



BY JOHN M. CURTIN

The Legacy of Bernie the Loser

**“Blow, wind! come, wrack!
At least we’ll die with harness on our back!”** —William Shakespeare,
Macbeth, Act V, scene V

“Didja hear about Bernie Lauser?”

The news wafted through the Maricopa County courthouse like a regretful sigh. News about Bernie Lauser, a courthouse hack of near-legendary ineptitude, was rarely a good thing. Bernie the Loser, as he was known to his colleagues and adversaries. Some lawyers, late in their careers, show the deep, rich patina of many years of experience. Others, like Bernie Lauser, demonstrate the smudged and superficial polish that comes from one year of experience, repeated *ad infinitum* over a career of many years.

The rumor was that Bernie Lauser had died in Division 48 of the Superior Court. In some ways, this was hardly news. They say a coward dies a thousand deaths. Such is also the life of the courtroom hack. This wasn’t the first time that Bernie Lauser died down at the Superior Court. Hell, it wasn’t even the first time he’d gotten “killed” in Division 48, home to the formidable Honorable Mary Clarice D’Antonini, a severe woman, with short, iron-gray hair. They said the county saved a ton on air-conditioning in her courtroom, because her mere presence could drop the ambient temperature in the room by 10 degrees.

But it was certainly the first time Bernie’s courtroom demise proved so ... final.

According to reliable sources, on the first day of a scheduled week-long medical malpractice trial, Bernard T. Lauser finished his opening statement and sat down at counsel table. As the defense lawyer, young Macklin Stern, got up to respond, Bernie put his head down on his folded arms and gave a loud sigh. The judge and Mr. Stern exchanged an eye-roll. Typical. As a gesture of dramatic indifference to the defense’s opening, it combined bad timing with a remarkably poor sense of the jury’s receptivity. Mr. Stern noted several jurors tightening their lips, and passed on the objection.

It had been a busy morning for Katie Donohue, the “Associate” of the Law Offices of Bernard T. Lauser and Associates. She was sitting second-chair in her first medical malpractice trial. The term “associate” under these circumstances has a very specific and accepted legal definition. It means “the one who carries all the boxes.” In truth, Katie couldn’t expect Bernie to do much physically. She wasn’t sure how old he was, probably close to 70, but he had gotten to the age where he smelled old. A combination of unidentified ointments and the kind of men’s cologne that no one wore anymore. He was a tall man, and perhaps he had once been imposing. But now, he had that old guy combination of skinny arms and legs supporting a large belly.

She hoped to pick up some pointers from watching the defense lawyer. She didn’t expect to learn much from her boss.

Bernie’s opening had been true to form. A disjointed presentation of facts, with a few good points, undermined by theatrical and oratorical flourishes that, coming from Bernie, seemed contrived and artificial. Katie was mortified when Bernie put his head down on the desk. It was over the top to demonstrate such disrespect for opposing counsel, especially this early in the trial. Maybe later, if defense counsel irritated the jury enough. But now, it was only going to offend everyone in the courtroom. Katie wondered if there was an ailment akin to tone-deafness or color-blindness that some lawyers suffered from, which prevented them from recognizing the jarring and off-putting impact of a poorly executed dramatic gesture.

“Jury blindness,” she concluded, staring at close-clipped white bristles on the back of Bernie’s head, and trying to WILL him to sit up. “He definitely suffers from jury blindness.”

Young Stern gave a brief and by all reports effective opening statement. But when Judge D'Antonini called for the plaintiff's first witness, Bernard T. Lauser, for the first time in his 35-year legal career, failed to answer the bell.

Bernie Lauser had died in harness.

There was a sweet, almost sentimental quality to the accounts of his death as they sped through the courthouse that day. It figures, many of the courthouse denizens said. He may not have been a great lawyer. In fact, he may have been doomed from the start. But at least he went down swinging. He stayed with it to the end. The Law, after all, is a profession that places a value on perseverance to the point of stupidity. Some things you can count on, many said with a fatalism that bordered on reverence, and one of them is that Bernie the Loser never knew when to quit. In an odd sort of way, his death was a fitting end.

But at the heart of the maelstrom of rumor, Division 48, things were considerably less philosophical.

