Essays on Advocacy

Theodore I. Koskoff

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To all of the trial lawyers of the United States
who have left a drop of blood
in one of the courtrooms of this country

Contents

Publisher's Note

The following is based on a series of discussions that were recorded in October 1986. The material has been edited to enhance readability.

This book is intended for practicing attorneys. This book does not offer legal or psychological advice and does not take the place of consultation with an attorney or other professional with appropriate expertise and experience.

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Foreword

Ted Koskoff—Founding Father

My father, the legendary Ted Koskoff, is often viewed as one of the founding fathers of the modern breed of trial lawyer. Along with such mid–twentieth century legends as Moe Levine, Jim Beasley, Bill Colson, Harry Philo, Gerry Spence, and Jack Fuchsberg, Ted forged a role for the lawyer that was nothing short of revolutionary. No longer would plaintiff's lawyers be viewed as ineffective bottom-feeders, groveling for the pennies beneficently dropped by big business to assuage the rage of the faceless victims of the industrial revolution. Now they were reformers, advocates for more than their individual clients, soldiers in a war for a safer, saner, more equal society. The fight was for the rights of the individual client against the insatiable greed of big business, and it was fought in our nation's courtrooms where jurors were urged to serve as the conscience of their communities.

Those who led the battle were brilliant Renaissance men—men who recognized that they fulfilled an important role for a vast unrepresented segment of our society. They knew that to combat the resources of big business and the tall-building law firms that supported them, they needed to be better prepared, stronger communicators, and more adept at trial skills. They had to raise the level of advocacy so they would be able to navigate the minefields of motions designed to prevent them from ever reaching the level playing field of the courtroom. In the end, they needed to be able to achieve jury verdicts that would not only compensate victims but also stimulate change. Through their tutelage, the art of the trial lawyer rose to what it is today.

Where did these men come from? How and why did they develop such profound skills? To answer these questions, one needs to know something about their lives.

Ted Koskoff was born in New Haven, Connecticut, on June 23, 1913. He was the youngest of the seven children of Israel and Hattie Koskoff, who had emigrated from the Ukraine in the late 1880s. Their emigration was, no doubt, occasioned by the fact that their town was repeatedly subject to pogroms. Jews fled to the United States and Ted's family chose New Haven, where they found a receptive community. Ted's father established a wholesale fruit and produce business where Ted worked as a youth loading and unloading trucks.

The Koskoff family was a nurturing environment. Ted and his siblings were all accomplished musicians and led a rich cultural life in a community dominated by Yale. In 1929, when Ted was sixteen, the Depression hit. The political turmoil that surrounded it influenced Ted's entire life. He saw firsthand how banks and big business risked the welfare of the rest of society for naked greed. Ted became a part of left-leaning groups that challenged the status quo.

After graduating from high school, Ted attended Wesleyan, but because money was short, he was only able to go for two years before switching to Boston University Law School. He saw the law as a way to not only make a living but also to help ease the suffering that was all around him. He graduated from law school and set up a practice in the small New England town of Stratford, Connecticut. There he handled any case that came in the door while my mother, Dorothy, commuted to Brooklyn to teach school—two and a half hours each way. When the Second World War began, Ted saw a way to help the war effort by purchasing a small munitions factory in Stratford. He had no money of his own but was able to obtain financing from an African American friend who had a successful refuse business. It was unheard of at the time for a white man and an African American man to become partners in business, but Ted was already forward-looking.

At the conclusion of the war, Ted decided to reenter the practice of law and move his office to Bridgeport, Connecticut's largest city. At thirty-two, he now knew what he wanted to do—he wanted to be a trial lawyer and he wanted to bring the profession to a new level. Having no cases of his own, Ted went to some

of the established personal injury firms in Connecticut with a simple proposition—give me the cases you can't settle; I will try them and win them. He did just that. He took personal injury cases of all kinds—falls in tenement houses, pedestrian injuries, trolley accidents, car crashes.

