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The Federal Bar Association's

Federal Litigation Section

A Letter from the Chair

I am the recently appointed Chair of the FBA's Federal Litigation Section. I want very much for this Section to be a success, and to accomplish that I need your help.

Our members have always been a diverse group, engaged in many different areas of federal practice. The Federal Litigation Section has traditionally addressed its members' special needs through committees. In the past there have been committees concentrating on such areas of practice as federal tort claims law, military law and practice, federal trade regulation, consumer protection, and trial and appellate advocacy.

It is essential that these committees accurately reflect the interests of our members. For that reason, I want to learn what areas of the law interest our members, and then create committees pertaining to those areas.

Please take a moment to tell me what areas interest you and the extent to which you are prepared to take an active role in the Section (whether as a committee member, as a source for information about recent developments, or as a contributor to the Section's newsletter). This is your opportunity to help yourself and help improve the practice of federal law.

I greatly appreciate your help, and look forward to meeting many of you at the upcoming convention in Los Angeles.

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On the Case

*By Mark Lee Hogge**

Prelude

This column's aim is to encourage dialogue about the art of trial practice. Those who are apt to appreciate this column are members of the bench and trial bar. Others may find this column makes very little sense. Recognizing that trial practice is an art as varied as the participants, please note that the material for the column is not expected to be agreeable. Comments, questions, observations, and advice are earnestly solicited. So, without further ado, let the dialogue begin.

The Attitude

"A lawyer is only as good as his case," an old war horse was heard to say to his client when pressed for the win. A lot of meaning is conveyed with this phrase when delivered correctly. A certain amount of philosophical detachment, recognition of the limits of the lawyer's role, and a refusal to share in the client's stress are conveyed.

A certain amount of philosophical detachment is good for a case. For example, objectivity and a clear head are useful assets to offer clients when they need trial work. One good way to remain objective is to practice viewing the case from other points of view (judge, jury, adversary) and freely discuss the weaknesses with the client. (Another good way to remain objective is to refuse to represent family and friends.) Litigation is largely uncontrollable, lengthy, expensive, and unpredictable. A certain amount of detachment is necessary to keep the "long view." After all, a case can last five years or more with the trial comprising only one month of the five years. Philosophical detachment is necessary to prevent burnout.

Knowing the limitations, whatever they may be, keeping focused on the case, and conserving emotion and adrenaline for presentation of the

case is characteristic of those who have been around for a long time. Streamlining, cutting out the fat, and doing what is necessary to get the job done while avoiding a lot of digression and emotional expense is at least one prescription to stay in the running for the duration.

It goes without saying that what trial lawyers do must be legal and ethical. Within this frame work, trial lawyers must find out what can be done and they must do it. They can do no more. Knowing everything has been done that can be done, is knowing that the best possible case has been presented, given the resources available.

At some point the facts and the law take over with the trial lawyer's role having been met, hopefully well met. It does not further the client's interest to feel or share in the client's stress. Minimizing the client's stress: yes; feeling the client's stress: no.

When first starting to practice trial law, stress can be overwhelming. Fresh out of law school, money or liberty at stake, sleep and nutrition can soon become distant memories when trying a case. The legal system expects rookies to go up against adversaries who have been practicing trial law longer than the rookie has been alive. Sources of stress can easily expand infinitely in all directions for the initiate.

The neophyte trial lawyer invariably wonders if trial law and health are compatible. Trial law and health can be compatible and even mutually beneficial. There are trial lawyers successfully trying cases well past the average life span.

After all, the ultimate goal (in practicing trial law) is to present the best possible case. The goal is not to become stressed or bring an early end to life at the bar.

The goal is to do the job. The job does not have to kill and, if one looks around, one just might find that trial practice

may keep one around longer than one might expect otherwise.

There are lots of attitudes observed among trial lawyers. At a CLE class in Washington, D.C., a recent lecturer expressed the attitude that he followed the rules and strived to win at all costs. This may be fine for Perry Mason, but some cases are not winnable. The only case somebody may have is one of mitigation, *e.g.*, Darrow's presentation in the Loeb/Leopold case. To be selective in accepting only winnable cases is not servicing the public. A certain number of cases are losers and somebody has to do them, hopefully do them well.

So how do trial lawyers know if they have a good attitude? Chances are the trial lawyer is doing something wrong if there are symptoms such as high blood pressure, ulcers, obesity, headaches, sleeplessness, depression, etc. If such things are present, an attitude adjustment is called for, more than likely.

Next time the client holds back on evidence yet nonetheless presses for a victory, remind the client that a lawyer is only as good as the case.

For Discussion . . .

What do you do about a lawyer/adversary who calls you up one day for a couple of minutes to discuss the weather and he barely mentions the case, whereupon half an hour later, a four page letter is hand delivered from the caller full of "you said this . . . and I said that . . ." and all you ever discussed was the weather?

Keep in mind the oral route of communication must remain open for your client's sake.

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