A DEFENDANT'S RIGHTS IN A 21st CENTURY CRIMINAL PROCEEDING OR TRIAL

1. The right to the presumption of innocence.
2. The right to require the state to prove its case beyond a reasonable doubt.
3. The right to require the state to prove each element of the crime charged beyond a reasonable doubt. *Commonwealth v. Liew*, 50 Mass. App. Ct. 162, 165 (2000).
4. The right to a fair trial. (United States Constitution, Sixth Amendment.)
5. The right to a public proceeding. (United Stated Constitution, Sixth Amendment.)
6. The right to a public trial. (United States Constitution, Sixth Amendment.)
7. The right to a unanimous verdict.
8. The right to confront one's accusers (*i.e.*, "to meet one's accusers face to face". (Massachusetts Constitution, Article XII; *see also* United States Constitution, Sixth Amendment.)
9. The right (in a misdemeanor case) to a preliminary (or Clerk's) hearing.
10. The privilege against self-incrimination. (United States Constitution, Sixth Amendment.)

11. The right to cross-examine one's accusers.
12. The right to see exculpatory evidence (*i.e.*, evidence "that may be favorable to him." (Massachusetts Constitution, Article XII.)
13. The right to view the grand jury transcript.
14. The right to have an attorney present at grand jury proceedings (in Massachusetts, by operation of Massachusetts General Laws, chapter 277, section 14A: "Any person shall have the right to ... have counsel present at every step of any criminal proceeding at which such person is present, including the presentation of evidence, questioning, or examination before the grand jury."
15. The right to an opening statement.
16. The right to a closing statement.
17. The right to exclude evidence if coerced.
18. The marital privilege right.
19. The right to jury instructions.
20. The right not to be cross-examined on prior criminal convictions (except for crimes involving dishonesty or truthfulness).
21. The right to counsel. (United States Constitution, Sixth Amendment.)
22. The right to competent counsel.
23. The right to counsel, in cases of possible imprisonment, at the state's expense if the defendant cannot afford one. *Gideon v. Wainwright* 372 U.S.

335 (1963) (The Court reasoned that the Sixth Amendment's guarantee of counsel is a fundamental and essential right made obligatory upon the states by the Fourteenth Amendment. The Sixth Amendment guarantees the accused the right to the assistance of counsel in all criminal prosecutions and requires courts to provide counsel for defendants unable to hire counsel unless the right was competently and intelligently waived.)

24. The right that a defendant must be criminally responsible. *Commonwealth v. McHoul*, 352 Mass. 544, 546-547 (1967).

25. The right to impose upon the government the burden to prove the defendant is criminally responsible beyond a reasonable doubt, when the defendant claims that he is not criminally responsible. *Commonwealth v. Kappler*, 416 Mass. 574, 578 (1993).

26. The right to be secure from all unreasonable searches and seizures, of his person, his houses, his papers, and all his possessions. (Massachusetts Constitution, Article XIV; *see also* United States Constitution, Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....")

27. The right of particularity in a search warrant. (United States Constitution, Fourth Amendment- "[N]o Warrants shall issue, but upon ... and *particularly describing* the place to be searched, and the persons or things to be seized.") (Emphasis added.)
28. The right to protection against double jeopardy. (United States Constitution, Fifth Amendment.)
29. The right to a speedy trial. (United States Constitution, Sixth Amendment.)
30. The right to a trial not influenced by pretrial publicity.
31. The right to a *Miranda* warning.
32. The right to require probable cause for police to arrest.
33. The right (in Massachusetts) to a jury instruction that an unrecorded confession be viewed with "great caution and care."
34. The "Humane Practice" (Massachusetts) Rule that requires a jury instruction in a trial that a jury ignore a defendant's confession unless found to be voluntary beyond a reasonable doubt.
35. The right to have evidence admissible at trial that is only relevant and material.
36. The right to prohibit evidence at trial that is unduly prejudicial or inflammatory.

37. The right to a trial without hearsay evidence. (There are 26 exceptions to this right.)
38. The right not to be required to present evidence at trial.
39. The right to remain silent at arrest or during any criminal proceeding or trial. (United States Constitution, Fifth Amendment.)
40. The right to due process of law. (United States Constitution, Fifth Amendment.)
41. The right to waive a jury trial and proceed before a judge (exercised in highly emotional cases such as child rape).
42. The right to represent oneself, *i.e.*, without an attorney. ("The right to be heard fully in his own defense." Massachusetts Constitution, Article XII).)
43. The right to a statute of limitations on crimes (except murder.)
44. The right to require that a confession be corroborated by some other evidence.
45. The right to exclude evidence obtained illegally.
46. The right to exclude a confession obtained involuntarily.
47. The right to an "impartial jury." (United States Constitution, Sixth Amendment.)
48. The right to a full, plain, substantial and formal accusation. (Massachusetts Constitution, Article XII).

49. The right not to be compelled to furnish evidence against oneself. (Massachusetts Constitution, Article XII; *see also* United States Constitution, Fifth Amendment.)

50. The right to a trial "in the vicinity in [which the crime occurs]." (Massachusetts Constitution, Article XIII; *see also* United States Constitution, Sixth Amendment.)

51. The right to have a warrant issued only if supported by oath or affirmation. (Massachusetts Constitution, Article XIV; *see also* (United States Constitution, Sixth Amendment: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation....")

52. The right not to be compelled to accuse or incriminate oneself. (Massachusetts Constitution, Article XII; *see also* United States Constitution, Sixth Amendment.)

53. The right not to be deprived of property without due process of law. (Massachusetts Constitution, Article XII; *see also* United States Constitution, Fifth Amendment.)

54. The presumption of release after arrest upon personal recognizance (*i.e.*, without paying a bail amount.)

55. The right to a reasonable (*i.e.*, not "excessive") bail. (United States Constitution, Eighth Amendment.)
56. The right not to be subjected to an "excessive fine." (United States Constitution, Eighth Amendment.
57. The right to not to be subjected to "cruel or unusual punishment." (United States Constitution, Eighth Amendment.)
58. The right to an expert witness to testify in the defendant's behalf.
59. The right to an appeal.
60. The right to an appeal at public expense, if unable to afford one.

OPINION

An analysis of jury composition by educational level

By Dennis J. Curran

Cast against the backdrop of the vanishing jury trial, the cases which do go to trial reveal an important message.

The most common complaint I hear from jurors when thanking them for their service is that they feel many trial lawyers treat them like dolts. They resent repeated questioning and attorneys who waste their time.

Having presided over nearly 300 jury trials (in Superior and District Court, with approximately 80 percent at the Superior Court level), many in Middlesex County, I am continually impressed by the jurors' sophistication, intelligence, dedication, ability to cut through to the heart of the issues, and deep commitment to justice under the law.

I also have been profoundly impressed by how well-educated our jurors tend to be, as well as by their professions: engineers, physicians, attorneys, microbiologists and many other notable vocations.

Moreover, I am inspired by those jurors who have not had the financial opportunity to attend higher educational institutions, but whose life experience has been rich, varied, commonsensical, direct and practical.

These two groups of jurors inevitably combine to create powerful and focused truth-seeking missionaries.

Recently, I reviewed my trial notes from 66 jury trials to determine exactly how well-educated jurors are in Middlesex County. The results are striking. Among 850 jurors, their education levels ranged as follows:

- 81.4 percent have attended some college or hold an associate's degree
- 67.1 percent hold bachelor's degrees
- 20.6 percent also hold master's degrees
- 2.2 percent hold MBAs
- 6.6 percent hold M.D.s, J.D.s or Ph.D.'s

More than 81 percent of Middlesex County jurors who have sat in Civil Session "F" have either attended college, have a college degree or higher. Granted, these results are from only from one county, and surely the results will vary from county to county, but I believe that other counties in the state may show either the same or close to the same level of educational and professional attainment.

The takeaway: The next time that trial lawyers think that their jurors "didn't get it," or, correspondingly, trial or appellate judges are only too willing to reverse a jury verdict, we should simply pause and reflect. After all, the jurors may well have understood the real issues far better than we.

Number of Jury Trials Examined: 66

Educational Level	Total Number of Jurors	Percentage of Total
Ph.D.	32	3.8%
M.D.	7	0.8%
J.D.	17	2%
M.B.A.	19	2.2%
Master's	175	20.6%
Bachelor's	320	37.6%
Associate's	32	3.8%
Some college	90	10.6%
G.E.D.	3	0.35%
High school	152	17.9%
Some high school or less	3	0.35%
TOTAL	850	100%

In this vein, Atticus Finch best captures the power of the jury in his closing argument:

