CHAPTER 1

The Qualities of Winners

Face it. It’s not just the facts; it’s also who tries the case.

Notice how it is fashionable for lawyers relaxing in the Brief Bag on Friday evening to take little cuts at the folks who get big verdicts:

“Well, look at the cases she’s got. She never takes a chance anymore. She only tries cases she can’t lose.”

The implication is clear. The speaker is saying that if he took the easy way out and tried only “winners,” then he, too, would be making four or five million dollars a year.

Like the Gershwins said, “Nice Work If You Can Get It.”

You hear the same conversation about corporate trial lawyers: “Well, look at the clients they’ve got. . . .” Or criminal defense lawyers: “Well, look at who he represents. . . .”

How did the lawyers that they’re talking about get to the point where they have their pick of cases?

By being winners.
And how did they become winners?

Here is where we become defensive. Ever notice how lawyers get jealous of each other’s successes? Lawyers aren’t the only ones. Almost everybody else does it, too.

One cause is a childish supposition. It is a perverse inversion of John Donne’s famous line, “No man is an island, entire of itself. . . .” Because we know we are not islands, we figure that when someone else triumphs it diminishes us. It is the mistaken notion that—like butter and guns—success is in short supply.

3
Not true. Success lurks everywhere, in almost everything we do. And yet we let this false sense of scarcity spoil how we feel about ourselves and embitter our relationships.

It happens in families, it happens in law firms, it happens in government offices. It even happens between supreme court justices and clergy members.

To be sure, jealousy can sometimes be a motivating factor. As ridicule can occasionally spur a young athlete to show her sarcastic coach that she can do it, jealousy can sometimes drive people to excel.

But not often. For the most part jealousy gets in the way. It wastes energy and obstructs clear thinking. One of the best things you can do for yourself is to discover that success is not in short supply.

With the cloud of jealousy pushed aside, it is a lot easier to approach the question we put off a minute ago. How did the best trial lawyers become winners?

The answer is they decided that’s what they wanted to be.

Sound like superficial motivational claptrap?

Hang on for just another minute.

I have spent most of my professional life studying, analyzing, teaching, writing about (and doing) trial advocacy. That has meant studying the styles, techniques, and ideas of the best trial lawyers in the country—undisputed winners.

Every one of those winners made a decision. She or he decided not to be a run-of-the-mill lawyer, but a winner. That decision led these people to develop (consciously or subconsciously) the qualities necessary to be winners.

I am going to tell you what those qualities are, but first I am going to tell you what they are not.

The essential qualities of winners are not:

• Extraordinary Intelligence
• Right School
• Law Review
• Right Family
• Ethnic Background
• Good Looks
• A Golden Tongue
• Luck

Oh, sure. Those things are nice. They can make life a little easier, but they can also make it a lot harder. Talent and ability
The Qualities of Winners

are useful, but are not required in large amounts. The road of history is littered with wasted talent, while men and women of ordinary abilities have carved out remarkable careers for themselves.

So what are the essential qualities?

First a word of warning. Forget about it—before you even start—if you are not going to keep at it. That is because the race is not to the swift, but to the determined.

Want to Help Others

The word “profession” means something different than it used to. Today, when plumbers have beepers and paid athletes make more money than anyone else, “professional” means you do something for hire.

The members of the three traditional “learned professions”—law, medicine, and clergy—were supposed to be different. Compensation was not the most important part of being a professional. The point was to help other people. That included taking your fair share of pro bono cases or doing other public service.

You should cringe when you hear lawyers talking about the “law business.” It is the kind of mind-set that takes specialization to the point where there is no client contact, and leaves pro bono work to those who specialize in it.

Winners are different. They do not duck assigned cases. They make a point of giving time to the profession. They serve on bar association committees. They give their time to law schools and to trial lawyer training programs.

Wait a minute, you say. Is this some cheap pitch to encourage me to be a “civic-minded lawyer”? What does wanting to help others have to do with why some lawyers are winners?

That is a good question. As near as I can figure, it has a two-part answer. First, lawyers who are interested in helping look at things differently from those who just go through the motions. And second, lawyers who really care about their clients aren’t likely to quit as quickly as those who don’t.

Need to Right a Wrong

Real trial lawyers are closet idealists. Some people may have gone to law school figuring it to be the quickest route to a flashy condominium and a new BMW. But not the winners. They learn how to kill dragons.
But dragon killing was not in the curriculum. The teachers did not talk about doing justice or righting wrongs. Instead, they taught us that the difficult problems were not right versus wrong, but right against right and wrong against wrong.

That was not only useful education—it was essential. But it was not intended to teach us that there is no right or wrong.

Winners are offended by injustice. It is a sense that pulls them into the fray and helps them identify winning arguments. And the sense of injustice is a powerful persuader. As Dr. Jeanne Fleming from Metricus—a jury research organization in Palo Alto, California—discovered in a nationwide poll, 60 percent of potential jurors view a trial as a “moral arena,” in which it is more important to do the right thing than the legally correct thing.

**Ethical**

My, how the media love to make the mighty fall. That fact alone ought to be enough to keep you on the right side of the line.

