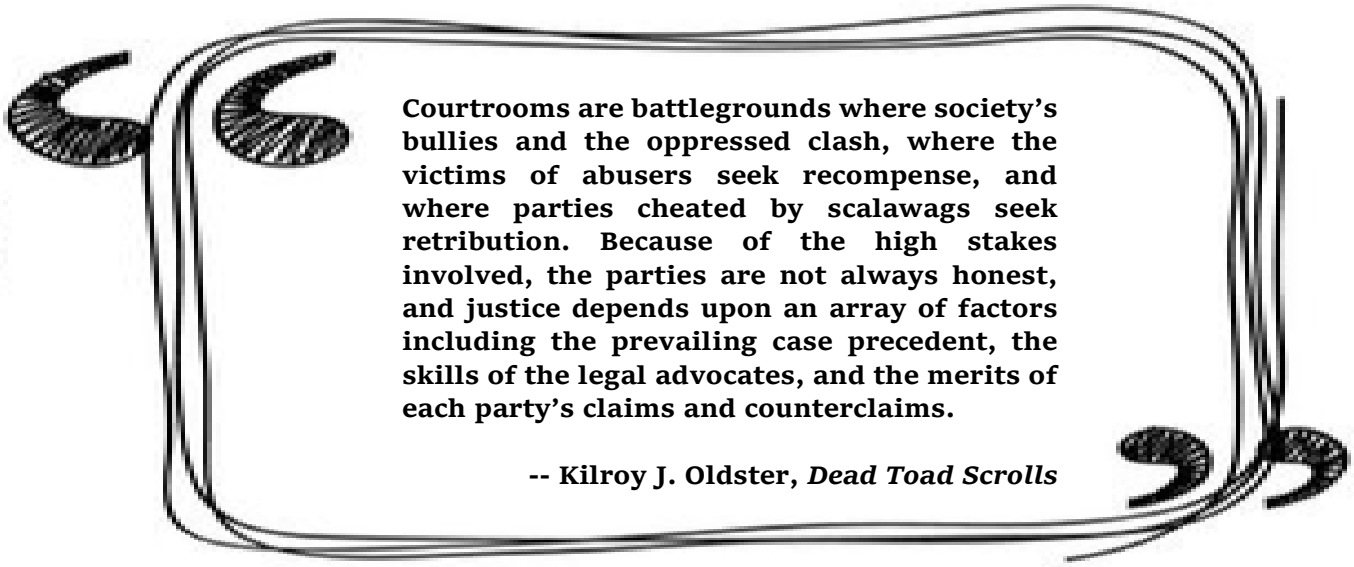
Chapter 1

A LITIGATOR'S PHILOSOPHY

Litigation, and being a quality litigator, is not about counting up wins and conveniently disappearing losses from the scorecard. Though over time a quality litigator will likely see more "wins" than "losses," whatever those words mean, wins and losses are not an appropriate measure of your worth as a litigator. Here we redefine what ***#winning*** *and* ***#losing*** *are all about and focus on the important thing--the* ***5P's****.*



Courtrooms are battlegrounds where society's bullies and the oppressed clash, where the victims of abusers seek recompense, and where parties cheated by scalawags seek retribution. Because of the high stakes involved, the parties are not always honest, and justice depends upon an array of factors including the prevailing case precedent, the skills of the legal advocates, and the merits of each party's claims and counterclaims.

-- Kilroy J. Oldster, *Dead Toad Scrolls*

Chapter 1 - A Litigator's Philosophy

#WINNING

Mastery of the facts is the key to victory. Full stop. But coming in a close second is credibility. Credibility of your witnesses and the implausibility of your opponent's witnesses determines which facts (or "alternative facts") will carry the day. That is why the jury instruction on credibility is so important. But even more important for a litigator is the personal credibility you establish (or lose) with the trier of fact.

Every action you take and word you speak at trial should have the sequential goals of establishing and then enhancing your credibility with the trier of fact. For they will drink from that well of credibility when they consider whose witnesses to believe and which closing argument is the most persuasive. So …

Do not just be organized, look organized—store your file folders in a box next to counsel table rather than strewn over it (aka "the Brent Jones rule"). Have your exhibits ready to go, but keep that counsel table uncluttered and neat—it sends a message. And it should go without saying, but project a sharp and professional image in your attire and appearance.

Move your case with purpose. Downtime that appears to be caused by your bumbling will crash your credibility. How many times have I seen the jury members or judge roll their eyes when counsel does not have copies of exhibits ready to go, or does not have their witnesses nearby the courtroom and ready to go when called, or did not set up the computer/screen for presentation or video testimony during an earlier break thus requiring another? Too many. How many times has counsel's bumbling turned a 10-minute recess they asked for into 20 minutes? Too many. Each of these bumblings weighs more heavily on your credibility than any word you speak in court.

Move yourself with purpose. Know where you are going to stand for directs, crosses, and argument and get there immediately when it is your turn. No fumbling around with a notepad, folder, glass of water, no consulting with co-counsel for a minute or two until sauntering towards your perch—get to it. Know whether you need to ask permission to approach and if you do have to ask for it, ask for it, get it, and then move with a sense of purpose. If you are going to provide (publish) a binder of exhibits to jury members, figure out before you stand up how you are going to pass them out.