As he tried these cases, Ted continued to hone his skills, and because of multiple successes, he gained a statewide reputation. He soon learned that in order to improve, he needed to associate with lawyers outside of Connecticut. He became a part of the newly formed National Association of Compensation and Claimants Attorneys (NACCA), the predecessor to the Association of Trial Lawyers of America (ATLA) and the American Association for Justice (AAJ). Ted became a frequent contributor to the NACCA journal. He began to speak nationally on trial technique. Soon his reputation spread as a leading trial lawyer in the Northeast.

Throughout the fifties and into the sixties, when I joined the firm, the practice continued to improve. It was a four-person firm with a burgeoning practice. A corpulent and prosperous-looking man, Ted traveled from courthouse to courthouse, smoking a characteristic cigar, with a pocketful more to give out. Wherever he went, he attracted a gathering of other lawyers, asking questions regarding evidence, trial tactics, and argument themes. Like Socrates with the Athenians, he was consulted for his wise answers. He was as generous with his knowledge as he was with his cigars. Many lawyers came to court to watch him try cases and to learn. Often, when they could not settle, they simply turned their files over to Ted while standing in the courthouse hallway.

As Ted's reputation began to spread, major criminal cases also started to come his way. It was the tumultuous sixties and new Supreme Court cases were coming out daily expanding the rights of the accused. The law seemed to be following a predictable path. As the rights of the accused expanded, so did the rights of consumers. The law of strict tort liability was adopted widely, providing a valuable remedy for victims of defective products. Ted encouraged lawyers to push the law to its limits in personal injury, product liability, medical negligence, and class action cases. The rights explosion—for anyone living through it—seemed to

be occurring all at once in the areas of both civil and criminal law, and Ted was in the center of both.

While personal liberties expanded, big business did not stand still. Armies of lawyers from big firms were hired to defend manufacturers and insurance companies against the assault. The battle extended from the courtrooms to the legislatures as attempts were repeatedly made to curtail the expanding rights movements. Ted and others realized that lawyers needed to be better organized and better trained to combat the assault. ATLA became the organizing force on a national level. It provided both education for lawyers and lobbying support. State trial lawyer groups assisted in the defense. Ted was in the middle of it all. He was on the board of ATLA, founded a trial lawyer association in Connecticut, and lectured throughout the country.

In 1969, Ted took on a case that would change our practice and catapult him into the national limelight. A group of Black Panthers was arrested in New Haven and charged with the torture and murder of one of its own members. Bobby Seale, the Panther leader, was arrested. Organizers of the defense team asked if Ted would become lead counsel and defend one of the alleged perpetrators of the crime—Lonnie McLucas. The defense would take more than a year and the Panthers had no money for fees or costs. Ted agreed to lead the defense. Emotions throughout the country ran so high that the president of Yale University, Kingman Brewster, declared that it was impossible for a black man to receive a fair trial in the United States. Ted publicly disagreed. He told the press that a black man could and would receive a fair trial in Connecticut in the McLucas case.

The McLucas case gained daily news coverage in the national media. In the end, McLucas—who had been charged with murder—was convicted of a lesser offense and ultimately released from prison because of illegal wiretapping. All agreed, though, that the trial had been fair. For Ted, the trial was a vindication of his faith in the jury system.

Now a nationally known trial lawyer, Ted was retained in several more celebrated cases. He was retained by Glenn Turner, a Florida man accused of a Ponzi scheme for a self-help program called Dare

to Be Great. He also was retained by famed criminal defense lawyer F. Lee Bailey for charges brought by the state of Florida.

Even with a busy trial schedule, Ted continued to lecture and maintain active participation in ATLA. He ran for president of ATLA twice, winning the second time in spite of some who were concerned about a taint from his Black Panther representation.

