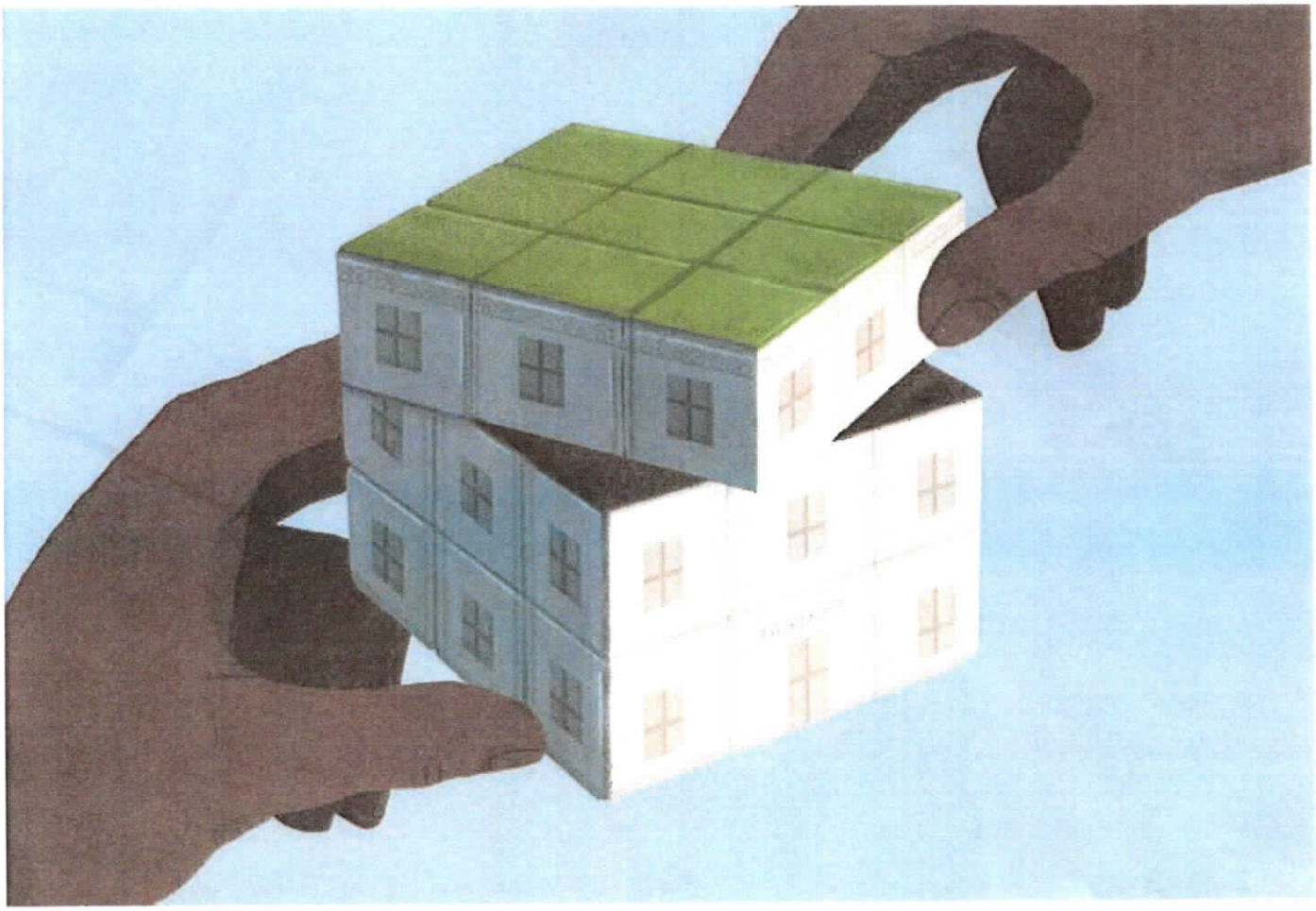
# The unsettling truth about settling

**The Honourable Joseph W. Quinn**

This article was prepared for Conduct of the Family Law Trial, a program jointly sponsored by The Advocates' Society and the Law Society of Upper Canada in Toronto on October 28, 2016.



**Overture**

How do you become a talented trial lawyer?

You become a good golfer by playing golf regularly. You become a proficient pianist by playing the piano frequently. You become a skilled skier by skiing often. You become … If you tell me that you know where I am going with this, I will cease using these annoying alliterative references.

*Experientia docet* [experience teaches].[1]

**So, you settle all your cases**

Do you settle all your cases? Why? Is it because you have had a fortuitous run of excellent pre-trial and settlement conferences? Really? Is it because opposing counsel consistently have been reasonable and obliging? Lucky you. Is it because you have a fear of, or at least an anxiety toward, trials? Oops. Have I touched a nerve?

If you settle all your cases prior to trial, some of your clients are not enjoying the outcome they deserve. Settling every case is not a virtue. A bank loans manager who boasted a zero percent default rate would be fired for not taking sufficient risks.

Litigation is all about risks: They must be assessed, reassessed, managed and, occasionally, taken.

If you have not had a trial in, say, five years, do you advise a new client, "I will be happy to take your case, but I must tell you that my parking privileges at the courthouse have been revoked for lack of use"? How fast and how far would you run if the surgeon you consulted announced that he or she had not seen the inside of an operating room in five years?

Furthermore, if you settle all of your cases, you are damag-

ing your reputation.