When Bernie Lauser failed to respond, the bewildered jury had been hustled out of the courtroom. Bernie was quickly moved to the floor, where his untimely demise was diagnosed by the defendant doctor, who seemed inclined to view the fatal outcome as a just resolution of the case. Bernie's large, ungainly frame now lay cooling on the gray and taupe-flecked carpet of



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the courtroom, the protruding vest of his old-fashioned three-piece suit rising like a small pin-striped hillock over his otherwise gaunt body.

He seemed at peace. Slightly more at peace than his former client, Grace Martinez, the widow of plaintiff's decedent Emilio Martinez, who confronted this second bereavement with the resentful stoicism born of long experience in getting screwed over by an unkind Fate. A bit more unruffled in his demeanor than Judge D'Antonini and young Macklin Stern, who seemed torn between the requirements of decorum and the more comfortable necessities of legal process.

And way, WAY more calm than Katie Donohue, who was finding her first medical malpractice trial somewhat more stressful than anticipated.

When the paramedics had finished their ministrations and bundled Bernie's remains out the door, the Judge took the bull by the horns.

"We still have a jury. I suppose we ought to tell them what happened and release them. Ms. Donohue, I suppose you would like to make a motion for mistrial at this point?"

"Huh?"

Admittedly, it wasn't the most elegant start to a career as a trial lawyer. But the record is perfectly clear that the very first courtroom oration uttered by Ms. Katie Donohue, in a legal setting, consisted, in its entirety, of a somewhat strangled, high-pitched "Huh?"

"A motion for mistrial," said the Judge, patiently, "At this point, the trial has not been terminated, the jury is still in the box, and we cannot release them until the matter is resolved. I assume your client wants a mistrial?"

"Oh, yes. I see. I guess I need to confer with my client."

It is not precisely clear what happened next. The Law draws a merciful veil of confidentiality over the sometimes messy and confusing interactions between lawyer and client. Courtroom observers agree that Ms. Donohue turned to her client and made a short, whispered speech of explanation. The client was observed to shake her head "no," at first hesitantly, and then with increasing vigor and emphasis, as Ms. Donohue's largely inaudible words became more urgent and took on a panicky tone. Without violating attorney-client privilege, it may safely be reported that the phrase "Are you out of your mind!?" was a prominent feature of the latter part of the conference.

At this point, it seems that a bit of background might help to

explain what happened next. First of all, the client.

Many people wonder where clients like Grace Martinez come from. The Law Offices of Bernard T. Lauser and Associates did not appear on TV. He did not purchase radio spots, or hire billboards. Bernie Lauser's marketing efforts, such as they were, existed on a lower stratum of mass media. Bernie put ads for his DUI clients on bar coasters. He was generous at Christmas with a select list of bail bondsmen and chiropractors. But

his most notable marketing effort consisted of placards on the benches of bus stops touting him as an "aggressive, experienced lawyer" in criminal, divorce, bankruptcy and accidental injury. The ads, perhaps unsurprisingly, were silent regarding the relative lack of success that accompanied said experience.

Who picks their legal counsel based on the recommendation of the battered and graffiti-tagged furniture of public transit? People who have been beaten down often enough to have lost all faith in their skill and judgment. People who are convinced that eventually the Lotto will pay off. People who pick their favorite numbers based on the date their divorce was final, and their "winning" horses based on random fragments of overheard conversation. People who believe in ... luck.

Bernie's clients were all confident, on some fundamental level, that the mysterious appearance of a lawyer's name on a bus stop bench, ON THE VERY DAY that they recognized a need for legal services, was a profound and holy manifestation of Fate, steering them toward a much-needed change of luck.

As a life strategy, it seldom worked.

The second element in this legal equation was, of course, Katie Donohue. Katie was two years out of a recently accredited institution that had not yet overcome its reputation as a night-school for lawyers. She, in fact, had attended part-time, while working full-time as a legal secretary. Despite her good sense and intelligence, she was a somewhat unlikely candidate for trial practice. She was short, round-faced, and inclined to plumpness. In high school, her nickname had been "Muffin."

