

Inside:
**'On Being a
Trial Lawyer'**

The Champion

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS MARCH 2000

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Preface to best-selling
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INFORMAL OPINION

By Jack B. Swerling

On Being a Trial Lawyer

Invite a group of criminal trial lawyers to a meeting in a beautiful city. Put them up at a first-class hotel. Offer good food and libations, and I guarantee a great time. Criminal trial lawyers are some of the most charismatic, engaging, outgoing and entertaining people to be around – especially for other criminal trial lawyers. These folks are warm and friendly, a hug here and a kiss there for old friends, and firm handshake and warm smile for new friends to be made. Stories, oh what wonderful stories! We've heard them a hundred times, but they get better and better. Everyone's got a bag full of anecdotes, and one is better and bigger than the next. There is no shortage of confidence in this group, no shrinking violets. Retiring folks need not apply!

One looking from afar would have to wonder whether these folks are ever down; do they ever suffer the normal emotions of other people? Even as a fellow trial lawyer, I have often wondered the same thing – are these lawyers always so sturdy and so full of self-confidence? Are they always up? Am I the only insecure criminal trial lawyer in America? Am I the only criminal trial lawyer who has self-doubts?

Last year, my wife and I attended a meeting of the American Board of Criminal Lawyers in Philadelphia. On Saturday morning, we attended a "group therapy" session along with a nationally-acclaimed psychologist. Many well-known lawyers were in attendance, some of the stalwarts of the trial bar. Then there was me. There was a candid and open dialogue about many of the sensitive issues that personally and professionally confront not only trial lawyers, but their spouses and children as well. The gloves were off and the masks stripped away. Everyone who participated allowed themselves to be briefly exposed as mere mortals.

One of the highlights of the session was an open discussion about how trial lawyers really look at themselves; what were their innermost feelings, and what they and their spouses thought were the strengths and weaknesses in their personalities. We also examined both the positive and negative aspects in our daily lives, both in our law practice and in our homes.

It was interesting to discover that there are a number of personality characteristics that many of us at the trial bar share. I also discovered that many of us are driven by the same factors to do what it is we do.

I learned that even the most successful, confident, talented, and poised among the trial bar have some wide swings of emotions and experience steep highs, deep lows, and a lot of mileage in between. We take a case and become focused on the issues. We build confidence in our ability to prepare and then deliver a persuasive case. We push ourselves and the people around us to set the case in its best posture, making sure that every issue has been covered, every possibility considered, and every contingency accounted for before trial. On the other hand, no matter how much we have done, there is always more to do. Did we consider this? Did we account for that? Have I done this and have I done that? Can I do this or that

better? We stay on an emotional roller coaster from confidence to doubt and from the beginning to the end of the case. We drive ourselves to prepare so that we can always represent our client effectively. We take pride in our effort. Our personality dictates that we face tomorrow knowing we always did the best we could yesterday and today. We are also driven to perform at a level the people around us come to expect. Once we reach a certain level of accomplishment, we do not rest. We continuously wonder whether we are living up to the expectations that everyone has in everything we do – we can never be "off." Our drive does not allow it any other way.

We are performers by nature; our stage the courtroom. In order to be effective, we prepare ourselves mentally. We learn to conceal our self-doubts, emotions and fears because we must exude confidence, not doubt. Rarely do we have anyone that we would dare share these emotions with. That might be construed as some weakness. Perhaps we try to confide in a spouse or friend, but they have a hard time understanding these unique emotions and feelings, even though they try. Only another criminal trial lawyer can really understand, but we often do not share these thoughts with them and choose to go it alone.

A trial wreaks havoc on the mind, body and spirit. During a trial we run on emotions. They exhilarate us. There is no time to rest. During the trial we stay keyed up, alert and running at full speed during the day. Each night we deal with a sudden reduction of adrenalin and emotional factors that drove us through the day, but we need to maintain enough discipline and strength to prepare for tomorrow. Every day we reinvent, rejuvenate, and regenerate to stimulate the passion that drives us to be effective criminal trial advocates.

