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WINNING TAKES CARE OF ITSELF

I hold that the odds of winning in the courtroom increase once the lawyer stops focusing on results and instead emphasizes process or simply doing their best. This is true for many reasons. The best reason is that our effort is the only variable we can completely control. Juries decide who wins lawsuits, not lawyers. Lawyers can't sell wins. We don't possess them to barter. Winning and losing are results that flow, in significant part, from effort.

While it is true that as lawyers we shouldn't hold ourselves accountable for things beyond our control, i.e., wins, conversely it is just as important that we broadly interpret what we can impact, meaning almost everything short of the ultimate jury verdict.

What is the difference between improperly accepting responsibility for the jury's result, and virtually everything short of it? It is probably more psychological than substantive. Drawing a relatively bright line between the jury's verdict and everything short of it promotes an attitude that respects the sanctity of what jurors do, and promotes a quicker closure when a loss does occur. Obstetricians can't always deliver perfect babies, but they can control their competence and effort. When nature precludes perfection, it allows the good doctor, and the expectant parents, the best opportunities to accept an unfortunate result. So it is with lawyers and their clients.

Focusing on effort also helps in viewing losses as growth opportunities. With the right

attitude there is much more to learn from losses than wins. The lawyer who lacks the temperament and emotional maturity to objectively view the facts is often the same lawyer who has the greatest trouble learning from their losses. This is because when losses occur, they minimize their contribution to the outcome. Instead of asking, “What can I do better?” they tend to deflect accountability. While there are certainly many factors that contribute to any jury verdict, from the lawyer’s perspective it is always most productive to focus on how the lawyers conduct, in the broadest sense, may have contributed to the loss.

In my view lawyers generally don’t win cases, the opposing side loses them. When lawyers are equal in talent **and preparation**, they neutralize each other. When either side has better legal representation, it follows that their chances of winning are just that much better; however, jurors are later sure they voted for the winning side, not because of the lawyering, but because that side was “right” or “had the better facts,” and therefore should have won. It is in the effective presentation of the facts that true legal skill resides. The greatest compliment a lawyer can receive is none, meaning the jurors voted in your client’s favor, not because of your obvious talent or effort, but because of the facts. You should be satisfied when later overhearing the jury foreperson saying to her friend in the line at your local grocery store, “Last week I served as a juror on a case that was so open and shut any first year law student could have won it!” Now that, my friend, is a real compliment . . .

Yes the facts are primary, however, exactly how those key facts are presented is almost as important. Let me explain. Rarely does anything exist without a context that impacts how the facts are interpreted. There is little in the real world that is an immutably fixed external reality without a context.

The relationship between “the facts” and the skills attendant to their presentation finds many analogies. Consider the work of a skilled gem cutter or portrait artist. Compare the core facts of a case to a large uncut diamond. Individual diamond cutters, each with their preferences and skills, will begin with the same starting point or rough stone, yet produce different final products. A second analogy is that of portrait painters. Have the same individual painted by several equally qualified artists, then compare the final products. Each portrait can be remarkably different, yet each artist was painting the same person. The same score performed by different musicians will once again produce dramatically different results, yet the notes on the page are the same. The preparation of a lawsuit is an equally artistic and creative enterprise.

Finally, let’s compare the preparation of a trial to that of a play. The lawyer concurrently wears the hat of every contributor. He or she is the director who is ultimately responsible for the final product; the economic producer when fronting costs in a contingency fee case; in charge of casting when selecting the witnesses, and script generation and editing when preparing the witnesses for their testimony. In no small way the lawyer is also dynamically both an “exhibit” and “witness.” Short of being responsible for the ultimate win, it is proper for a trial lawyer to accept as much responsibility as he or she can.

Focusing on process instead of results acknowledges the primacy of the jury in the litigation process and its final results. When lawyers gather to discuss “winning” and “losing,” the conversation is necessarily slanted toward the lawyer’s perspective, rather than that of the jurors.

It is difficult to remember to not take ourselves seriously, but to take what we do seriously. Most effective jury trial lawyers I know are confident in their skills and exude a

certain charisma. They possess stamina and strength that can be tapped by the trial team, client and their family. This kind of confidence has a self-fulfilling quality. If the lawyer doesn't believe they are going to win, why should the jury?

Stripped of all veneer, for most of the best plaintiff's jury trial lawyers I know, going to court is emotionally a "winner take all enterprise." You are either the victor or the vanquished. The ultimate economic consequence of losing is that a repetitive "loser" is driven from the market. This Darwinian harshness is tempered by the reality that most cases do settle for a sum that is viewed by each side to be in furtherance of their self interest.

