LESSONS FROM LOSING

Successful trial lawyers talk about painful moments.

By David Hechler
STAFF REPORTER

THE SPEAKER AT the podium raised his right hand. "How many of you have lost at least 10 trials?"

He was addressing scores of trial lawyers in a large hotel ballroom. A majority raised their hands—some more slowly than others.

"All right, how many of you have lost at least 20 trials?" Many hands quickly dropped. People glanced around the room. "Thirty?" More hands dropped. "Forty?" Few hands remained.

"Fifty?" The only hand to be seen was the one that still hovered over the speaker's head. Yes, he acknowledged, after trying cases for 33 years, he's lost at least 50.

The speaker was Leo Boyle, a former president of the Association of Trial Lawyers of America, and he was speaking recently at an ATLA conference in Orlando, Fla. His announced topic was "tort reform," and he talked about that. But Boyle, a name partner at Boston's Meehan, Boyle, Black & Fitzgerald, spoke most passionately and eloquently about losing.

It's not a subject that lawyers relish talking about. Who does? But it's common to hear lawyers say that they've learned more from trials they lost than from those they won. It's a lot less

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Lawyers attempt to learn from the pain of losing

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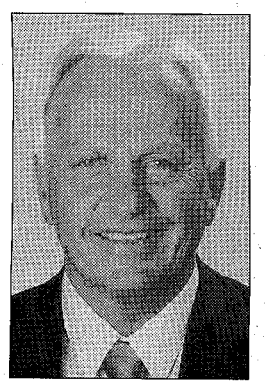
common to hear them explain what they learned.

Six lawyers—four plaintiffs' attorneys who spoke at the Orlando conference and two defense lawyers contacted later—agreed to do just that. What makes their insights particularly valuable is that all have apparently learned their lessons well: They are successful trial lawyers.

Some experiences they described were like old calluses; others were as raw as a fresh blister.

SIDNEY GILREATH

Beware of jurors who use the Internet.



Sidney Gilreath described a 2001 case in which he represented a child injured in a car crash. The claim alleged that the minivan in which she rode had a defective seat belt system.

Gilreath, of Gilreath & Associates in Knoxville, Tenn., thought he had a strong case, but the jury found otherwise. Two days after the verdict, a juror telephoned.

"She felt bad about the verdict," Gilreath said. One factor, the juror recounted, was the information the forewoman supplied. After court one day, the forewoman went home and searched the Internet to see if there had been a recall on the seat belts. There hadn't, and she reported this during deliberations.

The judge had warned the jury not to read the papers or watch television news, but he hadn't said anything about the Internet. Now Gilreath asks judges to add this admonition. In the meantime, some of the sting was assuaged when the judge granted a new trial and the case later settled.

PHIL BECK

Tell a story that makes the verdict feel right.

Phil Beck was a young associate at Chicago-based Kirkland & Ellis when he represented Pitney Bowes Inc. in a lawsuit against former employees. The employees had left to start their own business, and his client was attempting to enforce a noncompetition covenant.

The bench trial went about as well as he could have hoped, Beck said. He nailed the employees lying under oath. Appointment books showed that they had met when they said they hadn't, and some entries had been altered or removed.

"I felt like I was Perry Mason," Beck said.

The judge swiftly brought him back to earth. He agreed that the defendants had lied and tampered with evidence, but the covenants were unenforceable, the judge ruled.

"I was crushed and mystified," Beck confessed. That night he went out for drinks with partner Fred Bartlit.

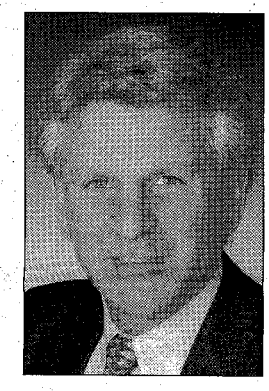
"The reason you lost," explained his older colleague, "was we freed the slaves when we enacted the 13th Amendment." No one likes to prevent people from going out on their own, said Bartlit. (Ironically, 10 years later the two left Kirkland to create their own firm—Bartlit Beck Herman Palencher & Scott of Chicago.)

His partner's larger message, said Beck, was this:

"You have to have a story that makes the judge or the jury feel good about ruling for your client—to feel that ruling for your client is the just and right thing to do and not just appropriate given the evidence." He had focused on the evidence without building a story, and he hadn't ignited a fire in the judge's belly, Beck said.

MARK MANDELL

Never hand control over to a witness.



Mark Mandell had a tough case on his hands and he knew it. His client was the widow of a man who had died at age 33. The alleged cause: his exposure to asbestos in elementary school.

It was 1986 and the trial lasted a month. Mandell and his co-counsel did a lot of things right, he said. But if he tried it again, he would change at least one cross-examination.

The witness was a medical expert who had performed a litmus test, Mandell said. He'd dripped a solution on an autopsy slide. If it turned one color, this purportedly confirmed a diagnosis of mesothelioma (which is caused by asbestos). In this instance, the expert had testified, the slide had turned a different color.

The test was new, and during the first 20 or 30 minutes Mandell got the witness to concede that at least some of his testimony on direct had been speculative. But Mandell didn't sit down.

He compounded this mistake by consenting when the expert asked if he could explain a point using the blackboard. The witness descended from the box, advanced to the blackboard and proceeded to lecture the jury for 15 minutes or more, Mandell said.

He recognized during this testimony that he'd made a mistake ceding control to the witness. But he couldn't think of a way to take it back—at least not one he was comfortable with. So the expert had free rein.