When I would ask my trial coordinator, "What do I have for Monday, and is preparatory reading required?" she would often reply, "It is a three-day trial, but Mr./Ms. X is on for the plaintiff and he/she always settles, so do not bother with any preparation." Do you want this to be your professional epitaph? Surely you do not aspire to be a litigation-lightweight.

You cannot call yourself a trial lawyer unless you do some trials. I recall an occasion in my law practice when I would not settle a particular family case. The other lawyer was miffed and said, "Why won't you settle? I settle all of my cases." I replied, "Good for you. Perhaps you should be a social worker."[2]

**Are you gun shy?**

For a senior lawyer with an established reputation for trying cases, a prolonged absence from the courtroom does not equate with reluctance or inability to do a trial. However, young lawyers without a track record of trials can quickly become gun shy. If you do not draw your gun on a regular basis in your early years as counsel, when you do, you will be shooting blanks.[3]

Should your trial experiences be ones for which you are ill equipped, the effect on you will be traumatizing and, perhaps, permanent. You will be both scarred and scared. Therefore, you *must* get trial experience. But how? I will get back to you on that in a moment.

**The broccoli imperative**

Trials are like broccoli. Regular consumption is necessary to develop a tolerance.[4]

**Mirror, mirror on the wall**

I once acted for the owner of an auto body repair shop that was destroyed by fire. His insurance company refused to pay, suspecting arson because the premises were heavily mortgaged and he was having financial difficulties. The action ambled through the usual stages and, on the Friday before the Monday on which our jury trial was to begin, I received a telephone call from counsel for the insurer with an offer. Had the offer been proffered a year earlier it might have been marginally acceptable; but not three days before trial. I was angry – but I also was embarrassed. What was there about me that led the other lawyer to think I would cave at this late date? Had I developed a reputation for being a settler of cases?

I reviewed with my client the risks associated with the situation, and I added one factoid: If we went to trial, and were unsuccessful, I would not charge a fee.[5] He instructed me to reject the offer. I was pleased. No, I was thrilled. Insurance counsel was stunned. Counsel even telephoned the lawyer who represented the first mortgagee, urging the lawyer to apply some pressure. (The settlement offer would have paid out the first mortgage.)

We were successful at trial for the full amount of the claim and, in addition, the jury awarded $50,000 in punitive damages.

I mentioned earlier that litigation involves assessing, reassessing and managing risks. Sometimes you, as counsel, must be prepared to take risks. Had I convinced my client to settle for the amount offered (and, I suppose, I could have subtly coerced him into doing so), I would not have been able to look in a mirror.[6]

**Gut check**

For a litigator, the gut is your most important organ. It will tell you whether you are selling out your client by way of an unreasonable settlement. In trial work, given the choice between guts and brains, I choose the former. Guts and hard work trump brains.[7]

**A trial is a trial is a trial**

Whether you are in Small Claims Court, the Ontario Court of Justice or the Superior Court of Justice, all non-jury trials are pretty much the same: They have issues, and they have evidence in the form of witnesses and documents. Issues are defined and argued. Witnesses are examined. Documents are proved and tendered to the court. In other words, a trial is a trial is a trial; the stakes are the only distinguishing feature.

All trials offer valuable experience.[8]

**Get trial experience by solving the trial equation**

A trial can be reduced to an equation:

*Trial = time + solicitor-and-client costs + party-and-party costs*

You can eliminate the solicitor-and-client costs of a trial by waiving your fees.

The spectre of party-and-party costs in a trial can almost be eliminated where the opposing litigant is self-represented.

That leaves *"time."* You have an abundance of time. You are young. You do not need sleep.

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The more that you can neutralize the risks associated with the right side of this equation, the more likely you will be able to reduce the left side to a takeable risk.

How do you get trial experience? In my opinion, there are two main options:[9]

1. Family trials frequently involve self-represented litigants. (In fact, it was the epidemic of self-represented litigants that drove me to an early retirement.) I think they offer the best path for anyone seeking courtroom experience. Self-represented opposing parties present a low costs downside. Also, family cases typically have modest disbursements.
2. Take trials in Small Claims Court. They are relatively low risk as far as costs are concerned (particularly where the other side is self-represented and you waive your fees) and are a valuable forum for the novice litigator.

The other options are ones that are commonly touted and I mention them for completeness, but without enthusiasm:

1. If you are part of a firm with a litigation department, presumably you will be given the opportunity to act as junior co-counsel.
2. Do *pro bono* work for a legal clinic or organization in your community. Frankly, however, I think that if you are going to do *pro bono* work, it – in the first instance – should be for your own clients, where you are able to pick the specific beneficiary of your generosity as well as the subject matter of the litigation to be undertaken.
3. Motions are not a waste of time for inexperienced counsel. I am overstating the point slightly, but contested motions are trials without the witnesses. A morning spent sitting in motions court will expose you to many types of on-your-feet advocacy.

Taking trials without charging fees will have immediate financial drawbacks, but the long-term benefits to your career are incalculable.

### Finale

Without the ability to competently and comfortably conduct a trial when needed, you are destined to become a salt lick in the field of law; and a mere condiment for the big dogs.[10] At that point, your only recourse will be to seek an appointment to the bench. It worked for me.

