I like meeting with new associates; they keep me feeling young. But I don’t usually have three beers with them like I did with you folks tonight. Anyway, since you asked, I’ll tell you this before I go. I’ll tell you the stuff they didn’t tell you in law school.

If I really work up a head of steam here, you’re going to think that I need therapy. Maybe I do, but it’s not for the things I’m about to say. I love my job; I’ve enjoyed my career; I wouldn’t trade it for anything in the world. But you asked about the bad stuff, and there’s plenty of it. Here goes.

When you thought your professors were misleading you, they were showing you the truth; when you thought they were being honest, they were deceiving you.

Take law school exams, for example. You always thought they were ridiculous; you probably still do. Cram irrelevant crap into your head for two days; spill it all out in an hour or three; forget about it, and move on to the
next set of irrelevant crap. Sit back and wait while someone passes judgment on your abbreviated presentation. Surely this has nothing to do with the practice of law.

Wrong, wrong, and wrong again. That process is the very essence of practicing law. What do I do when I argue a motion? Cram irrelevant crap into my head for two days; spill it all out in five minutes or thirty; forget about it, and move on to the next set of irrelevant crap. Have someone tell me if I win or lose.

What do I do when I take a deposition? Cram irrelevant crap into my head; spill it out in the course of a day; forget about it, and move on.

What do I do when I argue an appeal? Try a case? Participate in a beauty contest to attract new business? You got it. If you don’t enjoy cramming, spewing, and moving on, you picked the wrong profession.

On the other hand, the things that appeared to be true in law school were often deceiving.

Take moot court, for example. This was a practical experience, designed to show you what lawyers really do. Surely lawyers must spend most of their professional lives arguing cutting-edge legal questions before three robed scholars, familiar with the briefs and underlying issues, who pepper counsel with thoughtful questions.

Poppycock! First, lawyers rarely appear in appellate courts. Appeals are taken from final judgments on the merits. Since 98 percent of all civil cases settle before trial, final judgments on the merits are rarely entered. When entered, those final judgments are probably the culmination of months or
years of pretrial or trial proceedings. For most lawyers—those who are not appellate specialists—appellate arguments are rare as hen’s teeth.

Typical lawyers do argue issues, but the issues are usually framed in pretrial motions and argued to trial judges. That implies a couple of things they didn’t mention in law school. First, your motions—and most of your real-life practice—will wallow in the facts, not the law. In law school, your professors debated the intricacies of the First Amendment; in practice, it’s largely a question of who said what to whom when.

Second, the quality and interest of your moot court judges may not mirror the quality and dedication of your trial judge. Trial judges run the gamut from the brilliant, diligent few; to the average, overworked many; to the dim-witted, apathetic few at the other end of the spectrum. In every court, however, judges are overworked. Moreover, judges always know far less about your case than you do; you’ve been working the case for years, while the judge first flipped through the file yesterday.

In some court systems, a single judge is assigned to the “law and motion” calendar, which means that one person hears all motions filed by all litigants in all civil cases in an entire county. That judge may hear arguments on twenty to fifty motions before lunch on Monday morning. Afternoons are reserved for applications for temporary restraining orders and emergency motions. The judge saves the last few minutes of the day as free time, devoted to studying the twenty to fifty motions that will be argued on Tuesday morning. That is typical legal life, and it doesn’t feel much like moot court.

In this environment, what becomes of the majesty of the
law? Your half-hour of argument before three wizened scholars in moot court may collapse into ninety seconds of argument before an overworked judge who only briefly discussed your motion with the law clerk who actually read the papers. An able, experienced judge may have a question or two, but many judges will have none. After five minutes of argument—combined, between you and opposing counsel—your motion may be granted or denied in an order ranging from a single word to three or four sentences in length.

What becomes of briefs in this environment? Discard the fifty-page draft that would have impressed your moot court panel; this is real court now. If you can present your argument in a single, short opening paragraph, do so; that much, at least, might get read. Expand your argument over the course of a brief that spans five or seven pages and you’ll have a chance of victory; more than that, and you’ll try the patience of many judges. Moot court is not real court.

All courts are busy; a small minority are also unfair. In some courts, your brief and argument will be entirely irrelevant. Those courts may be populated with elected judges who are subtly, but unduly, influenced by local politics; they may be home to appointed judges who unswervingly pursue preordained results. Either way, you will occasionally find yourself condemned to lose no matter the righteousness of your cause or the brilliance of your argument. That is not simply terribly unfair to your client whose cause is lost. It is also unfair to you. Where’s the thrill of victory or the agony of defeat when the result is preordained? Where’s the competition that drew us into this field? Most of all, where’s the fun?
Law schools also do not warn you about the arguments that are true, but forbidden to be made. In the context of a motion for change of venue, for example, one possible transferee judge may have had a long and distinguished career in private practice and since become an immensely well-respected judge. Another possible transferee judge may have had a short career as a dog-catcher before being elected to the bench last month because his surname rhymed with that of a local football hero.

