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Racehorse trainers and trial lawyers

In order to win, having the Big Horse or the Big Case is necessary but not sufficient


Kelly

By Dan Kelly

"Horse sense is the thing a horse has which keeps it from betting on people"

— W.C. Fields

Most people who work at the racetrack believe that racing is a unique world unto itself. That it is, and yet there are some striking similarities between the racetrack and the courtroom which are seldom recognized. Consider, for example, the trainer of young racehorses and the personal-injury lawyer.

The personal-injury (or "PI") lawyer is always hoping for the Big Case to come through the front door. Such a case has three components: a severely injured plaintiff, a clearly liable defendant, and a deep pocket somewhere – the defendant's own personal wealth or, more likely, insurance coverage capable of paying a large judgment. By the same token, many thoroughbred trainers – for an owner, or even for themselves as owner – are just as actively searching for the Big Horse. Through the various yearling sales or other form of private acquisition, they are looking for a horse with superior breeding, conformation, and that certain indefinable something called potential.

In either situation one must not only spot, but also land, the coveted Big Case or the coveted Big Horse. Both trainers and lawyers can ruefully recall the horse, or the case, which they mistakenly passed up as a loser – only to see it enjoy a huge triumph in other hands. And in the same way that many hot cases are snapped up by rival lawyers, many such horses are acquired by other trainers.

Then there is the matter of financing and development. Owners have to put a lot of money up front to purchase a promising yearling, while the PI lawyers pay nothing at all to sign up a promising plaintiff. But the situation is somewhat reversed, since the lawyers – usually operating on a contingency fee basis, where they get paid only if they win – effectively bankroll the case through months and often years of pre-trial and trial proceedings. By contrast, it costs little more to feed and train a Secretariat than it does a modest low-level claimer, and those costs are usually paid by the horse's owner.

So far as development is concerned, there are often years, not months, of work to be done before any significant return is realized. For the trainer, it's breaking a colt or at least working patiently to bring the horse up to its first race; overcoming bad habits on the track; and diagnosing and curing a series of unexpected and sometimes career-threatening injuries. For the attorney, it's many months or years of discovery, of surviving pre-trial motions to dismiss the case, of finding credible expert witnesses or even (with luck) the smoking gun. A racehorse or a lawsuit may have all the potential in the world, but unless they're prepared properly, either can easily become a cropper. Except, perhaps, for that rare case or horse which is so good that only an incredibly botched preparation could snatch defeat from the jaws of victory.

The racetrack or the jury trial

With the financing behind them, the trainer/lawyer is ready for the ultimate test. Some differences exist, of course. For example, a horse often proves itself over a series of races or a period of years, so that its initial failures are not fatal, whereas an unsuccessful trial lawyer gets only one more shot after trial – by taking and winning an appeal. On the other hand, many an expensive horse never wins, while others never even make it to the races, so that its ultimate failure is quite similar to the lawsuit that is defeated at MSJ or loses at trial.

But now consider the jury trial – and the stakes race. There is, in both cases, the playing out of tactics, strategy, competition, and the skill of the participants. In order to win, having the Big Horse or the Big Case is necessary but not sufficient. For all may still be lost without the right game plan, the heady ride, the ability to get out of the gate quickly, to avoid being boxed in, to escape trouble (especially unexpected trouble) when it occurs, and to finish strong – whether it's coming down the stretch or presenting a closing argument to the jury.

Sometimes it becomes increasingly clear, as the race is run or the lawsuit tried, that one of the participants is almost certain to win. Yet on other occasions it comes down to an unspeakably anxious moment at the end. Few moments in life are more dramatic – or more fateful – than a photo finish in a big race. For then, after what seems to be endless minutes of waiting, the "photo" sign on the tote board goes out and is replaced by the number of the winning horse.

Such a moment, however, often occurs in a courtroom, when the jury returns from days of deliberation and files into the box, eyes sometimes averted from the lawyers and litigants. Then their verdict is handed up to the court clerk, who in a single moment reveals whether a criminal defendant is going to leave the courtroom through the side door, in

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handcuffs, to spend 10 years behind bars, or out through the main door and onto the sunny street with family and friends. Or whether a quadriplegic child will receive a multi-million-dollar award – or nothing at all.

When you're hot

So, in the end, both the personal-injury lawyer and the thoroughbred trainer wind up rolling the dice. And when they do, they can win big or come up empty, since each one receives a healthy percentage of the pot, although far more than money is involved. For the PI lawyer, a multi-million-dollar verdict means success and prestige and the ability to attract more seriously injured (or well-heeled) clients and/or more Big Cases; and for the trainer, a similar ability to attract more well-heeled owners and more Big Horses. When you're hot you're hot, in either profession.

