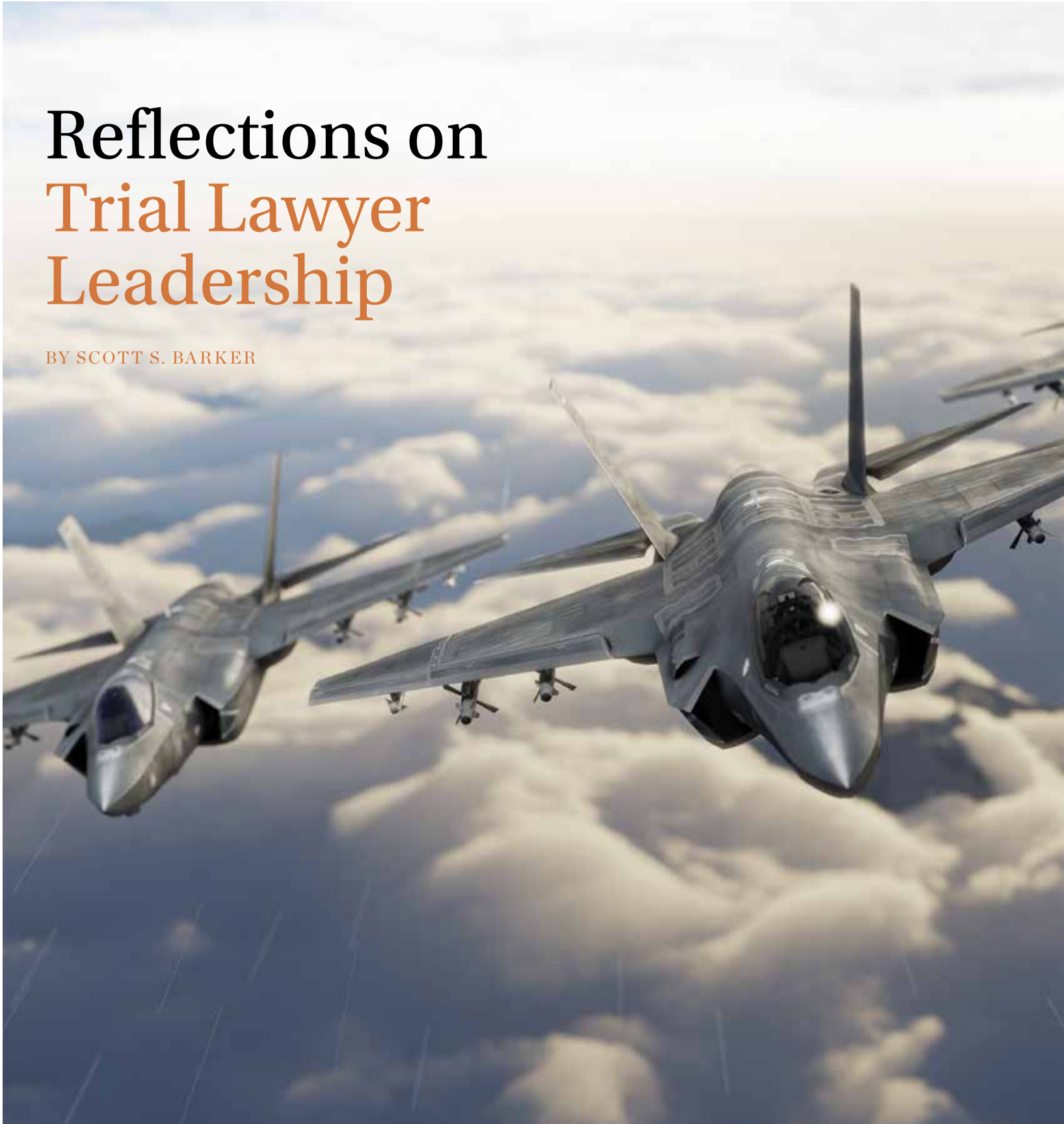


Reflections on Trial Lawyer Leadership

BY SCOTT S. BARKER





“The greatness of the leader is measured by the achievements of the led.”

