

## Message from the Chair

by Karen Koehler



Karen and Jesse Jackson

A sage lawyer once told me never to file a lawsuit purely “for the principle of the matter.” Instead, there needed to be a more reasoned decision – did the law provide for relief, did the chance of success outweigh that of failure, if we prevailed would there be a source of funds available. After all we were the professionals, trained to be dispassionate, logical and pragmatic; whereas the clients were often emotionally invested and hence subjective.

The sound advice given to me as a young lawyer has not withstood the test of time. What good is the law if we cannot reject the safe route and sue precisely because of the principle of the matter? If we are able to meet our financial needs, why can't we designate a percentage of our practice to tilting at windmills that need to be torn down?

Over the years I've accepted cases that don't make a lot of rational lawyer sense. For me, the touchstone is simple: is this right or is this wrong from a human decency standpoint? I've probably lost just as many of these as I've technically won. In each case the clients were given a voice and an opportunity to try to change an injustice.

Ruth Burr was the only child of a mother run down and killed in a cross-walk by a sleepy driver. Policy limits

were inadequate. In Washington, loss of parental consortium is a separate claim not a derivative claim – except in the insurance context. The insurer paid only a single claim for the death and would not recognize a second claim for the daughter's loss. The appeals court refused to hold insurance companies to the same standards as others. This case still bothers me.

Allstate wanted me to sign a protective order before it would hand over documents in a bad-faith case. I declined and so they filed a motion. The trial judge sanctioned me personally for refusing to agree to the protective order device and the appeals court declined to overturn the discretionary ruling. Half a decade later I had two cases in the court of appeals where trial judges denied Allstate protective orders, and last month one of the cases – *McCallum v. Allstate* – was upheld by Division II.

Ida Maisel was run down and killed and her daughter injured when a driver lost consciousness and drove up onto a city sidewalk. The defendant, the U.S. Government, wouldn't pay a single dime – not even funeral expenses – because it claimed the driver had a sudden loss of consciousness. We had to try the case to a federal judge under the FTCA, and despite our gyrations to prove the driver was negligent before he lost consciousness, we lost. I find this defense to be particularly repulsive when a defendant has adequate assets or insurance to cover the loss.

Kristopher Kime was helping a woman who had been assaulted when he was struck and killed by Jerell Thomas during the Mardi Gras Riots of 2001. He lay dying in the street as police stood by with instructions to stand back and not intervene with the crowd. Kris' mother had seen other lawyers before she met with me, and they told her there was little chance of prevailing and even if they did, the recovery would be nominal. As a result of pursuing that case, not only

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## BETTER?

by Jane Morrow, RN, JD

She was a good lawyer. She was a great lawyer. She was the best lawyer there ever was. HMMMMM... Just what is it that distinguishes the mediocre from the stellar? What is the measure of a lawyer's worth?

Anyone looking at the practice of law can see that it is not easy to find a scale upon which to measure the greatness of a lawyer. There appears to be no score sheet and certainly no grader. In Washington it is usually the case that the Supreme Court intervenes in lawyer discipline only when the breaches of a lawyer's duty rise to a level of harm that cannot be publically ignored.

But what about the mediocre? What is it that makes it acceptable to stumble through a career providing only an average or sub-average service to the client? Perhaps more than acceptable, it is commonplace to look at the day-to-day service in law as only a means to a paycheck.

In his book, *Better, A Surgeon's Notes on Performance*,<sup>1</sup> general surgeon Atul Gawande embarks on a quest through a series of essays looking to define what it takes to be good at something in which failure is so easy. He found three core requirements for success: Diligence. To do right. Ingenuity in reflection on failure and a constant searching for new solutions.

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was Kristopher able to posthumously take financial care of his parents, but in Pioneer Square under the tree near where he was killed, lies a permanent memorial in his honor.

At the end of the day, the hard impossible "for the principle of the matter" cases may or may not bear out economically; but they always reaffirm the moral value of what we do.

May you find personal satisfaction as you litigate your clients' cases. And may you make the world a better place through your efforts.

Every human being suffers from his or her own distractions, imperfections and limitations of resources. Often, it is the failures in a life that define the measure of life successes. Success is relative and should be viewed from a personal perspective.

So what is it that defines the best-of-the-best in law? Is it the length of a CV? High on-line systems ratings? How many people the lawyer was able to get to vote for him or her in the super-duper lawyer peer evaluation? Is it the amount of money earned? Is it the number of zeros in the amount of a jury award? The number of favorable verdicts? Political influence? Fundraising capabilities? Aggressiveness? Amount of money the lawyer was able to save an entity in legal fees?

Or maybe the best is...

the lawyer who took a case *pro bono* after a dozen others passed – only because it was the right thing to do.

Or maybe the best is...

the lawyer who possesses decency and compassion for all those she encounters.

Or maybe the best is...

the lawyer who has the ability to inspire – whose *joie de vivre* is purely infectious.

Or maybe the best is...

the lawyer who is the one who gets closest to the truth.

As Gawande found, when the stakes are our lives and the lives of our children (our clients, our clients' children), we want no one to settle for average. Gawande's recognition of excellence in medicine can be paralleled to excellence in law; "better is possible." "It does not take genius. It takes diligence. It takes moral clarity. It takes ingenuity. And

above all, it takes a willingness to try." During the course of his exploration on what it takes to become better, he developed five suggestions to make a worthy difference – or in his words, "to be a Positive Deviant":

1. Ask an unscripted question. Sometimes a question can lead to a human connection and sometimes you discover the unexpected.
2. Don't complain. It's boring. It doesn't solve anything. It will bring you down.
3. Count something. Be a scientist in the world. If you count something you find interesting, you will learn something interesting.
4. Write something. Make some small observation about your world. By offering your reflections to an audience, you make yourself part of a larger world.
5. Change. Be willing to recognize the inadequacies in what you do and to seek solutions.

If Gawande's suggestions don't ring true for those in the practice of law, there is an easy exercise to look at how a lawyer measures success. Pull out your most recent *curriculum vita* or résumé. How is it that you have measured your worth? What did you feel was important to communicate to others about the value of your life's work? Then, look back to your old *vitae* and résumés and see the evolution that has taken place.

Better?

*Jane Morrow is chair-elect of the section. At Otorowski Johnston Diamond & Golden, Bainbridge Island, her practice focuses on the representation of those who have suffered injuries or death, due to the negligence of others.*

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1 Gawande, Atul, *Better, A Surgeon's Notes on Performance* (Picador: New York, 2007).