And even in money won, there are similarities. For example, a winning plaintiff's PI lawyer will usually receive about 30-40% of the judgment or settlement, and a winning trainer will receive a flat 10% of the winner's share of the purse. On the other hand, the PI lawyer will usually have fronted all of the costs of the litigation as the case progressed and would have eaten those expenses had the case been lost. Whereas the trainer will be paid (day money) by the owner for the horse's food and shelter, as well as bills presented by veterinarians or the person who comes by to affix and change the horseshoes. But even then, the trainer is required to spend a serious amount of time in planning the horse's workouts, observing the horse's performance, detecting a zillion possible forms of injury or disease, finding the best race to enter the horse in, obtaining the services of a top rider, and so on and so forth. And that time is usually spent without any remuneration at all.

Despite these similarities, lawyers and trainers exist in two separate worlds, knowing – and seeming to care – only about their own. Occasionally, of course, they come in contact, as when a lawyer becomes the owner of a racehorse, and perforce hires a trainer; or when a trainer becomes enmeshed in litigation, and has to hire a lawyer.[1] But, even then it's often like ships passing in the night, as the lawyer-owner restricts his contacts to a few telephone calls to the barn, to find out when the horse is running next, or why the horse lost the last time out. Or else to a few remarks exchanged in the paddock right before a race, when the owner is in attendance.

And in litigation the client and lawyer are likely to confine their discussion to the case, the expected testimony, the likely outcome. It is true, however, that the lawyer and the trainer will always address the amount and method of payment, regardless of which way the payment is running.

Sometimes, though, the walls are breached. Trainer R. L. Martin, who for years was a leading trainer at Golden Gate Fields, used to tell of highly successful professionals and business executives for whom he'd trained, who often expressed a strong preference for being on the backstretch, rather than in the corporate suite. "Many of them," Martin once said, "would rather be bullshitting down here in the barn than tending to business back in their offices."

This is a positive development, since there are almost as many good stories to be told about the courtroom as there are about the racetrack. And indeed, trial law and professional sports must rank toward the very top of occupations or professions where the most and best stories may be found. As for the late Red Smith – who wrote about all sports and is considered by many to be the preeminent sportswriter of the 20th century – "out of all the spectator sports, horse racing was his favorite. 'There were more stories at a racetrack,' he liked to say, 'than anywhere else.'"[2]

The only problem with courtroom or racetrack stories is that, at their best, they are told in person rather than presented in written form. And told by real raconteurs like the many trainers who love to spin a horse-racing tale or two, be they true or slightly embellished.

Although lawyers generally are a stuffier bunch than trainers, there are plenty of colorful trial lawyers out there who love to tell war stories, be they true or slightly embellished. Especially when they've had a pop or two after court adjourns for the day. But as things now stand, the trainers swap their stories while they knock back a drink or two at a bar nearest the track, while the local trial lawyers are doing the same at a little more genteel taverns.

Still, if my trial lawyer friends were ever to run into a few trainers in some neutral watering hole, say the airport lounge in Fresno, they'd undoubtedly have a fine old time swapping tales. And likely bring to mind Ernest Hemingway's lovely comment about people who don't take themselves too seriously. "They say the seeds of what we will do are in all of us," he wrote (in *A Moveable Feast*), "but it always seemed to me that in those who make jokes in life, the seeds are covered with better soil and a higher grade of manure."

The author gratefully acknowledges the input from the late Bernhard Bergesen, III. In addition to his legal achievements in appellate law, he also did a stint as the racetrack writer for the Hayward Review newspaper. "Bernie the attorney" and I spent many a fine afternoon at the Turf Club at Golden Gate Fields. He died February 5, 2022. One of his favorite quotes was that of Damon Runyan: "All life is 6 to 5 against." He beat the odds for 87 years.

Daniel J. Kelly is a retired partner from the San Francisco firm of Walkup, Melodia, Kelly & Schoenberger *where he specialized in representing plaintiffs in personal injury litigation and the mediation of personal-injury cases. Mr. Kelly is a past president of the San Francisco Trial Lawyers Association and a member of the American College of Trial Lawyers, the American Board of Trial Advocates, the International Academy of Trial Lawyers and in 2003 was President of the International Society of Barristers. For years he co-authored the Rutter Group's three volume Personal Injury Practice Guide.*

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Endnotes

[1] Sadly, in the past few years there has been a spate of allegations against some trainers with a resulting spate of litigation. See e.g., *U.S. v. Navarro* (trainer pleads guilty in drug scheme and is sentenced to five years); *Baffert v. Churchill Downs* (trainer's action to overturn two-year suspension after horse tests positive); *Baffert v. New York Racing Association* (trainer's action to overturn suspension). The incidence of such doping cases, fortunately, appears now to be on the wane.

[2] To Absent Friends From Red Smith, from the Introduction by Dave Anderson, former Sports Editor of the New York Times.

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