**Notes**

1. Tacitus, *Histories*, Book 5, chapter 6.
2. Do I hear chants of, "Unkind, unkind, unkind"?
3. If I had an editor, this sentence would have been redlined for deletion.
4. Again, if I had an editor …
5. Remember, I was angry.
6. As I get older, I find it difficult to look in a mirror at any time. However, that is a different issue.
7. Imagine, in 2016, using "trump" and "brains" in the same sentence.
8. Even contested motions provide some transferable lessons.
9. Apart from stealing something or breaching a few contracts and then representing yourself in the ensuing litigation.
10. Once more, the editor thing.


# The unsettling truth about settling: Part II

The Honourable Joseph W. Quinn

Portions of this article formed the basis of an oral presentation by the Honourable Joseph W. Quinn, Superior Court of Justice (retired), at the annual general meeting of the Canadian Defence Lawyers Association in Toronto on June 8, 2017. The article is a sequel to "The unsettling truth about settling" (Advocates' Journal, Winter 2016).

Once upon a time, in a Kingdom far away, I was a lawyer. I recall that 99 percent of my professional headaches were caused by fewer than 5 percent of my files. A friend of mine referred to those problem files as "movers." He would stack them on a corner of his desk and, every week or so, move them to a different corner. Even today, when I am asked what it takes to be a trial lawyer, I reply, "A big desk with as many corners as possible."

Is there anything more satisfying than settling a problem file without a trial and being paid a nice fee for doing so? What about taking some of those files to trial and getting a successful result? Realistically, if you are light on courtroom experience, a trial is unlikely to happen.

Are you content being a trial lawyer who does not do trials? Really? If, on a golf course, you hit every green in regulation figures but then pick up your ball and walk to the next tee because you do not know how to putt, are you still a golfer? Just asking.

## Withering heights

Advocacy skills are withering because trials (in particular, civil trials) are an endangered species headed for the Canadian Museum of History. Even worse, those skills are not being developed in the first instance. There is nothing to wither.

How many lawyers can expect to match the trial experience of, say, Francis L. Wellman (1854–1942), a New York attorney who, it is estimated, examined or cross-examined 15,000 witnesses during his courtroom career? If one were to arbitrarily assume an average of 10 witnesses per trial, it would mean Wellman participated in 1,500 trials. Raise your hand if you are on track to reach that number.

## The urological connection

One lawyer I knew was well on his way to Wellman numbers.

Peter Kormos was called to the Ontario bar in 1980. He quickly developed a large criminal practice in the Niagara area. Peter was an avowed anarchist. In keeping with that trait, he took all his cases to trial. Every one. His goal was to create chaos in the courts by tying up the Crown's office with cascading trials. Peter did not sleep much and, for him, cigarettes were a food group. Thus, he was able to juggle trials in circumstances where others would require an intravenous drip.

His try-them-all approach likely would not work in a civil practice, where there are incessant interlocutory proceedings and often crushing disbursements. But it is quite possible in a criminal practice,[1] which in general is not as labour intensive and lends itself to a freewheeling, shoot-from-the-lip approach where the task is not so much to prove *your* case but to find a crack in the *opposing* case.

Fortunately, for the Crown, in 1988 Peter was elected to the provincial parliament as a member of the Ontario New Democratic Party. From 1988 until his retirement from politics in 2011 (a period during which he never lost an election), Peter brought that same talent for courtroom chaos to the halls of government. He died in 2013 at the age of 60, proving that anarchy is destructive on more than one level.

It takes a certain personality to try all one's cases. Who does such a thing? We are given a hint by former Premier Bob Rae. With mixed feelings about doing so, Mr. Rae appointed Peter as Ontario minister of consumer and commercial relations when the NDP came to power in 1990. In his book, *From Protest to Power: Personal Reflections on a Life in Politics*, Rae wrote: "It was better to have [Peter] inside the tent pissing out than outside the tent pissing in. The problem was that he ended up inside the tent pissing in."[2]

So, now we know the magical combination needed to produce a try-them-all counsel: an anarchist with a urological disorder.[3]

Although you probably need not worry about whether you try too many cases, there is room for concern about whether you settle too many cases. I am particularly interested in why you settle and the influence of pre-trial conferences in the settlement process.

