disputes are largely a function of history and philosophy. In our nation, the right to a jury trial in civil disputes enjoys a venerable heritage. We should welcome the many responsibilities that accompany the privilege of being advocates within this system. Any temptations to cut corners in order to win or simply to please clients become easier to resist when an advocate's role is fully

appreciated. Marginal conduct says more about you as a person and as a lawyer than about your client's case or your opponent.

Each time a lawyer circumvents a rule, it reduces the confidence society has in our profession. Abuse a privilege and soon it will be lost.

Working effectively

In 1983, representatives of the plaintiffs' bar, through the board of governors of the Oregon Trial Lawyers Association, and representatives of the defense bar, through the directors of the Oregon Association of Defense Counsel, convened to evaluate how to reduce litigation costs and delays. I served as a member of the joint committee from 1983 to 1988. The rules that the committee recommends (see appendix 3) have the endorsement of both plaintiff and defense bars. In conformity with our experience, we found ways to expedite dispute resolution cost-efficiently, without compromising the fundamental rights of either party.

Why does the behavior of so many lawyers violate the wisdom of the bipartisan committee's suggestions? At conventions, experienced lawyers of every persuasion tell horror stories about the ill deeds of opposing counsel or particular defendants. Our committee guidelines may seem too soft for the dog-eat-dog climate which often characterizes big cases, particularly those tried in big cities. The pretrial discovery papers become so vociferous that they acquire a life of their own. If you are in a case like this, send a copy of the guidelines to opposing counsel and ask if he or she is willing to process the claim accordingly. Consider filing any agreement with the court, with a copy of the guidelines attached. Neither side gives up anything by using the guidelines; both sides gain enormously.

Though there will still be numerous disagreements, the guidelines provide a context that fosters efficiency and professionalism. You do not have to be disagreeable to disagree; treat the other side as you would wish to be treated in matters of discovery, procedure, and protocol.

When lawyers are asked about their personal contribution to litigation delay and costs, they generally blame opposing counsel, citing a few well-worn complaints. I call these responses "myth-facts," because the statements are generally a mixture of both. They discourage lawyers from constructively focusing on ways to process claims effectively.

The following "myth-facts" are common:

1. "My opponents hide discoverable materials, forcing me to file a raft of discovery motions."

2. "Cases are settled on the courthouse steps because the opposing lawyer will not seriously evaluate the case earlier."

3. Some plaintiff's lawyers do not seem to appreciate that once a claimant is medically stabilized, passage of time does not necessarily increase the value of a case. Yet the more time a plaintiff's lawyer invests in a case, the less per-hour return there

is on a contingency basis. Assuming that an injured plaintiff is going to be paid basically the same sum at any point in the case, a quicker payment is to everyone's advantage and reduces the volume of cases in the system.

4. Many plaintiff's lawyers, especially the inexperienced ones, are unrealistic in assessing the value of their cases. Even a few experienced plaintiff's lawyers put their egos ahead of the client's interests.

5. Younger plaintiff's lawyers are concerned that cooperating with the defense will result in waiving a substantial right of their client, exposing them to malpractice claims. They mistakenly believe that aggression is synonymous with effectiveness.

6. "Big defense firms have a financial interest in generating billable hours." Substantial partnership salaries are produced by creating pyramids in which young associates bill 2,000+ hours a year, based in part on reams of pretrial motions and depositions of marginal necessity. Associates take lengthy shotgun depositions without a clear understanding of the issues or much guidance from the senior lawyer who will actually try the case.

7. "Defense lawyers are not responsible for delay; their clients, the insurance companies, are." Unless the jurisdiction has a prejudgment interest statute, insurance companies have little incentive to settle. Carriers earn substantial sums by investing the reserves set aside to pay the ultimate judgment, and in the interim pay only the legal defense costs.

Yet defense lawyers state that the carriers they represent constantly are pressuring them to settle—but within reasonable limits. The insurance companies like early evaluations that allow the money to be put into a reasonable settlement offer instead of defense costs.

8. "Unnecessary defense motions and excessive depositions would be reduced if plaintiffs' lawyers would voluntarily provide discoverable materials, narrow their pleadings as early as possible to a few viable theories of recovery, and give sufficient facts to apprise the defense of what the plaintiff is claiming."