The verdict – the end result! Once the argument is done and the judge delivers the charge, we wrestle with a new set of



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feelings. Did I do everything I could have done? Was there anything I could have done differently? Or better? In my closing did I say what I should have said, and did I cover that important issue? Waiting for a verdict strains the mind with anticipation. Some wait with their clients; some cannot. One lawyer I know sends an associate. We all handle it differently; we all have similar thoughts. The announcement of a verdict stimulates a new surge of feelings. From that moment until the verdict is announced, we seem to be in suspended animation. Look at the faces of the jury as they file in. Do you see any signs? What about the clerk who sees the verdict? What do her eyes tell you? Does the judge's expression reveal anything about the result? The publishing of the verdict takes forever, and we hang onto every word. When the verdict is announced, each of us has experienced exhilaration or despair. Depending on the outcome, you find yourself congratulating or consoling the client and his family. Winning is far more rewarding and easier to deal with than defeat. Losing requires searching for words designed not only to make the client feel better, but you also. No time for yourself right now – focus on them. Everyone assumes we handle it without emotion. We know better. This is just another day in the life of a criminal trial lawyer.

I also discovered that as emotions subside, many lawyers become melancholy. There is a substantial let down. All of our time, effort, energy, and passion have been dedicated to one cause that is suddenly ended. The victors experience fleeting exhilaration, and the defeated search for renewal. Is it really over? What do I do now? What is next? For some there is no time to reflect or to rest – another case calls and the process starts all over again. For others, we think, when if ever will the next client walk through the door? In the midst of all this turmoil, we dare not forget our family that is along on this ride. Our actions, emotions, and feelings affect them. We try to seek out an appropriate balance between being an integral part of the family and being an effective advocate. We criminal trial lawyers work with passion, play with passion, and love with passion.

From this meeting I now understand that most criminal trial lawyers go down these same roads, and that I am not alone. There are high and low emotions. There is confidence and self-doubt. We experience victory and defeat. We see elated clients,

and families that are destroyed. We are affected by it all and it takes a toll.

I am sure that we could find easier ways to make a living. I know that there are many careers that we could pursue that would not demand the time, effort, dedication and sacrifice that is required for one to be a successful criminal trial lawyer. We could all pursue positions that demand less of us; but I have also learned that just as we share many of these same emotions and experiences, we also choose to be criminal trial lawyers for many of the same similar feelings.

Many of our colleagues enjoy a degree of financial success. Some savor the sense of theater or the challenge of advocating a cause. Others relish the courtroom battle, matching knowledge, skill and wits with a good adversary or judge. Many of us actually thrive on the emotions – the ups as well as the downs – because we need them. The characteristics that seem to be common denominators to criminal lawyers are our original and continuing desire and need to work for people, to advocate for the accused. In law school we all had dreams that we could change things, right the wrongs, and make the world a better place. Many still feel that way. We embrace the underdog and we love a good fight. Clarence Darrow, known as the “attorney for the damned” once said:

I have lived my life, and I have fought my battles, not against the weak and the poor – anyone can do that – but against power, against injustice, against oppression, and I have asked no odds from them and I never shall.

As criminal trial lawyers, we represent people. They bleed, feel and cry. They are who we are about. To that person we owe and give our undivided attention and loyalty, our greatest effort and dedication. To that person we owe and give our undivided attention and loyalty, our greatest effort and dedication. To that person their legal problem may be the most important issue in the world – a question of freedom, financial disaster, or even life and death. In the criminal trial lawyer, the client places his trust and faith that you will perform for him and him alone against the whole damn world if necessary. This is a sacred trust. You are his lawyer – his champion. You may be the most important person in his life.

Who of us at the trial bar has not felt the pain and anguish of our clients or

their families? In the criminal practice we know that not all defendants are as the public perceives them, although some surely are. We are often called upon to represent people just like us and the people we love and care about. We are called upon to represent people who are scared to death of losing their freedom or even their life. We deal with parents, children and spouses who in one shattering moment see all of their hopes, dreams, and aspirations destroyed. More often than not we are disheartened by the fact that we have no adequate words or means to comfort them in their pain, fear, or anguish. Who of us has not stood and heard a verdict and sentence and felt the bodies of our clients jolt? Who of us has not stood in a courtroom, heard a verdict and sentence, and had our own bodies tremble, quiver and shake? Who of us at one time or another has not shed a tear for a client, a spouse, a mother, a father, or a child? That compassion is what makes us effective and represents who we are.