—General of the Army Omar Bradley

I’ve been thinking a lot about leadership lately. Those thoughts have been sparked by reading Colonel Kim Campbell’s riveting and provocative book *Flying in the Face of Fear: A Fighter Pilot’s Lessons on Leading With Courage*.¹ Now retired, Colonel Campbell had a distinguished 24-year career as a combat pilot and military leader. She is a 1997 Air Force Academy graduate who maxed out as the wing commander, the top military spot, in her senior year. She went on to realize her dream to be a fighter pilot. Her call sign, “Killer Chick,” was well-earned. She had more than 100 combat missions in the A-10 Warthog during multiple deployments to Iraq and Afghanistan. Colonel Campbell is famous in fighter pilot circles for flying her severely damaged close air support Warthog from the combat zone over Baghdad back to base, pulling off a rare and dangerous feat—a landing without any hydraulics. She went on to major command responsibilities and completed her career at her alma mater as director of the Center for Character and Leadership Development. Each chapter of Colonel Campbell’s book concludes with a meaty section called “Considerations for Leaders.” Her book is a fabulous read for anyone seeking a deep reflection on leadership.

Obviously, flying a fighter jet in combat is a world apart from the courtroom. Even so, I’ve been asking myself if some of Colonel Campbell’s leadership “considerations” might apply, maybe in modified form, to what we do as trial lawyers. At first glance, it would appear to be a stretch. Lawyers, unlike military types, don’t pay much attention to leadership. There is precious little leadership training in our profession. As trial lawyers, we have CLEs on how to conduct an effective voir dire, make a compelling opening or closing, or structure direct and cross-examinations. And we always make sure to check the box on the required amount of ethics training. But when was the

last time you saw a CLE on “leadership as a trial lawyer?”

In fact, we don’t really think that our craft involves leadership. We see ourselves as courtroom “warriors.” It’s our job to win on the (safe) “battlefield” we call the courtroom. We think that our ability to win is a function of our skills, hard work, experience, and, yes, courage. What does leadership have to do with it? I think the answer is: a lot. I suggest it behooves us and our clients to think intentionally about the role of leadership in preparing cases for trial and succeeding in the courtroom. Leadership, be it in a military or civilian context, is about the same thing: organizing and motivating people to work as a team to achieve a common goal.

My first real exposure to leadership was in the summer of 1966, when I joined the ranks of the US Air Force Academy Class of 1970. Ironically, the first thing I learned was how to follow. It was only after mastering that skill that I began to learn to lead. After graduation, I served for eight years in the Air Force. I resigned my commission in 1978 to attend law school and prepare myself for a career as a trial lawyer. Three years later I began trying cases, which is all I ever wanted to do as a lawyer. I’ve been in courtrooms all over Colorado and the Rocky Mountain West, as well as on both coasts and a few states in the South and Midwest. I’ve also had the privilege of serving for six years as the chair of the Management Committee of Holland & Hart, the largest Denver-based law firm, with offices in several states. After 29 years at Holland & Hart, I moved to Wheeler Trigg O’Donnell, a nationally renowned “trial boutique,” and concluded my active career as a trial lawyer in 2022. Along the way, I was blessed with fabulous mentors, the most prominent of whom was Bill McClearn, one of the gurus of the Colorado trial bar in his generation. As a junior trial lawyer in the making, I saw firsthand his special leadership skills and witnessed the

character and grace he brought to everything he did. I've strived to emulate him.

What follows are my ruminations about leadership in the day-to-day grind of the life of a trial lawyer. Experienced trial lawyers will recognize and hopefully agree with the principles I've listed. I'm sure they could add some of their own. Any list is bound to leave something out. What I've included here are my top five "leadership considerations" for trial lawyers. These "considerations" are not directed at the leadership of law firms. Instead, they're aimed at leadership in the relatively small and ever-changing teams of professionals who work up cases for trial, and try them if the cases don't settle. When I use the term "leader" I'm referring to the person commonly called the "first chair," typically a partner, although that isn't always the case. At the same time, every aspiring first chair trial lawyer should be keen to learn how

to lead, so that when they sit in that first chair, they'll be ready to lead effectively.

1. Cultivate a Culture of Professionalism

As trial lawyers, we are members of a profession. We are not businessmen and women. Certainly, there's nothing wrong with wanting to be paid well for what we do. However, law firms are not just business organizations designed to maximize profits for the partners. In the hurly-burly of our practice, it's easy to lose sight of the fundamental nature of our profession, which calls us to service beyond ourselves. In this regard, our oath is similar to the one I took to "support and defend the Constitution of the United States against all enemies, foreign and domestic . . ." when I was commissioned as a second lieutenant in the US Air Force in 1970. Here's the one we took when we were admitted to the Colorado bar:

I solemnly swear (or affirm) that I will support the Constitution of the United States and Constitution of the State of Colorado; I will maintain the respect due to courts and judicial officers; I will employ such means as are consistent with truth and honor; I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty; I will use my knowledge of the law for the betterment of society and the improvement of the legal system; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed; I will at all times faithfully and diligently adhere to the Colorado Rules of Professional conduct.