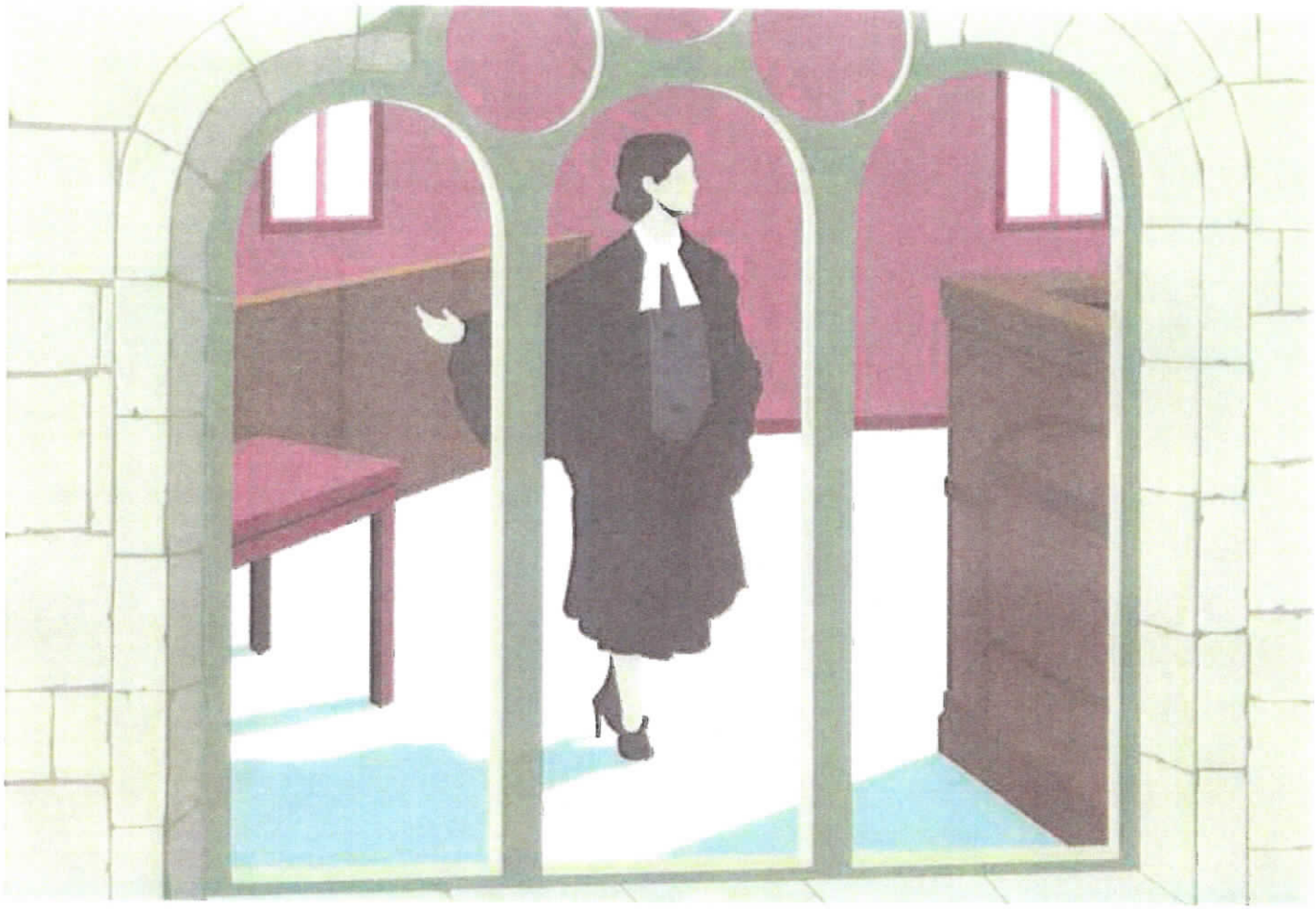
## The education imperative

Counsel must always be aware of the need to educate their judge. This is particularly important on a pre-trial conference. At trial, you might have several weeks during which you will be able to educate your judge on the legal principles relevant to your case. However, on a pre-trial, neither you nor the judge has the luxury of time. A judge could have six or more civil pre-trials in one day; and you are restricted to what you can fold into a pre-trial brief.

Educating your judge over the course of a multi-week trial is one thing, but having to do so within the confines of a pre-trial conference is almost impossible unless your case is blessed with one or two very narrow issues (and, then, only if those issues fall within an area of the law for which the pre-trial judge has some expertise).

I was a generalist judge sitting in a generalist court, which meant that, as each year passed, I knew less and less about more and more until I reached the point where I knew very little about an awful lot.

When you have a case privately mediated, you properly pick a mediator with the appropriate knowledge of the law for your case. Would you ask a family lawyer or a corporate



lawyer to mediate a motor vehicle claim? What about a judge with the same pedigree? Welcome to your pre-trial. Enjoy.[4]

In 2000, I received a letter in circumstances that cannot be conveniently summarized here. It was from the Honourable Mr. Justice Alvin Rosenberg. He died in 2013 at the age of 87. He was appointed to the Trial Division of the High Court in 1983. As you know, that was a circuiting court and, at one point, he was sent out from Toronto to preside at a murder trial in Napanee. Three prisoners, serving sentences in Millhaven, were accused of killing a third inmate with a baseball bat. Justice Rosenberg gave this background in his letter:

> When the preparations were made for the hearing it became obvious that there were real dangers involved in that the alleged murders were the result of an Anglophone–Francophone confrontation in Millhaven. There was concern that the Francophones would attempt to [avenge] the murder of their leader by having outside friends assassinate the accused. There was also concern that friends of the accused would attempt to help them escape while they were being transferred to the courthouse in Napanee. The result was that the prisoners were brought to the courthouse in a snow plough which it was felt could break through any barrier that was erected to try to stop the safe transport of the prisoners to the courthouse. There were helicopters hovering overhead and guard dogs used to assist in escorting the prisoners.
>
> Almost every complication that can arise in such a criminal case arose in this trial, from the selection of the very first juror until the verdict and sentencing.

With that background, let me add three facts to the story: (1) Justice Rosenberg had been appointed to the bench only several weeks before the trial; (2) he had not previously been part of, or witnessed, a criminal trial; and (3) he had never even been present at the selection of a criminal jury.

To complete the picture that I am attempting to paint, the letter from Justice Rosenberg continued:

> I had been advised when I was appointed that all of the members of the High Court and the Court of Appeal were ready to assist whenever a problem arose. I took advantage of this situation and was in touch with John Brooke of the Court of Appeal almost hourly for advice [Justice Brooke sat on the Court of Appeal from 1969 until 1999]. My calls were frequent, even to his home when he was not in court. I once received a message from John while I was on the bench advising me that he was going out to the supermarket for an hour or so and that if I had a problem that arose while he was out, to stall for a while as he would be back shortly.