Over the years I have stood in the courtroom with some great people, but also with some really evil people. At the moment of truth, lawyers have the ability to see even the worst of mankind as human beings with common fears, vulnerabilities, frailties and imperfections. We can always find a good word. As lawyers, we also realize that the worst or most evil of people are true symbols of a first line of defense against a potentially intrusive and overbearing government; for if those people are afforded their rights, those rights, when needed, will be there for everyone – especially the innocent. We lawyers know it is only when you start making exceptions to the rule of law does the line weaken. H. L. Menken once wrote about lawyers:

The trouble about fighting for human freedom is that you have to spend much of your life defending sons of bitches, for oppressive laws are always aimed at them originally, and oppression must be stopped in the beginning if it is to be stopped at all.

That is our role and responsibility, and we have always embraced them. As lawyers, we take an oath to defend with honor and vigor even the most damned and unpopular in society because therein lies the foundation of the freedom we all enjoy. No person, regardless of the enormity of the crime, should stand alone

without his advocate. The great Lord Erskine was ridiculed and ostracized for defending Tom Paine, and in an eloquent statement responded:

From the moment that any advocate can be permitted to say he will or will not stand between the crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end.

The pursuit of the client's interests and the pursuit of justice are not easy tasks. Despite our best efforts we have sometimes seen an injustice prevail. We have all dealt with some law enforcement officers willing to compromise proper procedure and truth. Who upholds the law if those that enforce it are lawless? We see some lawyers stretch or violate the rules that we must adhere to. They cause a blight on us all. To some, winning is everything. To do what we do and to do it effectively, we must maintain civility to each other, give obedience to the rule of law, and proceed in our quest honorably. Remember that no one can create your honor and integrity except you, and no one can destroy it but you. Once lost, it can never be completely regained.

Criminal trial lawyers are often criticized, sometimes from within our own profession and sometimes from without. There are some within our profession who do not agree with what we do or the positions we take. There are some who have forgotten the ideals and principles that our profession stands for and has always stood for. Then there are those that just like to be critics. Critics are like eunuchs – they tell you what you did wrong and how you could have done it better. They just cannot do it themselves.

The loudest outcry comes from the public. Our discipline and our commitment to the law serve the needs of the public to whom and for whom we are responsible. Unfortunately many in the public do not appreciate this until we are needed. As lawyers, we are always there. That is our greatest power; it is also our greatest responsibility – to protect them. In the end the irony is that the people must come to us for justice. Lawyers have been at the forefront and advocates for almost every great social and political change in history, providing the vehicle for orderly change – the law and courts.

As criminal lawyers, we have an ethical and moral obligation to keep govern-

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ment in check. Every one of us has the responsibility to act when we see an injustice, for it is in the hands of the criminal lawyer to ensure the continuance of a free and democratic society. It has been that way throughout history. Criminal lawyers are the guardians of democracy and freedom. We have all heard the oft quoted remark from Shakespeare – “the first thing we do is kill the lawyers.” The part we never hear is that this drastic proposal was the first step for the successful overthrow of a democratic and constitutional government by anarchists. No lawyers — no obstacle.

How do we prepare ourselves mentally? Every criminal lawyer has developed a method of rising up to the daily struggles to which we are subjected. Often there are long intervals between rewards, and our days are often filled with setbacks and defeats. Many years ago I found a quote from Teddy Roosevelt that I often refer to when the critics are vocal, the days look overwhelming, the cause looks hopeless, or I question my resolve:

It is not the critic who counts, nor the man who points out how the

strong man stumbled or where the doer of deeds could have done better. The credits belong to the man who is actually in the arena whose face is marred by dust and sweat and blood; who strives valiantly, who errs and comes short again and again. Who knows the great enthusiasms, the great devotions and spends himself in a worthy cause; who, at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who know neither victory nor defeat.

Each of us has known victory and defeat. We have been in the “pit;” we have been bloodied time and time again, but we have also found the great rewards and that is why we continue to do it. While the life of the criminal trial lawyer is full of trials and tribulations, it is also exciting and exhilarating. It is filled with a wondrous satisfaction. Former South Carolina Chief Justice A. Lee Chandler describes the life of the trial lawyer as “the great adventure.” What other profession allows you to touch the lives or cross

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the paths of so many people? We represent the rich and powerful, the poor and downtrodden. We represent widows and orphans, the injured and oppressed, the businessman, the professional, the laborer and the unemployed. We represent both sexes, all religions and people of every race. We represent these people in every possible legal conflict known to mankind and those that are to be discovered.