Undue focus on winning also places unhealthy emphasis on the ends rather than the means. This devalues the important process ingredients such as ethics, civility, and collegiality. When a trial lawyer makes the numerous difficult choices that are made in private, it is easier to take the ethical high road when the importance of winning is kept in perspective. I know that no lawyer ever says it's about winning at all costs, but you move closer to the edge of morality and ethics when the focus is on winning rather than process.

When one unduly focuses on winning, the entire litigation process psychologically becomes less about winning and more about avoiding losing. At its core, this is fear, a strong emotion that the jurors and everyone else can sense. All jurors are your friends: you must trust them, they want to do the right thing. It is your job to help them to do just that, i.e., the right thing. This has a different genesis from fear avoidance. By helping the jurors in their difficult job, you not only help yourself, but more important, your client.

You will also find yourself thinking differently when the accent shifts from winning to doing your best. You will see the case in bigger terms, meaning justice. You will paint with

larger and larger brush strokes. With justice as your goal, winning becomes more likely. Why? Not only because you now have your priorities **correct from the jury's perspective**, but you are also doing the "right" thing. This is what I mean when I say, "Winning takes care of itself."

As you know, each participant in the litigation process has unique tasks and interests, and you must carefully consider what each really wants in light of their differing jobs.

a. The clients: They want to win, it's just that simple. Each of them are certain they are entitled to win for every reason imaginable.

b. The jurors: They certainly don't, and really shouldn't, care about what any client or lawyer wants, or thinks they are entitled to. The juror's job is simply to do "justice." To them, and the community they represent as a reflection of its values, this means "to return the right verdict - for the right reason."

c. The lawyer: The lawyer's view is myopic. It is, within the rules, TO WIN, for the client! Acknowledged byproducts of winning for the client are the furtherance of one's own economic, professional and psychological ends.

d. The judge: In the abstract, the judge should not even be mentioned here. Your job is to keep it that way. Judges should only be interested in seeing that the trial operates within the proper rules of process. We all know that with the many discretionary rulings judges make they can and do affect the outcomes of jury trials. With this concession, I mention the bench here because it is your job, as a trial lawyer, to keep the judge as neutral as possible. In many ways it is doing all the little things well that results in excellence. Read and follow the trial court rules. File everything on time. Honor not just the letter of the court's rulings, but also the spirit. If there is a question concerning the admissibility of evidence, first consult with the court and

opposing counsel out of the presence of the jury. Don't make speaking objections. Do these things and most of the judges I know will stay out of the way and let you try your case. Are there exceptions? Yes, however they are small in number, well known to all, and to the extent they are autocratic or unfair, they generally are equally unfair to both sides.

With a little insight, what emerges from this swirling vortex is the notion that attorneys will win more when they focus less on winning and more on doing their best. When an attorney has done their job correctly and properly cast their case, it will be apparent to all the jurors that when your side wins, everyone (except the recalcitrant opponent) wins. Why? Because it is "just," meaning in alignment with your arguments, your client's position, and most important, in furtherance of basic community values. So you want to be a winner before juries? This is the answer. Why? Because this is where every juror begins and ends. The jury alone, as the conscience of the community, has the power to allocate justice in the form of a "win" or a "loss." The acquired perspective of carefully framing your case in the context of community values, and thereby justice, is one of the headwaters from whence a trial lawyer's real power hails.

When any lawyer embraces this perspective something important begins to happen, and happen quickly. The lawyer will start losing for the right reasons, meaning they will lose because they didn't have the facts, rather than for something they did that compromised their credibility with the jury. That is exactly what should happen. Losing "on the facts" permits the lawyer's learning curve to dramatically increase, resulting in fewer losses. This is because the instincts for what are the outcome determinative facts, supported by their predicate values, within the case grow keener with each new trial.

In a predictable way, with each loss that occurs for the right reasons, the slope of that

lawyer's learning curve accelerates as the lawyer's skills grow. This is because they have learned from the loss. Once losses for the wrong reasons are out of the way, it is easier to see the core ingredients of any case in all its potency.

It is appropriate to close with the obvious systemic comment that while a lawyer's contributions in trying the case are obviously important, it is primarily the facts that are determinative. This is as it should be. In a lawsuit, if you don't have the "best" facts or case, then you should lose. What is wrong with that? Nothing.