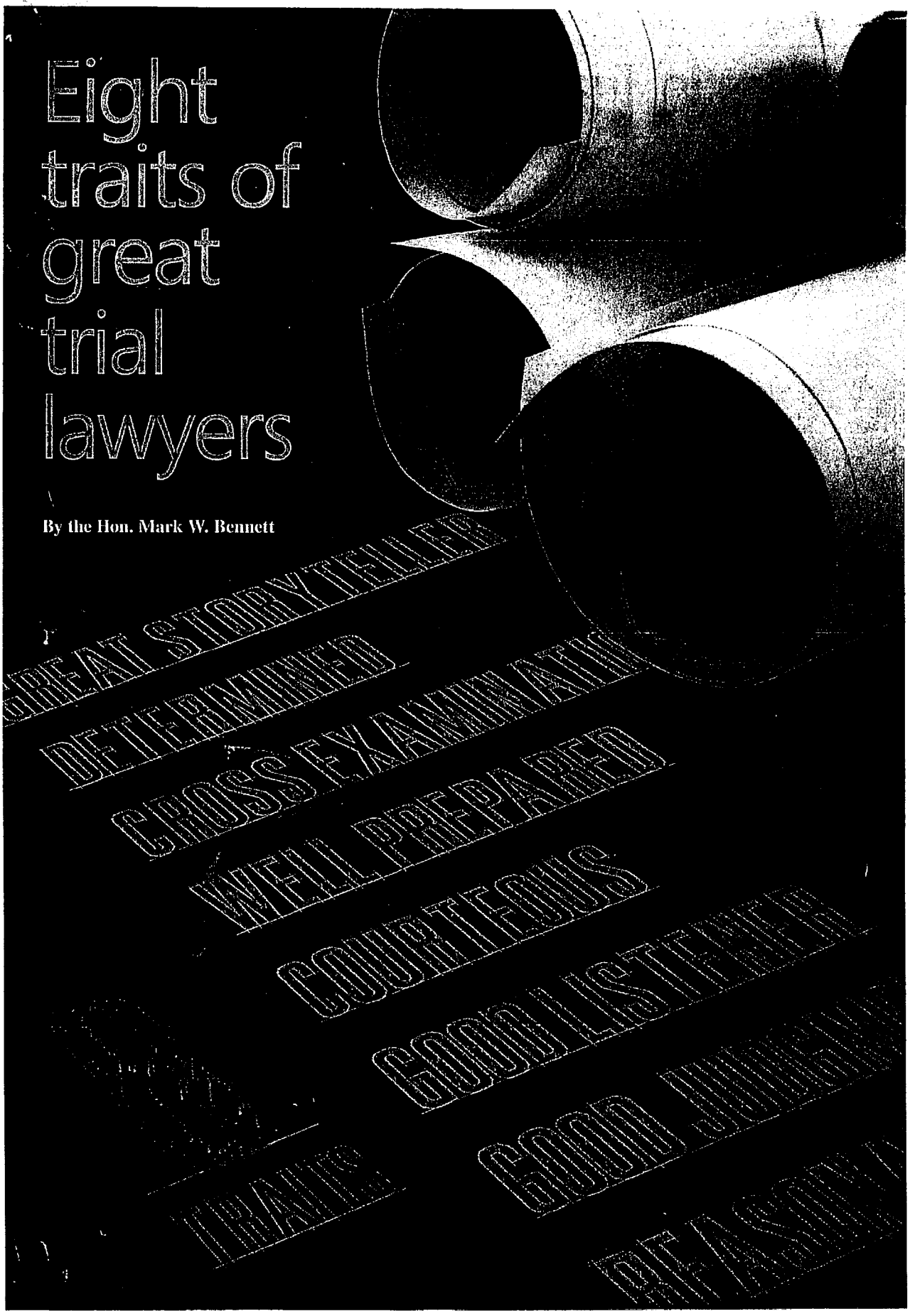
"[T]he integrity of our courts and our jury system is not just an ideal to me. It is a living and breathing reality. A court is no better than each of you sitting before me on this jury. A court is only as sound as the men and women who make it up."

Consequently, our judicial system succeeds when judges and the trial bar respect the vitality and dynamism afforded by our jury system. To do so, we must cherish the wisdom of our jurors. MLW

Dennis J. Curran is a Superior Court judge. Assisting him on the above article was Morgan J. Peterson, who served as an intern to the judge. The views expressed reflect the opinions of the co-authors and do not represent the position or policy of the court.

Eight traits of great trial lawyers

By the Hon. Mark W. Bennett



I. Introduction

Walk into any courtroom from Maine to Hawaii with a jury trial going on and you will likely discover the long-awaited cure for insomnia. Bottle it, sell it on a TV infomercial, and you will get rich. So what is it? It's boredom: "the sounds of lawyers droning on and on with their technical arguments, their redundant questioning of reluctant witnesses, the subtle points which are relevant only to them."[1]

George Bernard Shaw was unknowingly describing modern "litigators" when he observed that "[t]he single biggest problem in communication is the illusion that it has taken place." The vast majority of lawyers do not communicate effectively with jurors. As a federal trial court judge for nearly a quarter century, I have carefully observed lawyers from all over the country try cases in federal courts. More importantly, at the conclusion of each trial, I have given every civil and criminal juror a questionnaire to evaluate the lawyers (and myself as the trial judge). Reading thousands of these juror evaluations has given me rare insight into jurors' views of trial lawyers.

I remain shocked that lawyers with the perseverance to make it through law school and the courage to enter courtrooms are still so lacking in the art of persuasion and in the traits necessary to become great trial lawyers. I recently wrote about the rise of the "litigation industry" and the demise of trial lawyers through a mock obituary for the death of the American trial lawyer.[2] This article shares four decades of experience, including thousands of hours observing trial lawyers, in hopes of reversing the trend of "the vanishing trial lawyer" and helping the next generation of Clarence Darrows and Gerry Spences.

During my time as a federal trial court judge, I have identified eight traits of highly effective trial lawyers: *(1)* unsurpassed storytelling skills, *(2)* gritty determination, *(3)* virtuoso cross-examination skills, *(4)* slavish preparation, *(5)* unfailing courtesy, *(6)* refined listening skills, *(7)* unsurpassed judgment, and *(8)* reasonableness.

Of course, readers will not become great trial lawyers by memorizing these eight traits. This is not a trial lawyer's "magic bullet" that can be obtained from an infomercial by making three easy monthly payments. My more modest, yet achievable, goal is to help lawyers understand the eight traits of great trial lawyers and illuminate a path toward mastering them.

II. Spellbinding Raconteur

"Storytelling, especially among lawyers, is a dying art."
—Tom Galbraith[3]

A truer sentence about lawyers has never been written. Why are so few lawyers great storytellers? There is one trait that always separates great trial lawyers from lesser ones: superb, masterful storytelling. I know of no exception. This does not mean that all great storytelling lawyers are great trial lawyers—but that all great trial lawyers are great ranconteurs.

Forms of storytelling precede the development of most spoken languages. Petroglyphs (rock engravings) told stories from times dating at least as far back as the Neolithic Era (1020 BC). As old as the art of storytelling is, one would think that lawyers would have mastered it. They have not. I have never heard a colleague comment that lawyers are improving in the art of storytelling.

Lawyers, like everyone else, intuitively understand that storytelling is a very powerful form of communication. "[W]e dream in narrative, daydream in narrative, remember, anticipate, hope, despair, believe, doubt, plan, revise, criticize, construct, gossip, learn, hate, and live by narrative."[4] I recall from my Torts class 41 years ago, that one of the first opinions we studied was Chief Justice Cardozo's famous discussion of causation in *Palsgraf v. Long Island Railroad Co.*[5] I could not now accurately explain the concept of "proximate cause" without grabbing my most recent jury instruction on it. However, I still vividly remember the small, newspaper-covered package falling to the ground, the exploding fireworks, the ensuing shockwave, and the scale at the other end of the train platform falling on poor Ms. Palsgraf, who was on her way to Rockaway Beach. It is the compelling story that stays in my mind.

Trial lawyers' major problem is that most of them tell stories like lawyers and not storytellers. This simple truth prompted acclaimed Wyoming trial lawyer Gerry Spence to write:

> [L]awyers are not trained as dramatists or storytellers, nor are they encouraged to become candid, caring, and compassionate human beings. Most could not tell us the story of Goldilocks and the Three Bears in any compelling way. We would be fast asleep by the time they got to the first bowl of porridge.[6]

Spence then gives an example of how a lawyer might tell the story of Goldilocks and the Three Bears:

> Once upon a time in an unspecified and otherwise unidentified place was found, upon reasonable inquiry, a certain female child who allegedly bore the given but unlikely appellation of Goldilocks. She ambulated into and around a conifer growth one day and, unintentionally and without malice aforethought, lost her directions and was thus unable to ascertain whether she was proceeding in a northerly or southerly direction. By random unanticipation the said female child came upon an insubstantial abode constructed of conifers severed from the surrounding growth, and at said time and place, the said female child, allegedly named Goldilocks, entered, without invitation, inducement, or encouragement, the said structure, which, at said time

and place, therefrom the rightful and legal owners had absented themselves. Thereupon she espied three bowls of various sizes containing a substance that, upon inquiry and investigation, proved to be a concoction created out of certain boiled meal, grains, and legumes commonly known as porridge.[7]

Another classic example of the unfortunate way lawyers tell stories is a version of "The Three Little Pigs," called "The Trio of Diminutive Piglets," as told by a lawyer:

> Whereas these said piglets reached the age of majority;
>
> Whereas the sow desired the piglets to become self-sufficient;
>
> It was therefore resolved that this said trio of piglets should go forth into the world for the purpose of establishing their own domiciles.
>
> The initial piglet that went forth into the world met a homo sapien of the masculine gender who possessed a bundle of straw. The piglet inquired, "Would you be so kind as to bestow, devise and bequeath upon me that straw so that I may forthwith construct a dwelling?" The straw was bestowed upon him, and he constructed a dwelling.
>
> Presently along came a carnivorous lupine (hereafter referred to as "the Wolf") and commenced to rap upon the portal and said, 'Diminutive Porcine, Diminutive Porcine, grant me entry to thy abode.'
>
> After due consideration the piglet responded, 'Not by the follicular outgrowth on my lower jaw bone.'
>
> 'Then I'll inhale and exhale massive quantities of air and cause your dwelling to implode!' said the Wolf.[8]

To become a great trial lawyer, one must make the transition from telling a story like a lawyer to mastering the art of storytelling. Lawyers make simple events far more complicated than is necessary to win a jury trial. Lawyers are great at taking a six-second automobile accident and morphing it into a two-week jury trial. An average lawyer makes simple events complicated, but great trial lawyers make complex events simple. Gerry Spence described the experience of turning difficult fact patterns into simple stories for trial:

> I have tried cases with many exhibits, cases that took months in which scores of witnesses were called, cases with jury instructions as thick as the Monkey-Ward catalog and supposed issues as entangled as the Gordian knot. But I have never tried a complex case. . . . All cases are reducible to the simplest of stories. . . . The problem is that we, as lawyers, have forgotten how to speak to ordinary folks.[9]

Most trial lawyers simply do not comprehend the magical effect that simplifying cases has on jurors. If they did, they would try cases very differently. Indeed, emerging cognitive psychology research indicates that storytelling is the most powerful way to activate our brains.[10] Indeed, storytelling has both a psychological and neurological component that explains the human predilection favoring the narrative.[11]

Law and storytelling have always been inextricably intertwined. All lawsuits (and criminal prosecutions) are stories about events gone bad: the breakup of a marriage or a business, a devastating physical or emotional injury, the alleged violation of a civil or constitutional right, a stock swindle, a drug deal gone bad. The list is endless. Every lawsuit is generated by the occurrence of events, and it is the explanation of these events that comprises the case narrative. Trial lawyers fancy themselves good storytellers because they interpose an occasional anecdote, joke, famous quotation, or piece of advice their mother gave them as a child into their opening statements or closing arguments. However, as Nashville trial lawyer Phillip H. Miller has written, "A story is not a collection of facts interspersed with proverbs, analogies, metaphors, biblical references, song titles, and anecdotes."[12] Mr. Miller is spot on.

