

The Metropolitan Corporate Counsel®

www.metrocorpcounsel.com

Volume 16, No. 11

© 2008 The Metropolitan Corporate Counsel, Inc.

November 2008

How To Litigate Successfully: *Part V – How To Select Litigation Counsel*

**David J. Meiselman
and Jeffrey I. Carton**

**MEISELMAN, DENLEA, PACKMAN,
CARTON & EBERZ P.C.**

Editor's Note: *This article is the fifth and final in a series of articles that have appeared in The Metropolitan Corporate Counsel.*

Choosing the right litigation firm can and often does make the difference between winning and losing. This article (the final installment of our five-part litigation series) will discuss the critical considerations that should inform the selection of a successful litigator. By choosing a litigator wisely, one can dramatically increase the likelihood of a successful outcome to whatever litigation your company may find itself enmeshed in.

As previous articles in this series have explored, there is a difference between a litigator and a trial lawyer. There are many more litigators than there are trial lawyers. Litigators draft pleadings, make motions, conduct depositions and discovery, write letters and bill clients. Most are adequate, but very few are outstanding. Unfortunately, the legal process (as good as it is) oftentimes encourages far too much motion practice and discovery at great financial and emotional cost to the client. Many litigation firms not only survive, but thrive on this churning of paper. Sadly, this will continue as long as clients do

David J. Meiselman and Jeffrey I. Carton are Senior Litigation Partners in the White Plains firm of Meiselman, Denlea, Packman, Carton & Eberz. The firm represents plaintiffs and defendants in State and Federal Courts throughout the country. Messrs. Meiselman and Carton have been selected by their peers for inclusion in "Best Lawyers" and "Super Lawyers" and to the top 25 New York Super Lawyers™ list for Westchester County.



David J. Meiselman and Jeffrey I. Carton

business with law firms that are willing to engage in this type of practice.

Usually these are the same law firms that rarely dispose of a case through a successful jury verdict. To them, it's simply a business proposition. These firms focus primarily on the number of hours their attorneys bill rather than winning their cases. Far too often these firms define "success" as profits per partner or the financial return realized on the engagement. Yet there is a critical difference between winning and simply succeeding. A litigation firm that defines success through

billable hours should be an unwelcome partner. Playing to win, not just succeed financially, makes for an outstanding litigator.

Communication

Readers of this nationally recognized publication are far too sophisticated and knowledgeable to be told to retain an intelligent and prepared litigator. So let's skip the obvious and discuss the real qualities that should abound in your selection of outside litigation counsel.

First and foremost, the single most important quality of a winning litigator is the ability

Please email the authors at dmeiselman@mdpcelaw.com or jcarton@mdpcelaw.com with questions about this article.

to communicate clearly. Without this attribute, all of the other positive elements are diluted to the point of losing their value. Litigators are in the communication business, particularly the highly refined specialty area of persuasion. Without being understood and believed, there can be no persuasion. Persuasion is an art form which builds upon the basic and fundamental tenets of communication skills such as intelligence, vocabulary and organization, but then elevates that communication to the level of not simply informing the listener but, rather, affecting the way in which people think and feel. The key to persuading judges and jurors is to make sense. This may sound obvious, even trite, but very few litigators actually know how to make the issues and their arguments easy to understand. No judge or juror sitting in the courtroom should have to strain to understand what an attorney is saying and yet this commonly occurs. It is basic human nature to listen more attentively, relate to the message and like the messenger when the communication is clear and easily understandable. The “kiss” principle – keep it simple and succinct – is the key to effective communication.

Relating To Others

Similarly, the litigator’s ability to relate to others is invaluable. Call it interpersonal skills, personality or charisma, it all boils down to people liking and wanting to believe another person. Jurors don’t want to be fooled so they instinctively tend to agree with the attorney they trust and believe. And that person is often the lawyer who is understandable and most like the person you would want as your friend, a member of your family or a next door neighbor. Pompous, pretentious, self-important attorneys rarely succeed before a jury. Jurors root against these self-absorbed lawyers. The capability to communicate is not a skill one learns in law school or as an associate in a large litigation firm. It is a competence and aptitude that transcends the practice of law and that great trial lawyers hone over time through experience in the courtroom.

Passionate and effective communicators will be respected by the judge, admired by adversaries and trusted by jurors. The goal for any litigator is subtly, but continuously, to impress the judge and jury with one’s integrity, fundamental fairness and belief in the client’s cause based on the facts and common sense. Understanding the thoughts and feelings of people and what motivates them separates the winners from the losers in the courtroom. Knowing how jurors are going to react to certain witnesses and specific questions is what wins cases.