All these are little things, but they all add to the Credibility Index calculus. What is that calculus? Easy: **Con+AK=Cr** [Confidence+Actual Knowledge=Credibility]. All of the above adds to the perception that you are confident in yourself and confident in your case. Now, yes, you may have to feign confidence now and again, particularly in yourself and sometimes in your case, but you need to focus on projecting it. The meek will not inherit courtroom success (though neither will the smug and arrogant). Actual Knowledge [AK] you cannot fake, and you should not try to as you will only shoot yourself by shooting from the hip. And Actual Knowledge [AK] has its own sub calculus: **AK=IC+S&P+∞Hr**, where IC=your intellectual capacity, S&P=study and preparation, and +∞Hr=infinity number of hours . . . in other words, attaining credibility is a lifetime pursuit.

The meek will not inherit courtroom success (though neither will the smug and arrogant)

Understand, however, that trying to push up your Confidence Index with the trier of fact too far, particularly in the absence of Actual Knowledge, only serves to undermine your credibility. Cockiness does not equal Confidence. It equals Jackassery. Do not act like a jackass at counsel table. No making faces, snickering at witnesses or opposing counsel, loud talking while opposing counsel is conducting a direct or making an argument. Some attorneys may think all of that is good tactics intended to distract opposing counsel or send some message to the trier of fact . . . but the message it sends to members and judges (particularly in the military) is that you are a fool, a jackass. Some may think this funny coming from me, but as I have matured as a

litigator I like to think I have (sort of) kept myself in check in this regard for the most part, usually, maybe sometimes; but more importantly, I have come to recognize this shortcoming and its importance.

With north of 90 percent of trials ending in guilty pleas, being in a litigated trial usually means both sides think the facts support them. That cannot always be true. **#Winning** in such situations, while still fact dependent, is going to come down to which witnesses and which facts resonate as the most credible to the trier of fact. Your credibility plays an intangible part in their decision-making process. Establish then enhance, do not detract from, your credibility. That is **#Winning**.

#LOSING

Litigation is not for everyone. But do not judge your performance as a litigator by the results of one particular trial. Over time, good litigators win more cases than they lose. But I have won cases I "should have" lost and lost cases I "should have" won. As much as I would like to think it was different, and regardless of exaggerating the wins and minimizing the losses, all other things being equal, my performance as a litigator likely only had positive or negative effect on the margins of a particular case. There were many more aspects of those particular cases that were more important than my brilliance or incompetence as a litigator . . . like, say, for example, the facts.

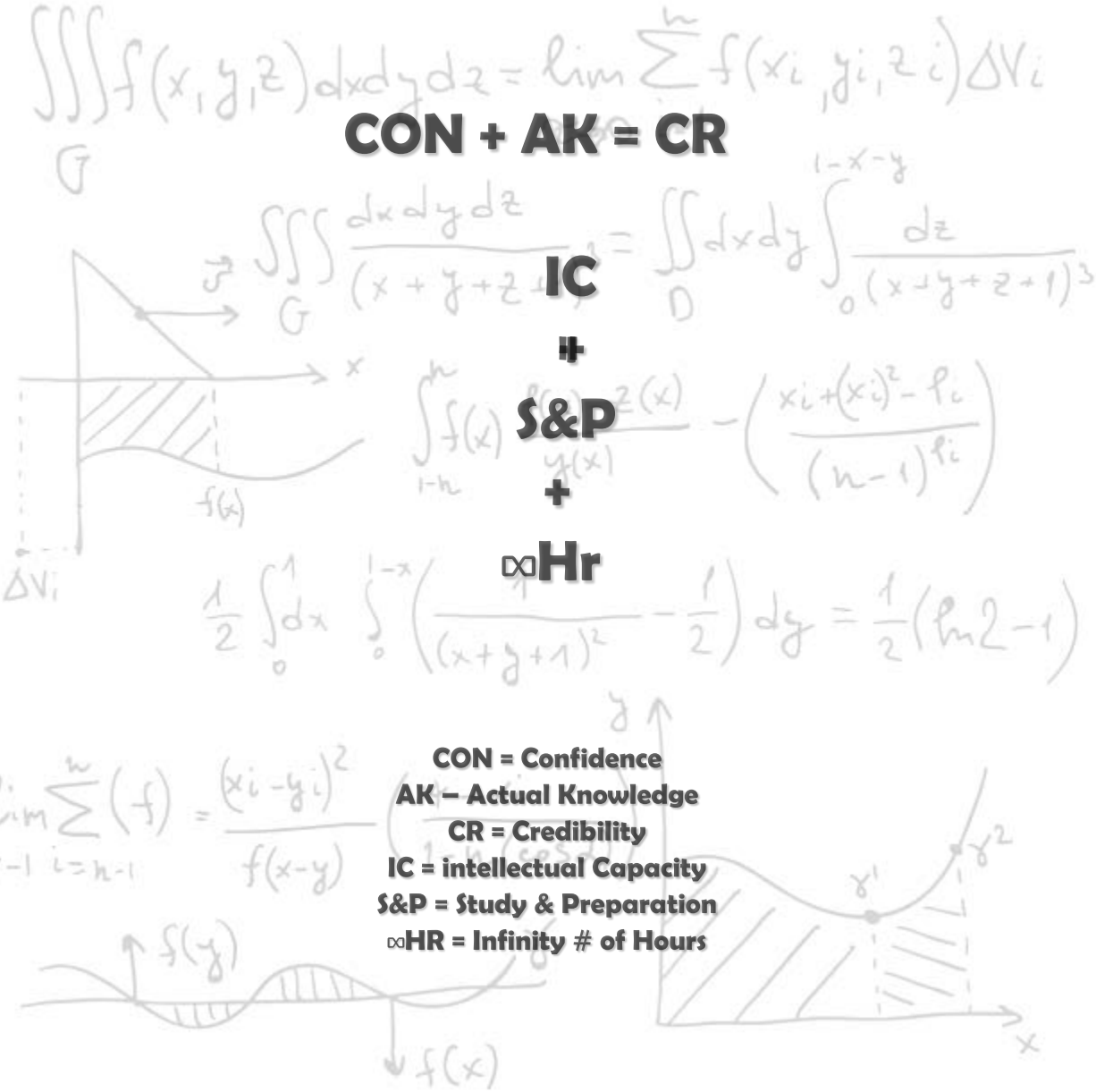
On the whole, facts win or lose cases. You of course bring to bear all your talent, energy, preparation, strategy, courtroom tactics, and credibility to the facts that you believe best support your case, assuming you have any facts on your side. But in the end sometimes members just have a different perspective on what is and is not important. As long as you have done all that you can to bring your facts to them, and advocate in a credible way (*see* **#Winning**), that is all you can do . . . the rest is left to the whims of the trier of fact.