Most lawyers think storytelling skills are important only for closing arguments and, perhaps, opening statements. I have heard many great closing arguments, many by mediocre trial lawyers. But highly effective trial lawyers understand that their storytelling skills are crucial at all stages of the case. This includes jury selection, opening statements, direct and cross-examinations, and closing arguments, which should powerfully reinforce the unified story of the case. I have actually heard closing arguments that introduce a different story than what was presented in the opening statement; this was not caused by any surprise evidence or a real need to change the story—just bad lawyering. Great trial lawyers work on the story of the case long before jury selection begins so that they are able to maintain a consistent and powerful story theme throughout the trial. One of the nation's premier capital defense lawyers, Michael N. Burt, has written that the refinement of the story narrative begins long before the trial starts.[13] Burt, who has appeared in my courtroom in a complex death penalty habeas case, observed "[w]hatever jury selection strategy is employed, storytelling has its place."[14]

I have often wondered why the quality of opening statements is so incredibly low compared to the quality of closing arguments. Ninety-nine percent of lawyers should spend far more time than they do crafting a powerful narrative for opening statements. The Northern District of Iowa's local rules limit the length of opening statements to 15 minutes. For 19 years as a judge, I waived this rule in every case—always against my better judgment. Without fail, at the 20- 30-minute mark, the jurors' eyes started to glaze over. An hour into the opening statement, virtually every single juror had "the look." In 2013, I stopped waiving the rule and the opening statements have improved. With only 15 minutes, lawyers do not have time to bore the jurors with a witness-by-witness

account of the testimony—the worst and most common approach to opening statements. Enforcement of the 15-minute rule virtually compels lawyers to tell a story.

Opening statements are also ineffective because of lawyers' reliance on written scripts. I shudder when a lawyer takes a legal pad or pages of text to the podium. This is a harbinger that the opening statement will be mediocre at best and probably dead on arrival. Eye contact will be poor, the delivery will be stiff, and the lawyer will shield himself or herself from the jury by standing behind a podium.

Storytelling in trial must come from the heart. Jimmy Neil Smith, founder and president of the International Storytelling Center in Jonesborough, Tenn., spoke to renowned storyteller Elizabeth Ellis about an interaction she had with a group of small children:

> Suddenly, one of the children jumped up and said "Do you memorize those stories?" Before she could answer, the little boy next to him poked him in the ribs and said, "No, stupid! She knows them by heart." "I chuckled inside," says Elizabeth, "but I was struck by the truth of the child's statement. No, my stories aren't memorized. I do know them by heart. For if the story isn't told through the heart, the story has little power. The stories that really move us are those that we learn, take in, and tell through the heart—not the head."[15]

But how do trial lawyers, schooled in legal analysis, learn storytelling from the heart? Above all else, they must read everything they can on the art of storytelling. There is an amazing amount of material on the Internet. There are national, regional, and local storytelling organizations, festivals, and short courses to participate in. Internet resources, including the website of TED, which hosts thousands of 18-minute or less talks on "ideas worth spreading," provide ample examples of great storytelling. Two examples of compelling storytelling available on TED include Joshua Prager's "In Search of the Man Who Broke My Neck"[16] and Ben Dunlap's "The Life-Long Learner."[17] If Mr. Prager can tell his incredibly rich and powerful story in under eighteen minutes, then surely attorneys can give a powerful opening statement in equal or less time.[18]

While mastering storytelling in trial will not come overnight, here are five quick tips to keep in mind. First, a good story can be relatively short: the 256-word Gettysburg Address said a great deal. On a related note, keep in mind that most audiences show up voluntarily. Juries do not. Second, keep it simple. Simple words should replace complex words. Simple sentences are more powerful and easier to remember than complex sentences. Third, summarizing each witness's testimony renders your opening statement dead on arrival. Fourth, a mediocre trial lawyer armed with graphics and PowerPoint is still a mediocre trial lawyer. Graphics work best in the context of telling a great story, but all too often they interfere with the story. Finally, speak in the active voice and present the story as your witnesses experienced it. This is critical—the most powerful and profound key to great storytelling. Instead of telling the jury "what the evidence will show," lawyers would be well served by explaining what actually happened. This allows jurors to place themselves, as observers, into the story as it unfolds before them.

Lawyers should practice storytelling during their day-to-day activities — while taking a bath, mowing the lawn, cooking dinner, or driving in the car. Practice can be done by simply picking out a nearby object, building, or person and spinning a yarn.

III. Grit

> "The only thing that is distinctly different about me is I am not afraid to die on a treadmill. I will not be outworked, period. You might have more talent than me, you might be smarter than me, you might be sexier than me, you might be all of those things—you got it on me in nine categories. But if we get on the treadmill together, there's two things: You're getting off first, or I am going to die. It's really that simple."
> —Will Smith[19]

Not all gritty trial lawyers are great trial lawyers, but all great trial lawyers have grit. Grit—what it is, who has it, and how it is measured—has been the recent subject of academic psychologists studying its role in achievement.[20] Professor Angela Duckworth and her colleagues, who lead this field of research, define grit "as perseverance and passion for long-term goals."[21] Duckworth's hypothesis "that grit is essential to high achievement"[22] came out of interviews with professionals in law, medicine, investment banking, painting, academia, and journalism.[23] When asked what qualities distinguish "star performers" in their respective fields, those interviewed answered "grit or a close synonym as often as talent."[24] They "were awed by the achievements of peers who did not at first seem as gifted as others but whose sustained commitment to their ambitions was exceptional."[25] Many also "noted with surprise that prodigiously gifted peers did not end up in the upper echelons of their fields."[26]

Talent and grit are very different characteristics.[27] All great trial lawyers have both, but even one with unsurpassed talent, like a Gerry Spence, has no assurance of grit.[28] Indeed, as Duckworth recently observed, "in most samples, grit and talent are either orthogonal or slightly negatively correlated."[29] Duckworth added that, in 1892, Sir Francis Galton studied the biographical information of highly successful judges, poets, scientists, statesman, and painters. Galton observed that high achievers were "triply blessed by 'ability combined with zeal and with capacity for hard labour.'"[30]

In a study of 1,218 freshman "plebes" at the U.S. Military Academy at West Point, "[g]rit

predicted completion of the rigorous summer training program better than any other predictor."[31] Specifically, the cadets' scores on the "Grit Scale" developed by Professor Duckworth better predicted success in the program than even the Whole Candidate Score (WCS) developed by West Point to gauge applicants for admission.[32]

Grit is also a strong predictor of success in college. In a study of students at an Ivy League university, students who scored higher on the Grit Scale outperformed their less-gritty peers with higher SAT scores.[33] The results demonstrated that grit was actually associated with lower SAT scores — "suggesting that among elite undergraduates, smarter students may be slightly less gritty than their peers."[34] Across six studies performed by Duckworth and her colleagues, grit accounted for "significant incremental variances in success outcomes over and beyond that explained by IQ, to which it was not positively related."[35]

Duckworth's observations comport with my experience on the bench and in the classroom. The smartest law students are almost never the best trial lawyers. The top law students—recruited by large national law firms from the nation's elite law schools—are generally marginal trial lawyers. Although they make excellent motion-filing and paper-pushing litigators and law professors, they are infrequently great trial lawyers.

Great trial lawyers did not become great overnight. They are gritty individuals who often lost early in their careers but didn't lose sight of improving and learning from each loss. They were not easily deterred or discouraged by early setbacks. They were willing to travel the long road and exert enormous effort to become great trial lawyers. As trial lawyer Rick Friedman explained:

> In fact, many successful trial lawyers initially showed little or no talent for trying cases. Perhaps the most notable is Gerry Spence, who by his own account failed the Wyoming bar exam on his first attempt. After passing it on the second try, he proceeded to lose his first eight trials.[36]

Duckworth states that "[g]rit entails working strenuously toward challenges, maintaining effort and interest over years despite failure, adversity, and plateaus in progress."[37] She argues that an individual with grit "approaches achievement as a marathon; his or her advantage is stamina."[38] It takes persistence, a burning passion to become the best, an unparalleled work ethic, an insightful introspection to learn from your mistakes, and a desire to read and learn everything you can about the craft to become a great trial lawyer. This is grit.[39]

IV. Virtuoso Cross-Examiner

> "Cross-examination is the greatest legal engine ever invented for the discovery of truth."
> —John Henry Wigmore[40]

Not all virtuoso cross-examiners are great trial lawyers, but every great trial lawyer is a virtuoso cross-examiner. In my experience many trials are won or lost on a successful or failed cross-examination of key witnesses. Most lawyers are mediocre cross-examiners, even on a good day. This is largely attributable to a lack of experience and insufficient grit to improve cross-examination skills.

Cross-examination is also a crucial vehicle for a lawyer to tell their client's story, albeit in a very different way than other parts of a trial. Cross-examination is often called an "art," but this is a misconception. As Fred Metos explained, cross-examination is "a skill that can be learned with practice . . . [involving] a great deal of work and even more concentration."[41]

So how does one become a great cross-examiner? Start by reading, studying, and thinking deeply about four cross-examination classics: Francis Wellman's *The Art of Cross-Examination* (the first edition is more than a century old);[42] Irving Younger's "The Ten Commandments of Cross-Examination";[43] Larry Pozner's *Cross-Examination: Science and Techniques*;[44] and Terence MacCarthy's treatise on cross-examination.[45] These insightful works offer different perspectives with conflicting advice on solving reoccurring problems. Together, they provide a thorough theoretical and practical foundation of the goals of cross-examination. Trial lawyers who study them can then perfect whose strategy works and whose does not, given the precise situation presented.[46]

Over the years, I have developed Bennett's "Top Ten Sins of Cross-Examination"—the 10 most frequent cross-examination "mistakes." They are based on my own observations and jurors' evaluations:

(1) Simply re-hashing direct. Do not do this! Rehashing the direct examination—which has already damaged your client—perversely promotes both primacy and recency. A client will be much better off when the lawyer says "no questions" with a feigned confident smile (a great tool for every trial lawyer in its own right). Indeed, it has been said that "perhaps the most important issue with regard to cross-examination [is] whether or not to cross-examine the witness at all."[47]

(2) No specific purpose for each question. Cross-examination requires great preparation and thought. If you do not have a crystal-clear purpose for a question, skip it, or risk doing more harm than good.