Having been schooled in the law, when we're admitted to the bar, we pledge ourselves to a professional life of service to others and the rule of law. Our service on behalf of our clients does not occur in a vacuum. It's not just an economic transaction. As Bill McClearn told me more than once: "Our value to our clients is found in the quality of our character; never sacrifice that character to a client's desire to win." Or, as my mother used to say: "Do the right thing!" This is more than just making sure we're obeying the ethical rules, although that is certainly important. It's seeing what we do as a special calling that gives us the privilege of standing in the well of the court on behalf of our clients. It calls us to service beyond ourselves.

As trial lawyer leaders, it's our responsibility to insist on high standards of character and ethics for ourselves and everyone who works with us on behalf of our clients. We need to make it a priority for everyone we encounter in our practice (judges, clients, opposing counsel, and our colleagues) to see that character at work. If you're the first chair, your team needs to know that you take the standards of the profession seriously for yourself and that you expect them to do the same. This includes taking this pledge seriously: "I will use my knowledge of the law for the betterment of society and the improvement of the legal system; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed." We cannot and should not ignore this promise of service

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to those who, but for our willingness to help, will be left without a lawyer.

Let's face it: most of our corporate clients will never be short of lawyers or lack the ability to pay them. But what about that battered wife who can't afford a lawyer to represent her in getting a restraining order against an abusive husband? Or that military veteran who needs legal counsel in navigating the befuddling process for obtaining the benefits to which he is entitled? Or the asylum seekers who have no hope of understanding what they must prove to meet the standards of the asylum laws without a lawyer? The list could go on and on. As leaders, we need to lead by example by devoting some of our time and expertise to the causes of those who can't afford to pay for a lawyer. We also need to make sure our team members know we expect them to follow our example. Then we must support them when they step forward and meet the need. We should also praise them often and in public for stepping up to help a needy client.

Promoting a culture of professionalism is our *sine qua non*. It's the foundation on which our practices should be built. Nothing is more important.

2. Actively Promote a Team Mentality

As anyone who has gone through basic military training knows, the main goal of that grueling first phase of military service is to transfer the trainees' mindsets from the individual "me" to the collective "we." The armed forces teach from day one that the mission cannot be successful unless all members of the team are pulling together in the same direction. As we used to say at the Air Force Academy: "cooperate and graduate." We quickly learned that we were facing four years that would stress us to the limit and that the only way we were going to get through it was to rely on each other.

As a fighter pilot, Colonel Campbell describes this team orientation as the "wingman attitude," the mindset of watching out for each other when flying in formation, be it in training or in combat. The fighter pilot's survival depends on team effort, not only from the other pilots in the air, but also from the maintenance and weapons crews who keep the planes safe to fly

and load them with weapons and ammunition to complete the mission and return alive to base. It's a total team effort.

Although we certainly don't risk our lives, a lawyer's success in the courtroom also depends on the efforts of a team all pulling together in the same direction. When the team wins, we tend to applaud the first chair's stellar performance, but the first chair is just the tip of the spear. The first chair's success, just like the fighter pilot's, depends on the hard work of the entire team over the months and sometimes years of

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discovery and preparation culminating in the trial. Remember that leadership starts at the top. If you have passion and commitment, your team will too. The best trial lawyer leaders are those who love what they do. Although they're engaged in serious work, these trial dogs are attracted to the excitement of the courtroom and the fun of trying a case. Let your team see that excitement and allow them to share in the fun.

Who makes up this team? A typical civil case of the type I've spent my career handling is staffed by a first chair (usually a partner), a

second chair (usually an associate), a paralegal, and the secretary/personal assistants who work with the lawyers and paralegals. That means that most of my work has been done in teams of about four to six people. In larger cases, there will be more lawyers, and the paralegals may be assisted by document clerks. When a large case goes to trial, other professionals may be brought on board (e.g., a computer presentation specialist). Thus, in larger cases, the team could grow to around 10.

The first step in team building is to make sure that all team members know their contributions are valued. Words of thanks on a regular basis are essential, but that's just the beginning. As soon as possible after a case comes in and the staffing is decided, the first chair should introduce all team members, including the personal assistants, to the client. An in-person meeting with the client is best, but a virtual meeting is a reasonable second choice. This demonstrates to the client and all team members that their respective roles are acknowledged and valued. It's also an opportunity for the first chair to emphasize the importance of a coordinated team effort in accomplishing the client's goals.