In that situation, you may be tempted to explain, accurately, that the former judge would have the capacity to understand and handle your case appropriately, while the latter judge is a train wreck waiting to happen. Don’t you dare! Courts cling mightily to the legal fiction that all judges are created equal. These are the true words that you may not speak in court: Some judges are better than others.

Moot court spreads other misconceptions, too. Moot court consists, first, of time spent alone crafting a persuasive brief and, second, of time spent in public, in the presence of judges and opposing counsel. You never speak to opposing counsel privately before argument, and everyone is courteous and respectful before the court. In short, in moot court, the entire game is refereed.

Not so in real court, my young friends. Litigation these days means pretrial activity, and pretrial activity means discovery, and discovery means no referees in the room. It’s two-year-olds flinging mashed potatoes at each other. It’s you and the sociopath, mano a mano.

Tomorrow morning I’ll hunt around through my files for a
dog-eared copy of a deposition transcript that trial lawyers have passed from hand-to-hand for years. In that deposition, counsel disagree over whether one lawyer intentionally spilled a cup of coffee on the other lawyer’s notes. There’s really not much doubt about it; he did.

Better yet, go online yourself and find the published Delaware state court decision quoting the renowned Joe Jamail telling opposing counsel during a deposition: “Don’t Joe me, asshole,” and, “You could gag a maggot off a meat wagon.” Or look up the Texas federal case where, during a deposition, defense counsel called plaintiff’s counsel an “idiot,” an “ass,” and a “slimy son-of-a-bitch.”

These examples are extreme, but the day-to-day indignities of the unrefered part of this game are not for the weak of heart. Many lawyers will object to the form of virtually every question you pose during a deposition, for fear that one question may in fact be improper and, without objection, the impropriety would be waived. Other lawyers have bright-line rules for discovery, such as never answering more than one-quarter of the interrogatories posed by opposing counsel: “That’s enough to satisfy the judge, and we shouldn’t give away more information than we must.”

In law school, your professors misled you on this score; they hinted that judges do not tolerate this misconduct. In real life, judges rarely care. Discovery motions are filed en masse. They are routine; they are boring; and they always seem to involve two children who can’t play nicely in the sandbox. Discovery motions rarely engage judges, and judges rarely call misbehaving counsel to task. The practice of law is
not like the learning of law; in real life, most of the game is a
free-for-all.

Law school also never burdened you with a true understand-
ing of the word “discovery.” That word does not mean
3,000 pages of documents that you can read, understand, and
inquire about intelligently at depositions and trial. Maybe “dis-
covery” meant that in the 1950s, but it doesn’t mean that today.

Today, “discovery” means documents beyond human com-
prehension. At our firm, a case with only 2 million pages of
documents is a small case; big cases involve tens—or hun-
dreds—of millions of pages of information. The information is
so vast that we could never read it all in a lifetime. We certain-
ly can’t read it in time for the depositions that we’re taking
next month. Since we can’t read it all, we don’t. We run word
searches (which are inherently inaccurate) of our databases
and hope we find the important stuff. Teams of junior lawyers
review the results and imperfectly try to identify the docu-
ments that truly matter. More senior lawyers then review the
thousands of selected pages to try to conduct discovery intel-
ligently, prepare witnesses for trial, and pick perhaps 100
exhibits to ask a judge or jury to try to understand.

The discovery records in our cases thus literally outstrip
human comprehension. When we ultimately argue our cases,
we inevitably mislead the factfinder. We have no choice. We
can either overwhelm the jury with detail or deceive the jury
by omission, but neither we nor the jury could ever compre-
prehend the true meaning and interrelationship of all the facts.

They also never told you in law school that this job would
drive you nuts. In a sane world, you can persuade people by
making reasonable arguments. If your wife wants to drive to Chicago, you might convince her to fly. If the guy at the shoe store sold you bad shoes, you might convince him to refund your money or give you a replacement pair.

In litigation, this doesn’t happen; there’s no such thing as rational discourse. If you want the deposition to be held in Houston, opposing counsel insists on Denver—and won’t be convinced otherwise. If you want the trial in June, opposing counsel wants it in December—and won’t be convinced otherwise. If you want each side to have the right to serve fifty interrogatories, he wants 100—and won’t be convinced otherwise. If you want black, he wants white. If you want yes, she wants no. Over the course of the coming decades, your heart will long for a rational discussion with a person susceptible to reasonable persuasion.

