

How To Litigate Successfully: Part II – How To Litigate

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Editor's Note: This article is the second in a series of five articles which will appear in The Metropolitan Corporate Counsel.

In Part I of this five-part series, we addressed in a candid and straightforward manner the challenges confronting in-house counsel when deciding when to litigate. Assuming that the decision to litigate has been made, or has otherwise been thrust upon your company, this article discusses how to conduct that litigation to ensure an expedient and successful outcome. For ease of reference, we consider these our "10 commandments" on how to litigate successfully. Future articles in this series will discuss how to reduce litigation costs, how to monitor ongoing litigation, and how to choose outside litigation counsel but for purposes of this article, knowing how to litigate is the paramount concern.

Commitment To Winning

Litigation is one of the few white collar professions in which a scorecard is still kept. Most often, litigation concludes with a winner and a loser. Even when the outcome is a negotiated disposition, one party or the other inevitably declares itself the winner or the victor to whom the spoils of litigation have been delivered. Given the win/loss mentality that pervades litigation, there is an abundance of sports metaphors and analogies that are used to discuss how to litigate. The key to successful litigation, of course, lies in a passionate commitment to winning. And winning a litigation, in turn, depends on the preparation or game plan that is conceived and a trial lawyer's commitment to executing that plan until there's a successful conclusion.

Preparation, Preparation and Preparation

Great litigators work backwards when devising their litigation strategy. A great trial lawyer will write her summation at the outset of her engagement in order to ensure that the elements of the case and the evidence to be offered in support of those elements is crystallized at the beginning of the litigation. If a trial lawyer knows the conclusion or punch line which they intend to deliver in a summation at the completion of the case, they can begin to work towards that summation from the outset of the litigation. Preparation is the hallmark of a successful litigation strategy.

Theory Of The Case

When prosecuting a case as a plaintiff, trial counsel should articulate the elements of the claims they intend to pursue, the evidence required to sustain those claims, and the need for expert testimony to support the claims at the earliest possible juncture. Similarly, when defending litigation, there is no substitute for devising the theory of the case at the earliest possible juncture. The plaintiff's complaint has laid bare the claims

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which plaintiff intends to prove against you and evidence must immediately begin to be marshaled by which to refute or disprove those claims. Witnesses' recollections must immediately be preserved. Documents must be scoured to identify weaknesses, as well as strengths, that will ultimately be discovered by the other side. Articulating and refining the theory of the case is essential to achieve an ultimately favorable outcome.

Retain The Best Experts Early

Skilled litigators will often retain experts even before an initial pleading has been filed. Too often experts are retained too late in the game and not afforded an opportunity to help dictate the strategy and approach that is necessary to a successful litigation. Knowing what facts an expert will require in order to be able to opine favorably upon the dispute at hand, is critical to being able to frame the dispute in the manner most conducive to an ultimately favorable outcome.

Experts must also be retained to help guide the preparation of the defense strategy. It is often remarked that "the best defense is a better offense," and that holds particularly true when litigating. Litigating with a plaintiff's mentality ensures that actions are deliberately thought out and part of an overall game plan. Throwing counterpunches, rather than just deflecting the punches being thrown by the plaintiff will help to keep your adversary off-balance and may ultimately knock-out part of their case.

Truthful Communication With Outside Counsel

As in-house counsel, the most valuable tool you have to conduct an efficient and effective litigation is to ask "why." Why is that claim for relief included? Why are we seeking to depose that individual? Why are we not moving in limine to exclude certain evidence? Why do we have to put up multiple corporate representatives for deposition? Why are we proceeding with a bench trial and not a jury trial? Questions such as these should abound and be part of the regular, daily discourse between in-house counsel and their trial team. Demanding and discriminating in-house counsel will continually challenge their outside litigators to explain simply and plainly the litigation strategy and how steps to execute that strategy are being pursued. Indeed, experienced and seasoned trial lawyers welcome such a continuous inquiry and barrage of questions as it sharpens their presentation and refines the execution of the game plan that has been devised.