Second, the process of staffing a case should include a separate sit-down with each potential team member. This is especially important if the first chair has not previously worked with the team member. A number of things should be discussed, including:

- what the case is about, the client's goals, and how the case is expected to unfold (recognizing that cases often take unexpected twists and turns, both procedurally and substantively);
- the role you foresee for the team member and whether they have the experience necessary to fulfill that role or the desire to work into that experience;
- whether the team member has any professional or personal commitments that might inhibit them from investing the time you'll need on this case; and
- what growth opportunities the team member hopes to have in the case.

Third, all team members should be included in significant meetings during the course of the engagement. This is especially important for the

initial strategy and tasking sessions on the front end, and trial preparation sessions on the back end. All team members, including the personal assistants, need to know, at the outset, what the case is about and what their respective roles in the engagement will be. At the other end of the case, all team members should be invited to see the fruits of their labor. Invite them all to attend mock trials and dry runs of the openings and closings. When you invite the team members to attend meetings, encourage them to be active participants. Solicit their views and let them know their contributions are valued.

If the trial is in town, invite those who won't be at counsel table to attend significant aspects of the trial, such as openings, closings, and examinations of key witnesses. When you meet with the client, think about including some, if not all, members of the team. If need be, tell the client you won't bill for their time,

but that you think it's important for the client to know who is doing the work and that it's a morale booster for team members.

Finally, when a case is concluded, by settlement or trial, it's important to thank the team for its hard work. This is easy to do when there's a win. It's harder to do, but even more important, when the team loses. Don't just assemble in a conference room. Take them out to a nice restaurant for lunch or dinner. Let them relax and enjoy each other's company. Tell them you appreciate what they did for you and the client.

3. The Best Leaders Are Good Teachers

Bill McClearn was a great teacher. Because I learned so much, I cherished every opportunity I had to work for him. Oh, he was demanding; no doubt about it. He expected nothing but your absolute best effort. I knew that if I worked

for him, he'd show me by example how to be a top-notch trial lawyer and would take the time to give me feedback. If you're a teaching first chair, you'll have no problem assembling top-flight teams.

The first thing I learned from Bill was to think. Sounds crazy, but it's true. He told me that I was never to come to him with a problem unless I had thought through it and was ready to propose a solution. Quite often, he agreed with my solution. When he didn't, I learned from the application of his experience and wisdom in coming to a better solution. In the process, I learned that solutions to litigation problems are, more often than not, as much about common sense as the law.

He also taught me the importance of in-depth knowledge of the rules of procedure and evidence. For example, he told me that every time I was tasked with drafting a discovery

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request (or a response to a request), I should read the *entire* rule governing that particular request. For example, the lawyer should pay attention not only to what is allowed by CRCP 33 in discovery, but also to what the rule says about how the response can be used at trial. This sounds obvious, but you'd be surprised how many litigators don't pay careful attention to the details. It was such good advice that I carried it over to my role as first chair. Whenever I reviewed a set of discovery requests or responses, I pulled the rule book off the shelf and read (for the umpteenth time) the governing rule. I found that knowing the details of the rules is sometimes the extra margin you need to get an important piece of evidence admitted at trial.

What applies to the rules of procedure applies in spades to the rules of evidence. Bill told me that learning the rules of evidence as a junior trial lawyer would pay big dividends over the years—and he was (surprise!) absolutely right. It's a rare law school evidence course that teaches what a trial lawyer really needs to know about evidence. What you really need is a Faust Rossi blast like you get at NITA. (I love his hilarious but instructive lesson on refreshing an elderly blind Italian lady's memory with the smell of her homemade fettuccine!)

The time to think about those rules isn't when you bounce up to make an objection at trial (although you better know what the proper objection is). I learned from Bill that one of the reasons you should start working on your trial examinations early is to identify the evidentiary pitfalls and be prepared to overcome them at trial. In my experience, far too many trial lawyers don't put in the work necessary to deal with the evidentiary intricacies of their cases. If you and all members of your team master the rules of evidence, it will earn you the respect of the judge and give you extra credibility with the jury. It will also ensure that all the bricks you want in the wall will be there when you make your closing!

One final comment on the teaching role of the first chair: make sure you take the time to give the junior lawyers and other team members feedback. We have all suffered the frustration of getting a redline of a brief back from a first chair with extensive changes and no explanation

as to why the changes were made. If you have time to mark up a draft, you should take the time to teach the lawyer who drafted it how to make it better the next time. I could give other examples, but you get the point.

