



WINNING ISN'T EVERYTHING

*by Gerald J. Gleeson II
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American society loves its winners. We laud victors, champions and undefeated seasons. We issue awards for the most valuable player in nearly every professional sport. But seldom are the benefits of losing discussed, let alone extolled. Few, if any, sports fans are going to say, "Wow, wasn't that an incredible losing season?" or award the player whose statistics sit near the bottom. In our business, no client shops around for a losing lawyer. In fact, we lawyers regularly emphasize that "winner" spirit by including our professional successes in our marketing materials. No one advertises his/her losses with the belief that significant defeats will generate business. But, just the same, I suggest to you that losing is valuable.

This past summer, United States Supreme Court Chief Justice John Roberts was the commencement speaker

at the Cardigan Mountain School in New Hampshire. The words of his speech struck a chord with me:

From time to time in the years to come, I hope you will be treated unfairly, so that you will come to know the value of justice. I hope that you will suffer betrayal because that will teach you the importance of loyalty. Sorry to say, but I hope you will be lonely from time to time so that you don't take friends for granted. I wish you bad luck, again, from time to time so that you will be conscious of the role of chance in life and understand that your success is not completely deserved and that the failure of others is not completely deserved either. And when you lose, as you will from time to time, I hope every now and then, your opponent will gloat over your failure. It is a way for you to understand

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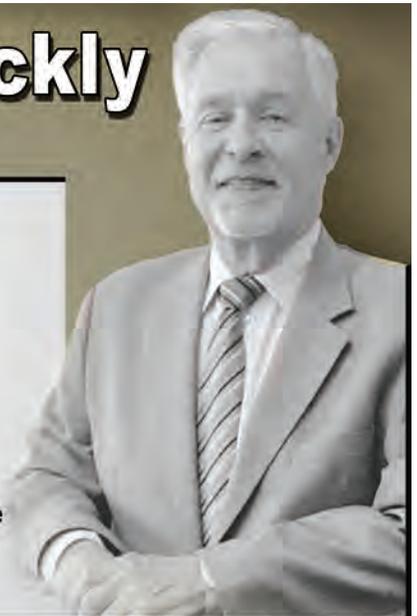
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the importance of sportsmanship. I hope you'll be ignored so you know the importance of listening to others, and I hope you will have just enough pain to learn compassion.

While I have cited Justice Roberts from time to time in a professional capacity, I believe his words here mean as much or more to our profession than some of the Supreme Court opinions issued during his tenure as chief justice. The short lesson is that adversity builds character. The larger lesson is that we are better lawyers for having lost a case or two.

The best among us (who are honest) will likely admit they learned the qualities that make them great lawyers from the ashes of their defeats. I do not make any claim to courtroom greatness, but I am not afraid to admit that I have taken it on the nose a few times in my career. When juries returned an adverse result, I took it upon myself to visit with them and ask what they liked and didn't like, and what I could have done better.¹ From those meetings, I learned that losing does not just teach sportsmanship. Losing teaches humility. Losing provides perspective. Losing gives a certain opportunity for introspection that is unique. To quote that great Michael Douglas character, losing, "... for lack of a better word, is good."

Because of the nature of my practice, for me, "losing" means losing a trial. We can talk about losing motions, but losing a motion doesn't teach the same lesson as losing a trial. To me, arguing a motion is just articulating why a particular result is required under the law. Summary disposition motions are granted when the material facts are no longer in dispute. In such a situation, the law controls the outcome. And if the motion is denied, generally facts remain in dispute, ready for the fact finder to make the call.

The trial is where the true proverbial rubber meets the road. The time and place where a judge or jury makes the call on the case you put together: your strategy, your theme and theory, your opening, your direct and cross examinations, and your closing.² While painful, losing a trial is the one of the best teaching instruments in our profession. Because losing a trial makes us ask ourselves the right questions about how we conduct ourselves during the most important point in litigation.

The irony of today's practice is that most cases are resolved by settlement, which clients never view as anything better than a tie (and usually as forced capitulation). Just as no sports fan is going to say, "That was the best tie game I have ever seen," clients do not always appreciate the benefits of settlement (or even when understood, they are conveniently forgotten shortly thereafter). For us, settlements eliminate both the thrill of victory and the agony of defeat that come with a trial. Just as we miss the opportunity to win, we miss the opportunity to learn from defeat.

The crux of my message this month is to try some of your cases. In doing so, understand that in no case will the sides ever be evenly matched, either in evidence or law. Understand that defeat is inevitable if you do the work long enough. But embrace the opportunities that trials provide not just for a victory lap, but to learn the humble lessons that defeats will teach you. No lawyer takes a case in hopes of losing it. None of us ever want to lose (or be known as a loser). But lawyers shouldn't fear losing. We should take Justice Roberts' message to heart and embrace the risk of loss. One's reach should always exceed one's grasp, as it were.

Footnotes

- ¹ And, lest I keep you in suspense, our fine citizens were often brutally honest.
- ² And perhaps they take just a bit of your personality into account as well.