Litigation Mistakes - Reflections of a 30+ Year Litigator

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Introduction

Most successful professionals have had their share of losses and mistakes. Though we all try to avoid them, mistakes are inevitable. The focus of this paper is mistakes and lessons learned from them.

When I was in high school, I spent part of three summers at wrestling camp, learning technique that helped me throughout my wrestling career and beyond. For sure, I learned a lot of new moves and techniques from two superstar coaches, but I also strengthened my attitude at wrestling camp. Two wrestling camp lessons apply as much to the practice of law as to wrestling.

During my freshman year in high school, I had a winning record, but I was pinned in matches two times. Getting pinned was demoralizing. The next summer, I attended Doug Blubaugh's wrestling camp at Indiana University. Coach Blubaugh taught me about never giving up, not in a match, not in a season, not in a career, and not in anything that is important. Blubaugh's words resonated when he told all of us that he "would break his neck before he would get pinned." Like the Wizard of Oz who bestowed intellect on a scarecrow, compassion on a tin man, and courage on a cowardly lion, Blubaugh reinvigorated my attitude, and while I lost matches in my next seven years, I won more than I lost, and I was never pinned again, and I never broke my neck.

In the summer of 1976, I attended Coach Stan Abel's wrestling camp. Abel coached at Oklahoma University, and, like Blubaugh, he was expert at teaching technique. But his speech about learning has stayed with me. Paraphrasing, he said there is something to learn from every coach, and that if you want to be a winner, study both the most successful, and the least successful. Try to follow what the winningest have done; then figure out what the losingest have done, and make sure to not do that. This gets to the heart of the topic. See success, and replicate it. See and study mistakes, and figure out how to avoid them.

One more sports story to prove that mistakes are okay, and that even the best can make mistakes. The most prolific "loser" in Major League Baseball. During his career, he suffered 316 losses, more than any other pitcher to play the game. But in 22 years of playing the game, he learned from losing. Cy Young, the pitcher whose record for losses may never be broken, also chalked up 511 wins and became the namesake of the most valuable pitcher award in Major League Baseball. Losers, those who have made plenty of mistakes, can be huge winners too.

So, the most successful, be they coaches, athletes, performers, or lawyers, have all made mistakes. The key to the success of the successful is to recognize mistakes, your own and those of others, figure out how the mistake was made, and succeed by not repeating it, at least not very often.

Are lawyers proud of mistakes? Of course, not – if we were, we would read monthly confessions of experienced and less experienced lawyers in our monthly journals and we would hear more about case studies focusing on those mistakes and how to avoid them, as well as focusing on techniques used to win. Writers and presenters do not usually focus on their mistakes. They usually tell war stories of success.

Professor James McElhaney wrote a regular feature in the ABA *Litigation* magazine using fictional characters to demonstrate mistakes that are made by junior and senior lawyers, on issues of legal research and writing, oral advocacy, trial presentation, evidence and strategy. By using fictional characters, actual lawyers did not have to be called out for their mistake, and the privacy of clients and adverse parties could be preserved. After all, who made the mistake is less important than allowing the reader to learn from it.

Mistakes

Over the years, I have made my share of mistakes, and I have seen them made by other lawyers. Here are a few.

Not knowing the law – Within my first year as a lawyer, I was assigned to assist in the defense of a dog bite case. As settlement negotiations were getting underway, I thought there was an arguable comparative negligence defense, and mentioned that in a draft opinion letter to the insurance company client. After reviewing the letter, my supervising lawyer asked me if I had read the new dog bite statute. I hadn't yet, but I did after being told. I learned that subject to a few exceptions, all of which were inapplicable in my case, there was strict liability for a dog bite. Comparative negligence was not a defense. The opinion letter was corrected, and the case settled reasonably.