(3) Not stopping while the going is still good. Over the last 19 years, time and time again I have instant messaged my law clerk in the courtroom, during an otherwise excellent cross-examination to ask, will she stop now? The inevitable answer is no. It is almost impossible for lawyers to stop after making three, four, five, or more excellent and devastating points in rapid-fire succession. Most trial lawyers have an internal need to keep going and going until they run out of steam, like the Energizer Bunny. At that point, the cross-examination has gone on for so long that those of us in the courtroom—the judge, the law clerk, and the jury—are left thinking that there was something quite good about that cross-examination a few hours ago, but we

have forgotten what it was.

If you are fortunate enough to strike gold, stop! Throw the legal pad away, sit down, and say "no further questions." Most trial lawyers never do this. Only the great ones stop.

(4) Failing to keep the questions simple. Keeping the questions simple— in terms of the words used and the length of the question—is essential to controlling the witness. Equally important is limiting each leading question to one fact. Otherwise, "The complexity of a question can allow a witness wiggle room to deny a point the attorney wishes to affirm, or vice versa."[48] The consequences for ignoring this rule can be fatal. For example, a lawyer might ask, "Didn't you run the red light because you dropped your lit cigarette on the floor of your car as you were turning off your car radio?" The defendant could honestly answer "no" to the entire question if the cigarette was not lit, if she dropped it on her seat and not the floor, or if she was turning the radio on and not off.

(5) Beating up a witness who has not given you "permission." There is an old English proverb that says, "You can catch more flies with honey than with vinegar." Jurors resent lawyers who bully witnesses unless the witness has given "permission" to be beaten up. Witnesses give permission. not literally, but rather when they are arrogant, nasty, obviously lying, extremely argumentative, or just plain obnoxious. Until then beating up the witness will backfire. When a witness has given the cross-examining attorney "permission" to beat him up, most jurors enjoy the entertainment value of aggressive cross-examination. They believe the witness is getting what he deserves. It is dangerous not to err on the side of caution in deciding whether the witness has given "permission."

(6) Impeaching a witness over silly inconsistencies. Not all prior inconsistent statements are created equal. Impeaching on irrelevant, minor, or fringe issues undermines cross-examination. It weakens the stronger aspects of the cross-examination and lessens an attorney's personal credibility with the jurors. It is much better to impeach on one core issue than to do so 10 times on minor inconsistencies. For example, if a witness testified in the deposition that she "hated" Mr. X, perhaps the attorney could technically impeach her trial testimony that she "despised" Mr. X. But such a ridiculously technical impeachment gains nothing and makes the attorney look like a silly nitpicker. I see this type of impeachment all too often.

(7) Flubbing impeachment technique. Watching a botched impeachment is painful. The various techniques of impeaching a witness on cross-examination are fodder for a law review article of their own. Here are a few key points to keep in mind: In my district, all of the courtrooms are well equipped with state-of-the-art technologies. Not all trial lawyers are created technologically equal. Thus, some impeachment is done the old-fashioned way, and some is done using high-tech, video-taped depositions, with or without scrolling text. The scrolling text feature can increase the cost of the deposition; however, it is usually well worth it. Nothing is more powerful than both seeing and hearing a witness contradict the courtroom testimony he or she just gave, especially since some jurors are primarily visual learners while others are auditory learners. But—and this is a big but—nothing takes away from the impact and value of a high-tech impeachment more than a lawyer fumbling to find the video clip while everyone in the courtroom watches and waits. High-tech impeachment is worth its weight in gold, but only if you are proficient.

The same is true of the old-fashioned methods. If an attorney stumbles and everybody in the courtroom waits while the attorney scrambles to find a certain page of the witness's deposition, the impact is lessened. Repeatedly doing this renders the impeachment effort worthless.

Some methods of using a written deposition to impeach a prior inconsistent statement may be better than others. I recently had a very good trial lawyer ask the witness to read both the questions and answers. The witness did so, but she read them so quickly that nobody in the courtroom could figure out where the question ended and the answer began, rendering the impeachment effort worthless. I have found that the most effective impeachment technique is for the lawyer to read the question asked in the deposition, and then have the witness read the answer they gave. It is more powerful when witnesses impeach themselves.

(8) The "Mexican jumping bean" approach. Years ago, the prevailing thought on cross-examination was that jumping all over the place with questions and confusing the witness yielded greater fruit. The problem with this "Mexican jumping bean" approach is that it confused the jurors as much as or more than it confused the witness. Larry Pozner's "Chapter Method" of cross-examination takes the opposite approach, and its structure works extremely well.[49]

(9) Lack of pace. Much of the success of cross-examination depends on a strong pace, pausing for effect rather than shuffling through notes or deposition pages to impeach. Jurors frequently comment negatively on lawyers who fumble impeachment by having trouble locating the allegedly impeaching statement in a prior exhibit or deposition. Gaps in the pace of cross-examination inevitably lessen the effect of the cross-examinaton.

(10) Failing to have a graceful exit strategy when the cross-examination inevitably goes south. Even the best-prepared cross-examinations can and do go badly. That is why it is critical to have an exit strategy for every cross. These are a few questions—the only ones that I suggest be completely written out—that allow you a graceful exit from the cross-examination. These "fail-safe" questions must be a component of each witness's cross-examination outline in your trial notebook. Effective cross-examination, which is more theater than direct examination, requires a strong beginning and a strong ending every time.

In my experience, the best cross-examiners are the top criminal defense lawyers and federal prosecutors. Trial lawyers who ply their craft in federal criminal

cases do not have the crutch of taking depositions for impeachment purposes. Civil trial lawyers can learn from watching criminal defense lawyers and prosecutors, who are forced to be more resourceful and to think much faster on their feet. In this sphere, necessity truly breeds invention. In my opinion, depositions enable civil lawyers to become lazy. Take their depositions away, and few would have any effective cross-examinations. But since civil depositions are here to stay, it is worth noting that successful deposition skills in the conference room dictate how successful the cross-examination will be in the courtroom.[50] The major mistake made in civil depositions is the failure to use leading questions that limit one fact per question. This critical failure, as described above, allows witnesses to successfully wiggle out of and escape impeachment at trial. Although the first part of a civil deposition is often a fishing expedition for potentially impeaching material, a skilled trial lawyer will later elicit one fact per question to lock in that impeachment material.

Cross-examination requires practice, practice, and more practice—and even more preparation.

V. Preparation

"In all things success depends on previous preparation, and without such previous preparation there is sure to be failure."
—Confucius[51]

Just like Confucius, federal trial court judges place great value on the level of preparation by the lawyers appearing before them. In an informal, non-scientific e-mail poll of trial court judges in the Eighth Circuit, I asked respondents to list the three most important qualities or attributes of great trial lawyers.[52] Eighteen of 33 judges responded that "preparation" was either first or second in importance. One judge said "slavish preparation." I agree. While intense preparation alone does not make one a great trial lawyer, you cannot be one without it.

Lawyers must dedicate a section in their trial notebooks for developing the case's narrative and themes. Moreover, they should be thinking about and developing this section from the first client interview. I firmly believe that plaintiffs' lawyers should draft the jury instructions on the elements of any potential claims and begin developing the case narrative and themes before accepting the case and executing the written retention agreement. Civil defense lawyers should do the same shortly after being retained.

Lack of preparation is near the top of the list of jurors' frequent negative comments about lawyers. It is also at the top of my list. Lack of preparation also manifests itself in lack of organization. Jurors and judges do not like lawyers that have to search and fumble for exhibits or notes. This is true both for lawyers who use high-tech exhibits and those who rely upon stacks of files in banker boxes. Jurors value their time too, and lack of organization creates juror resentment and wastes jurors' and judges' time.

Preparation means thinking of every detail, especially in communicating with juries. Lawyers who are oblivious to the needs and attention spans of jurors are doomed to failure. It makes no sense to have exhibits blown up on a board that jurors cannot read, nor does it behoove lawyers to show exhibits electronically in a font size too small for anyone to decipher.

After a decade in a high-tech courtroom, I still encounter lawyers who display a tilted document on the document camera, forcing jurors to crane their necks to read it. Others fail to enlarge the document enough for the jurors to see the relevant language. In my courtroom, I have a zoom feature installed on my control panel so that I can enlarge documents when the lawyers fail to do so.[53] On many occasions, I have called lawyers up to side-bar to point out that the jurors' glazed looks are due to their endlessly repetitive and mostly pointless direct examinations. I ask the lawyer to look at the jury when resuming the direct examination and, if the jurors appear bored out of their minds, I encourage him or her to wrap it up. Once, a lawyer responded that he was taught to never look at the jury, so he did not think he could follow my suggestion. Sometimes a lawyer cannot be saved from himself.

A major preparation attribute that separates great trial lawyers from lesser advocates is the ability to streamline their cases. Highly effective trial lawyers jettison redundant witnesses, unnecessary exhibits, repetitive questions, causes of action, or defenses that detract from the principal theory of the case. All of this is critical to success at trial. Of course, it also takes a significant amount of judgment and courage—two related attributes of all great trial lawyers.

A team of alleged trial lawyers from a large national law firm recently brought several-thousand exhibits to a final pre-trial conference in my chambers. But the case was only complicated in their collective minds. When asked how many of the exhibits were important enough to mention in their closing arguments, after some fumbling responses and further prodding, they said less than fifteen The team dramatically trimmed its exhibit list.

This is not to say that only exhibits mentioned in closing arguments need be offered at trial. However, it is not a bad general rule of thumb. Great trial lawyers understand that less is almost always more. Indeed, wasting jurors' time with repetitive questions and unnecessary exhibits tops the list of jurors' criticisms of trial lawyers.

