

The Benefits of Disappointment

Henry David Thoreau said, "If we will be quiet and ready enough, we shall find compensation in every disappointment."

Have you ever wanted something really, really badly and didn't get it? A job? A significant other? A house? Have you ever lost something that devastated you? A trial? An investment? A friend? Have you ever noticed that *not* having gotten that something, or losing that something, was actually better for you in the long run?

The phrase "no pain, no gain" really does have meaning. We learn from and through pain and disappointment. Without the pain, we have nothing to strive toward. Without the pain, life's lessons would remain unlearned. Pain is a diverting mechanism toward a different path. Without the beating you take, you wouldn't consider other options and it's in having the courage to pursue those options that you can find success. It is imperative that we continually allow ourselves to be at risk of *not* succeeding or the opposite will become true – we will never succeed.

Alexys Kalafer, a CASD Board member who suddenly passed away in 2008, found a new way to deal with a loss after trial. She threw a party and invited anyone and everyone who ever lost at anything to come to her beautiful La Jolla home to just celebrate being together. She called it a "Losers Party," but it was filled with anyone but losers. The party was festive and fun and so full of life and color.

Ken Sigelman, a Past President of CASD, tried a case last Fall. His client was a 58-year-old psychologist who was getting rehabilitation from spine surgery. An incident occurred several days into his admission and about 20 hours after the incident, he was completely quadriplegic. The defense was that the incident was not the cause of the quadriplegia. The defense was that the plaintiff had an unfortunate combination of cervical spinal stenosis and a spinal tumor at the stenosis unrelated to one another and the combination of those two doomed him.

At trial, the jury was asked to return a verdict of \$37,000,000. After 6 ½ weeks of trial and 16 days of deliberation, the jury came back with a defense verdict. The jury found negligence on the part of the defendant, but did not find causation. Despite the sting of this loss, Ken said that every case is a learning experience. In past cases, he had learned that if something bad came out about the plaintiff or the plaintiff's family, you may lose your case. If the jury likes your client, there is less of an uphill fight. You can't take the jurors' perception of your evidence for granted. Things that clearly seem non-credible to you as the attorney may ultimately be accepted as credible by the jury. You need to plan preemptively and meticulously to deal with that.

Something else Ken Sigelman has learned is that the arbitrary limits on the time for voir dire make it very, very difficult to weed out all of the jurors whose pre-existing mind set makes them not capable of being fair and impartial. He's always surprised to learn where one or two particular jurors stood on various issues and in a number of those instances it seemed pretty clear that they had what seemed like a pre-existing mind set about lawsuits or medical cases or another bias. There just wasn't enough time to elicit that information. He advised that you need to prospectively submit a trial brief re voir dire advising your trial judge that the changes in the statute in 2012 have been revised so that judges are not allowed to restrict voir dire capriciously. If

by Rebecca Lack Mowbray



Rebecca Lack Mowbray is a principal at Mowbray Law Firm and the 2013 President of Consumer Attorneys of San Diego. She's the seventh woman President of CASD. She practices civil litigation with an emphasis on insurance bad faith and personal injury law and is very proud to call herself an attorney. CASD has recently awarded Rebecca an "Outstanding Trial Lawyer" award. She currently shares her life with her two standard poodles.

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the judge sets an arbitrary time limit in voir dire, you need to advise the judge prospectively of the scope of the issues that need to be covered in voir dire so that you're able to draw out those biases that may change the course of your verdict.

Ken advises that dealing with a loss at trial is a process. You have to recover physically. You have to help the client recover from the loss as well. You need to be as proactive as possible to keep going forward. Physical and emotional health are important, especially with longer cases. You have to make sure you get back to having enough rest and the right exercise and diet and emotional support from your loved ones, close friends and family. There's no question that it is not really healthy to be working 100+ hours per week and focusing on something very narrow and to the exclusion of all else. You need to immerse yourself in the other things in life. Take a few deep breaths and smell the roses. Remind yourself of the beautiful things you have and realize how lucky you are.

Finally, Ken advised that you need to look very hard at post-trial options. The verdict is one aspect of a trial, but it's not the end. You need to look to see if there is a way to overturn the verdict and get justice for your client.

Bill Berman, who co-tried this case with Ken Sigelman, told me that he learned a few things about being a trial lawyer with this case as well. "Sometimes despite as much as we can believe and as much as we can try, there are just certain facts that we can't overcome. A lot has to go right in any trial. Some things are just out of your control. It makes us better, stronger attorneys. Unless you're willing to try your difficult cases, you're never going to get the full value for your clients on other cases."

