



Lessons from losing: How to beat defeat

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The jury had reached its verdict. My heart was pounding as I sat at the counsel table and watched the jurors parade into the courtroom. My young associate was next to me nervously tapping her pencil on the table. I glanced back at my client and smiled. I felt we had won the case. I always felt I had won my case. As a plaintiff's lawyer, why else would I try the case unless I thought I had a winner?

My client was a fine, ethical prosecutor who had been wrongfully fired by a vindictive small county District Attorney in retaliation for my client reporting him to the State Bar for what she felt was unethical conduct. I believed the DA had lied on the stand and was a real sleaze. I really respected my client's integrity and felt that she had done a pretty good job. However, in the back of my mind was a nagging concern that she was a bit hard-edged and that the local employees who worked in the small DA's office often criticized her. I wondered if the jury had connected with her.

The jury foreman handed the verdict to the judge who looked it over and gave it to the clerk to read. The first part of the verdict form was good news. "We find for the plaintiff." Then the bottom dropped out. "We assess damages in the sum of \$25,000." This was a shockingly low sum and a fraction of what I could have settled the case for: I was expecting a verdict closer to a half a million to a million dollars, not this!

My face flushed as I looked over to the defense counsel table and saw the smirking smiles of my opponents as they glanced my way. The anger and frustration of this loss hit me hard. How could I have so misread this jury? At the time, I was a successful trial lawyer with over 35 years of trial experience and over 150 trials under my belt. I felt that I should have seen this coming. What had I done wrong? How could I have tried this case differently? Should I have even taken this case at all? These thoughts raced through my head as they had so many times before.

I was in that situation and felt the same pain, fear, frustration, humiliation, shame and guilt over 30 times in my legal career. Thirty jury trial losses. Yet, I had tried over 150 jury trials to verdict, of which well over 100 were plaintiffs' personal injury cases. I am proud of my record, but strangely enough, I seem to remember my losses much better than my wins.

As lawyers, we don't want to talk about our losses. We only want to bask in the glory of our victories, no matter how large or small. However, any litigator is going to have to deal with losses and will probably suffer many of them.

May the best man win

For the last several hundred years our common law heritage has honed our legal system into our current adversarial system of justice. Most of us are very proud of this system. We hail it as the greatest legal system in the world. It is founded on the premise that if both sides of a disputed

matter can present their best arguments to a neutral tribunal, a fair and just decision will be rendered. It assumes that the lawyer who cites the best legal authorities, presents the most persuasive facts and makes the best arguments will win. Justice always triumphs – or does it?

This notion that justice is won through both sides presenting their best case is deeply rooted in our common law history. It began with men fighting to the death with their chosen instruments in "trial by battle." We now fight the battle with words instead of weapons, but the theory is the same: may the best person win.

Magazines, practice guides, and seminars offer advice on how to win our cases. We trial lawyers talk about winning trial strategies, winning in voir dire, winning in opening statements, winning in closing arguments, and on and on. Just pick up any legal publication and notice how many times the word "win" is used. Nobody ever talks about losing. We ignore that subject.

Our overriding desire to win comes not just from our legal training. It runs through virtually everything in our culture, from business and politics to sports. In fact, one of the greatest sports heroes of all time was the Green Bay Packers' coach Vince Lombardi. He talked about winning:

There is no room for second place. There is only one place in my game, and that's first place. I have finished second twice in my time at Green Bay, and I don't ever want to finish second again. There is a second place bowl



game, but it is a game for losers played by losers. It is and always has been an American zeal to be first in anything we do, and to win, and to win, and to win. (See <http://vincelombardi.com/about/speech.htm>.)

Isn't this how most of us feel? Does anyone want to come in second place in a lawsuit? We are not only supposed to win, but we often feel a *need* to win at all costs.

The cost of "driving to win"

Unfortunately, this drive to win at all costs leads to many problems. There is a lack of civility among lawyers. The need to win causes rancor, nastiness and aggression among us. It often leads to something more serious. It causes clear ethical breaches such as lying, hiding documents and misleading judges, jurors and other lawyers in every effort to achieve the only acceptable result: victory.

Some people criticize our judicial system. The public and most parties to litigation are fed up with seeing lawyers constantly fighting. This is true in all areas of civil litigation, and especially in family law matters. Many people yearn for something different. They want to find a better way to resolve their differences on a win-win, not a win-lose, basis.

Furthermore, our current system of litigation causes lawyers a great deal of stress. We have the highest rate of depression of any profession. Recent polls indicate that many lawyers are not happy in their work and are feeling the burnout of constant conflict. In short, being a lawyer today is stressful.