VI. Unfailing Courtesy

"Life is not so short, but that there is always time enough for courtesy."
—Ralph Waldo Emerson[54]

There is a large public misperception that the greatest trial lawyers are those that employ "Rambo" trial tactics. "Rambo" lawyering[55] is derived from the fictional John Rambo character made famous by Sylvester Stallone in a series of movies. Rambo was a fictional Green Beret—a one-man-army killing machine. Professor Perrin describes the Rambo lawyer:

The quintessential Rambo lawyer is one who terrorizes, intimidates, and obfuscates

> his way to victory in pursuit of the client's objectives, just as the Sylvester Stallone character laid waste to anything and everything in his way, killing and terrorizing the masses, in his effort to achieve vindication.[56]

While I have encountered Rambo lawyering both as a practicing lawyer and as a judge, the vast majority of lawyers who have appeared before me are highly professional advocates. The best trial lawyers always are. They are as courteous to the courtroom deputy, court security officers, clerk's office staff, and my chambers' staff as they are to witnesses, opposing counsel, jurors, and judges. Tough, zealous, and successful trial lawyers do their best not to personalize issues, "win at all costs," or do anything to sully their most important currency: a reputation for civility, candor, courtesy, and integrity. These lawyers understand that no legal or factual issue and no case is worth spoiling the reputation that they have worked to create and maintain.

In a 1928 speech at Marquette University Law School, the Honorable Burr W. Jones, a lawyer and former member of the U.S. House of Representatives, said:

> It is the popular conception, perhaps the true one, that the able and successful trial lawyer must be a fighter; that his life is one of battle and contention. I have known lawyers who seemed to act upon the theory that legal warfare is inconsistent with courtesy and gentlemanly manners in the court room and I have seen them fail of the high success which might have been within their reach. It is true that a client may sometimes gloat over the abuse which his lawyer hurls at the adverse attorney or party. For a moment even a jury may enjoy the excitement caused by such wordy encounters. But as a rule, both jurors and judges think of the legal profession as a learned profession, and that this conception should not be a mere fiction. When the time comes for rendering the verdict or the judgment they have more respect for, and more confidence in the fairminded gentleman than for him who deals in epithets and abuse.[57]

This is equally true today. Jurors, in their evaluations of trial lawyers, almost always give the most favorable evaluations to the most courteous and professional lawyers. While television shows inculcate an expectation of Rambo trial lawyers, real jurors are critical of them and seldom evaluate them as effective advocates. Rambo lawyers are too busy bullying to listen to other lawyers and witnesses—a shortcoming discussed in the next section.

VII. Great Listener

> "When people talk,
> listen completely.
> Most people never listen."
> —Ernest Hemingway[58]

Lawyers often fit Hemingway's description of "most people": they love to hear the sound of their self-perceived silver tongues, but they are notoriously poor listeners. Just ask any judge or jury. The source of the problem could be legal education, according to Professor Neil Hamilton, who explained that despite being "critically important for effectiveness in both law school and the practice of law... listening skills are among the least emphasized skills in legal education."[59] Kentucky lawyer Richard M. Rawdon, Jr. adds that while listening is not easy or natural for trial lawyers, they must learn to listen to be successful: "Listening develops knowledge. Knowledge grants power. With power, you can win."[60] Spence's views on listening at trial support both Hamilton and Rawdon's assessments:

> If I were required to choose the single essential skill from the many that make up the art of argument, it would be the ability to listen. I know lawyers who have never successfully cross-examined a witness, who have never understood where the judge was coming from, who can never ascertain what those around them are plainly saying to them. I know lawyers who can never understand the weakness of their opponent's case or the fears of the prosecutor; who, at last, can never understand the issues before them because they have never learned to listen. Listening is the ability to hear what people are saying, or not saying as distinguished from the words they enunciate.[61]

In my view, listening skills are incredibly underdeveloped in most lawyers I have observed in the courtroom. As Spence noted, poor listening skills have dire consequences for trial lawyers. For example, they almost always result in poor direct examination of witnesses. Unlike cross-examination, where the lawyer is the focus, direct examination should place the emphasis on the witness. The story or case narrative is told through the witness's testimony, not through the lawyer's questions. An attribute of all great trial lawyers is their ability to stay out of the way of their witnesses, who are the ones telling the client's story.

How many, when introduced to a new person, cannot remember that person's name ten seconds later? That is because too many of us are so focused on what we will say and making a good impression that we do not even listen to the person's name. The irony is, had we actually listened and repeated the person's name in our response, we could have accomplished both goals.

The same is true of the direct examination of virtually all witnesses by less-than-great trial lawyers. These lawyers commonly write out their direct questions in a script on a yellow legal pad. At trial, they will go down their lists from question to question—paying little or no attention to the witnesses' answers—hoping to get to the next question on the list without an objection. If these lawyers would listen more closely to a witness's answer, they would be able to use the technique of

"looping" to form the next question, rather than using the ones on their legal pads. Here is an example of looping in a defense lawyer's direct examination of the human resources director who decided to terminate the plaintiff:

Q: Why did you decide to discharge Mrs. Smith?
A: Because she violated the company absenteeism policy.
Q. Please tell us what the company's absenteeism policy included.
A. If you missed three days in a month without calling in, you are subject to termination.
Q. How many days in July of last year did Mrs. Smith miss?
A. Six.
Q. Did she call in on any of the six?
A. No, but she had called in sometimes on other occasions during 2012 when she missed work, but she would not always do so.

Looping requires you to listen to the witness's answer and form the next question based on that answer.

Good listening is an acquired skill, and any lawyer can achieve it with a little gritty determination. Listening skills are crucial to developing trusting relationships with clients, regardless of your practice area. Strong listening skills also help to enhance judgment—yet another trait that all great trial lawyers possess in abundance.

VII. Unsurpassed Judgment

"Failure is not a single, cataclysmic event.We do not fail overnight . . . [F]ailure is nothing more than a few errors in judgment, repeated every day."
—Jim Rohn[62]

Not all trial lawyers with great judgment are great trial lawyers. But all great trial lawyers have great judgment. The most important exercise of great judgment by great trial lawyers is knowing when not to say something. Francis Bacon, Attorney General and Lord Chancellor of England, wrote that "[s]ilence is the sleep that nourishes wisdom."[63] In every phase of a jury trial, the great trial lawyers know when to stay silent. In discovery, they do not take ridiculous positions or file unnecessary motions to compel. In jury selection, they do not personally embarrass or argue with potential jurors. On direct examination, they do not beat a question to death by asking it over and over again in slightly different ways. They have the confidence to know that the jurors got it the first (or maybe the second) time. Redundant questioning by lawyers has been the number one criticism by jurors in the jury evaluation forms over my entire judicial career. Jurors resent lawyers who waste their time with needless repetition. Great trial lawyers do not plead 24 affirmative defenses just because the word processor can spit them out in seconds. Great trial lawyers do not have six alternative objections in the pre-trial order to exhibits that are clearly admissible. Great trial lawyers do not file frivolous motions in limine in an attempt to exclude obviously admissible evidence. In jury or bench trials, great trial lawyers seldom object, even when they know the objection would be sustained. They know the evidence is not hurting their client's case, and they have no need to show everyone how smart they are by reciting complex rules of evidence. Great trial lawyers do not want the jury or judge to perceive them as obstructionists. I think most state and federal trial court judges would agree with "Bennett's Anomaly," which posits that the better the lawyers and the greater their knowledge of the rules of evidence and their proper application, the fewer objections they make in jury trials.

The best and most effective trial lawyers also strive to be extremely professional and are marked by unsurpassed civility and professionalism. As such, great trial lawyers do not fail to cite non-controlling, adverse authority, even though the rules of ethics only require the disclosure of adverse controlling authority. They know they will be viewed in higher esteem by the judge for citing and distinguishing non-controlling adverse authority. As a practical matter, the failure to do so sends a message to the judge that the lawyer thinks neither opposing counsel nor the judge is industrious enough to find the adverse authority. This is not a good message to send. Great trial lawyers understand that the state ethics codes and rules merely set the minimum floor. No great trial lawyer wants to be known as a minimally ethical lawyer.

Over the years, I have observed other common judgment errors:

(1) failing to ask questions in jury selection that go to the core issues of the case;
(2) failing to bring out the weaknesses of the client's case before the other side does;
(3) leading on direct and failing to be facile in asking non-leading questions;
(4) failing to begin and end the client's case with strong, virtually unimpeachable evidence;
(5) being argumentative with witnesses, opposing counsel, or the trial judge;
(6) presenting too much cumulative evidence;
(7) failing to take clues from observing the jurors that they are bored;
(8) fumbling for exhibits and other time-wasting habits;
(9) being blind to the strengths of the opposing parties' case; and
(10) being too tied to written-out questions and notes for jury selection, opening statements, direct and cross-examinations, and closing arguments.

The final judgment error is well illustrated by a trial in my courtroom from several years ago. An expert witness had just been sworn in, and the lawyer asked the first question on his yellow pad: "Good morning, Dr. So-and-So, I am the lawyer for the plaintiff..." Unfortunately for this plaintiffs' lawyer, we had taken the witness out of order and it was 2:45 in the afternoon. Even the jurors laughed at this lawyer who was so tied to his legal pad.

Finally, the most common and most critical judgment error

is not simplifying and shortening the trial presentation. As Albert Einstein noted, "Everything should be as simple as possible, but not simpler."[64] In almost all jury trials, less is truly more. All great trial lawyers understand this. They also understand that one of the major reasons judges and jurors both like, admire, and are persuaded by these lawyers is that they bring a heightened measure of reasonableness to the courtroom.

IX. Reasonableness

"I tried being reasonable —
I didn't like it."
—Clint Eastwood[65]

"Dirty" Harry Callahan, played by iconic actor Clint Eastwood, is a character from a series of movies in the '70s and '80s. He was not a model of reasonableness. In the 1983 film, "Sudden Impact", Dirty Harry corners a bank robber after killing his two accomplices. When the bank robber grabs a fleeing waitress and points his gun at her, Dirty Harry aims his .44 Magnum at the robber's head and utters one of his more famous lines: "Go ahead. Make my day." If Dirty Harry had been a trial lawyer rather than a police inspector, I expect he would have taken Rambo lawyering tactics to new and unimaginable heights.

Inexperienced and less-than-great trial lawyers often conflate zealousness with unreasonableness (most likely driven by their personal insecurities). Great trial lawyers pride themselves on being both zealous and reasonable. Unlike their lesser adversaries, they do not see reasonableness as a sign of weakness, but instead as one of strength.