It is a little-known fact that in the history of American jurisprudence, there has never been a famous trial lawyer named Muffin. Muffin-like qualities, while not unappealing in their own right, are apparently not the characteristics that the majority of legal consumers look for in their trial counsel. Thus, she had spent the first two years of her legal life working for Bernie Lauser.

"Ms. Donohue?" Judge D'Antonini was losing patience.

"A moment more, your Honor."



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It was then that Grace Martinez made what most experienced legal observers would agree was, in technical legal terms, a Very Bad Decision. However, an argument could be made that this particular Very Bad Decision was inevitable. Given the unlikely intersection of sudden death, the raw emotional shock and dismay, the smirking of the defendant doctor, and the majesty of the law in all its august trappings, is it really surprising that a woman of Grace Martinez's outlook on life would perceive the Hand of God, intervening in a most dramatic fashion to raise up a new legal champion on her behalf?

"Um ... your Honor? My client does not want a mistrial. She wants to go forward."

Macklin Stern sputtered and objected. What if the jury blamed his client for not saving plaintiff's lead counsel? The emotional effect was unpredictable and dangerous.

But the Judge wasn't having it. The jury had been whisked out of the courtroom at the first sign that something was wrong. They didn't actually KNOW that Bernie the Loser was no longer ... making an appearance. His absence could be explained away. No prejudice need ensue.

The Judge cautioned Mrs. Martinez on the record, in the gravest and most awful tone, that if she insisted on going forward with untried counsel, it might be a Very Bad Decision Indeed, for which an appellate court would have no sympathy if it turned out poorly. But Mrs. Martinez was implacable. Katie Donohue had stood safely to one side when the Angel of Death struck down Bernie the Loser. Obviously, she was lucky. Mrs. Martinez wanted a lucky lawyer.

And, at the end of a very odd day, Grace Martinez got her Muffin.

The Court, in observance of the proprieties and the necessity of getting Bernie in the ground quickly, granted a continuance of one day. That night, the figurative candles burned far into the night at the office of the late Bernie Lauser. Katie spent much of the night poring through medical records and reading page after page of deposition testimony. The thing was impossible. No lawyer prepares to try a medical malpractice case in a day.

The funeral of Bernie Lauser was a dismal affair, attended by two out of three of his ex-wives and none of his children. Very few clients. Nathan Lauser, Bernie's younger brother, flew in from California to represent the surviving Lausers, most of whom couldn't arrange to get there from Florida. A few embarrassed-looking colleagues shuffled in, looking distinctly uncomfortable in borrowed yarmulkes. Naturally, Bernie's office staff attended, albeit they spent most of the service gossiping amongst themselves about how long it would take to close the practice and whether the public defender's office was hiring. Nathan gave

the eulogy.

"Bernie loved his work," he said, sadly. "I'm not sure why. He made a living, sure, but it was no picnic for him. But he loved it. To talk to Bernie, you would think he was the next Clarence Darrow. Every case was a big case. Every trial was the Hindenburg trial. I don't know why he loved it so much. He never made a big success like he talked about. But he never stopped *wanting* to be a great lawyer. I think he tried as hard as Clarence Darrow or F. Lee Bailey or any of the big-shot lawyers. He just didn't have it in him."

After the service, one of the lawyers pulled Nathan aside. "Did you maybe mean the Lindbergh trial?" he asked.

"Whatever." Nathan shrugged. He took a Southwest flight back to San Bernardino that afternoon.

For Katie, the one bright spot in the whole proceeding occurred in the parking lot. An older woman, notably underdressed for a funeral, came up to her as she was opening the door to her Toyota.

"You going to take over Mr. Lauser's practice, I guess?"

"I don't know what's going to happen. I suppose his family or his estate will decide what happens to his clients." Katie was in a hurry to get back to the office and her preparations.

"Don't you care?" the woman persisted.

"It really isn't my place to say what happens. I'm only the associate lawyer. They're not really my clients." Katie turned back to her car, keys in hand.

"You know, he wasn't really a bad lawyer." The woman seemed to have something she was struggling to say. "He did my bankruptcy for free when he did my divorce. He saved my house. I couldn't pay him. To me he was a good lawyer." The woman fell silent. Katie had actually started to open the door to the car, when the woman murmured apologetically. "I guess he wasn't all that great. But maybe wanting to be a good lawyer made him a good person, you know?"