The lessons – 1. Make sure your research is current. 2. My mistake was caught by a good mentor. Not everyone is blessed with a good mentor. If you do not have a good mentor, find one. 3. Opinion letters should never go out from a junior lawyer without the review of a senior lawyer. We are retained to be legal advisors, which means that we must know the law about which we advise our clients. 4. Failing to discover the existence of a statute (new or old) can be malpractice. 5. For younger lawyers, find mentors who are wise and sensitive. For more senior lawyers, be a mentor who uses wisdom and sensitivity when teaching, because the junior lawyers are your investment in the future of your practice.

Misreading a trial judge; and failing to accurately recall a rule of evidence (rookie mistakes) – 30+ years ago, I represented a physician's estate in a claim against one of his residents for repayment of a loan, that was not committed to a writing signed by the parties. It was not a great claim, but the family was adamant that there had been a loan, and that the resident knew it. I got the case to trial. During my direct examination of one witness, opposing counsel objected, and the judge responded "Sustained." Prepared as I was, I knew that there was no valid basis for the objection. I told the judge that I was entitled to know the basis of the objection. The other lawyer turned to the judge and responded, "It's not my job to educate him." The judge repeated, "Sustained," at which point I said, "I think I am entitled to know the basis for the objection." The judge told me to move on and I did. Was I right? Nope. When evidence is *admitted*, to preserve appeal, a lawyer making an objection must state the "specific ground of objection." Evid. R. 103(A)(1). However, when evidence is *excluded*, the rule permits an objector to provide the basis for his objection, but it's not required of the objector. Rather it would have been for me to make a proffer (which I did) to preserve the issue for appeal. I proceeded to come back to the question later and I got the desired testimony. I recovered from opposing counsel's rude remark (when he really didn't have a valid objection), and I recovered from the judge's "reprimand." However, when the day was over, I thought that the piling on by opposing counsel and the judge put my credibility with the jury in jeopardy. The case settled, reasonably.

The lessons – 1. As a young lawyer, be careful how you interact with senior judges and opposing counsel. 2. Although I was sure that I was right about the rule, I was wrong. Don't be wrong. 3. At trial, the judge gets to decide what evidence is admitted and what is excluded. Make a proffer and move on. Don't wait for a judge or opposing counsel to tell you off.

What happened when Chas Reynolds faced emotional, confrontational plaintiff's witnesses?

Failing to use the bench to your advantage – I tried several personal injury matters as a younger lawyer. Several times I had a hostile witness on the stand, usually a close family member of the plaintiff, who was clearly angry with me as defense counsel. Most of the time they were older, and very accomplished people who felt they could evade the questions of a clearly younger adversary. On one occasion, I had a grandfather simply fire back questions of me asking why I was disparaging his granddaughter. I was put on the defensive and not sure what to do as I never expected someone to respond with a question rather than an answer. He said several times "Where is this going counsel" and I would start explaining my rationale for the questions. The judge sat silently on the bench and allowed me to twist in the wind.

The lesson – What is obvious now, is that I should have calmly asked the judge to instruct the witness to answer my question. I should have used the authority of the court to compel an answer, or possibly even better, another hostile response from

the witness to the court. With any hostile or uncooperative witness, we must remain the reasonable one. Seeking involvment from the bench not only makes you look in control, but gives the appearance the judge is working with you to move the case along and get to the truth. When a judge actually follows your instruction or request, your credibility is immediately elevated. Even simple requests like "Would the court please direct the witness to point to the place on the map where the accident happened" will confirm with jurors that you know what you are doing and have the approval of the court. I have found that any cooperative interaction with the bench is a plus in the eyes of a jury.