Reasonableness in the pre-trial setting takes many forms: selecting appropriate causes of actions and defenses to plead; meeting early with opposing counsel to see if issues can be voluntarily narrowed and determine the truly contested issues; discussing (sensibly) how and when to conduct discovery; agreeing on times and places for depositions; conferring with the other side in good faith before filing discovery motions; being willing to make reasonable compromises on discovery without court intervention; opposing only unreasonable requests for extensions of time; and refraining from personal attacks on opposing counsel and their clients in briefing.

In trial, reasonable trial lawyers know not to waste the time and resources of the judge and jury. When the inevitable unexpected problems arise, unreasonable lawyers are the first to create additional obstacles to resolution, even for easy-to-resolve problems. Great trial lawyers are quick to suggest reasonable solutions to problems that arise in trial—the rest, including "litigators," often create them and whine about solutions. In contrast, reasonable lawyers are quick to suggest workable solutions, no matter how difficult the problem. For example, scheduling experts and other out-of-state witnesses can be daunting for attorneys. The less skilled the opposing counsel, the more likely they are to complain if the other side needs to take a witness out of order (i.e. during the opposing party's case), in order to accommodate the witness.

Another example comes from a high-stakes federal death penalty prosecution in my courtroom. I was concerned that the government would unfairly load up on victim impact testimony during the penalty phase, given the staggering amount of potentially admissible victim impact testimony. Fortunately, the Assistant U.S. Attorney prosecuting the case was an extraordinarily zealous and talented trial lawyer. He was impeccably reasonable and pared down his victim impact testimony, obtained a unanimous death verdict, and avoided the risk of a reversal on that issue. A lesser trial lawyer would likely not have avoided this potential pitfall.

Thus, unlike Dirty Harry, great trial lawyers pride themselves on reasonableness, which contributes to their zealousness.

X. Conclusion

Nothing in this world can
take the place of persistence.
Talent will not; nothing
is more common than
unsuccessful men with talent.
Genius will not; unrewarded
genius is almost a proverb.
Education will not; the world
is full of educated derelicts.
Persistence and determination
alone are omnipotent.[66]

So you want to be a great trial lawyer? It is critically important to remember they come in all shapes, sizes, genders, ages, colors, and with or without disabilities. Some have great natural talent, but most do not. A few went to top-ranked law schools and did very well; many, many more did not. All it takes to be a great trial lawyer is striving to be a gritty raconteur with unsurpassed listening skills and judgment, unfailing commitment to preparation, reasonableness and courtesy, and excellent cross-examination skills. Of course, if you are a litigator, you also must overcome your fear of going to trial. Let the immortal words of Rosa Parks, one of the grittiest individuals in American history, be your inspiration: "I have learned over the years that when one's mind is made up, this diminishes fear; knowing what must be done does away with fear."[67] So make up your mind to go try cases. That is the only way to become a great trial lawyer. ■

Adopted from the University of Texas School of Law's Review of Litigation law review article: Mark W. Bennett, *The Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker: "I am a Litigator,"* 33 Rev. Litig. 1 (2014)

The Hon. Mark W. Bennett is in his twentieth year as a U.S. district court judge for the Northern District of Iowa and served for nearly three years as a U.S. magistrate judge for the Southern District of Iowa. As a federal judge he has jury trials from the districts of Iowa to the District of the Northern Mariana Islands in Saipan. Bennett is a long-time adjunct professor of law at the Drake University Law School. He is a frequent contributor to VOIR DIRE.

happiness and life satisfaction. Kamleash Singh & Shalini Duggal Jha, *Positive and Negative Affect, and Grit as a Predictor of Happiness and Life Satisfaction*, 34 J. INDIAN ACAD. APPLIED PSYCHOL. (SPECIAL ISSUE) 40, 40–45 (2008).

[40] California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 3d ed. 1940).

[41] G. Fred Metos, *Cross-Examination: Methods and Preparations*, UTAH B.J., Nov. 1990, at 11.

[42] FRANCIS WELLMAN, THE ART OF CROSS-EXAMINATION (1903). The four editions of Wellman's book generated so much buzz in the legal community that the Harvard Law Review reviewed the book three times. Book Note,17 HARV. L. REV. 433, 433–34 (1904); Emory R. Buckner, Book Note, 37 HARV. L. REV. 402 (1924); Book Note, 50 HARV. L. REV. 859 (1937).

[43] IRVING YOUNGER, THE ART OF CROSS-EXAMINATION (1976). His Ten Commandments are:

(1) Be brief; (2) Short questions, plain words; (3) Never ask anything but leading questions; (4) Ask only questions to which you already know the answer; (5) Listen to the answer; (6) Don't argue with the witness; (7) Don't permit a witness on cross-examination to simply repeat his direct testimony; (8) Don't let the witness explain; (9) Avoid asking one question too many; (10) Save it for summation.

Id. at 21–32.

[44] LARRY POZNER & ROGER DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES (1993). Their now-famous "Chapter Method" of cross-examination presents the most illuminating and insightful technique for cross-examination I have ever read. Rick Friedman has offered this advice about Pozner and Dodd's book on cross-examination in his own must-read book: "This is the definitive book on cross-examination. Any trial lawyer who has not read this book should be ashamed. Learn the techniques. When you have mastered them do not be afraid to cast them aside when the occasion warrants it." FRIEDMAN, *supra* note 37, at 195.

[45] TERENCE F. MACCARTHY, MACCARTHY ON CROSS-EXAMINATION (2007). Mr. MacCarthy retired from the Federal Defender Program of the Northern District of Illinois at the end of 2008, after serving that office for forty-two years.

[46] In Chapter 8, "Beware of Formulas," of Rick Friedman's ON BECOMING A TRIAL LAWYER, he writes: So we read Irving Younger's *Ten Commandments of Cross-examination* and try hard to follow his precepts to the letter. By calling them the "Ten Commandments," Younger implied we must always follow them, and when we do, everything will be okay. Many lawyers have strictly followed these commandments through one bad cross-examination after another. This is not to say there isn't great wisdom in Younger's Ten Commandments or in many of the other principles advocated by those who study the trial process. It is to say that none of them are universal — that is, always controlling or true. FRIEDMAN, *supra* note 37, at 71–72.

[47] Gregory A. Hearing & Brian C. Ussery, *Guidelines for an Effective Cross-Examination: The Science Behind the Art*, 17 PRAC. LITIG. 7, 8 (2006); *see also* J. Alexander Tanford, *Keeping Cross-Examination Under Control*, 18 AM. J. TRIAL ADVOC. 245, 249 (1994) ("Too many lawyers automatically cross-examine every witness called by their opponent. No rule of trial practice requires this.").

[48] Hearing & Ussery, *supra* note 48, at 10.

[49] In Chapter 9 of CROSS-EXAMINATION: SCIENCE AND TECHNIQUES, "The Chapter Method of Cross-Examination," Pozner and Dodd define their methodology of cross-examination as follows:

Why use the word "chapter"? It signifies that there is a structure, a beginning and an end to the cross-examination on each topic. Just like a book, there is a purpose to each chapter, and each chapter interlocks with the others. Cross-examination is not a sputtering jumble of thoughts. It is a controlled, pinpoint series of inquiries into selected topics. The chapter method suggests and, it is to be hoped, demands that the cross-examination be a planned and controlled series of questions designed to accomplish well-defined goals. Pozner & Dodd, *supra* note 45, at 187.

[50] For an excellent discussion of the interdependence between deposition skills and cross-examination skills, see Gary S. Gildin, *Cross-Examination at Trial: Strategies for the Deposition*, 35 AM. J. TRIAL ADVOC. 471, 511 (2012) (arguing that a successful deposition sets the stage for a successful cross-examination).

[51] Confucius, *The Doctrine of the Mean*, THE CHINESE CLASSICS 136 (James Legge trans., 1887).

[52] E-mail from author to trial court judges on the Eight Circuit (April 2013) (on file with author).

[53] I have even had lawyers exclaim: "Wow that's neat—it even does it automatically." Right.

[54] RALPH WALDO EMERSON, LETTERS AND SOCIAL AIMS 85 (1886).

[55] Unfortunately, the phrase "Rambo lawyer" now appears in the venerable Black's Law Dictionary. *See Rambo lawyer*, BLACK'S LAW DICTIONARY 1373 (9th ed. 2009) ("Slang. A lawyer, esp. a litigator, who uses aggressive, unethical, or illegal tactics in representing a client and who lacks courtesy and professionalism in dealing with other lawyers. — Often shortened to Rambo.") (emphasis removed).

[56] L. Timothy Perrin, *Lawyer as Peacemaker: A Christian Response to Rambo Litigation*, 32 PEPP. L. REV. 519, 522 (2005) (footnotes omitted).

[57] Burt W. Jones, *Courtesy and Friendship in the Practice of the Law*, 13 MARQ. L. REV. 9, 10 (1928).

[58] Malcolm Cowley, *A Portrait of Mister Papa*, LIFE MAGAZINE, Jan. 10, 1949, at 90 (quoting from a letter of advice from Ernest Hemingway to a young writer).

[59] Neil Hamilton, *Effectiveness Requires Listening: How to Assess and Improve Listening Skills*, 13 FLA. COASTAL L. REV. 145, 145 (2012).

[60] Richard M. Rawdon, Jr., *Listening: The Art of Advocacy*, TRIAL, Jan. 2000, at 99.

[61] GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME 67 (1995).

[62] Jim Rohn, *The Formula for Success (and Failure)*, SUCCESS, http://www.success.com/article/the-formula-for-success-and-failure (last visited September 30, 2013).

[63] FRANCIS BACON, THE PHILOSOPHICAL WORKS OF FRANCIS BACON 553 (John M. Robertson ed., 1905). Bacon was a noted scientist, statesman, orator, and author.

[64] THE ULTIMATE QUOTABLE EINSTEIN 384–85 (Alice Calaprice ed., 2011). The quotation is commonly attributed to Einstein, but the actual, original source quotation is "a bit" different.

[65] Eric Wiland, *Williams on Thick Ethical Concepts and Reasons for Action*, *in* THICK CONCEPTS 213 (Simon Kirchin ed., 2013) (attributing the quote to Dirty Harry); *see also* CONSERVATIVE WIT: A DICTIONARY OF CONSERVATIVE POLITICAL HUMOR 56 (Robert Golla ed., 2012) (collecting quotations on conservative political humor).