So celebrate your victories as a reward for the hard work you put into the case, but then bring some self-assessment to what you could have done better as there always will be something. And get that not from the members, who generally only have nice things to say about counsel, but from the other participants in and observers of the trial (particularly court reporters, senior counsel and paralegals, and judges who have seen lots of trials). Mourn briefly your losses and then engage in that same self-assessment. For both, quickly flush the high or the low and move on to the next case.

> **… do not judge your performance as a litigator by the results of one particular trial**

Now, if over time you are losing more than you are **#Winning**, you might want to reassess whether litigation is your best legal

career path. But do not allow the results in one trial to make that decision for you by defining who you are as a litigator.



PREPARATION – THE 5 P's

My father, the PGA golf professional, gave me a piece of advice that has transcended my lack of golfing ability and driven much of my success as a trial litigator—the **5 P**'s ... **P**reparation **P**revents **P**iss **P**oor **P**erformance (or **P**ractice **P**revents **P**athetically **P**oor **P**erformance, they are interchangeable).

You will read this a few times throughout this Compendium, as it is the key to my litigation theory: Contrary to every briefing you have ever received at every litigation-skills course, whatever aspect of trial practice the instructor is then briefing (from *voir dire*, to opening statement, to direct examinations) is not the key to victory. Trust me, *voir dire* is not the key to victory. And neither of the two glory moments for every litigator in every case (cross-examination, particularly of the accused, and closing argument) is the key to victory. Mastery of the facts and evidence is the key to victory. Let me repeat for effect: mastery of the facts and the evidence is the key to victory.

If you do not know the facts and the evidence better than every person in that courtroom, all your litigation skills may enhance your ego and watercooler boasting, but they will not win you a conviction or an acquittal. Only knowing the facts and the evidence better than every person in that courtroom will do that.

> **Mastery of the facts and evidence is the key to victory**

And the only way to ensure you do that is through application of the **5 P**'s. This is the non-glorious tedium of pre-trial practice. This is watching every minute of the recorded interviews of the victim and the accused, and every other witness, reviewing a transcript (or creating one) as you go, and then reviewing the recorded interviews again and again until the images are seared into your brain. This is interviewing every named or potential witness, even if you have their written statement or recorded interview, and then talking to every other potential witness those interviews lead you to, and so on and so forth. This is traveling to law-enforcement's office to put eyes on every piece of evidence, even if you have pictures

or have "seen it all before." This is a tortuous slog that prepares you to meet every eventuality in court.

But it is not enough. The **5 P**'s also require that you distill this deluge of information into a useable form. That means not only preparing your case, your theme and theory, but preparing to meet the case your opponent is likely putting together—and then revising your case, or being ready to flex, to meet every eventuality that could be thrown your way in court by your opponent. That means not only preparing your careful *voir dire*, scintillating opening statement, pin-point directs and crosses, and crushing closing argument, that means practicing them over and over again and tweaking and adjusting (or starting over) as needed. That means having every exhibit and demonstrative aid (and copies) ready to go.

Application of the **5 P**'s will not win your case, but ignoring them will lose it. Do not be a loser.