And you probably thought that the only reason for frequent short adjournments in a trial was a weak judicial bladder. Well, now you have a second working hypothesis: Your judge is seeking advice. On a regular basis judges preside over trials and pre-trials covering areas of the law in which they are less knowledgeable than counsel.

Surely the minimum requirement for an efficient and dependable legal system is to have judges who know at least as much law as the lawyers who appear before them. Those unfamiliar with our courts would be shocked to learn how often this minimum requirement is not met. In the Superior Court of Justice, this requirement, in my opinion, is consistently satisfied only in four instances: (1) the

Family Court branch; (2) class proceedings where certain judges have been designated to handle such cases; (3) matters on the Commercial List in Toronto (established in 1991 for the hearing of actions, applications and motions involving issues of commercial law); and (4) some criminal cases heard by judges with a particular expertise in criminal law who seem to sit only on criminal trials. The rest of us are engaged in on-the-job training.

The fact that Justice Rosenberg survived his experience and went on to enjoy a long and distinguished judicial career does not flatter the system. He succeeded despite the system, not because of it.

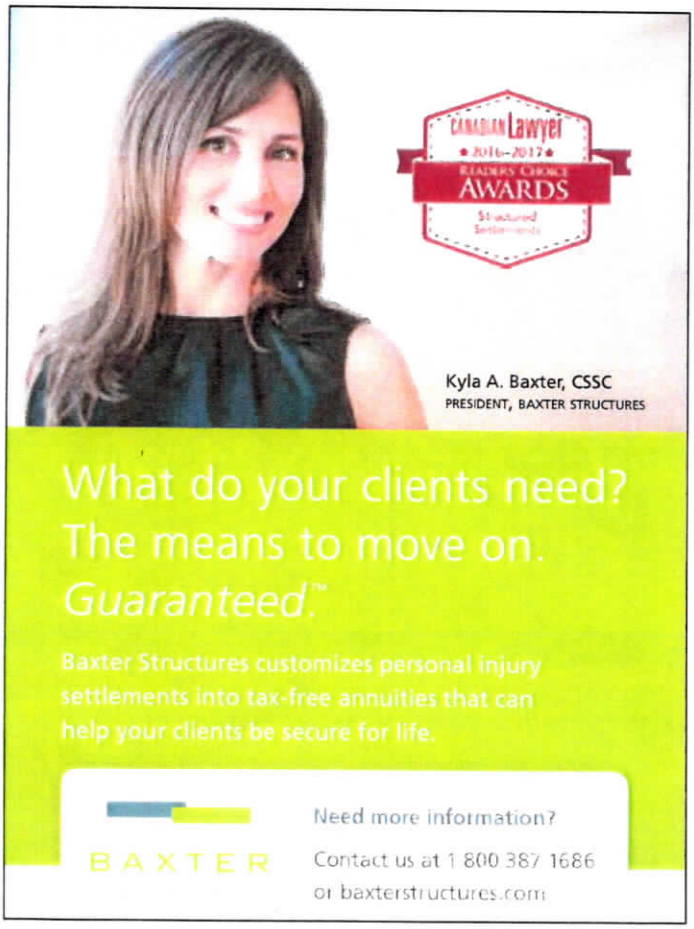
## Pre-trial conferences and detrimental reliance

In civil actions, some lawyers seem to think they have fulfilled their duty to a client with completion of the pre-trial conference. It is not so.

### *A crutch or a tool?*

Are your pre-trials an excuse for settling or a reason for settling? In other words, do you use pre-trials as a crutch or as a tool?

Civil pre-trials are valuable if they are treated as a tool to uncover weaknesses in your case of which you were unaware. They become a crutch where you blindly rely on the settlement recommendations of the pre-trial judge so as to avoid a trial. I hold to the heretical view that lawyers should not be unduly influenced by a pre-trial. Very good lawyers know their case far, far better than does the pre-trial judge. Such lawyers do not materially benefit from a pre-trial. Typically, lawyers have lived with a file for two or more years before it reaches the pre-trial stage. If your case is scheduled for a 10-day trial, can you meaningfully address the key issues and evidence within the confines of a pre-trial brief? And how can the pre-trial judge, in one hour or so, fairly and reasonably address the resolution of those issues (even assuming the judge has expertise in the relevant area of the law)?




### *Thanks, Your Honour, but no thanks*

I never saw my judicial role in a pre-trial conference to be one of actively seeking a settlement between the parties.[5] Frankly, I was thoroughly disinterested in whether the case was settled.[6] I gave to counsel my views on the issues in dispute and how I thought those issues would be decided at trial. Counsel could figure out for themselves what weight to give to my views and what compromises they were prepared to make. They did not require a judge to determine a midpoint between two positions. Thanks, Your Honour, but no thanks. Anybody with a calculator or a pencil and a scrap of paper could fulfill that function.

### *All right, show me yours if you wish – but I might not show you mine*

When I was in practice, I knew a tough and experienced Welland counsel[7] who once complained to me that he disliked pre-trials because often the judge would identify the weaknesses in his opponent's case and either suggest cures or at least alert the opponent to the need for a cure.[8] I see nothing wrong with that mindset. As I have mentioned, for very good lawyers, pre-trial conferences are of debatable utility. They are merely thumb-twiddling, time-wasting money burners. In a pre-trial conference with a skilled lawyer on one side and a mediocre counterpart, a pre-trial judge effectively becomes co-counsel for the latter.

