



REFLECTIONS OF A TRIAL LAWYER: On Winning and Losing

by: Ken Suggs

"Young lawyers think trying cases is all glory. But trial lawyers lose cases. If you lose at trial, every explanation seems lame. The jury has rejected you. It's a personal defeat. It burns in memory. Defeat is the price trial lawyers pay for success." So said attorney Henry G. Miller.

I just lost a case. It was an important case for my client, for my firm, and for me. I walked out of the courtroom into a sunny day that was, by South Dakota standards, quite warm, yet I couldn't shake the chill. Not that it was the first case I've lost, by any means. It might not be the last, either, but hope springs eternal.

In the ensuing days, there's been a lot of reflection going on. There's of course the obvious, "what could I have done differently?" That's an important aspect of post-loss analysis, I would argue. Sometimes there are clearly things, both tactical and strategic, which could have been changed, and we're usually in a better state for learning after a failure than coming off a success. The challenge, of course, is to know whether anything done differently would have made the result different, and that's almost always impossible. In our work, there are so many variables – choice of witnesses, order of witnesses, one expert versus another, use of demonstrative evidence, the list is endless – that, without the ability to go into some parallel universe and try each combination, we'll never really know.

The more vexing question – and it becomes tougher with each loss – is how do I, as an attorney, a trial attorney, deal with this? In some ways, the question seems trivial and irrelevant. After all, the parents of the disabled child I represented have an awful lot more to deal with than do I. They still have to provide for her ever-growing needs, and now, that'll have to be with just whatever help they can get from their families

and the government. As I write that, I realize that a large part, maybe the largest part, of the pain of this loss is the feeling that I've let them down, that their trust in me was misplaced. We attorneys will have another case next week or next month. This family now has to live forever with the consequences of the defendant's negligence, and their lawyer's failure to convince a jury of it.

I do have another case next month, though, and since giving up the practice of law altogether or becoming a real estate lawyer are not viable alternatives for me (for reasons of both aptitude and temperament), I do have to find a way to deal with the personal consequences of the loss. Glenn Bradford, an ATLA attorney from Kansas City, wrote about losing in *Litigation Magazine* years ago (and his article provided me the quote I used to start this piece). He focused on the inevitability of losing as a part of the trial practice, if one is trying a significant number of significant cases. Glenn pointed out that even Abraham Lincoln, Edward Bennett Williams and Clarence Darrow sometimes lost, and that many believe that it's not the lawyer's performance, but indeed the facts of the case, that make the difference in 80% of the cases or more. Recognizing

that our skills may have little to do with losing may be comforting in defeat, but we'd also have to acknowledge it to be a humbling concept when we win.

My recent loss was still on my mind as I traveled to ATLA's third annual Leaders' Forum Retreat. One of our speakers was Bonnie St. John, who describes herself as "a one-legged black woman." She's also a champion downhill skier, despite having lost her right leg at age 5, and growing up in San Diego, both obvious impediments to expertise in snow skiing. Bonnie won the bronze medal at the 1984 Paralympics. Leading after the first day, she could see the gold in her grasp. Unfortunately, Bonnie fell on her final run. With the finish line in sight, she struggled to her feet and got across with a time that qualified her for third place, in itself a remarkable achievement. What she learned, though, is that the woman who won the gold also fell. The difference between first and third, Bonnie teaches, is that the other woman got up faster.

And isn't that the answer for us? When we fall, we've got to be the fastest to get up. Other families are depending on us to do so.



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