With a phone call that afternoon, Katie managed to hammer out an agreement with Macklin Stern that the jury would be told that Bernie Lauser had taken ill and was unavailable. In keeping with the grand traditions of the Law, it was technically the truth.

That night, in the office, Katie started to feel like the case was coming together. The case wasn't all that complicated. The doctor had operated on Emilio Martinez for appendicitis. During the surgery, he perforated the colon in two places, which he failed to notice. Over the next 36 hours, Emilio developed a raging peritonitis. By the time the doctor figured out what had hap-



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pened, Emilio was too weak from sepsis to survive the surgery to repair the bowel. He died on the table.

She would call the defendant doctor as her first witness. That would shake things up.

In her mind, Katie could see the cross of the defendant playing out like a textbook demonstration. Short, leading questions. One small concession at a time, stacking up into a devastating admission of negligence. In the last two years, she had seen her boss plod through pedestrian cross-examinations, his points lost in the sheer tedium. That would not happen to her.

She slept well that night.

The nightmares didn't start until the trial got going. She called the defendant as her first witness. Her questions were carefully phrased, scripted in fact, to elicit the precise admissions she was looking for. Unfortunately, the defendant had not read the script and insisted on giving answers that put him in the best possible light.

"When you removed the appendix, you poked several holes in Mr. Martinez's colon, didn't you, doctor?"

"I'm not sure when the perforation occurred."

"Nevertheless, it was you who performed the surgery, am I correct?"

"Well, yes—his appendix had to come out or he would have died."

"Was it necessary to poke a hole—no, two holes—in his colon to remove the appendix?"

"Well, the appendix hangs off the bottom of the cecum, which is part of the ascending colon, so technically you can't remove the appendix without entering the colon. Is that what you mean?"

"No. Wait. You're missing the point. Please just answer my questions, doctor." Katie seethed, and flipped through her outline.

"I'm sorry. What did you want to know?" The doctor smiled helpfully.

"My point is, you made things worse."

"Objection, she's arguing with the witness." Macklin Stern interjected.

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"Sustained."

"Mr. Martinez came to you with appendicitis, correct?"

"*Acute* appendicitis." The doctor agreed.

"You successfully removed his appendix, true?"

"Yes."

"At the time of autopsy, they found at least two perforations in Mr. Martinez's large intestine, am I correct?"

"That's true."

"Did you intend to leave two open perforations in Mr. Martinez's large intestine when you operated on him?"

"No. I intended to remove his appendix before it burst, in order to save his life."

"But you *didn't* save his life,

did you doctor?" Katie flailed.

"No. I tried everything I knew how to do to save his life. But it couldn't be done ..."

And so the day went. After Katie gave up and sat down in confusion, young Stern increased her misery by getting up and leading his client through a seminar on the physiology of appendicitis and the risks of modern surgery, with occasional side trips through the doctor's many years of medical and surgical training, and his personal high-minded motivations for becoming a surgeon. The words "life-saving" figured prominently in the presentation, as did the phrase "ordinary complications of surgery."

When Stern sat down, Katie couldn't think of a single thing to say. So she waived re-direct. All in all, it was the best decision she made that day.

Katie stared blindly into a cup of Seattle Brew's strongest coffee. The rest of the witnesses that day had been hit-and-miss. She stumbled through her directs. She made some points, but some of her questions had confused her witnesses, to the point where they gave wrong and sometimes unfavorable answers. Every time a witness said "No" where they should have said "Yes," or got that scared, confused look on their face, she'd felt a little tightening sensation down in the pit of her stomach. She couldn't eat now if she tried. The coffee was hitting that same tight spot, like a jolt of battery acid. But she needed the caffeine. She needed to get over to Mrs. Martinez's house in half an hour to get her ready for her testimony in the morning.



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More than anything she'd ever wanted in her life, Katie Donohue wanted to quit. She wanted not to go back into the courtroom the next morning. She dreaded having to stand up and feel awkward and ineffectual, and then sit down and feel helpless while the defense undid her feeble efforts. A fight-or-flight response is a hell of a thing, when you don't know how to fight, and you're not allowed to run.

