

IT'S NOT ABOUT PERRY MASON

I was going to write about the new registered counselors law and it's similarities to the current state bar proposal to allow non-lawyer "legal technicians" to assist people with their divorces. While no doubt a scintillating topic, I'm going to put it off for a few months so I can write about a personal experience that was both searing and instructive.

I lost a trial I should have won.

Lawyers may understandably balk at making such an admission. After all, what will non-lawyers make of this? The truth is that if you've been doing this long enough, it's going to happen. I was actually quite comforted by e-mails from colleagues (in response to my *crie de coeur* that went out the night of the judge's ruling) that they had been on both sides of this particular experience.

I went on line that night and Googled something like "losing cases you should win" and came upon a number of lawyers' comments that stated something I have claimed for years - Losing hurts much worse than winning feels good. While I have been able to sleep in the 5 nights since the ruling was issued from the bench, the case inhabits my dreams. In waking hours I wonder what I could or should have done differently - this despite the fact that when we rested, my client and I agreed that there was nothing left unsaid - no argument left in the quiver.

The outcome serves to reinforce an admonition I have often repeated, to the point of it taking on a *mantra* quality. Do not go to trial if you can help it. There just isn't a good enough correlation between trial and justice. This is particularly true in the divorce arena.

I think part of the problem is that judges who preside over these trials do all kinds of cases. They do criminal trials and big dollar business disputes and....well, you name it, they do it. The judge who presided over our trial had a long and distinguished career in the criminal law field as a prosecutor. He conducted the trial with grace, respect and impeccable professionalism. Unfortunately, he has probably never heard of "family systems" or "circular causality." The inquiries that fascinate MFT's (What is each person's role in this dispute? What does each person do (often unconsciously) to cause the other to be emotionally reactive? What can be done to help these people disengage from their seemingly intractable conflict?) don't register a *blip* on the radar of most judges.

Judges are professional decision makers. Often their decisions have to be instantly made, like when they have to rule on objections during trial. If you are a Myers-Briggs judging type, you will relish this role because you spend your entire professional life *making decisions*. You resolve things. You say, "this is the way it is," and the law gives you wide discretion to make these calls. Your decisions will stand unless you misinterpret the law or you have committed an "abuse of discretion." That last one is *extremely* difficult to establish. So as a judge you have great freedom to decide. In this decision process, you avail yourself of everything in your experience. While judges engage in continuous training and are made mindful of various biases

that might infect their decisions, I know of no expectation that they engage in the kind of personal inventory making that good therapists undertake.

Family law cases are extremely nuanced. They do not avail themselves to that Texas Hold ‘Em “all in” mentality of the personal injury or criminal trial. In my case, for example, the husband and wife had engaged in a very painful dance for control of their relationship. They both were extremely wounded by the other and by the time we had gotten to trial, they were terribly polarized. This is the reality in virtually every divorce case that comes to trial. The damage that is inflicted by a divorce trial is that judges who are educated and trained in the Aristotelean philosophy of causation are more inclined to think “You are right and you are wrong.” The family law trial falsely anoints a winner in a lose/lose conflict. Unless the decision is rendered with exquisite sensitivity to the conjoint nature of the conflict and the issues presented, a judgment proclaiming a winner will serve only to drive a wedge even deeper between these poor people who are also parents. Yet, as I have said, I’m not sure that judges can help it.

The legal system is actually quite brutal to individuals experiencing divorce. In order to prevent trial, we usually engage in a process of “mediation” which couldn’t be more inaptly named. It is in fact a “settlement conference” in which each spouse is separated from the other and spends the better part of a day in a conference room with his/her lawyer while the “mediator” shuttles back and forth between them trying to hammer out a settlement. There is no effort to, or opportunity for, communication and some resolution. Each person is permitted to retain the often extreme and unrealistic view of the other. Each will be forced, in a relatively short period of time, to make concessions while at the same time *completely* disregarding the fact that the other person, too, has made concessions. I tell clients that they will emerge from this process exhausted and feeling beaten up, but that doesn’t ameliorate their sense of brutalization. I have had numerous debates with colleagues over the years about what I perceive to be the flaws in this process, but their general reply is that “the best settlement is when both parties are unhappy,” and “it is the best way to protect the rights and interests of our clients.” Indeed, lawyers will remind us that trial with its procedural protections (lawyers and judges take due process very seriously - which is a *good* thing) was a civilized evolutionary step away from trial by ordeal. They’re right. It’s just that we’re not in the middle ages any more and divorce has been “no fault” for almost 40 years now in Washington.

The bottom line is that when you go to trial, you win cases you should lose and lose cases you should win. On average, and across the greater range of cases, the outcome is pretty much in line with what you would have expected. However, the family law trial has its own particular flavor. The courtroom is not where people need to resolve the conflicts, fears and needs that arise out of the end of a marriage. So if there is a word of advice I would have for therapists working with divorcing clients it is this: Don’t allow them to delude themselves that they will get a “day in court” in which the justice of their side will finally be vindicated. The courtroom is the place to seek protection from abuse and to establish boundaries which people cannot manage to establish (or respect) on their own. Aside from that, the family law court is its own form of trial by ordeal for our poor clients who are going through the painful end of a marriage.