In traveling the country for ATLA, he realized that the new breed of lawyer had emerged, a breed that was expert in handling cases for the seriously injured and competent to take on businesses of any size in cases of infinite complexity. Large verdicts were recovered against the auto industry, the drug industry, and securities dealers. The time had come, he felt, for specialization. Just as the medical profession had developed specialties, Ted believed that trial law was a specialty within the legal profession and needed to be recognized. He founded the National Board of Trial Advocates (NBTA), the first and only true accrediting organization for trial lawyers. Through his heroic efforts, the board became recognized in states throughout the country. Ted also realized that scholarship was needed to support the efforts of trial lawyers, and he was instrumental in forming the Roscoe Pound Foundation affiliated with ATLA. The foundation sponsored academic inquiry and support for the day-to-day work of trial lawyers.

One after another, Ted took on the issues that confronted trial lawyers nationally. He fought to preserve the attorney–client privilege when it was attacked by overzealous prosecutors often taking on the American Bar Association (ABA). He also fought to support respectable lawyer advertising as a way to help the public become aware of their rights and the availability of legal services.

On a legislative level, Ted never stopped fighting attempts to abridge the rights of the injured through no-fault insurance, caps on damages, and restrictions on legal fees.

Although all of the above highlights of Ted's legal career will be remembered, the thing that will be most remembered by those lawyers who knew him was the warmth of his persona, the charisma of his speech, and the gems of wisdom that came from his lips even in casual conversation. In the end, he was a teacher. He

had analyzed the anatomy of the jury trial from voir dire to summation, and he had studied the psychology of persuasion and the importance of the creative use of language. He spoke of the value of creative thought and cerebration. He discussed how to deal with crises in the courtroom. He talked of the need for maintaining respect for other counsel and the court, but reminded lawyers of the need for zealous advocacy, stating, "You can't try a case on your knees."

This slender volume, *Essays on Advocacy,* contains essays that are less like academic papers and more like conversations with Ted. Imagine sitting in a room, cigar smoke curling into the air, and listening to one of the great trial lawyers of our time talk about the secrets of success and what it really means to be a trial lawyer: "leaving a drop of blood in every courtroom," and fighting for the underprivileged and the disabled in the eternal battle for justice.

—Michael Koskoff

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—Theodore I. Koskoff

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Cerebration

Although it may seem axiomatic that you think about a case before you do anything, it has always been my view that too many lawyers act without giving their cases sufficient thought. Nowhere does Murphy's Law apply more than in the courtroom. If something can go wrong, it will. The way to prevent this is to anticipate it, and the way to anticipate it is to "cerebrate" about it. "Cerebrate" is only, of course, a fancy word for thinking. It's how you think about a case that ultimately determines its outcome.

Oliver Wendell Holmes said that "a word is not a crystal, transparent and unchanged, it is the skin of a living thought."[1] It needs the light, dimension, texture, and color of the words around it, as well as the conditioning of the listener, to give it real meaning. What Holmes said is entirely applicable to preparing a lawsuit for trial.

Let's talk about the words you have to use in describing and amplifying that living thought that Holmes talked about. If I asked you to describe the year 1776, how would you do it? Would you describe it as the year that James Watt's steam engine was first used? Would you say it was the year that Adam Smith's *Wealth of Nations* was published? Or the year that the first volume of

1. Holmes, *Towne v. Eisner.*

Edward Gibbon's *The Decline and Fall of the Roman Empire* was published? Or would you describe the big year, 1776, in some other fashion? Wouldn't you say it was the year of Paul Revere's midnight ride through the Massachusetts countryside? Wouldn't you say it was the year of the Declaration of Independence?

One way of describing 1776 has punch and grabs the attention right away. The other is ho-hum.

But before you begin describing, you need the living thought. Let's begin by thinking about the nature of persuasion and how you think of it in preparing your case. Thinking about case preparation is not a simple matter. But there are things you can do to make a sound start.