Bill also advised, "It's devastating having to convey to your client the nuances of what it means to have a defendant negligent yet not be the substantial cause of their harm. We all understand that this is part of our judicial system. We just have to keep on believing that it works. But you question it at times in the face of disappointing results like this. You ask whether or not there could be a better way [to obtain justice]. At the end of the day it comes back to this - it's the best we've got."

In order to gear up for the next trial, Bill advises, "Remind yourself that not one case makes a career. Remind yourself that you're going to lose some trials. It doesn't ease the disappointment of a loss, but it certainly is part of the process and pro-

fession. Afterward, though, it's time to dive right in to the next case."

John Gomez, Immediate Past President of CASD, lost two big cases last year. In one case, he asked for nearly \$20,000,000 and in the other case he asked for \$12,500,000. They were both very challenging cases. The last case was a blasting case in which the defendants were commercial blasters. His client was hit in the head with a piece of debris from the blasting. Over time she developed symptoms of a mild traumatic brain injury. The jury was asked to return a verdict in excess of \$12,000,000, but instead returned a defense verdict.

John found out after the trial that the jurors just didn't like his clients. John recommends that you assess the likeability of your clients early on. If you have clients that could go either way, he recommends that you allow your clients to see what the focus groups say about them so they can get a true picture of what the outcome of the case might be if the jury doesn't like them. Then they might change how they present themselves, if possible.

John used to believe that he could win any case with any client in any courtroom. He's learned otherwise. From the most recent case he learned, "If you win every day at trial, win every witness and out lawyer the

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defense attorneys from A to Z, it doesn't mean you're going to win. Likewise, if you feel like you're getting beaten up everyday during trial, it doesn't mean you're going to lose."

John advised that the best way to handle a loss is to focus on the efforts you put into the case for your client. The end result is sometimes hard to swallow, but at least you can feel good that you gave your client the very best you could.

In order to deal with the heartbreak of losing at trial, John likes to retreat a little and lay low. He takes care of himself by spending time with his kids and his wife. After that he gets "super psyched" to try to win the next case. He's eager to get back in the courtroom and get a shot at redemption.

John advises, "To the degree you think you're not a good trial lawyer, or worse, because you lost [at trial], that's not right. If you keep with your vision and your approach, eventually the numbers will work themselves out, and you'll win more than you lose."

CASD member Ray Ryan tries a lot of cases. He too has lost in the past. Most recently, in 2009, he tried a personal injury auto case. His client was rear ended at a highway off ramp at 35 - 40 mph. She had pre-existing neck pain and radiculopathy for

which she had sought a surgical opinion, but she failed to let Ray know about this. In fact, she denied this and even told Ray that she hadn't experienced any pain a few months before the accident. Ray believed in this case, believed in his client and demanded \$5,000,000 at trial. The jury returned a defense verdict. In this trial, Ray learned that you can't always trust what your clients tell you. You need to ask multiple times and multiple ways to gather your pre-litigation facts and then you still may not know the truth.

According to Ray, after losing at trial, "Emotionally you always have a sense of inadequacy. A trial loss has a temporary jading effect and you need to be cognizant of it." After a cooling-off period, Ray can't wait to get back in there and make up for what happened before - to win with absolute resound. "It's like when you're a quarterback and you throw an interception. You can't go back out there the next set of downs and keep thinking about that interception."

Current CASD Board member, Kevin Murphy, tried some mental health conservatorship cases *pro bono*. When he lost some of them, he let the clients know that he was as disappointed as they were, but that he did his best to win for them. The need to

win overcame the feeling of loss so he picked himself up, dusted himself off and got in the ring again.

CASD member, Craig Klein, advises, "If you really think the jury has done the wrong thing, file your motion for new trial. Don't give up; keep fighting. Never underestimate the benefit of a likeable client, nor the detriment of an unlikeable client. Take the admonition that you never know what a jury will do seriously."

CASD member, Joe Fox, recommends that after losing at trial, you benefit when the jurors can tell you how you could have tried it differently to get a different result. You should go back over the trial and look at what you did. You look at whether it was something you did that caused the loss to occur. Then you just get it behind you and start on the next case.

No one who tries a case and loses is ever a failure, but I found this quote by Sir Winston Churchill meaningful for trial attorneys: "Success is the ability to go from one failure to another with no loss of enthusiasm." We cannot lose our enthusiasm. We cannot lose faith in the process. We cannot lose faith in the system. We cannot lose faith in ourselves, even in the face of tremendous disappointments. **TBN**

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