She picked up her purse and left a dollar on the table for the busboy.

How in god's name did Bernie do this for 35 years? she wondered. She'd made Bernie look like a genius trial lawyer today, but even so ... She'd seen the hurt look flash across his face, when things went poorly, when the air of confidence slipped momentarily. *He'd have to have known about his nickname.*

Grace Martinez lived out on the far west side, in a small house with a carport. There was no lawn. Inside, it smelled funny. Not dirty. Just "people who cook stuff that I don't know about" funny. They sat in what was probably called the dining room, an alcove that was separated from the main room by the back of a couch. There was no room for a table in the tiny kitchen.

"How do you think it went today?" Grace asked anxiously.

"I don't know." Katie didn't want to answer that question. "I thought we made some points. I thought they made some points."

"That defense lawyer seems kind of smart-alecky. Like he wants everyone to think that *he's* the doctor." Suddenly, Grace put her head in her hands. "I don't want to do this. What am I going to say that will make a difference? The only one who listened to me was Emilio. He thought I was smarter than him. Now he's gone." She looked up bleakly. "What am I gonna do now?"

Katie remembered something she had heard Bernie say one time.

"C'mon, Grace. You can't back out now. The only way out is *through*. You have to go through it to the end." It seemed to work, a little. Grace's head came up. "Good, now, let's start with your direct."

After two hours, Grace was fading fast. Katie was still fully caffeinated and extremely frustrated. Grace was a stoic. She shied away from expressing any emotion connected with her husband's death. Nothing Katie did seemed to elicit anything but abstractions. "He was a good man." "He was good to me." "He was a good earner." Everything was *good*.

Grace got up to take a bathroom break. Katie stood and stretched, feeling the tight muscle under her right shoulder pull as the joint clicked back into place. She wandered around the living room. Not much to see. The furniture was fairly new, but cheap. Emilio had done okay working for the newspaper as a

printer. Through a crack in the bedroom door, she saw a flickering light. Curious, she pushed it open. Oh. Some kind of Hispanic religious shrine. The Virgin of Guadalupe. A Martin de Porres candle. And a snapshot of Emilio Martinez. He was dressed in a suit, with a loud tie. He was seated at a table with some other people, also dressed up. Everyone was smiling. Katie felt someone come up behind her.

"My younger daughter's wedding," Grace explained quietly. "Five months before he died. I keep his picture on this table. I talk to it sometimes, when I can't get to the cemetery."

"You still go to the cemetery?"

"Every day."

"And you talk to your husband at the cemetery?"

"Yes." Grace got the stoic look on her face again. "Don't ask me what I say. It's not anyone's business."

Katie went home. When she did the direct the next day, she didn't ask. Maybe she couldn't be a good lawyer. But she could try to be a good person.

The next few days passed. That really is all you can say. They passed like a kidney stone passes, but they passed nonetheless. Witnesses testified. Documents were introduced. Evidentiary points were argued at the bench. In as much as a lawyer in the Great Sonoran Desert of the Southwest can be said to slog, Katie slogged.

In her closing argument, though, she had a moment. After her first cross-examination of the doctor, she had not much hope of persuading the jury. Still, over the next few days, she had won a point here and a point there. Those scattered bright points were kind of like the flickering of fireflies in the dark of night. This was something different.

She'd stood quietly for a moment, looking at the panel. She knew she'd lost. But it didn't relieve her of the responsibility to do her job. The only way out is through, Bernie had said. Can't go around it, can't get over it, can't slide under it. The only way out is through.

"Tonight, when all of this is over, Grace Martinez will go home." She began softly. "Her house is empty now. But there will be one light on. Back in a small bedroom, there is a candle lit. Three things are in front of that candle. Two of them are religious icons. The third is a picture of her husband, Emilio. Maybe, if there is no one else there to hear, she will talk to the picture."

"What does she say?"

"We don't know. It is not our business to know. What she says, is between husband and wife ..."

It didn't win the case. It didn't change the verdict. Facts are stubborn things, and everyone agrees that a closing argument comes too late for drama to carry the day. But for a moment, when she spoke for Grace Martinez, it felt ... true.