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The Art Of Litigation – Part II

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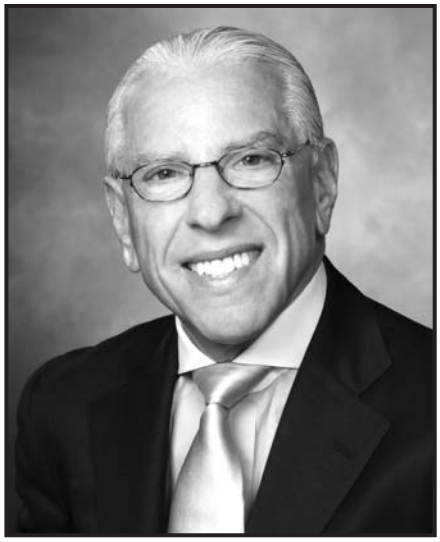
Have you been involved in litigation and disappointed in both the system and your attorney? Perhaps you felt the result was not right, that it fell below even your reduced expectations. That's due to ego. The litigation "fire" is fed by the ego of one or both of the parties. One or both who need to be right, need to prove to themselves, to their boss, to the world, that they are right. Remove the ego and focus on solving the problem. Listen to what the other side is saying. Stop having to be right! When you stop selling your position as the only viable position, then you may find a solution. If the solution causes settlement, you've saved money, and the often greater expense of your continued involvement with the past, inhibiting you from focusing on a positive, forward-looking personal or corporate agenda.

Ironically, you – the client – may have your ego under control. Your lawyer may be insisting on being right – on winning, no matter what. It's somewhat analogous to going to a cardiologist versus a cardiac surgeon. Generally, the cardiologist will seek to solve the problem through medication; on the other hand, it's the inclination of a surgeon to solve the problem through surgery. Cardiologists are taught to cure with medication, while surgeons are taught to cure with surgery. Likewise, transactional lawyers are taught to negotiate to settlement; litigators are taught to litigate to victory. Hence, we must control the litigation, just as we, as patients, must make the final decision regarding our medical care. No one knows the facts of our legal case better than we do, just as no one knows how our body feels better than we do. By removing our blinders, we can better understand all perspectives.



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Perhaps our litigation is inexorably moving toward the trial stage. Despite our efforts, the case isn't settling. It certainly takes two to make a deal. No matter how good a negotiator we may be, it may not be possible to settle the matter. Chances are the dispute causing the litigation started with an exchange of emails months, or even years, ago. Remember the lifespan of emails. They never go away! They will be produced as part of the discovery process in any litigation. Emails are forever, so treat them as formal letters. Write them with clarity, and without rage or emotion. Less is more. Don't say too much or say things you wish you could retract. Don't stake out or lock yourself into positions before you have all the facts. Once litigation begins, more facts will be revealed via correspondence, complaints, briefs, depositions, motions, and replies.

Assume, months or even a year later, a judge's clerk will be reading these papers. Perhaps the clerk is 26 years old. Perhaps the judge will ask for the clerk's opinion of each side's equities. Like it or not, the judge may never read all the papers. The judge may only read the first several pages of each brief. So, while all of your papers should be terrific throughout, give particular focus to the preliminary statements. Is your position compelling from the start? Is it clear and convincing? Does it have a ring of authenticity and legitimacy? Will the judge want to find for you and support your position, without reading every page?

If not, rewrite it. Rewrite your papers until they are compelling. Adverbs and adjectives won't strengthen your position. Inflammatory rhetoric will not help. You may wish to insert emotion, but remember, to others it is only words on the page. The judge must be dispassionate and impartial. The judge has seen and heard it all before. Clerks and judges look past the noise and focus on the facts. Emotional attacks do not resonate with impartial jurists. A clear, compelling exposition of facts that, without technical niceties, without nuance and spin, make your posi-

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tion compelling, notwithstanding appropriate credence to the position of the other side.

To write convincingly requires the removal of ego. Remember, there are three sides to every story: yours, your adversary's, and the truth or perspective that falls somewhere in between. Have you presented an honest and compelling story of your facts? Is it readable? Is it digestible? Will it resonate with the sympathies of the clerk and/or the judge? If their spouses heard your story, would they agree your position is better and you should prevail?

Road Rule #3 requires a recognition that even the best litigators can become caught up in the moment. They may react poorly to attacks on their client or themselves. Do not let that happen (control ego). It is expensive and unproductive. It will only create more paper, more expense, and further separation between the parties, who may become more invested in their position, intent on proving they are right rather than listening to the other side. Thoughts of finding an appropriate and cost-effective compromise will evaporate. Some cases need to go all the way. However, chances are that your case should be settled.

