

Lessons Learned

William B. Smith, 2004–2005 Senior Lawyers Conference Chair



When my calendar reminded me that it was time to do a column for this issue of the *Virginia Lawyer*, I happened to be doing some reading about lessons learned by practicing trial lawyers. One source was an article in the May 2005 issue of the *ABA Journal* and the other was the book *Courting Justice* by David Boies—best known for his representation of Vice President Gore in the Bush-versus-Gore 2000 presidential election recount litigation.

In the American Bar Association article, J. Gary Gwilliam of Oakland, California, from his experience in losing a major plaintiff's jury trial, suggests:

- You cannot be truly successful without from the beginning being completely and honestly facing the fear of losing the case.
- The best way to get over a big loss is to immediately turn back to your work with renewed effort.
- You should recognize that even if you lose, you did the best you could and you shouldn't fault yourself for not doing better.

Glenn Bradford of Kansas City, Missouri, says that lawyers who say they have never lost a case give the public and young lawyers the wrong impression that if they lose a case, they are a failure. He thus opines:

- Any lawyer who tries a number of cases is going to lose one every now and then.
- You have to be honest with yourself in determining what you are able to accomplish with the law and the facts that you have been given to work with in a particular case.
- Trial lawyers should look at their cases as helping people one at a time.
- You can never really know how a particular juror is going to vote.

Chicago plaintiff's lawyer Christopher Hurley says:

- Never use an in-court demonstration unless you are absolutely sure it's going to work.
- If your client makes a poor witness, try to settle.
- Tell your client not to look at you during his cross-examination.

David Barber of Louisville, Kentucky, concludes from his experience that:

- While closing arguments longer than thirty minutes are not encouraged, if the particular case demands one, don't hesitate to give it.
- The real measure of trial success is whether the client looks at it as a win or loss.
- A disappointing verdict in a case that gets community publicity may lead to larger cases.

Mr. Boies's book, which I recommend to all lawyers, gives us the benefit of his experience in major litigation of all kinds. He tries his cases by applying five principles:

1. Evidence should explain to the fact finder that your client is good and successful. What the other side complains of should be applauded rather than criticized.
2. Go on the attack by finding the opponent's weak points and pressing them.
3. If possible, never seek and always oppose delay in the trial proceedings.
4. More cases are won or lost by lack of preparation than for any other reason.
5. Present your evidence to dramatize the key points of your case to the jury.

In discussing settlement, he suggests:

- Objectively analyze your case at the outset, and if it should be settled, do so.
- An aggressive position from the outset of the case often does not work in getting the case settled.
- If the case is one that should be settled, be quick to settle early, because failing to resolve the case early may result in missing an opportunity to settle before the client's costs have built up and positions have polarized.
- If your decision is that the case should be tried, be prepared to accept and live with the outcome.

In reflecting on these suggestions, it occurred to me that senior lawyers in Virginia would, of course, have their own "practice tips." Lessons learned in the practice of law are not limited to trial practice, but include those that relate to law practices that do not involve appearing in court or trying cases. There should be many wise and useful suggestions to guide the young lawyer relating to office management, client communication, how to arrive at appropriate fees, negotiation and other dealings with other lawyers and their staff, and interacting with nonlawyers who are involved in an office practice transaction such as bankers, real estate brokers and agents, politicians and medical professionals.

As the Senior Lawyers Conference continues to increase in size and in its activities, I would like to see it establish and maintain a "practice tips" database. These valuable bits of wisdom could then be made available to all Virginia lawyers by publication in Senior Lawyers News and Virginia Lawyer. 📖

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