Too often, however, inexperienced courtroom practitioners (or "paper litigators") resist their client's input and miss critical opportunities to reshape the message they are being asked to advocate. These paper litigators often demonstrate an undesired arrogance that they simply "know better" than in-house counsel which, unfortunately, is ultimately belied by their discomfort and unease when the case reaches a courtroom and when their confidence is most needed. In-house counsel should always ask their outside litigators how the strategy that has been devised will play out at trial, how a witnesses' demeanor will be received by a jury and how the prosecution's or defense's "theme" will resonate with the fact-finder. Only by anticipating the manner in which the ultimate fact-finder will judge the merits of the case can an effective litigation strategy be devised.

Know Your Audience

Another critical component to knowing how to litigate successfully is to know your audience. Litigation has a multiplicity of audiences ranging from your adversary, to



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your adversary's counsel, to the presiding jurist (or arbitrator) and ultimately to the jury. Establishing the right tone, message and approach to your particular audience is critical to the effective delivery of the message you are trying to impart. Too often litigators feel a need to appear tough and unreasonable at all times which often does not auger well for their clients' interests. While aggressive advocacy is critical to the successful litigation of a dispute, a scorched earth policy at all times and for all purposes is often counterproductive. Similarly, effective trial counsel know how to choose their battles wisely.

Have A Cogent, Efficient Discovery Plan

With alarming frequency, litigation today quickly becomes mired in petty discovery disputes for which judges have a natural disdain and little patience, and which jaundices future proceedings in the case. A skilled trial lawyer will never confuse the forest from the trees. A skilled trial practitioner will streamline discovery disputes, not resist his adversary's discovery demands that will not materially impact the litigation and will seek to accomplish in one or two depositions what others might accomplish in five or six. A competent battle-tested trial lawyer will not pursue (or permit) an unending fishing expedition in discovery, but will have a purpose to every question he poses and a ready explanation for in-house counsel as to the question's relevance and relationship to the ultimate objectives to be achieved.

Budget Wisely

In today's economy, litigation is often waged as a war of attrition. This requires a financial commitment at the very outset of the litigation designed to ensure that sufficient resources are marshaled to make it to the finish line. Critical to establishing the appropriate financial reserves to fund litigation is a candid and truthful dialogue with outside counsel about the costs of litigation. Although future articles in this series will discuss how to reduce litigation costs, in-house counsel should demand (and outside counsel should welcome) an honest dialogue concerning the costs of each phase of the litigation.

Master The Facts

While it should be axiomatic, mastery of the facts is indispensable to a successful litigation strategy. Knowing the nuances of every witnesses' pre-trial testimony, reviewing every scrap of paper produced in discovery, and scouring the public domain for facts helpful to your case is essential. Great trial counsel must essentially "stand in the shoes" of their client and know the facts as well as, if not better, than the client does.

Master The Law

Equally important is an absolute command of the law. Skilled trial counsel must be readily conversant in the applicable law governing the subject matter of the dispute, as well as the laws of the governing jurisdiction. Favorable legal precedent must be identified and your adversary's legal support must be anticipated. By mastering both the facts and the law, surprises in the litigation should be few and far between.

The twin pillars upon which each of these ten commandments are built are preparation and communication. Knowing how to prepare a case and, in turn, how to communicate the story which has been prepared to be told are the keys to how to litigate successfully. Preparation has no equal or substitute. Nothing is more dangerous to in-house counsel than an outside trial lawyer who is not one hundred percent prepared to take the matter at hand to verdict. When trial counsel is fully prepared to take the action to trial, few, if any, surprises will occur and the ultimate outcome can usually be predicted. Similarly, constant communication between in-house counsel and your trial team always bodes well for a successful outcome. If trial counsel cannot simply, efficiently, and effectively communicate their strategy to in-house counsel, how can they reasonably be expected to communicate to a judge or jury the company's position in the litigation. On the other hand, a plainspoken and passionate storyteller who understands the company's objectives and who can communicate them to both in-house counsel and the jury alike, will always serve a company well in waging the heavyweight fight that is litigation.

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