There’s only one limit on this constant quibbling: No one will ultimately insist on a position that a judge will view as unreasonable. No one wants to defend an unreasonable position in court and thus to look like a jerk to the person wearing the robe. Opposing counsel may therefore occasionally accede to your position, but never because your argument carried the day; it’s only because resisting your position might result in public humiliation.

There’s a flip-side to that insanity, and it, too, will drive you nuts. Taking positions that verge on the unreasonable is perfectly logical in the practice of law. You may adopt this approach, too. On most contested matters, you’re looking for an advantage, and the other side is looking for an advantage. There’s no reason voluntarily to give the edge to the other side;
indeed, many would say that you’re duty-bound to resist. Over the course of a long career, you may find yourself unconvinced by opposing counsel’s reasonable arguments and unwilling to yield unless you risk looking silly in court.

Don’t get me wrong; I didn’t say this was proper. I said it was routine and would drive you crazy over time. You can, and should, resist becoming a reflexive nay-sayer. Try making horse trades with opposing counsel: The trial can be in December so long as the deposition is in Houston and each side is limited to only fifty interrogatories. Try currying favor with opposing counsel: I’ll yield on this issue if you’ll yield on the next one. Try acquiescing every once in a while just to avoid the cost of motion practice or to prove that you’re a decent human being. Being reasonable can protect your sanity and save your client money. But only the strong among us manage to retain our reason through the years; the currents of litigation run almost irresistibly in the other direction.

There’s one other thing they never told you in law school: This profession will eat at you. Suppose you’re defending a case that’s going terribly, and you see no escape for your client. You’ll think about that case all day, every day, trying to find a solution. The case will follow you home every night, invade your thoughts when you’re taking a shower, disturb your sleep when it appears in dreams.

Suppose there’s a miracle. You come up with a theory for summary judgment; the case is defensible! You’ve won back your mind; you no longer stew about the case every waking minute.

At our firm, this means that you no longer have enough
work to do. If your first case no longer occupies you full-time, then you need more work. If the next case is easy and defensible, then you still need more work. If the third case is easy, you're still not busy enough.

Eventually, you'll pick up a new case that fully occupies your time. The case will consume you—because it is indefensible, because there is no way out. You will be turning the case over in your mind as you commute to work, take a shower, sleep. You will never be free.

This truth may disturb you, but it shouldn't surprise you. After all, we defend hard cases; some of our clients did something wrong. Independently of that, you've chosen a profession in which intelligent, motivated opponents are trying to make you fail. Some of them will succeed. And our law firm still largely bills clients by the hour, so winning cases quickly and easily will leave you in search of more work. You haven't picked an easy profession.

Maybe I'll have one last beer before I go. That'll give me time to tell you one last thing: If it's so terrible, why did I stick with it for all these years? Actually, it's much more than that: If it's so terrible, why have I loved it for all these years? That's a good question; it deserves an answer.

First, I'm a competitive guy. I like winning and losing, and I like the world to know when I've won. I've never had a decent fastball, so this was my best choice for a career. My professional life is a never-ending series of competitions, with the emotional thrill that the game provides.

Second, this career offers endless variety. Every case involves new areas of law, new facts, and a fascinating new
cast of characters. Some of those characters are good and some are evil; some are brilliant and some are moronic. But they change with every case, and every case presents a new challenge. The details may be tedious, but the big picture is never boring.

Third, Robert Bork was right: As he said at his Supreme Court confirmation hearing, the law can be an intellectual feast. We unearth the facts, craft the arguments, and help to develop the law in ways that further our clients’ causes. We’re free to interpret facts and cast the law in any way we can imagine. The only limit on our ideas is the limit imposed by our own abilities.

And last, I’ll quote a movie. Joe Gideon, the tightrope walker in “All That Jazz,” was asked why he risked his life every day for his career. He answered, “To be on the wire is life. The rest is waiting.”

That’s the life of a litigator, too. When I’m engrossed in the law, I’m alive. I’m engaged; I’m attentive; I’m focused. I can tell you now, decades later and with almost pathological recall, lines of questions that worked and others that didn’t at my earliest trials. I can tell you the one time an appellate judge asked me a question I hadn’t anticipated. I can tell you when, after wrestling with an insoluble issue for months, I finally saw the light. Maybe those great events don’t happen often enough, but when they do happen, they’re unspeakably good.

To be on the wire is life; the rest is waiting.

Can one of you call me a cab?