No other profession becomes so skilled in so many disciplines in the pursuit of justice for our clients. Not only must we be lawyers and versed in the law, but we acquire enough knowledge to examine the doctor, the chemist, the ballistics expert, the engineer, the surgeon, the pathologist, the psychiatrist, the economist, the crime scene investigator, or accident reconstructionist and a thousand other disciplines. Most of all we need to be skilled in the art of communication, for without communicative skills we cannot deliver what we have learned to the people who judge our client's cause – the judge or jury.

We do what we do because of the rush we get in standing up and claiming victory in a just and worthy cause. Winning and losing are not necessarily the only issues that drive us, although they are important. Darrow once said that no one really remembers how many cases you may have won or lost – what they remember is how you fought the great causes. As lawyers, we learn that satisfaction can come in how we play the game – hard nosed, but civilly, ethically and honorably. We know satisfaction is had in a well argued legal point, a good direct examination, a skilled cross-examination, a great jury argument, a scholarly brief or an effective appellate argument. We know satisfaction where our preparation, intellect, skill and passion seize the moment.

We love this profession because the way we pursue justice for our clients creates a unique relationship between the law and lawyers and among lawyers. We are often told in law school that the law is a jealous mistress, and those of us who devote ourselves to the law understand the significance of that statement. It takes hard work, great sacrifice and focused dedication, but as lawyers we really do have a unique opportunity to cause change, to make a difference, and to make the world a better place.

I love the law and criminal trial lawyers. I love being with criminal trial

lawyers. We are a unique group of people with a common bond and with similar hopes, fears, and aspirations. We have experienced things and feelings that only other criminal trial lawyers understand. We are motivated by a fire within us to seek justice and to be willing to stand up, speak up, and fight for that principle no matter what the odds. Harrison Tweed, a trial lawyer, once said:

I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with or play with or fight with or drink with than most other varieties of mankind.

I also love this adversarial system in which we practice and while it is not perfect, in its best form it is a search for justice. I love being a criminal trial lawyer. With all we have to deal with and subject ourselves to, I cannot think of a day in twenty-five years that I did not look forward to the practice of law. How many of our friends in other professions can make that claim?

What lies ahead for us toward the end of our journey as criminal trial lawyers? What do we want to feel as we look back? I recently attended the funeral of an uncle who was most proud of his participation in the D-Day invasion and his march across Europe and into Germany. Besides his family that is what he most wanted to be remembered for. We will also look back and reflect. We will wonder what is our legacy, what are we most proud of and what do we want to be remembered for as lawyers? Some of our fellow criminal trial lawyers will want a statue erected in their honor in the town square. Some deserve them; some do not. Always maintain some humility. Remember that a statue also serves to be a depository for pigeon crap for all eternity!

Those of the more humble among us I hope will find the answer in the words of James Hay written over a century ago and brought to my attention by an outstanding trial lawyer and judge – Alex Sanders:

If you live a long, long time, and, if you keep the faith in all you do, day by day and hour by hour, then, remembering the colonnade of the courthouse, the purple shadows of the courtroom, and the dreams of

your youth, you can look upon this magnificent temple of justice we call the law, and say, with pleasure and with pride: "the work of my hand is there."

If at any time in your life you start wondering if what you put yourself through, what you do, or what you stand for makes a difference, I would like you to remember one of my own life experiences. A few years ago, my son Bryan and I ventured off to Europe for a father-son trip, a bonding experience, and bond we did in an unexpected way. In one of the places we visited, we saw the following proclamation on a wall in a building:

Legal Bulletin:

Articles 114, 115, 117, 118, 123, 124 and 153 of the Constitution are invalid until further notice. Restrictions on the freedom of the individual, the right to free speech, including freedom of the press and the right of assembly and to form groups, infringements on the secrecy of mail, telegraph and telephone communications, house searches, confiscation and limitation in property ownership are now permissible.

This decree takes effect from the date of its proclamation.

Do those principles sound familiar? Does the abolition of those rights chill and frighten you? Well it should! That proclamation was on the wall of the reception center at the Dachau Concentration Camp on the outskirts of Munich, Germany. The proclamation was signed in Berlin by President Von Hindenburg and Chancellor Adolf Hitler on February 28, 1933.