Going to trial on a breach of contract case without an expert – I represented a company that sold pipes and other underground components feeding fuel pumps at a truck stop. A contractor at a jobsite owed our client about $32,000 and refused to pay, because some of the components required repairs which cost more than what our client claimed was owed. We sued for breach of contract and the defendant counterclaimed for the cost of repair. Our engineering expert had performed some tests and he was prepared to testify for our side. At a final settlement pretrial, defendant offered 50% of the claim value. I advised the clients (two partners) that with anticipated attorney fees and expert fees, the offer was reasonable. The clients didn't care about the cost of going forward, and thought the offer was too low. They wanted a trial. Then, opposing counsel called to inform me that his father was ill, that needed to ask for a continuance to which I consented. Six months later, and about three weeks before the new trial, I called to line up our expert for trial, and learned that he died! We had no back-up expert. The expert did the testing, and only he could testify. The system had long since been repaired and installed, and there was no way to get a new expert. The other side didn't have an expert either. At trial, our client representative testified to the product supplied, and the price billed and amount still owed. The defendant responded with first-hand accounts about the poor quality of the original material. Our testifying client representative was a "suit;" the defendant's representative came across as "Salt-of-the-Earth." We had a jury trial that lasted 2-3 days. The jury awarded nothing to plaintiff and nothing on the counterclaim.

The lessons – 1. In a breach of contract case, consider waiving a jury. Our jury was not happy to be there. There was no compelling story. With a bench trial, the judge typically requests that both sides submit proposed findings of fact and conclusions of law. Judges are trained to evaluate the facts and not to care about the parties' personalities. I hadn't spent time with the gentleman who was to be our client representative. That is a must. Before demanding a jury in a business case, make sure to consider how your client will come across. 2. If you need an expert in the case, you better have a good contingency plan. My case was not a dead-bang winner with an expert; without him, it was weaker. I could have taken his deposition earlier, but I had no reason to know that he would become unavailable (by virtue of his death or otherwise). 3. Whenever there is a settlement offer, and a client decides not to settle, communicate your recommendation in writing, and include

the reasons for the recommendation, the status of the case, the anticipated cost of going forward, and the client's decision.

Failing to plead the necessary elements of a claim or cause of action – be aware of the applicable deadline for amending your pleadings. In a recent federal court jury trial, Melissa Matthews urged a trial judge to strike Plaintiff's request for exemplary damages. The case had been remanded from an MDL court in another state to the Northern District of Texas. Plaintiff's Complaint was filed in the MDL using a short form complaint that disposed of the usual pleading requirements. Her attorneys simply checked the boxes for the claims, causes of action, and damages being sought. The MDL Master Complaint contained no gross negligence or malice claim. The Master Complaint requested punitive damages, but did not tie that request to a specific cause of action. Under Texas law, punitive damages are allowed only for a few causes of action – causes of action which were not added by the Plaintiff. Despite being informed of this shortcoming before trial (by defense counsel and the judge), Plaintiff never sought leave to amend her Complaint. The judge saved the day for Plaintiff and instructed her counsel to file a motion for leave to amend the Complaint and to amend the Pretrial Order. Fortunately for us, the jury did not find our client liable on the new cause of action, and therefore did not award punitive damages.

A similar issue arose several years ago in state court, when Melissa Matthews took over a multi-party commercial case three weeks before trial. The answer appeared to incorporate all conceivable defenses, including a catch-all reference to "all available defenses under the UCC." While preparing for trial, we determined that the best defense was a UCC defense, but the prior attorneys had not pleaded it specifically. We tried the case on that defense (and others), but did not seek leave of court to amend the answer to include the specific defense. The other side did not object to any of the evidence concerning the primary defense. The judge held the charge conference and the parties submitted objections to the charge. The judge ruled on all objections, and then instructed the bailiff to bring in the jury for closing arguments. It wasn't until the bailiff had re-entered the courtroom that opposing counsel stood up and objected to our failure to specifically plead the UCC provision that drove our defense. The judge overruled the objection, and we proceeded to close. We won, but the judge eventually entered Judgment Notwithstanding the Verdict, and we would have to try the case all over again. By the way, we had appellate counsel with us every step of the way. There was simply no law on point. We appealed the JNOV, and we took it to the Texas Supreme Court. This put us in a much better position to settle the case, which was fortunate for the client.

The lesson – Set a calendar reminder to check your pleadings to make sure you have your claims and defenses properly pleaded. Look at the latest complaint filed by Plaintiff. See what defenses are supported by the evidence. Inevitably, you will find something to add to your answer. If you're past the deadline, consult appellate counsel, and determine if you need to file a motion for leave to amend your pleading.