Why would you reveal your full case on a pre-trial? According to Article 17 under the *Geneva Conventions of 1949*, a prisoner of war is required to provide only his name, rank, serial number and date of birth. There are some pre-trials where you should adhere to Article 17. "Tactics" is not a four-letter word. Litigation is war with rules.[9]

### *Beware the ambiguity of inscrutable silence*

As a lawyer, I assumed judges possessed more knowledge of the law than I did.[10] Why? It was because they sat in inscrutable silence throughout the case and appeared all-knowing. How wrong could I be? Very wrong, it turns out. When I became a judge and sat in silence, it was because I was not comfortably familiar with the area of the law in issue. Why would I ask a question and expose my ignorance? On those occasions when I interrupted and sprayed counsel with questions, it was because I *thought* I knew something. (The exceptions were criminal trials, where I always sat mute. If a fire were to have broken out at the front of the courtroom, I would have remained silent for fear that to do otherwise might upset the carefully crafted strategy of one of the parties.)

### *How does your judge perform on a muddy track?*

Thoroughbred handicappers have the *Daily Racing Form* as their resource for researching the past performances of racehorses under varying conditions. Lawyers have *Quicklaw* and *CanLII* for doing the same in respect of the judges before whom they appear.

How do you gauge the past performance and expertise of your judge? Research. For example, if you checked up on me you would find, I think, that I last presided over a motor vehicle trial in 2003.[11] (This was not by design. It was simply the way the docket unfolded. I had many motor vehicle pre-trial conferences since then, but no trials.) Imagine the learning ladder that I would have to climb if you and I

were starting a motor vehicle trial tomorrow. And, if the trial included accident benefits issues, one ladder would not be enough.

In addition to the usual pressures preparing for trial, why should you have the extra burden of my education to worry about? That will always be a problem with generalist judges; and the problem is compounded by the limitations presented by a pre-trial conference.

**Tabula rasa: *A poor business model***

You are well aware (but too polite to mention) that lawyers who never saw, say, a family file or a personal injury file in their law practices are appointed to the bench and preside over such matters. Imagine if this same business model were found in the health care system; we might have the following conversation between a hospital nurse and a doctor recently appointed as head of cardiology:

> Nurse: Congratulations on your appointment.
>
> Doctor: Thank you. Those years of bake sales and fundraising for the hospital paid off for me.
>
> Nurse: The patient in Room 312 is complaining of arrhythmia, palpitations, light-headedness and chest pain. What is your diagnosis?
>
> Doctor: You're asking me? Before I was appointed head of cardiology last Tuesday, I was a urologist. But, gosh, it sounds serious. My neighbour had the same symptoms. He was a nice man. I miss him.
>
> Nurse: Do you have any idea about a diagnosis?
>
> Doctor: It sounds like the heart.
>
> Nurse: That's it? Can you be more precise?
>
> Doctor: I'll have to telephone someone. Do you have the number for Dr. Michael DeBakey?[12]
>
> Nurse: What if something happens to the patient in the meantime?
>
> Doctor: Not to worry. There is a panel of three doctors to whom the patient may appeal, posthumously if necessary.
>
> Nurse: But aren't two of those doctors also former urologists?
>
> Doctor: Good point. And the third used to be a dermatologist.

I once accompanied my wife on a visit to a medical specialist. When the nurse who did the pre-appointment prep-work learned that I was a judge and, as part of my duties, actually presided over medical malpractice cases, she was horrified. "What medical training do you have?" she asked, still horrified. Good question. I explained to her the *tabula rasa* ("blank slate") approach to judging. She was not impressed and remained horrified to the point of distraction. Can you blame her? The only other occupation where people routinely obtain serious employment for which they have no previous experience, learning as they go, is politics.[13]

***Well intentioned, but not well informed***

If it is your plan to hide behind the recommendations of a pre-trial judge, always be mindful of the need to educate the judge by outlining the legal principles and case law at play in your action so that you receive informed recommendations. As but one example, claims for loss of competitive advantage are common in personal injury actions. In your pre-trial conference briefs, I would like to see you set out the basic governing principles found in the leading cases. No counsel *ever* did this in any personal injury pre-trial conference over which I presided. Surely, from the 858 cases that came up in my last *CanLII* search under "loss of competitive advantage" (at the trial and appellate levels in Ontario), some are useful. If your judge finds all this education to be pedantic and demeaning and says, "You must think that I am an idiot," your reply should be, "No, Your Honour, but we were told that Justice Quinn would be hearing this pre-trial conference."

Judges are not any smarter than you are and although, in an efficient legal system, the judge would always know the law at least as well as counsel, the fact is that, in many cases, I knew less about the law than you knew. I was more well-intentioned than well-informed. In what other field of endeavour do the latter take guidance from the former?

When you step into a courtroom or conference room, educate the judge and you will have a best friend forever. Should you not want to bother doing so, but still require a judicial opinion, bring darts, dice and a Ouija board.

It is a silly system that appoints people to do work for which they have no experience. It is stressful for the judge,[14] it unnecessarily complicates the life of counsel and it can be a disservice to the litigants. Therefore, whether you have a favourable or unfavourable pre-trial conference, it could be immaterial. If your pre-trial judge is inexperienced in the relevant area of practice, you might as well have a urologist conduct the conference; and, if you settle your case on that basis, shame on you.[15]

***Forceful, but still not well-informed***

The fact that your pre-trial judge may express his or her views forcefully is irrelevant. I know of one judge who adopted the motto, "Sometimes right, sometimes wrong, but never in doubt."