You've probably heard from other lawyers about the ubiquitous black notebook. It is the first thing you prepare. Then, when your client is in your office, you'll know what to think about while he's there. Organize a loose-leaf notebook by section, and label the first tab "Things to Do." This is where you write down everything you're going to have to do to handle the case.

In the second section, list the prospective witnesses and the order of their testimony. Include a synopsis of what their testimony will be. This material is the source of your third section, on direct examination. After you get to know the case, prepare section four, on cross-examination. This should be followed by section five, on summation. During the trial, take notes in this section to use in your summation. Since you will need to instruct the jury as to what the law is, include your requests to charge the jury, what the judge's instructions should be, and any other things you consider important in the case.

That's where case preparation begins. Now, before I talk about other things that you think about, let me make a few preliminary observations.

First, we will learn about eyewitness testimony in these essays. A person in any lawsuit will say, "I saw that happen." You have to understand that seeing is not perceiving.

Seeing is not perceiving. If you look at a series of photographs in your own office, you may not see the forest for the trees. You may also not see the trees for the forest, because instead of looking

at individual items in a picture, you look at the total photograph. The results of not focusing on a specific item can be devastating. Let me give you an example.

On a quiet Sunday afternoon, Margo Farnham, a suburban housewife and part-time real estate construction broker, was found brutally murdered near a wooded building site on the outskirts of a Connecticut city. When the police found her, her face and head had been smashed with boulders, one of which weighed about forty pounds. Other boulders had blood on them. The police theorized that she was murdered on the construction site with the boulders; the state pathologist and state's attorney's office agreed.

If you were handling the case, you'd want to look at photographs of the woman lying on the boulders at the site. You might see a number of things in a photograph. You'd see the boulders, the blood, and the general construction area, and then you'd ask yourself, is anything wrong with this photograph? You have to analyze a photograph based on what is there. But you also have to think of what isn't there that should be, if the theory of the police is accurate.

Begin by writing down everything that you see in the photograph. When you get to the boulders and the blood on the boulders, you notice that nowhere in that photograph do you see any large amount of blood on the ground. That tells you something. If you think of the dynamics involved in smashing a person's face with a rock, there should be blood all over the place. There should be pools of blood, because while someone was banging the woman's face, blood would have been spurting out. If there is no blood or no considerable amount of blood visible, you must ask yourself why.

The reason that there isn't much blood there could be that the woman was bashed with the boulders after she died. But what would be the purpose of bashing somebody's face in with rocks after she's dead? This sets up a whole new train of thought for you. If she was killed somewhere else, there's a good possibility that she was not killed the way the state pathologist and the state's attorney's office said she was killed, by being beaten about the face with the boulders.

Next, you ask a forensic pathologist to examine slides taken of the person's tissues. The slides reveal hemorrhages in the heart and stomach lining. These hemorrhages, which were not noticed by the state pathologist, suggest that the victim was killed by asphyxiation. This hemorrhaging also could suggest that she died of drowning. There was no water in the victim's lungs, however, so she clearly did not drown. Her life was snuffed out by either strangulation or suffocation. That's what caused the hemorrhages.

This analysis provides you with a new timetable. It gives you a new set of reasons. It gives you a whole new scenario with which to discredit the state's case.

So it's important to use your reasoning ability. Here the ability to reason leads you to the idea of using forensic pathology in a murder case.

Some of the problems we have when we think about our cases come from the way we are trained to think. We are trained to think linearly, in channels of thought. Our educational process is not interdisciplinary. When you go to law school, you take a course in landlord and tenant law, you take a course in agency, and you take a course in constitutional law. To apply the various courses to any given set of facts can require considerable cerebration. Let me give you a fact pattern that illustrates this point.

A woman rents a furnished one-room apartment. In that apartment is a hot plate. Since she doesn't have a stove, she will use the hot plate to boil water and make her morning coffee. The morning after she moves in, she gets up and begins to make her coffee. She plugs the hot plate into the wall socket without noticing that the cord is frayed. She receives a shock and a resulting severe nerve injury. She comes to your office and asks you to bring a case against her landlord. What kind of case do you have?