Letting an opposing expert under your skin – Some experts are notorious for trying to throw counsel off track in one way or another. Among my experiences with such experts, I remember one expert responding to one of my questions of him with something like, "Can we get on to something more germane to the topic?" My heart began to pound, because I knew this was right on point, and the expert was missing something. I got what I needed.

The lesson – Experts will get under your skin, or you are not normal, and might even get you to have an emotional reaction. As with the opposing counsel, take a break if you think you might be getting off your game. In my case, I got what I needed, and until our motion for summary judgment was filed, the expert had no idea, and I think the plaintiff's counsel was also in the dark.

On the subject of opposing experts, Chas Reynolds offered the following example:

Buying into Expert Cliches - Early in my career, I was very impressed with "experts". To be a recognized authority on a subject seemed very powerful to me. I also bought into all of the tried and true assumptions and tactics I was taught about how to deal with experts at trial. Specifically, spending a great deal of time on trying to show bias or conflict of interest when I had them on the stand. Several times I got experts to acknowledge that they worked for plaintiffs 90% of the time and made hundreds of thousands of dollars with that work. I would then sit down, satisfied that the jury would certainly conclude this person could not be trusted because they were a "hired gun" of the plaintiff's bar. What I discovered in several instances is that juries did not always get the message. Without the right follow up questions the jury often decided that the expert must be really, really, good if they made that much money from attorneys! If they did so much work and were in such demand, then they must be very qualified, right?

The lessons – Don't assume the jury is a jaded or seasoned legal professional. They may not think the way you do regarding an opposing expert. If you are going to try and discredit an expert or show bias, do it in a way the jury will clearly understand. I should have followed my initial questions with additional ones that would have left no doubt in the jury's mind that certain doctors or experts would never want to disappoint a plaintiff lawyer because they derived so much money from them. Even if an expert witness denies bias, you must make your implications clear and then revisit them in closing. Alternatively, consider leaving the entire subject alone if the plaintiff does not attempt to bolster his expert in a way that gives you an opening to question bias based on financial relationships. In fact, make sure to blunt this tactic with your own expert by freely acknowledging that he or she makes good money from litigation exactly because they are so qualified.

Letting opposing counsel under your skin – I was faced with conducting depositions of an opponent's witness in a commercial product liability case. My partner had alerted me that he had been having difficulty with the opposing counsel,

whom he described as obstructionist, and unprofessional. I poo-pooed the idea, and welcomed the chance to have my turn deposing a witness in the case that I was assisting him on. Lo and behold, during my deposition of a fact witness in the case, opposing counsel made constant and inappropriate speaking objections during my cross-examination. I told him his objections were improper. He responded that he had the right to preserve the record. I pressed on, repeatedly telling him that it was inappropriate. Then, on the record, he falsely accused me of leaning across the table to intimidate his witness. I said that I hadn't leaned over the table. I re-started my cross, and he continued to object. Finally, I was upset enough that I properly suggested that we take a break to discuss the matter, suggesting that we should "step outside to do discuss this." I had no intention of doing anything other than having a discussion outside, and that is all that happened, but I didn't like the words that came out of my mouth that led to the break. Once outside, I defused the situation by suggesting that we should just agree that each of my questions would be objectionable and that I would agree that he was objecting to every one of my questions from that point on, without him having to interrupt. I made essentially the same statement on the record, and the deposition ended without any further issues.

The lessons – 1. Opposing counsel will get under your skin, whether or not you believe it can happen to you. Once it does, act professionally. That means that while your instinct might be to say something that could also be offensive, we should try to be better, not just as bad. In sports we talk about playing down to one's competition. When we respond unprofessionally to an opponent's lack of professionalism, we are just as bad. When your blood begins to boil, defuse the situation, and take a break if possible as soon as possible. Rarely should there be a need to reach out to the court. Avoid that if possible, knowing that the record will reflect on what was done properly and what was not. 2. An opponent's conduct should never let you get off track. My opponent's speaking objections and comment about leaning over the table were inappropriate, but I managed to stay on track or at least get back on track. Make sure that you get what you need from the witness, and don't let your frustration with your opponent cause you to give up on that.