[66] THE SPEAKER'S QUOTE BOOK: OVER 5,000 ILLUSTRATIONS AND QUOTATIONS FOR ALL 382 (Roy B. Zuck ed., 2009). This quotation is from a person who never went to law school and failed his initial entrance exam to Amherst College. However, he developed a reputation as a hard-working and diligent attorney in Hampshire County, Massachusetts, where he was admitted to the bar after apprenticing with a local law firm because he could not afford law school tuition. This small-town country lawyer should know about persistence. His name was John Calvin Coolidge, Jr., and he went on to become the thirtieth President of the United States. DAVID GREENBERG, CALVIN COOLIDGE, THE AMERICAN PRESIDENTS SERIES (Times Books, 1st ed. 2006).

[67] ROSA PARKS & GREGORY J. REED, QUIET STRENGTH: THE FAITH, THE HOPE, AND THE HEART OF A WOMAN WHO CHANGED A NATION 17 (1994). Parks is "nationally recognized as the mother of the modern-day civil rights movement in America . . . [who] refused to surrender her seat to a white male passenger on a Montgomery, Alabama, bus on December 1, 1955 . . . ." *Id.* at 11. Parks "set in motion a chain of events that were felt throughout the United States. Her quiet, courageous act changed America and redirected the course of history." *Id.*

"As judges, we manage the chaos at the intersection of the human condition and the law."

--Justice Gregory C. Flynn, First Justice,
Waltham District Court

"Discourage litigation. Persuade your neighbors to compromise whenever you can.
Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

--Abraham Lincoln

Notes for a Law Lecture, in 2 ROY P. BASLER, COLLECTED WORKS OF ABRAHAM LINCOLN, 81 (Rutgers Univ. Press 1953).

CLE: A business plan for your firm — page 15

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Odds against tort plaintiffs in Massachusetts

Success at trial poor, especially in suburbs

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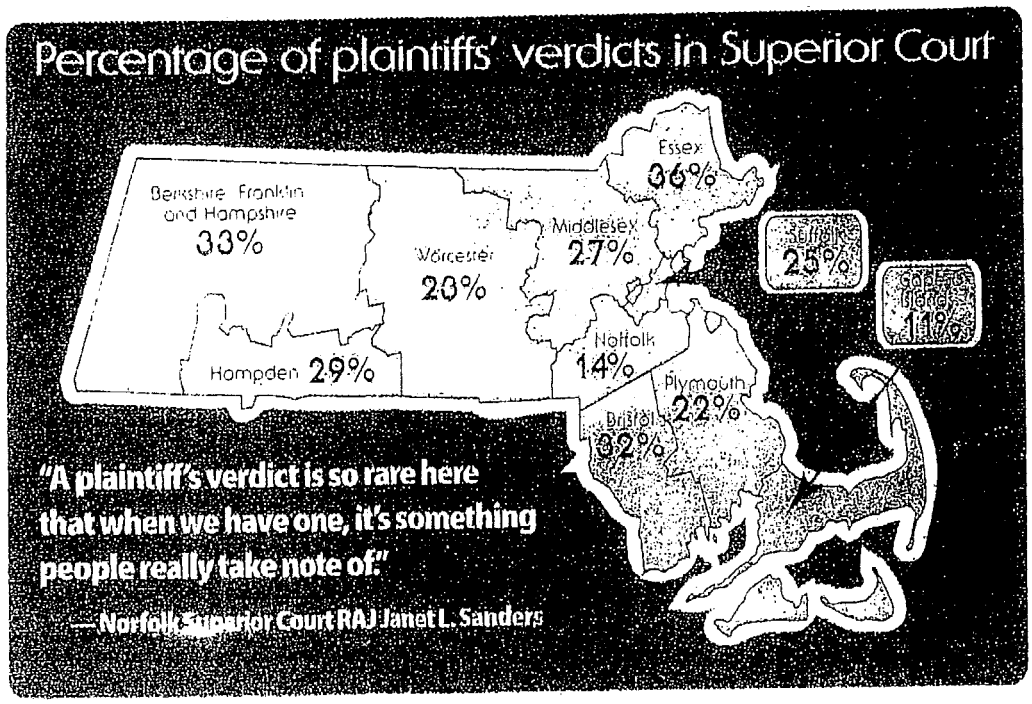

Eight years later, James W. Gilden remembers the day he fell down the steps at the Dedham Probate & Family Court like it was yesterday.

The 70-year-old divorce lawyer from Sharon, a regular at the courthouse for more than four decades, lost his balance on the slippery marble floor and tumbled down several flights of stairs before slamming onto the landing below.

Gilden would go on to file a negligence suit in Norfolk Superior Court against the Trial Court and its chief justice for administration and management, Robert A. Mulligan.

"The steps were concave and slanted a little bit forward," Gilden recently recalled of the 2002 accident. "At a minimum, they should've put up some kind of warning. After that happened to me, they put no-slip strips on the stairs, but the trial judge refused to allow us to even bring that up in front of the jury."

Gilden said that ruling by Judge Thomas A. Connors dashed any chance he had of holding the court accountable for the injuries to his knee, which required arthroscopic surgery and months of painful rehabilitation.

But practitioners claim there was something else at play when the jury returned a defense verdict in the case last April: a deep-seated anti-plaintiffs' bias in Massachusetts.

In fact, a review by Lawyers Weekly of the civil verdicts rendered in Superior Court in 2009 shows that the deck is heavily stacked against tort plaintiffs, particularly those who go to trial in Norfolk County and other suburban communities. And the numbers are even more dismal for plaintiffs in medical-malpractice cases (see sidebar on page 27).

According to the statistics, only five of the 35 personal injury verdicts returned in Norfolk County in 2009 favored plaintiffs. The county's 14 percent success rate was 22 percentage points lower than Essex County, which had the highest rate of plaintiffs' verdicts, and 12 points behind the statewide average of 26 percent.

"A plaintiff's verdict is so rare here that when we have one, it's something people really take note of," Norfolk Superior Court Regional Administrative Justice Janet L. Sanders said. "Norfolk has traditionally been pro-defense, but there seems to be a more pronounced trend in the last few years, particularly the last two, where the numbers of plaintiffs' verdicts have dropped precipitously."

Superior Court Judge Patrick F. Brady, who

Continued on page 27

Odds against tort plaintiffs in Massachusetts

Continued from page 1

regularly sits in Norfolk County, concurs with Sanders.

"This is certainly not the golden age of torts," he said.

'A hard battle'

Lawyers Weekly collected the numbers for this story by running every Superior Court case tried in 2009 through the state's Trial Court Information Center database. Of those 700-plus cases, any verdict for the plaintiff, regardless of the amount of money awarded, was considered a plaintiff's win.

The only region in Massachusetts with a lower success rate than Norfolk County was the Cape and Islands, which saw eight of its nine tort trials decided in favor of defendants.

Brady, who specialized in products liability defense at the Boston law firm of Nutter, McClennen & Fish prior to his appointment to the bench in 1989, keeps a log of every negligence case tried in his courtroom.

Unlike the method used by Lawyers Weekly, however, the judge defines a plaintiff's victory as a verdict in which the jury awards a dollar figure that exceeds the plaintiff's pre-trial settlement offer. (Such data is not available on the state's database.)

"To me, beating the offer is the true measure of whether someone wins or loses," Brady said. "Those numbers tell you that it's a hard battle for a plaintiff's lawyer in any case where the defendant presents some sort of plausible defense. The plaintiffs will hardly ever win by my definition of a win."

Of the 151 negligence trials Brady has presided over since 1993 when he first started keeping track, only 16 have resulted in plaintiffs' verdicts, he said. In Norfolk County, only seven of 69 ended in favor of plaintiffs. Of the 52 trials he has heard in Plymouth County, 49 — or 92 percent — were decided for the defense.

Because the likelihood of plaintiffs attaining success is so remote, Brady said, he has seen far fewer personal injury cases — especially those involving car accidents and slip and falls — go to trial over the past three or four years.

Since Norfolk County started tracking its results in 2006, the few cases decided for plaintiffs have generally resulted in miniscule monetary awards, Sanders said.

"Over a four-year period, we're talking about only a handful of cases that have been big verdicts, in the hundreds of thousands," she said. "The plaintiffs' bar has admitted to us that they only come to Norfolk if they have to for venue reasons. They're not avoiding us because of our court, they're avoiding us because of the low verdicts."

When a lawyer has the option of filing outside of Norfolk County, the decision is an easy one to make, according to Robert M. Higgins of Lubin & Meyer in Boston.

In fact, he said, any attorney who would willingly try a case in Dedham when alternative venue options exist — knowing how bleak the numbers are — would be committing malpractice.

"Generally, the belief is that the majority of big verdicts in Massachusetts come out of the larger cities," Higgins said. "The further you get into suburbs — the Dedhams, the Barnstables, the Plymouths — the perception is that you'll get a more conservative, pro-defendant jury pool than you will in places like Worcester, Springfield or Boston."

'Same wasteland everywhere'

J. Michael Conley, who represented Gilden in his Superior Court case in Dedham, said while the news out of Norfolk County is dismal for plaintiffs' lawyers, it's not a whole lot better in other parts of the state.

"What we're seeing in Norfolk, which is an affluent suburban community, is a subset of what we're seeing statewide," he said. "It's the same wasteland everywhere you go."

Like most of the judges and attorneys interviewed by Lawyers Weekly, Conley struggled to explain the precise reasons for the bleak results. The Braintree lawyer said one factor is the pre-conceived beliefs that members of the venire bring to trial.

"There is a lot of sociology behind it, but one thing that is going on out there is that there is a huge amount of anti-plaintiff sentiment in the populous and therefore in the jury pool," he said. "I don't think you'll find plaintiffs' lawyers in love with jurors anywhere in Massachusetts these days."

Because Massachusetts is one of the few states in the country that does not allow a meaningful voir dire process, lawyers have difficulty weeding out troublesome jurors during empanelment, Conley said, calling it a "good day" if he can get a judge to ask potential jurors whether they believe they would be adversely affected by a plaintiff's verdict.