All of the preceding complaints are certainly true for some lawyers and some insurance carriers. Many lawyers are general practitioners who handle plaintiff's cases only occasionally. They also may be business lawyers, sole practitioners or members of small firms, or young and inexperienced. Contrast this with the insurance defense lawyer, who is often a member of a medium-sized or large firm and is typically an experienced litigator. The defense lawyer probably represents a number of carriers, and insurance defense is usually a significant portion of the practice. New admittees who do defense work are generally employees of firms representing insurance carriers and are mentored by seasoned lawyers. This is seldom true for the young plaintiff's lawyer, who has no one to turn to for practical guidance.

Senior members of the bar talk of the "good old days" when agreements were made by telephone or handshake. The size of the legal profession, particularly in metropolitan areas, has grown so that the familiarity which facilitated such behavior

is dwindling. When an opposing lawyer is an unknown, many lawyers feel that it is prudent, if not essential, to protect their client with defensive lawyering.

Given this backdrop, it is no surprise that the process of resolving a claim can take on a life of its own.

Courtroom skills

The final component of advocacy deals with clinical skills. Can you actually perform the operational tasks necessary to litigate effectively? Do you know the rules of evidence? Are you familiar with effective tactics and proof? The remainder of this book is dedicated to teaching you exactly how to try a particular kind of case. Before we begin, a few general propositions of advocacy are in order:

1. Try a clean case: Select just a few theories of liability that can be proven and have been accepted by your state's highest court. I encourage expanding the common law and believe that a great service is rendered when through one lawyer's persistence a new concept of duty finds a toehold in the law. But if you have good facts and an acknowledged theory of liability, why be brave? It is better to be smart.

2. Give opposing counsel an opportunity to object to known matters of controversy out of the presence of the jury.

3. Find ammunition within safe, nonreversible damages instructions to support strong closing arguments. Appellate reversals generally occur when you are: (1) pleading theories of liability that are new to your state's jurisprudence; (2) arguing theories of liability that are not supported factually when you have other theories that are; and (3) getting overenthusiastic about instructions and thinking that cases are won or lost there. Facts, not instructions, win lawsuits.

4. Understatement is advocacy's most powerful tool.

5. Preempt the defense by promptly acknowledging the weak points in your case and integrating them in the most favorable light as early as possible.

6. Effective advocacy is a matter of "A, B, C": Be accurate, brief, and clear.

7. Learn how to to disagree *without being disagreeable*.

8. All effective advocates are "CCC": credible, competent, and caring. If you are competent and caring, it follows that you will be credible. Where the choice is between competence and caring, there can be no doubt which is more important. If you give the impression that you do not care, that you are not emotionally committed to your case, then why should the jury care?

9. Rarely raise your voice. Loud people are stereotyped negatively.

10. It is very dangerous to accuse anyone of being a liar. If it is obvious a witness is lying, then there is no need to state it; if lying is not obvious, then it is probably too risky to mention.

11. Show mercy: Judge acts, not people. Never vanquish—leave that for the jury.

I will close with three presumptuous moral principles.

12. Decide whether you would like a career only or would like simultaneously to maintain a family. If the latter is important to you, you ought to consider the following: At times the challenges of work will command all of your time, but there should be an underlying proportionality that reflects the priority of family. The quantity of time is not the only criterion; more important is the *quality* of the time that is spent with loved ones. Victories in the courtroom are ashes in the mouth if you lose your family. If your home is merely a pit stop in the race, you are in the wrong race.

13. Excessive alcohol and substance abuse are sinister allies to anyone, and particularly to one who aspires to an undertaking as demanding as the trial lawyer's.

14. The public library has many nonlaw books which deserve your time. The New Testament's Sermon on the Mount and its parables, writers from Kahlil Gibran to Shakespeare, and all great literature offer powerful messages that communicate enduring social truths. Their insight into human nature is timeless. Great books are all law books, and of the highest order, because they are dedicated to the challenges of mortality, its dilemmas, heartaches, defeats, and triumphs.