Failing to complete discovery – I defended a life insurance company on the basis that the plaintiff's decedent misrepresented his health history on his application. The applicant/decedent failed to disclose hypertension in a question asking for cardiac history, including hypertension. The applicant died from a heart attack. There was a material misrepresentation on the application, so coverage was voidable. The beneficiary requested payment of the death benefit, which was denied based on the decedent's misrepresentation. Suit was filed. We settled the case early for about 50% of the death benefit without written discovery being exchanged. Why did we settle? Our client's underwriting file showed that it had knowledge of the hypertension, despite the misrepresentation, because the underwriter had obtained plaintiff's medical records with an authorization provided when the applicant applied for the insurance. The insurer could have cancelled the

policy when it discovered the misrepresentation, but it didn't. Avoiding liability for the death benefit when it failed to act over a year before was dubious.

The lesson – Plaintiff's attorney failed to hold off settling until after some initial discovery, the important underwriting file. Had he done so, his client may well have recovered 100% of the benefit. It's a lesson I have carried with me since. Do the necessary investigation and discovery to evaluate your case. Getting cases concluded early is usually a good idea, but make sure that you have done your job first.

Making a closing argument without anticipating the rebuttal – I defended an airline in a case in which plaintiff claimed that a flight attendant set a cup of coffee down on her tray table in such a way that the cup tipped over and spilled in plaintiff's lap causing second-degree burns. The flight attendant claimed that she placed the cup properly and that the passenger must have bumped the tray table to cause the spill. I brought in a passenger witness who was seated next to plaintiff. The witness was a little reluctant because the flight attendant's post-spill conduct left something to be desired but, ultimately, he testified in support of the flight attendant's position. During closing arguments, plaintiff's counsel argued that his client – a retired school teacher – was more believable and that the spill was the flight attendant's fault. He argued alternatively that the airline coffee was too hot, and that the airline should have known that spills can happen due to turbulence or passengers bumping their tray tables, so coffee should be at a temperature that doesn't burn one's lap. I thought I was convincing enough on causation, but I thought I also needed to respond to plaintiff's argument that the coffee was too hot, so I argued that all customers want their hot coffee served hot. That could have been enough, but even the drive-thru at McDonald's serves hot coffee, even though a car ride can be bumpy and result in a spill. On rebuttal, plaintiff counsel responded that McDonald's provides drink holders and puts lids on their coffee cups, making spills less likely. By the way, this was all before the famous McDonald's coffee spill case.

The lesson – When making a closing argument, whenever possible, every aspect of the argument should be evaluated on the basis that plaintiff's counsel will get the last word, which I knew, but the McDonald's argument had a rebuttal that I thought was pretty good. I could have lost that case, but that time, my client was found non-negligent.

When undercover surveillance is not undercover – My partner hired an investigator to catch plaintiff performing activities inconsistent with his alleged injury. The investigator captured video of the plaintiff working out on a weight machine. Unbeknownst to the investigator, plaintiff discovered that he was surveilled and informed his lawyer. During opening statements, plaintiff's counsel told the jury that defense counsel was going to show a video that would demonstrate how hard plaintiff had to work out to get better, all because of the injury from the accident.

The lesson – If doing surveillance, make sure it is done competently and truly undercover.

Conclusion

The thing about mistakes is that it's easier and less painful to learn from someone else's mistake than your own. This is the tip of the iceberg of mistakes we have made or seen, and lessons we have learned from them. It's been said that anyone who hasn't made a mistake … hasn't tried a case.

We are all capable of misjudging judges, misreading opposing counsel and lay and expert witnesses, making errors in judgment, mistakes in strategy, and missing the importance of certain facts, but the goal is to get it right most of the time, and when we get in wrong, to learn from it. If litigation is anything like baseball, most of our innocent mistakes can be overcome, and the most frequent winners will be the ones who learn best and quickest from their own mistakes, and from the mistakes of others.