Judge Brady, who meets with jurors at the conclusion of each of his trials, said juries tend to be hard on personal injury plaintiffs, "figuring that they've got their back problems, too, and that this is another one of those McDonald's suits about hot coffee."

In motor vehicle cases, meanwhile, many jurors mistakenly believe that insurance premiums will be negatively impacted by a plaintiff's verdict, Wilbraham lawyer Francis W. Bloom said. That perception has prompted Bloom to steer clear of soft-tissue cases, which he gladly tried a few years ago.

"You have an uphill battle before you even stand up because there is no way a juror with that kind of bias can possibly sit indifferent on your trial," he said. "There is an attitude among jurors, particularly with the economy being so tough, that if they have to struggle, why should they be generous with the plaintiff?" LWW

Defense verdicts rule the day in med-mal trials

COUNTY	Med-Mal Trials	Plaintiff verdicts
Cape & Islands	4	25%
Essex	14	21%
Plymouth	10	20%
Suffolk	23	17%
Worcester	14	7%
Middlesex	13	0%
Norfolk	12	0%
Berkshire, Franklin and Hampshire	1	0%
Hampden	3	0%
Bristol	1	0%
TOTAL	95	12%

REASONS FOR ORDERING BAIL, CONTINUED DETENTION STATUS OR RELEASE [CPCS v. Chief Justice of the Trial Court]	Trial Court of Massachusetts ☐ District Court Division: _____ ☐ Boston Municipal Court Division: _____ ☐ Superior Court County: _____ ☐ Juvenile Court Division: _____
NAME OF DEFENDANT	DOCKET No(s).

RELEASE REVIEW	BAIL ORDER
☐ Detainee release request denied	Cash $_____ Surety $_____
☐ Detainee ordered released on probation order	
☐ Detainee ordered released on the above docket number(s)	NEXT COURT DATE: _____

The Court relied on the following factors:

1. ☐ The defendant's financial resources.
2. ☐ The nature and circumstances of the offense charged.
3. ☐ The potential penalty the defendant faces.
4. ☐ The defendant's family ties.
5. ☐ The defendant's employment record.
6. ☐ The defendant's history of mental illness
7. ☐ The defendant's reputation and length of residence in the community.
8. ☐ The defendant's record of convictions
9. ☐ The defendant's present drug dependency or his or her record for illegal drug distribution.
10. ☐ The defendant's record of flight to avoid prosecution.
11. ☐ The defendant's fraudulent use of an alias or false identification.
12. ☐ The defendant's failure to appear at a court proceeding to answer to an offense.
13. ☐ The fact that the defendant's alleged acts involve "abuse" as defined by G.L. c. 209A, § 1.
14. ☐ The fact that the defendant's alleged acts constitute a violation of a temporary or permanent protection order.
15. ☐ The defendant's history of orders issued against him or her under the aforementioned sections.
16. ☐ The defendant's status of being on bail pending adjudication of a prior charge.
17. ☐ The defendant's status of being on probation, parole or other release pending completion of sentence for any conviction.
18. ☐ The defendant's status of being on release pending sentence or appeal for any conviction.
19. ☐ Risk of exposure to COVID-19.
20. ☐ The safety risk to the victim, victim's family members, witnesses, the community or defendant if released.
21. ☐ The defendant's particular vulnerability to COVID-19 due to ☐ preexisting medical condition ☐ advanced age.
22. ☐ The defendant's detention for violating a condition of probation or release for ☐ criminal ☐ noncriminal conduct
23. ☐ The defendant's release plan. _____

Further explanation:

☐ Based on the above information, bail has been set at its current amount because the Court finds that the risk that the defendant will flee or otherwise fail to appear before the Court as required is such that it outweighs the potential adverse impact on the person, their immediate family or dependents and that no alternative, less restrictive financial or non-financial conditions will suffice to assure his or her appearance at future court proceedings.

☐ An expedited hearing was granted because the defendant (1) is not held without bail subsequent to a determination of dangerousness under G.L. c. 276, 58A or (2) is not charged with an offense listed in Appendix A of CPCS v. Chief Justice of the Trial Court, SJC 12926 (April 3, 2020).

The Commonwealth ☐ has ☐ has not established, by a preponderance of the evidence, that release would result in an unreasonable danger to the community or that the defendant presents a very high risk of flight.

JUSTICE	Date:

FINDINGS AND ORDER REGARDING BAIL	DOCKET NUMBER	Trial Court of Massachusetts The Superior Court
CASE NAME: Commonwealth v.	COURT NAME AND ADDRESS	

☐ Bail Set at Arraignment ☐ Petition for Review of Bail ☐ Review of Bail Set by Magistrate ☐ Changed Circumstances
☐ Other _____

After hearing, ☐ The defendant is released on personal recognizance.
☐ Bail is set at $ _____ cash, or $ _____ surety ☐ and with the conditions stated.
☐ The petition for review of bail is denied.
☐ This decision is without prejudice to reconsideration on further showing of: _____

Dangerousness

☐ **58A Motion Filed.** The Commonwealth has moved to detain the defendant as dangerous under G. L. c. 276, § 58A, and after a hearing, I find there are conditions of release, including considerations of bail, that will reasonably assure the safety of other individuals and the community and that will reasonably assure the defendant's appearance at future court proceedings.

☐ **No 58A Motion Filed.** Because the Commonwealth has not moved to detain the defendant as dangerous under G. L. c. 276, § 58A, in setting the amount of bail I have not considered whether release of the defendant will endanger the safety of any other person or the community.

Ability to Pay (check all that apply)

☐ The defendant has been found indigent.

☐ The defendant has the ability to post bail of $_____ cash. This finding is based upon:
☐ Probation intake ☐ Representation of: _____ ☐ Other: _____

☐ I have not been presented with sufficient credible information to determine the defendant's ability to post bail.

Reasons for Setting Bail. I find that:

☐ The amount of bail that the defendant is able to post is sufficient reasonably to assure the defendant's appearance at future court proceedings on the conditions stated, if any.

☐ Having considered the following factors, an amount of bail greater than the defendant is able to post is necessary reasonably to assure the defendant's appearance at future court proceedings and no alternative, less restrictive financial or nonfinancial conditions will suffice to assure the defendant's presence at future court proceedings.

- ☐ The charged offense (strength of case/nature and circumstances/potential penalty). Explain: _____
- ☐ The defendant's background (family ties/residence status/employment/history in community/mental illness/substance abuse). Explain: _____
- ☐ The defendant's criminal history (convictions/crimes while on bail or court supervision/probation violations). Explain: _____
- ☐ Restraining orders (alleged conduct is "abuse" or violates a restraining order/history of restraining orders). Explain: _____
- ☐ The defendant's flight risk (use of an alias/false identification/failure to appear at court proceedings/flight to avoid prosecution). Explain: _____
- ☐ Duration of pretrial incarceration to date. Explain: _____

Explain how the bail was calculated after taking the defendant's financial resources into account and why the Commonwealth's interest in this bail outweighs the potential adverse impact from pretrial detention on the defendant and the defendant's family and dependents: _____

Additional Conditions

☐ No additional conditions are required.

☐ The defendant shall abide by the conditions of the Order of Pretrial Conditions of Release, which are necessary and sufficient reasonably to assure the safety of other persons and the community and the defendant's appearance at future court proceedings.

Date: _____

_____
Superior Court Justice

(Form April 2019)

EXHIBIT 22A—Sentencing Guidelines Grid

Level	Illustrative Offense	Sentence Range				
9	Murder	Life	Life	Life	Life	Life
8	Manslaughter (Voluntary) Rape of Child with Force Aggravated Rape Armed Burglary	96–144 Mos.	108–162 Mos.	120–180 Mos.	144–216 Mos.	204–306 Mos.
7	Armed Robbery (Gun) Rape Mayhem	60–90 Mos.	68–102 Mos.	84–126 Mos.	108–162 Mos.	160–240 Mos.
6	Manslaughter (Involuntary) Armed Robbery (No gun) A&B DW (Significant injury)	40–60 Mos.	45–67 Mos.	50–75 Mos.	60–90 Mos.	80–120 Mos.
5	Unarmed Robbery Stalking in Violation of Order Unarmed Burglary Larceny ($50,000 and over)	12–36 Mos. IS-IV IS-III IS-II	24–36 Mos. IS-IV IS-III IS-II	36–54 Mos.	48–72 Mos.	60–90 Mos.
4	Larceny From a Person A&B DW (Moderate injury) B&E (Dwelling) Larceny ($10,000 to $50,000)	0–24 Mos. IS-IV IS-III IS-II	3–30 Mos. IS-IV IS-III IS-II	6–30 Mos. IS-IV IS-III IS-II	20–30 Mos.	24–36 Mos.
3	A&B DW (No or minor injury) B&E (Not dwelling) Larceny ($250 to $10,000)	0–12 Mos. IS-IV IS-III IS-II IS-I	0–15 Mos. IS-IV IS-III IS-II IS-I	0–18 Mos. IS-IV IS-III IS-II IS-I	0–24 Mos. IS-IV IS-III IS-II	6–24 Mos. IS-IV IS-III IS-II
2	Assault Larceny Under $250	IS-III IS-II IS-I	0–6 Mos. IS-III IS-II IS-I	0–6 Mos. IS-III IS-II IS-I	0–9 Mos. IS-IV IS-III IS-II IS-I	0–12 Mos. IS-IV IS-III IS-II IS-I
1	Operating Aft Suspended Lic Disorderly Conduct Vandalism	IS-II IS-I	IS-III IS-I	IS-II IS-I	0–3 Mos. IS-IV IS-III IS-II IS-I	0–6 Mos. IS-IV IS-III IS-II IS-I
	Criminal History Scale	A No/Minor Record	B Moderate Record	C Serious Record	D Violent or Repetitive	E Serious Violent

Sentencing Zones

Incarceration Zone

Discretionary Zone (incarceration/intermediate sanction)

Intermediate Sanction Zone

Intermediate Sanctions Levels

IS-IV	24-Hour Restriction
IS-III	Daily Accountability
IS-II	Standard Supervision
IS-I	Financial Accountability

The numbers in each cell represent the range from which the judge selects the maximum sentence (Not More Than).
The minimum sentence (Not Less Than) is 2/3rds of the maximum sentence and constitutes the initial parole eligibility date.