The first thing you think of is landlord and tenant law. What is the duty that a landlord owes to a tenant? Well, most jurisdictions will hold that in this situation, the tenant is like a trespasser. The landlord only has a duty to warn the tenant about known defects that are not immediately discernible to the tenant. You have a very poor case, don't you? Until you stop to think about it.

The duty I've just described is the duty as far as the real estate is concerned. But a totally different duty attaches to personal property that is leased. This duty is that of a bailee. In most jurisdictions, the duty a landlord has to a tenant for personal property that goes along with the tenancy is to use reasonable care to see that the bailed property is reasonably safe for the purpose for which it is used. In some jurisdictions, such as Massachusetts, for example, this set of facts would invoke a warranty, where a landlord warrants a thing to be reasonably safe.

You've come a long way from the duty of the landlord to the tenant. And you have a good case, because you've thought about it.

So, while your client is in your office, begin to think about the case in different ways. First, size up your client. How will this client do as a witness? You may even want to cross-examine her. In a civil case, you want to know everything; however, you may not want to know certain things in a criminal case.

Second, think of the investigation. In your investigation of the case, use all of your discovery tools. You may want to use experts in your investigation; in most substantial cases, experts are necessary. Think about the strengths and weaknesses of the opposing side, as well as the strengths and weaknesses of your case. Think of theories of liability in a civil case and defenses in a criminal case. Think of using trial experts. Think of using visual aids as demonstrative evidence. Think of the kind of jury you want. Think of where the direct examination should go, and how you think the cross-examination should go. Then, think of your summation.

In other words, think, think, think.

Don't be afraid to stick your neck out, to do something imaginative and different. Consider the turtle. He only makes progress when he sticks his neck out. Don't be afraid to try the novel, the different, the creative. The courtroom is not the place for boredom. Nor is it the place for the Marquis of Queensberry's rules.

Most of all, as you indulge in the art of cerebration, remember that you have to stand up for the rights of your client. You can't try a case on your knees. Before you can become a genius in the courtroom, you have to be a drudge in the office. The process

of learning is not the importation of information, but its ignition. What's important is how fired up you are about a case.

Some of the process of learning is the process of plagiarism. Consider the famous story about Sir Isaac Newton. A woman walked up to Newton and said, "Dr. Newton, how is it that you see things so clearly?" He said, "I stand on the shoulders of men like Galileo." We all see things that way. We all benefit from information that comes to us from many sources.

Suppose you have a client who walked into a hospital in relatively good shape, but came out a paraplegic. In the opening statement, would you say something like, the evidence will show this, that, and the other? Would you say, starting from the beginning, on such and such a date? No, you wouldn't. You might say:

> Lying on his back in a bed at Saint Clare's Hospital is John Jones, who walked into the hospital emergency room three months ago with pain in his neck and shoulder. Today, he can't move his legs or his arms, he has no voluntary control over his bowels, he will never experience the joy of fathering a child, and he will never have any of the ordinary pleasures that people have.
>
> Every day at 11 a.m., a woman comes to visit him. That's Mrs. Jones. Every day, she walks into the hospital, goes up to the floor he's on, looks at him before she walks into the room, pulls up a chair beside his bed, and reads to him for an hour; but he really doesn't understand what she's saying. She pats his arm, but he can't feel her touch. She smiles at him, but she sees no visible response. She smooths the bedclothes out, but he doesn't seem to care. She reads to him, she kisses him good-bye, and at 12 noon, she stands up and leaves.
>
> How did he get that way? How could it have been prevented?

That's part of the kind of opening statement that would set the theme of the case in a way that would shift the burden of

proof. It's the kind of opening that would put the defense in the position of defending by explaining why John Jones is that way.

