

EVALUATING AND PREPARING
A PLAINTIFF'S COMMERCIAL LITIGATION CASE

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A. The Challenges and Opportunities of “The Great Recession” for Plaintiffs’ Attorneys

- In many areas of plaintiffs’ commercial litigation, the recession has changed the focus and dynamics considerably
 - Cases in general
 - Leveling off of cases arising out of aggressive expansion
 - Unfair competition
 - Intellectual property
 - More cases caused by hard times
 - Protection of assets
 - Breach of contract
 - Bankruptcy (especially Chapter 11)
 - Lien disputes
 - Securities Arbitration.
 - There are many more cases coming in the door, but not necessarily many more cases being filed
 - Why did an account go septic?
 - The difficulties of case evaluation when the whole market has “gone to hell in a hand basket.”
 - Disputes among competitors
 - Everybody wants somebody to blame when deals go bad - but few can afford an hourly fee

- Construction cases
 - More cases involving contractors going under
 - Mechanics liens
 - Incomplete projects
 - More cases where contractors are milking their contracts
 - Unnecessary additional work
 - Misapplying construction draws
 - More cases where owners are trying to squeeze contractors
 - Becoming more technical about contract requirements
 - Complaining more about results in order to cram down bills
- Employment law
 - With a vastly larger number of layoffs there are many more people looking for ways to block their dismissal, improve their severance packages or seek damages for contractual or statutory violations
 - Employers are more tempted to walk into forbidden areas to save money
 - E.g., laying off older, more expensive employees
 - With a bad economy, it is harder to evaluate employer motivation
- Reading the tea leaves - Trying to interpret the signals coming from the other side
 - Some of the messages are, or seem, different
 - Especially those which are unrelated to case evaluation
 - Money is tight
 - Are the old assumptions still valid?

B. A Snapshot of the Preparation of Plaintiffs' Commercial Litigation Cases

- Initial case evaluation:
 - Range of economic value drives decisions about the approach to be taken
 - Contingent fee vs. hourly fee
 - If too small for contingent, does it make economic sense for the client to do it on an hourly basis?
 - If hourly, can the client afford to bring the case?
 - Considerations:
 - Scope of discovery and other preparation
 - The need for client assistance in order to economize
 - Expert witnesses
 - Experts to assist in discovery and fact analysis (e.g., electronic discovery, appraisers, economists and forensic CPAs, industry experts)
 - Cost of Discovery
 - Travel and other expenses –more use of video conferencing and depositions
 - Other fee options:
 - Split hourly and contingency
 - Reduced hourly rate with a results bonus
 - Extended payment
 - Advancing/paying costs for the client
- Strength of the case
 - Almost all cases look good at first
 - Parties to litigation have selective memories

- May not know how good a case really is until weeks or months into the case
- Initial investigation is critical
- Continual re-evaluation is critical
- Thorough research:
 - Of all pertinent documents that can be obtained
 - Of the dynamics of the subject industry
 - Of the background of the potential defendant(s)
 - Of the products/processes as well as the relevant industry or professional standards
 - Of the relevant law
- Early conversation with the defense is critical
 - The interest of both sides in an early exchange of information (junk yard dogs stay chained up next to junk all their lives)
 - Avoidance of weak cases
 - Early understanding of potential risks and rewards
 - Potential for effective, early mediation
 - Potential savings of litigation costs - even if the case does not settle
 - Potential for creative problem solving - the most overlooked area in commercial litigation
 - Planning electronic discovery
 - Format in which documents will be produced
 - Agreement on search terms
- The Complaint
 - Shotgun or arrow?

- You have to eat what you put on your plate
- Economic considerations
- Decisional paralysis
- Preliminary motions
 - The defendant's playground #1
 - Especially in Federal Court preliminary motions are used more and more to get rid of cases early.
 - Stealing the march
 - Testing the plaintiff's resolve to go on with litigation
 - Narrowing the issues
 - Taking the temperature of the Court
- Discovery -
 - On both sides, be careful what you wish for - you might just get it
 - Including the pitfalls of e-discovery
 - Know why you are asking for what you are asking
 - The defendant's playground #2
 - Testing the plaintiff's resolve to go on with litigation
 - Button, button, who's got the button?
 - The temptation for the plaintiff to get bogged down in too much information looking for the Holy Grail
 - The plaintiff's use of sluggish and evasive defense responses to affect the attitude of the Court
- Mediation
 - Advantages
 - Potentially makes litigation more affordable for both parties

- 85-90% success rate
- Takes the decision out of the hands of strangers
- Creates certainty
- Offers the opportunity for solutions a court cannot offer
 - Examples
- Offers confidentiality of the entire process and the result - creative problem solving
- Techniques
 - Preparation of the client
 - Case evaluation
 - Managing expectations
 - Mathematical model – favors defense
 - Don't rush to the bottom line
 - Preparation of the mediator
 - Don't give up the opportunity to affect the mediator's view of the case
 - The mediator is not a decision maker but he/she is a powerful influence on the decisions that must be made
 - Don't overwhelm the mediator with garbage
 - Copies of relevant pleadings and briefs
 - Pre-mediation statement
 - Confidential or not?
 - Do not give up the right to make an opening statement
 - Opportunity to let the other side hear what your case will sound like to a court or jury

- Opportunity to hear what the other side's case will sound like
- It's all about risk/opportunity assessment
- Be visual - a picture really is worth a thousand words
 - Power Point
 - Graphics
 - Handouts
- Let the parties speak
- The dance
 - Be prepared to be insulted by the other side's first offer
 - Why we never seem to be able to cut to the chase quickly
 - Send the clearest signals possible
 - Patience
- Never, never, never walk away from the negotiating table
 - Even if you think you have reached the end of your willingness to bend
 - Even if everyone leaves without a settlement, let the other side know the door is still open
 - Like the lottery, "you can't win if you don't play"
 - Follow up later
- At the very least you will have had a rehearsal and will have learned useful information about the other side's case
- Finally, a pitch for collegiality and professionalism