

## How Do You Handle Losing?

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I lost a case today I should have won. Despite prep and clear instructions, client testified BADLY, I mean BADLY. Even I thought she came across like she was not truthful. Her demeanor on the stand was horrible. This was something we worked on Friday. By the time she left my office after prep, she really seemed like she could hold it together. Nope.

I know the exact moment I lost. I did my best to try to fix it, but I just couldn't. There was no fixing that. I also know there was nothing I could have done to prevent it. The judge found "serious credibility issues" with her testimony.

The problem was that I think she misspoke initially, then realized what she had done, then got really flustered and said a bunch of contradictory things.

So why do I feel badly?

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I am sorry to read that. I have had a witness go sideways on the stand because of the stress of actually, finally, testifying.

She tubed her case, not you. Unfortunately, if you were in a contingency fee arrangement, she tubed you too. Sorry. Calgon! Take me Away...

Eliz. C.A. Johnson, California

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Take comfort in that you did a good job, even prepped your client. Trials are unpredictable. You never know how witnesses will answer undet pressure.

gilbert valdes alba, Florida

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Not sure why you think you should have won. Did she expect to win too? If outcome depends on an adversarial hearing, I never advise clients their chances are better than 50/50. I'm actually somewhat ambivalent about winning or losing. If I cared about whether or not I win, it would probably discourage me from taking some cases. Instead, I measure myself by whether I did the best I am capable of doing for the client. If so, no problem; I forget about it and sleep well. If not, then I adjust and correct for the next case. I think there is some closure and therapeutic value to losing clients just by getting their story told. I try to help the client get comfortable with the results, but I don't cry with them.

Duke Drouillard, Nebraska

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It wasn't that she expected to win. She just really needed to win. Losing her license is going to have major consequences for her. Job is a half-hour away. No public transportation. Husband is disabled and can't drive her.

Prosecutor was willing to roll the dice, so there was no offer to plead. At least she didn't walk away from a good deal to try the case.

Original Poster

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That happened to me many times. consider it as if that the client lost, not you. I have prepped clients and for some reason, once they get to court, they say all the wrong things. I once had a client forgetting the name of the defendant while testifying on the stand. I did not win that case.

Rod Alcidonis, Pennsylvania

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Can you appeal? Here, I believe there is often a de novo appeal right to a Superior Court jury trial for many misdemeanor bench trials. Would she testify better know that she knows "how it works"?

Any grounds for rehearing or reconsideration?

-Rick

Richard J. Rutledge, Jr., North Carolina

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The reason you feel so badly is because you care. Particularly in a case that has gone on for many months and you have had a considerable number of meetings with the client, you begin to treat the client as a friend and take any loss personally. If you didn't, you really wouldn't be human (or at least somebody I'd hire as my attorney).

OTOH, if you have done your best and thoroughly prepped the witness and prepared the case (as seems to be the case here), then there is no reason to hold your head down. Let's face it, witnesses sometimes freeze when trial comes, and more often than most lawyers would expect, sh\*\* happens. Allow yourself some time to grieve, perhaps have an adult beverage or two, and the next morning, arise committed to facing today's challenges. And remember that when a lawyer claims to have never lost a case, then he obviously hasn't tried many cases.

Robert A. Merring, California

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Because you asked: you feel bad because your ego is bruised. You made an investment of ego in the belief that you could control the witnesses--including your own--plus the judge and jury (if there was one).

This is not a criticism. It is what a good trial attorney MUST do. Nonetheless, when the investment fails, it is more painful than an investment where mere money is lost.

The expectations of your client are a different question. I think pretty much like Duke. Client should understand risk is great. I tell clients that it is always a gamble when we enter the courtroom. Until then, I have control of the case. In the courtroom, we give control to the judge.

Part of the reason I became an attorney is that I had been in a number of lawsuits and always settled on the advice of my attorney. I resented that. I always was willing to fight.

Now, from the other side of the table, I see the dangers that are hard for clients to understand. For so many reasons, a trial is a gamble.

BRAVO for you being willing to take the chance--especially because you were driven by your client's desperate situation.

AND.....IT WAS YOUR CLIENT'S PROBLEM. I say that to every client on first interview--very plainly:

I may be willing to help you solve your problem. If so, I will give you my best efforts, but this will never be my problem. That is why I need you to commit to give me your full cooperation. This is not a problem you lay on my desk. It is your problem that we work on together.

By the way, this is not just for attorneys--I first developed that spiel when I was a real estate broker specializing in distressed properties.

John Page, Florida

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I never get used to losing, especially when think I should have won. After the initial angst wears off, its a good time to re-assess what you can do better next time. Unlike our clients, we lawyers get a second chance next time.

Tom Crane, Texas

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Thank you for all the insight. No chance for appeal. If I were the judge I probably would have done the same thing. My client just had a mental melt-down. It wasn't that the misstated testimony helped her in any way. If she had just said the same thing she had told me over and over (which all made logical sense) all would have been fine. Instead nothing made sense. Even the prosecutor tried to point out how the time-frames could not have possibly worked the way she testified. At that point she just started saying "I don't know" to everything.

Other than being branded a bit fat liar, my client had nothing to lose by going forward. There was no offer on the table. She either rolled over or rolled the dice.

It was almost like she had a case of test anxiety. She got under pressure, forgot everything and just started guessing. I wish I had the skill to fix something like that while it is happening. I just don't.

Original Poster

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A suggestion: if you anticipate that the client will have demeanor or speech / articulation issues which affect credibility, consider using a video tape of the "testimony" during the practice session witness prep. Watching one self and seeing/hearing "this is what it looked and sounded like before and after practice" can be far easier for a lay person to understand, to "get it", compared to only having a discussion with the lawyer-coach.

Michael L. Boli, California

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Cry, yell, go for a long walk, take a drink (or two) -- then at some point you set a limit on it, put it in the past and move on.

In this case, client lost the case, from what you relate. It is always the client's case and there is only so much you can do as an advocate.

Over time, you win some, lose some, win some you should probably have lost and lose some you probably should have won. Past events are water that has already flowed downstream. You take lessons and pointers for future improvement, but otherwise you turn around from the past and face today and the future.

Darrell G. Stewart, Texas

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"Over time, you win some, lose some, win some you should probably have lost and lose some you probably should have won. "

If you killed something every time you went huntin', you'd call it "shoppin".

That's what litigating is about: never knowing what's going to happen.

James M. McMullan, Alabama

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Drink a quart of bad scotch and move on.

Larry Frost, Minnesota

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Unless you were paid hourly; then drink a bottle of good scotch. Remember what the criminal lawyer tells his client after the client is found guilty and the client asks what happens now. Lawyer tells client now you go to jail and I go back to the golf course. Amen brother.

Shell Bleiweiss, Illinois

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The good scotch is for the wins.

Regards,

Phil A. Taylor

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Michael and others, do you think videotaping your client and yourself is good or appropriate? Also, do you videotape yourself as part of practice for different parts of a trial?

Thanks in advance for any replies.

Roberta Fay, California

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