4. Give Your Team Members the Opportunity to Grow

Remember that the junior lawyers who work with you want to become you. That means they don't just want to write briefs. They want to build the skills necessary to be first chair. They want that adrenaline rush that keeps all

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trial lawyers coming back for more. The most impactful thing you can do for the morale of junior lawyers is to give them a meaningful role at trial. That presents a dilemma: if they've never done it in the courtroom, how do you get them the experience to do it? We are beyond the "sink or swim" world of the "good ole days" (if there ever were the good ole days) where legend has it that young associates were thrown into the courtroom to go solo on small-stakes cases. It's your job as first chair to make sure the people on

your team have the experience and/or training to play a meaningful on-the-feet role at trial.

One of the first things you should do is to encourage the junior lawyers in your firm to attend a quality trial skills training program. I was fortunate that, back in the early 1980s, Holland & Hart paid for me to attend NITA's three-week trial skills "boot camp" at the University of Colorado Law School in Boulder. The students lived in the dorm, and we were immersed 12 hours a day for three weeks in all aspects of trial (including that Faust Rossi blast on evidence). NITA now offers a slate of shorter trial skills programs and a very good program on depositions. The great thing about NITA is that you're on your feet (or sitting at a deposition table) getting constantly videoed and critiqued on your performance. It's not unlike the simulators used to train pilots. I know that when I finished NITA, I was confident that I could try a case competently. And I did!

As you'll recall, in that first sit-down with your team members, you're going to ask them what growth opportunities they hope to have in the case. Invariably, the junior trial lawyers will say they would like to take some depositions and get some witnesses at trial. If they've had no experience, a training program is indicated. However, there's no reason why they can't take a deposition with preparation help from an experienced lawyer. The same is true for trial examinations. In my experience, judges and juries like to see the young people sitting at counsel table have a crack at a witness or two. Review their outlines and make suggestions. If it's a direct examination, sit in on the dry run with the witness. Mock and critique the cross. The point is that the first chair needs to take the time to get "first timers" ready for the trial task; they should be confident they can get the job done.

Experienced second chairs will want to do more than just take witnesses. In longer trials where the openings and closings may have several issues and the judges allow more time to make the presentations, consider splitting one or the other, or both. Here again, practice is key. If there's a mock trial, consider having the second chair present the other side's case as a confidence booster for all concerned, including the client.



5. Share the Successes and Own the Failures

This last “consideration” is definitely not the least. As first chair, if you haven’t already cultivated a “team recognition” attitude and practice, start now! When things go right and the team succeeds, make sure to share that success with the entire team. Give them credit privately and in public, and certainly with the client. This is the easy part.

The hard part is when you lose at trial, or a case takes an unexpected turn for the worse during discovery. It should go without saying: don’t play the blame game. We’ve all seen first chairs who blame the associate for missing the key case or the paralegal for failing to uncover the key document. Remember that as far as the world at large is concerned (especially the client), the first chair owns the responsibility for the case, whether things have gone well or poorly.


That’s not to say there shouldn’t be accountability. To the contrary, the ability to learn from mistakes is the key to improvement. And we all make mistakes. Immediately after the case concludes, be it by settlement or trial, conduct an all-hands debriefing of the case. Ideally, the client will participate. Explore in detail what was done right and, perhaps more important, what went wrong. Identify the concrete steps that are needed to improve, and follow up to

make sure the improvements get implemented in the next case.

The Path to Victory

I’ll conclude with one last military vignette about leadership, with a shout out to Admiral William McRaven, who included it in his newly published book, *The Wisdom of the Bullfrog*.² In 1942, Admiral Chester Nimitz commanded the Pacific Fleet. He was considering a momentous decision: should he commit the fleet to battle against the Japanese at Midway? The intelligence was cloudy, and Nimitz was agonizing over the

decision. He went to seek advice from Admiral Bull Halsey, who was hospitalized at Pearl Harbor. Nimitz confessed his ambivalence, and Halsey exclaimed, “when in command, command!” Admiral Nimitz took Bull Halsey’s advice to heart. He decided to commit the fleet to battle and won one of the greatest naval victories in history.

If you’re the first chair, you’re in command. To ensure that your commands don’t rattle hopelessly around the walls of the courtroom, you must have a well-organized and motivated team to execute them. That’s the path to victory in the courtroom. 



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NOTES

1. Campbell, *Flying in the Face of Fear: A Fighter Pilot’s Lessons on Leading With Courage* (Wiley 2023).
2. McRaven, *The Wisdom of the Bullfrog: Leadership Made Simple (But Not Easy)* (Grand Central Publ’g 2023).

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