You, the attorney, are to appear before the court. Perhaps it's your very first court appearance. You are to handle a small part of the case for a senior partner. Would it be inappropriate for you to approach the judge (the bench) with your adversary, and indicate you are inexperienced? This technique humanizes the relationship between you and the judge. Do you think it is inappropriate? Why, if it's true?

When you begin your presentation, focus on the judge's facial expressions. Use that feedback to adjust your comments. Don't proceed blindly. Oftentimes, judges will interrupt and take control. This might fluster you. Instead, consider yourself lucky; consider it a look into the judge's perception of the case. Good trial lawyers would rather be interrupted so they can respond to the judge's real concerns. As you present your argument, "listen" to the judge's reaction to help you adjust your direction and emphasis.

You may have to ad-lib when the judge poses a question you are not sure you can properly answer. Don't be afraid to humbly ask the judge to clarify the question. Take the chance to catch your breath. Perhaps the judge will give you more insight by rephrasing or elaborating. Listen carefully; absorb the words and the silence between the words. Reflect for a few seconds before responding. Remember, sometimes the answer is embedded in the question. Listen with all your senses: eyes, ears, and heart.

As you present your argument or your client's testimony, your adversary might interrupt you to object to something you said. That objection may or may not be perceived by the court as appropriate. Don't over-talk your adversary. Listen to what he is saying. It's seldom wise to jump in. Give the judge a chance to react. You'll get your chance to respond. Perhaps the judge will pre-empt your need to respond and tell your adversary to sit down. With experience in court, you will learn to absorb all that occurs while you speak. Is your adversary fidgeting? Is the judge making faces? Do you sense the judge wants to interrupt? What should you do? Practice developing all your senses. If you sense you are not being persuasive, and you feel the judge is about to interrupt, stop for a comment by the judge. But if you feel you are hitting "pay-dirt," press forward. Learn to take in vibrations from the judge, the clerk and, of course, your adversary. It will help you determine your direction and emphasis, and when to allow yourself to be interrupted. This skill develops with experience, if you first learn to observe while you speak.

So how can you speak and listen simultaneously? Be fully prepared. If you are prepared, as you present your case you will absorb the vibrations of your adversary and the judge. Your case and how you present it may not change the outcome. However, if you present yourself in a calm, knowledgeable way, the judge will be able to better listen to what you are saying and fully absorb your words. Do not undercut the judge's understanding with distracting emotionalism. Also, do not expect the judge to support your client because you are more likeable. However, the judge will listen better if you present your arguments with grace.

The reality is simple. People who make us comfortable get more attention than those who attack. Don't use invective, and don't go off on tirades. Those antics simply stir up the air, making it more difficult for the judge to listen to you. Raising your voice will not make your words more convincing. Using sound negotiating techniques will help the judge to better listen to you and better understand your position – your equities.

Why must we litigate any garden variety commercial dispute? Because one or both parties cannot remove themselves from their need to be right. If you sense this in your adversary, use their intractability to your advantage. Find a way to present your position in a compelling and equitable manner. At the same time, focus on pressure points to elicit emotion from your adversary; he may make unintended, unwise comments. The same concepts apply to negotiation and litigation. Pressure or rage can squeeze out something that we wish we could take back.

Do not allow your ego to blind you from seeing your adversary's position. Do not indulge your ego's need to win every point, regardless of significance. Virtually always, in litigation or otherwise, there are just a few (sometimes only one) core facts. Technical legal points and secondary and tertiary facts seldom, if ever, affect a result. As the client, it's your job to be a smart client. As the attorney, it's your absolute obligation to understand the core facts and principles and to present them to the judge by appealing to his sense of equity and fairness so he will find for your client.

It's virtually impossible to see the key elements of your case when you are fixated on being right on every issue. You must understand the other side's position and needs, regardless of your opinion. To be fully effective, accept the reality of a third position. Take the time to free-think the theory of the case. Discuss the case and listen to the feedback, no matter how surprising you may find it. You must see all sides to present the facts and the law in the most compelling manner. What's the point in making a great argument about seventeen minor points, if you fail to convince the clerk or the judge on an issue you couldn't recognize was the fulcrum of the case. Don't be blinded by the need to be right on every issue. Get to the heart. Mend the broken limb; cuts will heal themselves. Make sure you see and understand the jugular issues that are, by definition, the only ones that get directly to the heart of the matter.