I recently read Malcolm Gladwell’s latest book, *David and Goliath*. Most of us are familiar with the Old Testament story of the shepherd who slays the Philistine giant who was physically imposing, coated with armor and equipped with the best weapons of the time. How did David win? Simple? David was prepared for a different fight than Goliath. Goliath expected hand-to-hand combat while David came with a stone and a sling.

I think all of us have had those moments heading into a trial in a serious case with almost no evidence in our favor. Gladwell calls it “the unexpected freedom that comes from having nothing to lose.” Other times, we have clients who turn down a plea bargain offer and we enter into battle even though we have serious concerns that the outcome might be much worse than the pretrial offer. I think this happens disproportionately in cases with court-appointed attorneys who often do not enjoy the same level of trust as between most privately retained attorneys and their clients. I say “most” privately retained clients because all of us have had experiences where our privately retained clients turn on us, to the point of threatening a grievance and/or demanding a fee refund once the reality of the case hits them and we give them our final opinion.

As much as I bemoan these situations, I have learned it is when I am pushed against the wall with seemingly no hope that I do my best work. Malcolm Gladwell talks about this very thing in his book, *David and Goliath*. Gladwell states:

> Much of what we consider valuable in our world arises out of lopsided conflicts, because the act of facing overwhelming odds produces greatness and beauty . . .

I have found this to be true not only with advocacy as a lawyer but also in other aspects of our criminal justice system. I have seen jurors struggle over sending a young person to prison for a terrible and heinous crime, wrestling with the decision for days. I have seen judges show mercy when every indication prior to trial was that retribution would be the leading force. I have seen prosecutors give a defendant a much more lenient sentence in a case where a trial result would certainly be harsh. It is the essence of our job to fight to the bitter end for our clients, who are often detested and difficult to like.

Another analogy is that the arrogance of power can work against the Government in trying a case. In his book, Gladwell states: “Goliath’s size was also the source of his greatest weakness . . . The powerful and strong are not always what they seem.” How many times have you seen a prosecutor who was arrogant and dismissive before trial? Gladwell states further, “There comes a point where the best intended
application of power and authority begins to backfire. These thoughts capture the essence of what we do. We must constantly challenge the assumption that the fact that someone has been arrested means they are guilty. I know the Constitution says otherwise, but the reality is that there is still a presumption of guilt in the minds of most of our jurors, especially in serious cases.

One of the most rewarding moments in a trial is seeing a prosecutor who was so confident prior to trial suddenly become more humble and approachable when he or she realizes that the case isn?t as simple as originally thought. Putting up a battle, even if you don?t win, is at the core of what we are supposed to be doing. I hate losing. Yet, I have suffered many guilty verdicts. However, as Vince Lombardi said, ?Show me a good loser and I?ll show you a loser.? Of course, one of the highest rewards as a criminal defense lawyer is when the judge utters the words from the verdict form and says, ?Not Guilty.? Be humble in those moments but don?t forget to enjoy them as well.

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