However, many would still argue that the present justice system is serving us well. The joy and excitement of competition are what drove many of us to become trial lawyers. Is competition inherently bad? It is all right for us to enjoy the feeling of winning?

Is justice being served?

I answer these legitimate questions in the following way: if the win has pro-

duced true justice, we have every right to feel good. Some of my most satisfying memories as a trial lawyer have been those of my victories. However, it is the other side of the coin that bothers me. I am concerned about the state of our profession and our well-being as lawyers. It is the primal fear of losing can lead us to be less than our best as lawyers and as human beings.

Many trial lawyers have such a deep-seated fear of losing that it becomes almost impossible to acknowledge that emotion. It is a dark shadow within us that we never want to face. The fear of losing is really the fear of failure. And failure is embarrassing and shameful. It brings up childhood memories that are often too overwhelming to face.

How do we feel when we lose? Angry, shamed and resentful – all negative emotions that we want to put behind us as quickly as possible. Sometimes we deal with our failures by drinking excessively, taking drugs, throwing ourselves into work, taking our feelings out on others or by withdrawing emotionally. A loss can make us feel our lives are failures. Depression can soon follow with all of its related problems. It is no secret that the high rates of depression and suicide among lawyers is caused in part by the terrific pressure put on us by our own fear of failure and our reaction to losing.

It is impossible to be a lawyer and not experience losing. How we react to losing is important. Winston Churchill once stated, "Success is never final, failure is never fatal, courage is what counts." (See, www.peoplesuccess.com/success-quotes/.) This is not a cliché. The problem that many trial lawyers have is that the fear of losing becomes so pervasive that they lose the courage to litigate the difficult case.

Atticus Finch was the heroic trial lawyer in Harper Lee's novel, *To Kill A Mockingbird*. Finch represented an African-American man accused of raping a white woman in a small southern town in the early 1930s. Atticus didn't stand a chance of winning that case, and he

knew what he was up against. However, Atticus took the case to trial and did the best job that he could do. Of course, he lost the case, but he became a hero to his client, his family and to his community because he had the courage to stand up for what he believed in.

As trial lawyers, we should fight for justice. We need to confront our fears and overcome them. We need to find the courage to take on the tough cases in order to bring justice to our world.

President Franklin D. Roosevelt, in his first inaugural address (found at <http://historymatters.gmu.edu/d/5057/>) told the nation that "the only thing we have to fear is fear itself." He was right. Fear paralyzes us. It makes us timid and uncertain of our actions. A true trial lawyer is not timid and uncertain.

If we approach our cases with courage and do our best to overcome our fears, we are off to a good start. However, we must be prepared to lose. When we do lose, we must recognize that it is not defeat that makes us fail. Our refusal to see the defeat as a necessary part of learning about success makes us failures. There can never be success without failure. There can be no wins without losses. They are two sides of the same coin.

Lesson from losing: Perseverance

To continue to grow and develop as lawyers, we must learn from our losses. An important lesson we should learn from losing is *perseverance*. We need to prepare to fight the next battle. We cannot allow losing to become such a huge monster that it frightens us from trying our next tough case. Otherwise, our value as a lawyer and as a person is diminished. We must always be willing to take the next risk and try, try, try again.

Lesson from losing: Humility

Another lesson we can learn from our losses is *humility*. Every time we win, we get a little more full of ourselves. We think we are the best. Our ego grows, and we become more self-centered.



Humility is not a term often used to describe trial lawyers. It is so easy to get involved in our cases that we come to believe that the “win” achieved is our win and not our client’s. We love nothing better than to preen ourselves and talk about “our” big wins.

How do you feel when you are preparing for trial? What do you visualize in your mind when you think about winning? Are you at the center of the picture? Do you hear people saying good things about you? Do you perceive the good feelings about winning as revolving around how well you, the lawyer, performed?

It is easy to fall into the “me, me, me” syndrome. What happened to the client? What about the others who worked on the case and who also deserve credit? The moment of triumph in winning can so easily inflate our narcissistic egos that we lose sight of the importance of our victories and the credit that others deserve.

When we experience a tough loss, there is none of that. Nothing deflates a ballooned ego faster than the words: “We find for the defendant and against the plaintiff.”

Lesson from losing: Compassion

A related lesson to be learned from a loss is *compassion*. We can’t feel much compassion for others if we have never experienced our own losses. Conversely, those who have suffered the greatest losses are usually the most compassionate. It is easy to feel compassion for others when they lose. How often have we consoled a fellow attorney after a loss and told him or her not to take it so hard? We can empathize with that person. Our heart goes out to our colleague. Yet, when we look at our own losses, we are usually hard on ourselves. We blame ourselves and are rigidly unforgiving of our losses. We ask ourselves what we should or could have done differently and replay our mistakes in our minds. We become failures.