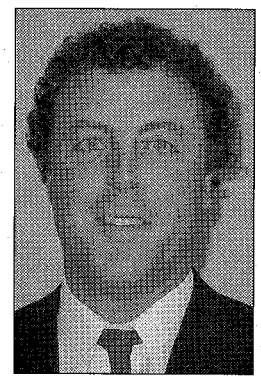
During deliberations, the jurors asked to have the testimony at the blackboard read back. A short time later (it seemed like minutes, he noted ruefully), they returned a defense verdict.

"There are a lot of reasons why you win, and sometimes the lessons are lost because you did win," said Mandell, now a name partner at Mandell, Schwartz & Boisclair in Providence, R.I.

"There may be a lot or reasons why you lose. But because it is so impactful, you learn the lessons. They sear in."

ALAN KAMINSKY

Learn from your opponent, but don't be intimidated.



Alan Kaminsky had a searing experience about seven years ago, when he went up against plaintiffs' attorney Harvey Weitz. A partner at New York's Wilson Elser Moskowitz Edelman & Dicker, Kaminsky represented the New York City Housing Authority after a resident of a Brooklyn housing project was robbed and shot while waiting for the elevator. The lawsuit claimed the city was negligent for failing to provide security: The assailant entered through a door with a broken lock.

It was not an easy case to defend, Kaminsky said, "but I felt it was a case I should have won." Though the law presented some challenges, the greater challenge was Weitz.

"It was clear that he had control," the defense lawyer acknowledged. "I was so worried about every move that he was going to make that I may have objected too much." There were witnesses he didn't call "because I was afraid of their being cross-examined by him.

"I let him be the star of the trial."

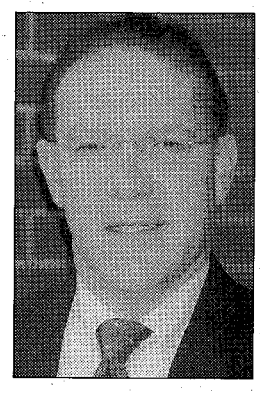
It started in voir dire. Weitz had established a rapport "by telling stories, by being personable, by touching on questions that connected him and his client to the jury," Kaminsky recalled. "I think I was more matter-of-fact."

During the trial, Kaminsky planted himself behind the podium, rarely moving closer to witnesses and the jury. He is now more fluid; he frequently approaches the jury when asking important questions. He has also learned to cross-examine more aggressively, "but in a nonconfrontational way, so as to be more appealing to the jury." He credits Weitz for helping school him in these skills.

That was the silver lining in the $3.5 million cloud, which the judge set aside as being insufficient and boosted to $8.1 million (though he was reversed on appeal, and the initial verdict was reinstated).

JULES OLSMAN

Retain your composure: juries are unpredictable.



Some cases the lawyers cited were technically wins but felt like losses.

Jules Olsman tried a case in 1997 with a high-low agreement and an arbitration clause. When the jury hung, it went to arbitration and his client was awarded $800,000. But to this day, Olsman said, "I consider it a loss in the sense that I should have been able to persuade the jury."

It was a malpractice case against a hospital and an emergency room doctor in rural Michigan. His clients were the family of a 17-year-old girl who had suffered an allergy attack and died in the emergency room.

On the stand, the doctor said she didn't remember the girl.

"All you white people look alike," said the doctor, who was of Filipino descent. The jury was all white.

Olsman thought it was the end of the case. So did the defense lawyer, he said.

On the trial's third day, a hospital witness revealed that he had key documents the hospital had claimed were missing. But ironically, this development contributed to Olsman's undoing. It poisoned the relationship between the lawyers.

"I'm the first one to concede I'm a hothead with a short fuse," said Olsman, a partner at Olsman, Mueller & James of Berkley, Mich. The bickering and hostility spilled over into the trial. At one point, the judge ordered both lawyers to take a five-minute break to cool off.

On another occasion, after a long day of testimony that continued into evening, the defense lawyer inadvertently knocked over the easel holding his notes. It tumbled toward Olsman, who was sitting at the counsel table.

"Jesus Christ!" Olsman swore as he jumped out of the way.

The easel was righted, the trial continued and Olsman thought no more about it. Until after the trial, when his jury consultant talked to jurors. None of them talked about the doctor's remark about whites, but one juror said: "I was very upset when Jules swore that night."

The remark he thought was dispositive proved anything but, and the one he barely remembered was very important to at least one juror.

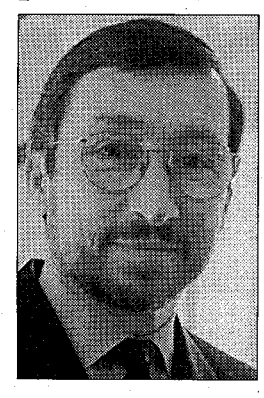
The trial taught him not to be too sure he could predict how a jury was reacting, and not to put too much faith in one piece of evidence. He also learned the importance of self-control.

"I considered it a watershed event in the way I handle cases," Olsman said. "You have to learn how to turn the temperature in the room down."

"Never again," he vowed, "will I let my buttons be pushed like that."

LEO BOYLE

Winning is easy; learn to persevere through losses.



The most important lesson about losing, Leo Boyle told the lawyers in Orlando, is simply learning to endure it.

Plaintiffs in his home state of Massachusetts win one in six medical malpractice lawsuits, he said. The measure of a trial lawyer isn't what you do when you're winning and it's easy. "The real test is what you do when you lose four or five in a row."

"When you look around at the people still standing," Boyle said in a recent interview, "it isn't the ones who were on law review. It isn't the ones who necessarily were at the top of their class.

"It's the ones who are durable," he said. NLJ

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