As we walked the grounds of the concentration camp our legs got heavy; we heard no music; no birds singing; only silence conjoined with the cries of millions of people who were murdered by the Nazis. One cannot help but cry from the savagery of mankind when man is left unchecked or unchallenged. The experience changed me forever, not only because I am Jewish, but for the first time in my career as a lawyer, I truly realized what we as criminal trial lawyers preserve if we are vigilant and what can happen if we are not. One of Hitler's first official acts as Chancellor of Germany, within 30

days of his election, was to suspend the German Bill of Rights and with them the vehicle to enforce those rights – a court system with an independent judiciary and a strong criminal trial bar. Once Hitler controlled the legal system, nothing and no one could stop him. It took 13 years, a world war, and millions of lives to extinguish this fire that ravaged the world.

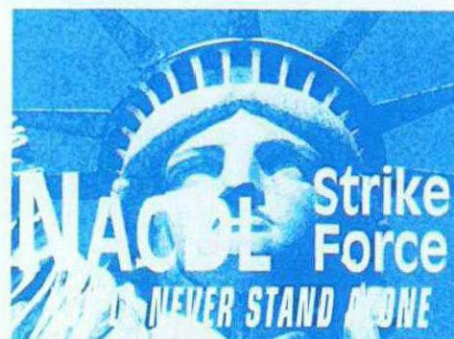
Make no mistake about it. It is our Bill of Rights, our court system, criminal trial lawyers and an independent judiciary that prevents that from happening here. The world has gone a little mad. Crime has reached nightmarish levels. It pulls at the very fiber of our society. It is times like this when politicians and the public criticize our system of justice and question our Bill of Rights. It is exactly times like this when our fortitude and resolve must be stronger and more determined than ever. There can be no exceptions to justice or the judicial process. As long as there are criminal trial lawyers prepared to defend our rights, challenge every wrong and stand up for what is just, what happens in every totalitarian society will not happen here.

A few years ago the South Carolina Bar abandoned what I thought was a great slogan; it went something like this – where there is no freedom, there are no lawyers, and where there are no lawyers, there is no freedom.

As we go through our careers, remember that we share many of the same feelings in our daily experiences. As criminal trial lawyers, we share many of the same thoughts. As criminal trial lawyers, we are motivated by many of the same emotions. We are a fiercely independent group, but we are also united as one force with common goals and aspirations. We are never alone.

Stay the course. Fight the good fight. Be proud of what you are; be proud of your colleagues who are in this with you. Criminal lawyers are special people working within an extraordinary process for the administration of justice. As long as one criminal trial lawyer remains standing, I am confident that our voice will be heard and our presence felt in the halls of justice. After all, they cannot kill us all! ☐

Got an opinion that's of interest to NACDL members? Have a philosophy you would like to espouse? Have something important to report? Informal Opinion is your forum. Write for our Editorial Guidelines. The Champion, 1025 Connecticut Avenue, NW, Suite 901, Washington, DC 20036.



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May 10, 2000

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Re: On Being a Trial Lawyer

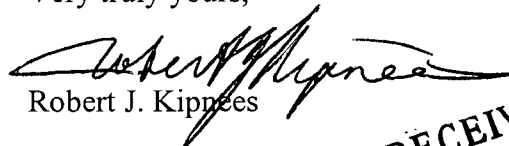
Dear Mr. Swerling:

I had just finished trying a five week criminal fraud case. The jury had rendered its disheartening verdict of guilty. Incredibly, the jury chose to believe the testimony of an "accomplice" who admitted to multiple episodes of lying, cheating and stealing. I was exhausted from the long ordeal of trial and pretrial preparation, and was quite frustrated.

I then read your article, On Being a Trial Lawyer, " which appeared in the March 2000 edition of The Champion. Your article captured to a tee the reasons which drew me to white collar criminal defense work fifteen years ago, when I left the U.S. Attorney's Office. Your article was beautifully written, evocative and heartening. I can't tell you how much your article help transform my ugly mood, and re-energized me.

I teach a course at Seton Hall Law School in Newark, New Jersey on White Collar Criminal Defense. With your permission, I would like to distribute your article to my students to show them what being a trial lawyer, and particularly a criminal defense trial lawyer, truly means. Thank you for your inspirational words, and thanks for your attention to this matter.

Very truly yours,


Robert J. Kipnees

RJK:mg

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