I have spoken to lawyers and have found self-criticism is one of the most difficult problems we have to deal with as lawyers. So, maybe it’s time for us to be a little easier on ourselves and recognize that losing isn’t the end of the world. Some of life’s greatest lessons come from these so-called losses. Defeat is not synonymous with failure unless we allow it to be. In the long run, it is more important to accept our losses and learn from them rather than basking in the glory of our wins, from which we learn nothing.

In order to illustrate these principles I need to tell you about some of my personal experiences. I would much rather talk about my wins than my losses, but that is not the subject of this article. If I don’t have the courage to talk honestly about my defeats, how can I expect you to give much credence to my advice?

My personal lessons from losing

Perhaps the most difficult loss I have ever suffered took place in 1977. At that time, I had been a trial lawyer for 15 years and a plaintiff’s lawyer for over 10 years. I had a good trial record, and I was as full of myself as the next lawyer.

I took on a case against General Motors involving a gas tank explosion in a 1974 Chevrolet pickup truck. The defendant who caused this tragedy was driving his car at about 80 miles per hour when he crossed the yellow line and slammed into my client’s pickup truck. My client was a passenger in the truck and her husband, a young man in his early thirties who was driving the pickup truck, was killed. My client was also eight months pregnant and the impact of the severe crash caused her to spontaneously abort her unborn baby.

There were also two little children who were passengers in the pickup truck. One was my client’s child, who suffered serious, life-threatening burns, but ultimately lived. The other child was a friend who was riding in the pickup truck while her parents followed in another ve-

hicle. This child was burned alive inside the pickup truck when the gas tank exploded.

After a three-week trial and several days of jury deliberations, there was a problem. One of the jurors had done some independent research on the case. I made a motion to excuse this juror. I was convinced that she was against us because she owned General Motors stock. The defense counsel vigorously contested this. After a daylong hearing, the judge ruled in my favor and excused the juror. I later learned that this person was our most favorable juror. Eventually the other 11 jurors reached a defense verdict.

I distinctly remember my reaction to that loss. I felt shame and anger. I did not want to face my partners. I didn’t even want to call and tell them the results. I just wanted to be alone and lick my wounds. But of course, I had to go back and face the music.

My partners and friends sympathized. They knew this was a tough case. I went along with them on the surface, but deep down, I was full of self-blame. I tried to shrug it off by saying, “Well, there will be a next time.” It didn’t matter though. The pain in my gut persisted. I turned to the time honored trial lawyer’s anesthetic: alcohol. Although I had been a heavy drinker for years, this loss severely exacerbated the problem.

I attempted to compensate for the loss in the only other way I knew how: I worked harder. I dove back into my other cases. I needed to find a “win” to heal the wound of my loss. Although I did win a case now and then, I severely struggled over the next several years in my attempt to win “The Big One.”

It wasn’t until 1988 that I was finally fortunate enough to win a substantial verdict. By this time, I had stopped drinking and dramatically changed my life. In particular, I changed my attitude towards trying cases. I had come to realize that I couldn’t be truly successful without completely and honestly facing



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the fear of losing before a case began. By “successful,” I mean being able to deal with yourself, no matter what happens to the case. This means recognizing that you did the best you could do if you lost, and not beating up on yourself for not doing better.

Lesson from losing: Forgiveness

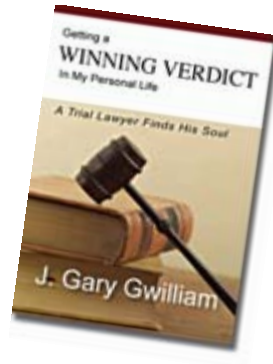
The hardest lesson of all is *forgiveness*. Forgiveness is a process of letting go. Releasing our feelings of resentment, anger and especially self-righteousness is not as easy as it sounds. However, it is the only way to heal the wounds of our losses. If we can forgive those individuals in our losses (clients, witnesses, judges, juries or opposing counsel), we can release our negative emotions. We can now dictate how we feel about the loss. We are in control.

However, if we choose to hang on to bitterness, anger and resentment, we cannot grow and move forward. These

negative feelings will handicap our ability to act with the courage we need. This courage comes from being in touch with our deepest spiritual values, and there is nothing more powerful than this. We will then become true winners.

Conclusion

Who are the real winners and losers in our profession? Winners are not necessarily the people who win the case. Being a true winner has to do with values. Winners have integrity. Winners have courage. Winners sometimes lose cases. Losers, on the other hand, have arrogance when they win and bitterness when they lose. Don't be a loser.



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