Winners understand that they are part of a profession that imposes rules and draws lines. They also know there are times to question those rules and attack those lines. And when they do, winners have the sense to challenge the rules openly and deliberately instead of concealing what they are doing.

Winners keep their word. They don’t cut corners. They don’t keep the meter going just to run up the bill. They don’t try pit-bull tactics in depositions or use discovery to inflict pain. They make reasonable accommodations for other lawyers.

**Want to Know Everything**

Good trial lawyers have wide-ranging interests. Great trial lawyers—like Kipling’s *Elephant’s Child*—have insatiable curiosity. As Edward Bennett Williams used to say, “There is no substitute for knowing everything.”

When good lawyers have a railroad crash case, they learn about locomotives by studying diagrams and taking depositions. Winners do not stop with studying diagrams and taking depositions. Like Craig Spangenberg from Cleveland, Ohio, they go down to the railroad yards and get into a locomotive cab to see what it’s like.

Winners want to know how things work, why people act like they do, who is pulling the strings, and what they get for what
they do. They are quick studies. They can put themselves in anybody else’s shoes. They are both careful and suspicious.

**Need to Communicate**

There are people who can tease apart a problem until it finally yields to logic—and then forget about it.

Not trial lawyers. They have a passionate need to communicate to other people. They take responsibility for making things clear. It’s as if their understanding is wasted if it is not shared with others.

They are storytellers, explainers, raconteurs. Sometimes writers, they are more often found at the center of a circle of listeners than at the keyboard of a word processor.

Are they performers? Certainly. But here is where superficial critics often miss the point. The need is not to hear the roar of the crowd—it is to teach, to feel the spark of understanding passed on to someone else. For real trial lawyers, the case is a story to be told, and the art of persuasion is in how they tell it.

**Goals**

Everybody has dreams—winners have goals. And there is a big difference between goals and dreams.

Remember that story about the three bricklayers and the way they looked at their work? It is meant to be heartwarming, to lift us out of the lassitude of daily drudgery:

> A traveler comes on three bricklayers, working in the sun. He asks each one, “What are you doing?”
> The first bricklayer says, “Laying bricks.”
> The second bricklayer says, “Building a wall.”
> And the third bricklayer says, “I’m building a cathedral.”

That’s where the story ends. But for our purposes we need to take it a little further.

The winner knows he’s building a cathedral, but he also knows where the next brick goes. Goals without plans are idle dreams.

The most important thing winners do is make realistic plans—for their cases and their personal and professional lives. In mapping discovery, conducting the cross-examination of an expert witness, or in working on a settlement agreement, they know where the next brick goes.
One point before we go on. Having a plan does not mean following the plan no matter what. Winners know how to change their plans when the need arises—which always seems to happen.

**Imaginative**

Legal education seems to squeeze the creativity out of a lot of people. There are thousands of lawyers who take the position that if you can’t find a precedent for something, then you can’t do it.

It is astonishing, for example, how many judges will prohibit lawyers from using charts and diagrams that explain the testimony—what Deanne Siemer calls “testimonial aids” in her book *Tangible Evidence* (3d ed 1996, National Institute for Trial Advocacy). These are judges who are happy to let you show the jury a picture of something physical, but will not let you use an outline of expert testimony.

Why? Because they haven’t heard of it before.

More thoughtful judges, like Patrick Higginbotham of the Court of Appeals for the Fifth Circuit, say, “If the jury can hear something, they ought to be able to see it, too.”

Imaginative lawyers don’t ask why, they ask why not?

**Energetic and Persistent**

Louis Nizer used to pull all nighters well into his seventies when he was in trial. Make your own list of great trial lawyers. One of the common threads you will find binding them together is the great energy they pour into their cases.

People ask where you get that kind of energy, and there is an answer. You will have as much as you use. No one has an inexhaustible supply, but like athletes in training, the more you spend, the more you have.

Next is persistence.

Failure theory says you learn from your defeats. It is a useful idea. Analyzing the failure tells you what went wrong, why it didn’t work.

But failure theory is dependent on persistence. If you don’t try it again, your learning won’t continue. You won’t validate your analysis.

**Realistic**

Like the gambler on the train in that country-western song, winners know when to hold ‘em and know when to fold ‘em. One
of the key values any trial lawyer has is the ability to step back and take a good hard look at the case.

Being realistic is the most important limit to persistence. Everybody knows lawyers who persist in taking losers to the bitter end, who keep making the same motion again and again, who want to take some evidence point that has already been irretrievably lost and keep arguing it for the rest of the trial.

That trait is neither admirable nor productive. To be sure, lawyers like that sometimes win cases despite themselves. But they do it at an unacceptable cost.

Not Afraid to Fight

The time comes to stand and fight.

There are intractable differences that cannot be settled. There are questions that need the help of a judge and jury. There are principles that can’t be compromised.

But a number of lawyers don’t have the stomach for it and have developed nice-sounding rationalizations that let them off the hook. They never go to trial. That makes their credibility in settlement negotiations suspect, as well as their advice to their clients.

You have to understand why some lawyers act this way. Mostly it is not cowardice, but ignorance. They don’t stay away from court because they have no spine—they stay away because they don’t know what to do when they get there.

Now that is something we can cure.