***The epitome of futility***

Perhaps there is some room for argument over what I have said so far. However, this point is inarguable: Certain issues do not lend themselves to a pre-trial, with the result that the conference is as productive as Question Period in the House of Commons. I will give two examples.

First, liability in a motor vehicle case or in a slip-and-fall case is an issue that the janitor at your courthouse is as equipped as a judge to resolve. Second, credibility issues are a poor fit with a pre-trial. Apart from the difficulty of conveying sufficient information to the pre-trial judge, why would you telegraph at a pre-trial how you intend to discredit a party at trial, thereby giving that party months to prepare and rehearse?

If your pre-trial presents those issues, adjourn the conference and go bowling.

**Players and pretenders**

You cannot always validly excuse your avoidance of a trial by saying that the case was settled in accordance with the recommendations of the pre-trial judge. It is only where those recommendations reflect the true merits of the case, and where the judge has sufficient expertise, that the excuse is valid.

Some counsel are players and some are pretenders. You cannot be a player if you settle all your cases. A bank loans manager who boasts a zero percent default rate would be fired for not taking sufficient risks. Litigation is all about risks. They must be assessed, reassessed, managed and, sometimes, taken. You cannot become a competent counsel while camped in your office.

Do not fear losing a case. If you win a high percentage of your trials, I suspect you are selling many clients short because you obviously are not litigating the tough cases. Most high-profile counsel in the United States and Canada lose more often than they win. Losing is a part of advocacy – a *big* part. Your willingness, if not eagerness, to go to trial is the most effective weapon in your advocacy arsenal.

Lawyers avoid going to trial for various

reasons. It is important that you honestly identify the basis for your avoidance of the courtroom, because there are both good and bad reasons for doing so. A good reason would be one that takes into account the risks associated with a trial. A bad reason would be fear.[16] The only basis for fear is inexperience, and there is a foolproof cure for inexperience. Another bad reason is laziness. Unfortunately, there is no known cure for laziness.

**Why try (cases, that is)?**

Try some cases. Be a player.

I assume you do not want to be in the position of having to obtain a Google map to find your way to the courthouse. Apart from that, why should you try cases? I offer several reasons. Although they are obvious, it might be helpful to hear them mentioned out loud.

*A professional trifecta*

By trying cases with reasonable frequency, you achieve a professional trifecta. You (1) enhance your reputation; (2) protect the interests of your client; and (3) preserve your mental health.

How can you call yourself a trial lawyer if you do not do trials? What does that do to your professional reputation? And how can that be in the best interests of your client? A settlement that does not reflect the risks reasonably associated with taking a case to trial probably is an unreasonable settlement.

Fear snowballs. The longer the gap between your trials, the greater the apprehension and even the fear that results.[17]

I was called to the bar in 1972. Although I had tried several cases in Small Claims Court as an articling student, jury trials were a mystery. I dreaded having my first jury trial. Nothing in my legal education and training had prepared me for a jury trial. And the written precedents of the day (both civil and criminal) were utter garbage compared with the excellent material now available.

I did everything possible to avoid getting stuck with a jury trial. It was a foolish decision, for my anxiety rose to an irrational crescendo. I was drowning in fear.[18] I have no memory of my first jury trial, much like the lone survivor of a plane crash from whose conscious thought the body blocks out all the gory details. Given a second chance, if I were called to the bar on Monday I would arrange a jury trial for Tuesday.

Because advocacy can be learned, it makes sense that watching other counsel argue a motion or try a case will be beneficial. In fact, watching bad lawyers[19] is as enlightening as observing good ones. I rarely see young lawyers linger in motions court after their matter has been heard, and it is equally uncommon to spot such a lawyer serving as a spectator in a trial involving experienced counsel. These are missed opportunities to add to your courtroom toolbox. In 1972, I should at least have sat in on a few jury trials. I have no idea why that did not occur to me at the time.

*Taste-test your judgment and analysis*

Another reason for taking trials is to periodically test your assessment of what constitutes a reasonable settlement. In doing so, you are honing your judgment and analysis for future settlements. If a chef never taste-tests the food, how does he or she know the dishes are palatable and the correct recipe is being used? A trial is the best way to taste-test your work.

*Try steering the bus for a change*

Occasionally, a case will present a novel legal issue. What personal price are you prepared to pay to advance the case law and become part of the jurisprudence in your field? Do you not feel even a small duty to your profession? Sorry to hear that.

Are you merely along for the ride? Why not try steering the bus from time to time?[20]

*Good news – you are not as important as you think*

Inexperienced or otherwise poorly prepared counsel create disorganization and sometimes chaos, but it is difficult to lose a case where the facts are on your side. Injustice is likely to result only where an important witness is not called or a relevant document is not tendered in evidence.

Justice John Sopinka once estimated the importance of counsel to the outcome of a case as follows: at trial, up to 50 percent; on appeal to the Court of Appeal, about 25 percent; and, in the Supreme Court of Canada, 10–20 percent.[21] Thus, you probably are not as important to the case as you think.

A strong case likely will offset your inexperience. Facts should defeat fear.[22]

**The young offender grace period**

Putting yourself in a position to get early trial experience means you will be doing so at a relatively young age. Judges, even curmudgeons, generally are kind and sympathetic to young, inexperienced counsel.

