



My first trials

Preparing for the trial of a small case as if it were a million-dollar baby

By JOHN ROACH

It is not easy for an attorney who has been practicing only five years to get much “trial experience.” Becoming a good trial attorney is a catch-22 because you only get better by doing it. There are a number of barriers to getting trial experience for young attorneys.

First, it is very expensive to do a civil jury trial, and the stakes are high, especially with CCP 998s pending, so most firms are not willing to let a junior lawyer handle a trial. There is also the self-imposed barrier of not having the confidence to be the first chair in a jury trial. Despite these barriers, I have been lucky enough to get trial experience since I began practicing in 2009.

Being a trial lawyer is not for everyone and not everyone wants to be a trial lawyer. I know many highly skilled attorneys who are very bright and who are perfectly happy helping others prepare for trial, assisting with discovery, and doing law and motion work. I knew that I wanted to be a trial lawyer. My favorite course in law school was trial advocacy. We put on a mock trial and I was hooked. I felt like the lead singer of a band. I was drawn to the spotlight.

I started my career in law filling a subordinate position at a larger law firm under a senior trial attorney. This laid the foundation for my own trial work. I was fortunate enough to get experience taking and defending depositions, doing law and motion work, and preparing for trial. It was like boot camp, and I soaked up the wisdom of my colleagues. At a larger firm I was able to learn by making stupid mistakes, but if I stayed at a larger firm I would never have been able to first chair a trial, at least not within the timeframe that I envisioned.

I started studying the art of trial advocacy. I read David Ball and Rick Friedman. I attended CAOC conventions and SFTLA seminars. I started going to the courthouse whenever I could to watch my heroes try cases. I paid special attention to master trial lawyers in my community, especially Steve Brady, Chris Dolan, Bill Veen, and Bob Arns. I was interested in seeing their different styles. I gained an appreciation for the preparation that goes into a trial. It dawned on me how crucial discovery is, the importance of working with the right expert witnesses, and selecting the right jury.

I met my boss, Steve Brady, by going to the courthouse and watching his trials. During one of his trials he invited me to lunch. When I joined the Brady Law Group, I had a mentor with over 80 trials under his belt and a willingness to “pass it on.” Without a mentor who was willing to invest time, energy, and money into my career as a trial lawyer, I doubt that I would have any trials under my belt at this stage in my career.

Ready for a fight

A younger attorney has to be willing to try smaller cases to get started. I showed a willingness to try cases whenever the opportunity presented itself. I was ready for a fight. My first trial involved a taxi driver from Georgia (the country) who injured his low back when a driver ran a red light at Fell and Masonic in San Francisco. I felt that Farmers Insurance was not evaluating my client’s pain and suffering damages fairly. It was a smaller case with about \$20,000 in past medical damages, and the offer was not much more than that. The injuries were not catastrophic; they were soft tissue. If I blew it, and got defended, it would not bankrupt the firm, so the risk was

reasonably low. But I believed that my client was due more than what they were offering, and I believed in the case.

I was lucky enough to have access to resources that gave me the confidence to try my first case. I worked with a graphic artist who created a PowerPoint presentation that I used throughout the trial. We would get together on Saturdays at the office, order a pizza, and get cranking on the PowerPoint. I knew that I would not be the smartest or most experienced lawyer in the courtroom, but I was absolutely certain that I would be more prepared. We did over 20 versions of the PowerPoint presentation. Steve Brady told me he often has revised his own presentation over 50 times before starting a trial.

Jury selection

I learned many invaluable lessons about picking juries from my first trial. People say that trials are won and lost in jury selection, and this was certainly my experience: I picked a few younger jurors in my first trial, which resulted in lowering the verdict substantially. Talking to the jurors afterwards, I learned that the younger jurors were advocating not awarding any non-economic damages. I learned that younger jurors do not always appreciate pain. I also learned that I needed to do a more careful job in vetting out the tort reformers.

The most important lesson

The most important lesson I learned was that I could do it. I was so nervous at first. When I opened my mouth to start talking to the jurors in voir dire, my mouth dried up and I could barely get a word out. I took a sip of water and started talking. I got past the mental block that only senior attorneys can do well at trial. I followed Steve



Brady's advice and had all the documents in binders so that no one saw my hands shake. Even though the result was not amazing, I had overcome my self-doubt and got a verdict for the plaintiff. By the end of the trial I felt comfortable in the courtroom.

The costs count

There are economic considerations that a young lawyer must take into account when starting to do trials:

They are very expensive. Accident reconstruction and biomechanical experts are usually needed to combat the defense argument that a collision could not have possibly caused the claimed injuries. Just bringing in the plaintiff's health-care providers can get extremely expensive.

Use of a strategic CCP 998

You can win a small trial and still not recover any money for the client if you do not prevail on a motion to recover costs. That is why serving a strategic CCP 998 is a necessity in smaller trials. In my second trial, the jury awarded \$40,000 to my client, and I beat my own 998 of \$20,000. I knew that State Farm would not pay \$20,000 because their highest offer at mediation was \$10,000. It is crucial to get authority from the plaintiff to send a 998 that is just high enough so the carrier will not pay, yet low enough that you can beat it at trial.

Juggling the scheduling of witnesses is something that they do not teach you in law school. In my second trial, one of the hardest aspects of preparation

was finding relatives and friends of the plaintiff that were willing to come in to testify for 10 minutes to support my client's claim for non-economic damages.

Orthopedic specialists are often reluctant to testify in court and charge exorbitant rates for a half day or full day. Although I prefer to have all my witnesses testify live, in my second trial I videotaped the deposition of the doctor that gave my client injections, and saved about \$7,000 in costs; videotaping a witness who is unavailable or too expensive to testify in person guarantees that your witness will be ready when you press "play."

Look for undervalued cases

A young lawyer wanting to get trial experience must often take cases to trial that others do not want to, but where there is a chance to prove that an insurance company undervalued a case. My second trial had extremely difficult facts.

The case involved a 5-mile-per-hour disputed liability "reverse" rear-ender in a parking garage with minimal property damage. Plaintiff had about \$5,000 in chiropractic care and \$17,000 in pain management injections. State Farm's attorney called biomechanical expert, Benjamin Ewers, Ph.D., to testify that the forces in the crash were insufficient to cause injury. He also called Orthopedist Paul Perchonock, M.D., to testify that plaintiff's complaints were all due to degenerative changes from her work as a truck driver and to the fact that she was

a smoker. The jury awarded \$40,000, and I recovered all my post-998 costs.

Having real trial experience has helped me to resolve cases against reluctant insurance carriers. Recently, I was prepared to start a trial in Santa Clara. At the last minute State Farm more than quadrupled its offer to settle and offered policy limits. At the time I write this article, I am waiting for the results of a binding arbitration and preparing for back-to-back trials.

Steve Brady sums it up nicely: "It is incumbent upon 'experienced' trial lawyers to take the time to teach trial craft to the less experienced litigators and certainly the trial lawyer wannabes in their firms. I also try to negotiate with Steve Toschi, Scott Stratman, and Phil Andersen to set up 'fair fights' between associates (at our firms) to get them much needed trial experience."



Roach

John Roach is a trial lawyer who enjoys fighting insurance companies to achieve just compensation for his clients. He attended Hastings College of Law where he served as an intern for Judge Robinson of the San Francisco Superior Court and was admitted to the California Bar in 2009. He is a member of Consumer Attorneys of California, the American Association for Justice, San Francisco Trial Lawyers Association and is a board member of the Marin Trial Lawyers Association. He has worked at the Brady Law Group since 2012.