Think about the power of language. Think about describing the case to the jury in simple terms, repeating phrases, using impact phrases, and using other public speaking techniques. It is important to say what you mean. Let me give you a few examples. When you walk into a courtroom, you may hear a witness say, "Well, he collided with a stationary truck coming the other way." Now, obviously, if the truck was stationary, it was not moving and it could not have been coming the other way.

Or, "I had been shopping for plants all day and was on my way home. As I reached an intersection, a head sprang up, obscuring my vision, and I did not see the other car." Now, that isn't what the witness meant to say. "I had been driving for forty years when I fell asleep at the wheel and had an accident." "As I approached the intersection, a sign suddenly appeared in a place where no stop sign had ever appeared before." "The indirect cause of the accident was a little guy in a small car with a big mouth."

These things are funny, but they don't say what the witness actually meant. You don't want to make this mistake. Learn how to use language. Think about the language you're going to use. Use strong language. Don't say "I suggest," "I think," "I claim," "I submit." Use positive language. Strong words. You're positive about what you're saying. You don't "think." You know. You have to speak in language that creates images. Consider the power of language applied to a specific case.

> When you make a free, healthy young man into a sick man-child who will have to be institutionalized, you must be held accountable. When you start with a normal man with a normal relationship with his wife and you take away his manhood, you must be held accountable. When you take a father with a wonderful relationship with his children, destroy part of his brain, and make a mental cripple out of him, you must be held accountable.

> Most important of all, when you take a man and destroy his dreams forever, his dreams of his job, of a career, of life with his wife and children, you must be held accountable.

You'll notice that the phrases are repetitious. They have a common denominator: "You must be held accountable." They are the kind of phrases that capture the sense of the case immediately.

You have to think. These phrases don't come to mind immediately. I say to myself, if I were Charles Dickens and I were going to expand the first paragraph of *A Tale of Two Cities*—where he says, "It was the best of times, it was the worst of times"—if I were to amplify that phrase or go on, I would say: "A thin man sat on the throne of England, and a fat man sat on the throne of France; the high skies of peace were above the British countryside, and the angry black clouds of revolution gathered over the streets of Paris."

Doing things like that can help you flesh out your ideas.

Think in terms of contrapuntal phrases—imagery, contrast, rhythm, cadence, and short, definitive sentences that are not convoluted. Strive for clarity. William Safire said that "[t]he most saluted man in America is Richard Stans. Legions of schoolchildren place their hands over their hearts to pledge allegiance to the flag, 'and to the republic for Richard Stans.'"[2] That's how it sounds to people, and that's because it's not said clearly.

Ask yourself, when you are thinking about a case where your client is paraplegic, do I keep him in the courtroom all the time so the jury can get a look at him, or do I have him come in just to testify? You might actually want to think in classical terms. In "An Essay on Man," Alexander Pope wrote,

> Vice is a monster of so frightful mien,
> As, to be hated, needs but to be seen;
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace.[3]

2. Safire, *On Language*, 106.
3. Pope, "An Essay on Man," *Poetry and Prose of Alexander Pope,* ep. ii, 1.217.

Oliver Wendell Holmes put it another way: "Beware of the fascination of the horrible."

Should you keep the client in the courtroom? The obvious answer is no, because the jury gets desensitized. Jurors don't look at the things he can't do; they look at the things he can do. During that process of juror desensitization, you lose a lot of ground.

What Benjamin Nathan Cardozo said was true. He said of advocacy, "This is no life of cloistered ease to which you dedicate your powers. This is a life that touches your fellow men at every angle of their being, a life that you must live in the crowd and yet apart from it, a man of the world and a philosopher by turn."

You have to jive in order to be a persuasive lawyer. You have to be creative, imaginative, and have an electric spark. You have to think of the fact that each witness has the capacity to do harm as well as good. If the witness can both help and hurt your case, evaluate the testimony before you decide to use the witness. I don't think you ever want to use a witness who can both help and hurt you, except where you need the testimony for a very specific purpose. I would resist the temptation to use that witness at all.