In the 1970s, the world of fashion suffered a nervous breakdown and I was a willing victim. One morning, I was in motions court in Hamilton. I had been a lawyer for about 12 minutes. I was wearing a green blazer, an orange shirt and a tie that might have glowed in the dark. Mercifully, I have no memory of the colour of my trousers

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and I can only assume I was wearing shoes. I must have looked like a clown school freshman. The presiding judge did not criticize my physical appearance, but he did chastise Nick Borkovich,[23] a well-known Hamilton lawyer (10 years my senior) who was in court that morning, for wearing a somewhat sporty outfit, and sarcastically asked him when he was due at the yacht club. Much later, Nick was appointed to the bench and, when I subsequently joined him, he never missed an opportunity to complain that it was me the motions judge should have criticized. It was not until I went to the bench and discovered an urge to be protective of young, inexperienced counsel that I realized the motions judge humanely wished to send a message to me about proper courtroom attire without scarring me for life. His Honour had correctly concluded that Nick was better able to shoulder the criticism and it was better to annoy Nick than to scar me.[24]

Young lawyers should have trials early and often, when judicial empathy abounds.

**The you-should-know-better phenomenon**

Running a trial is not like riding a bicycle (except for the falling-down-and-getting-banged-up part). You can forget.

Senior counsel do not enjoy the same level of tolerance from the bench as that available to junior counsel. It actually is sad to see a senior lawyer conduct a trial in circumstances where his[25] advocacy skills have atrophied. It produces a curious phenomenon: a lawyer who makes mistakes and commits protocol *faux pas* but does so with the panache of someone who does not know what he does not know.

**Some final words**

Imagine we are on opposite sides of a case. Do you actually think you will get a reasonable settlement offer from me if I know you are an inexperienced or anxious litigator? The truth is that, in fulfillment of the duty to my client (and in furtherance of my predatory nature), I will try to take advantage of your inexperience or anxiety. I will take your lunch money every chance I get (but with a kind word, a smile and civility throughout).

Most counsel do not have enough trial experience. You can attend pre-trial conferences on an hourly basis until you die, but that will not advance your skills as a trial lawyer.

Trial lawyers try cases. Trial lawyers who settle all their cases are social workers.

Declare war on fear.[26] Try your brains out.

Get courtroom experience, even if you must take cases to trial for little or no fees (pick those cases carefully; but *pick* them). Do not view all your files from a financial perspective.[27] Treat some as educational opportunities that will advance your reputation as counsel and may lead to profitable future files.

I must tell you that the quality of advocacy is falling. Although there still are top-notch counsel to be found, they are becoming fewer and the number of mediocre counsel is swelling. Counsel today are as intelligent as their predecessors, but they lack the training and experience to be effective in court.

I was presiding in motions court in St. Catharines a few years ago when a lawyer approached the counsel table as his case was called. He addressed the court by saying, "Hi." How can that happen? How can it possibly happen?[28] Looking back I like to think that, maybe, I was mistaken and he was not a lawyer. Perhaps he was a urologist.

**Notes**

1. And in a family practice.
2. Bob Rae, *From Protest to Power: Personal Reflections on a Life in Politics* (Toronto: Penguin, 1996), 134.
3. Lyndon Johnson is quoted in *The New York Times* (October 31, 1971), when speaking about keeping J Edgar Hoover (1895–1972) as FBI chief: "It's probably better to have him inside the tent pissing out, than outside the tent pissing in."
4. This does not mean I am opposed to lawyers from a general practice being appointed to the bench. After all, I was such a lawyer. My concern is with continuing as a generalist once on the bench.
5. I was not appointed to the Superior House of Mediation.
6. I was not employed on a piecework basis.
7. Earle A Blackadder, Q.C.
8. His complaint came after a mutual pre-trial wherein the judge had suggested a cure for a flaw in my case in circumstances where I had not even noticed the flaw, let alone crafted the cure (and Mr. Blackadder had been aware of both).
9. Please. Enough with the raised eyebrows.
10. Okay, okay, there were one or two notorious exceptions.
11. *Mercier v Royal & Sunalliance Insurance Co of Canada*, 2003 CanLII 21638 (ON SC); aff'd (2004), 72 OR (3d) 94 (CA), in which I commented that anyone able to understand the world of statutory accident benefits should be entitled to claim bilingual status.
12. Dr. Michael DeBakey (1908–2008) was a Lebanese-American cardiac surgeon, scientist and medical pioneer.
13. And how is that working out?
14. If you want to witness pure fear, look into the eyes of a judge on the morning of his or her first jury trial (civil or criminal).
15. I have just noticed that urology has assumed a curious prominence in this article. I will look into that.
16. Are you uncomfortable hearing that word? Pity.
17. To this point, I have used the word "fear" six times.
18. Seven times.
19. In this article, I am using "lawyer" and "counsel" interchangeably.
20. The overuse of metaphors is a criminal offence. My sentencing hearing is tomorrow.
21. See *The Advocates' Society Journal*, March 1990 at 3.
22. Eight times.
23. (1935–2017).
24. Today, if you were to walk into my clothes closet you would think you had suffered detached retinas because my wardrobe consists of all blacks and greys. Too late.
25. I have not used the pronoun "her" because I have never encountered an inexperienced senior female counsel.
26. Nine times.
27. I am aware that litigation is expensive for clients. "I was never ruined but twice: once when I lost a lawsuit and once when I won one": Voltaire, pseudonym of François-Marie Arouet (1694–1778).
28. I suppose it could have been worse. He might have greeted me with, "Hi, dude."