Experience

The question is often posed whether it is better to hire a litigator already versed in the subject matter of the dispute, or one with a track record of effective advocacy. While obviously a combination of the two is most

effective, experience handling a particular type of case is not nearly as important as a winning track record of advocacy in a diversity of matters. Great litigators learn new areas very quickly, whereas learning how to win is a rarely acquired skill. The ability to demonstrate a broad spectrum of success rather than a narrow focus of activity is far more telling and indicative of a litigator’s true talent to communicate and persuade. It is this proficiency, rather than book knowledge about a particular subject matter, that should inform your selection of a trial attorney.

Similarly, a litigator who has represented both plaintiffs and defendants rather than only one or the other can see both sides of the case which makes him more agile and adept at planning strategy, advocating and negotiating. A litigator who has won significant cases representing both plaintiffs and defendants must be a skilled communicator who is able to muster sympathy and respect from a jury regardless of the side of the aisle on which he may sit. Typically, a track record of success representing both plaintiffs and defendants augurs well for the litigator’s appreciation of your company’s perspective in the litigation.

Real experience, that is, experience the client can benefit from, is revealed by a track record of success both in the courtroom and in the boardroom. The resourcefulness to know when and how to negotiate is an essential aspect of litigation too often overlooked by clients. Many cases are won or lost in the negotiation process. Not all good litigators are necessarily good negotiators. Interviewing prospective litigators should include discussion about their negotiating philosophy, techniques, timing and examples of where it was advantageous for their client to settle.

Too many clients spend time interviewing a prospective litigator about the rules of evidence and other technical topics. Few aspects of the litigation process are less important, as each particular issue tends to be so fact-intensive and unique as to allow for legal precedent both in support and in opposition to the position you seek to espouse. There is no accurate barometer by which to predict how a court is going to rule on a particular evidentiary point, so it’s better to have the following general philosophy: Everything that is favorable for the client is admissible, and everything that is unfavorable is inadmissible. From this starting point, a skilled litigator can find law that supports the client’s position and then advocate in a respectful, thoughtful and sensible way.

While some litigators appear at least superficially to have a long list of achievements, many have never even picked a jury let alone taken a verdict. When interviewing prospective litigators, ask them how often they are in a courtroom. Ask them how many juries they have picked. Ask them how they go about their voir dire. If you understand from the outset of the engagement what communication skills, style and philosophy your

litigator will bring to bear upon the matter, you will have the utmost confidence in that litigator when it comes time to deliver opening statements and to proceed to a trial of the dispute. Also, ask how the matter will be staffed. Will multiple attorneys be asked to do what one capable attorney can readily achieve? Overstaffing files and dividing up responsibility (so that no one actually feels responsible for winning . . . or losing) may be great for billing the client but it does nothing to advance the client’s cause. To the contrary, it reveals a fundamental flaw and lack of commitment by that legal team when they are focused on billing, not winning.

Fees Should Equate With Value

Fees are obviously an important part of the attorney selection process. Too many clients overpay for legal services because they feel that any lawyer charging that much must be good. But this isn’t true. Rather than automatically assign new matters to previously retained firms, corporate counsel should make the effort to interview new firms and explore the potential for fee arrangements far more favorable to the client while improving the quality of the work product and service. In-house counsel should ensure that they are receiving value for the significant expenditure they are being asked to make.

Conclusions

When selecting a litigator, corporate counsel should seek a clear communicator who relates well to people from the receptionist in your office to the waiter you meet at lunch. Observing how your litigator acts with regular people, not just corporate officers, in the normal and usual course of events goes a long way in telling you how he or she relates to jurors. If everyday people react favorably to your litigator, a jury probably will too. It is then your judgment call as to whether this attorney is trustworthy, credible and sensible in his or her demeanor and approach.

A personal meeting is absolutely crucial. Do you actually like this person to whom you are about to entrust an important legal matter? Do you trust and believe what they say? Are they easy and pleasant to be with? Would you have confidence in them taking care of your children or your parents in an emergency? In short, your first impression of them will probably not be terribly different than the first impression they make upon the jury that will be asked to deliberate upon your dispute.

We sincerely hope that our five-part series on litigation has achieved its goal of encouraging you to reexamine your process for retaining litigation firms, rethinking your options and reconsidering other possibilities. You may be pleasantly surprised to discover that you can get better results at far less cost, without sacrificing any of the quality of the work product to which you have become accustomed.