Persuasion is inherent in advocacy. You must constantly think of the psychological techniques of persuasion, of the doctrines of primacy and recency, of the order of words, the order of ideas, and the order of witnesses. People remember the first thing that they hear as important (primacy) and the last thing that they hear as important (recency). You can structure your whole case with that in mind, especially if the trial will be long. If you take a good shot at the beginning and a good shot at the end, the jury will remember what you want them to remember.

We have to be the instrument of change in the law, while giving assurances of the law's stability. It is said that *stare decisis* is not the sanctification of ancient fallacy. The whole products liability explosion would not have happened if people had been satisfied with the doctrine of *stare decisis*. Roscoe Pound said it best. He said that lawyers should think of "legal principles as instruments rather than as eternal pigeonholes into which all human relations

must be made to fit."[4] What that teaches us is that we cannot be slaves of custom, who hug our own chains.

Holmes put it another way. He said, "It is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[5]

If a particular law no longer serves the needs of society, your job, as a lawyer who thinks, is to try to change it.

In 1491, the world was flat. Columbus dissented. Of course, the art of legal advocacy will never die, for its preservation is vital to individual freedom. Those privileged to be advocates have a professional obligation to seek constantly to increase their powers. Our professional skill is more than the livelihood, status, or personal fulfillment that it may assure. It is a tool with which we can make a significant contribution to the attainment of that ideal of justice that must be a primary goal of a free society.

The external and immediate result of a lawyer's work is to win or lose a case. What the lawyer does that is more important is to establish, develop, or illuminate rules to govern the conduct of people for centuries, to set in motion principles and influences that shape the thoughts and actions of generations that know not by which command they move.

Lawyers must preserve the system, but let a little light and air into it. They must preserve the system, but constantly try to improve it. Lawyers must preserve the system, but not enshrine it. They must preserve the system, but not in cement.

Legal monks, said Pound, who pass their lives in an atmosphere of pure law from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood.

So lawyers have to feel as well as think.

Trial lawyers must be complete people. They must experience, read, listen, learn, teach. They must use the full range, all of

4. Pound, "The Law and the People," *The University of Chicago Magazine*, 16.
5. Holmes, "The Path of the Law," *Collected Legal Papers*, 187.

the variety of their experience. They must be able to handle any kind of case.

What part does the lawyer play in the judicial system?

The independence of the lawyer and the independence of the bench are probably the two most important elements of our judicial system. In thinking about judicial decisions that apply to our cases, we must feel free—consistently and courageously—to be critical. We have to fight restrictions on all proper activities in the court, particularly in the defense of unpopular clients and causes. Sad as it is to mention, we must fight judicial tyranny when and where we meet it. We must do this with the honor and dignity that our profession demands, but, as I said, we cannot try cases on our knees. If all that courts and criminal cases are for is putting people in the tombs, why give up the thumbscrew and the rack?

As Louis Brandeis said in his famous Olmstead dissent, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[6]

In thinking about our cases, we must remember not to lose faith in ourselves and in our profession. We have to provide the imagination and do the work to constantly improve our skills and our performance for our clients. This can only be accomplished by constant hard work and constant cerebration.

Or, as Professor Tom Lambert has said, the trial lawyer, "like the common law itself, is always in the process of becoming, like a stream, and not a stagnant pond."[7]

A trial lawyer is always in the process of becoming. Doesn't that make you think of Robert Frost's poem?

> The woods are lovely, dark and deep.
> But I have promises to keep,
> And miles to go before I sleep,
> And miles to go before I sleep.[8]

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6. Brandeis, dissenting, *Olmstead v. United States*.
7. Lambert, telephone conversation, March 14, 1988.
8. Frost, "Stopping by Woods on a Snowy Evening," *Collected Poems of Robert Frost*.