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The Art Of Litigation – Part I

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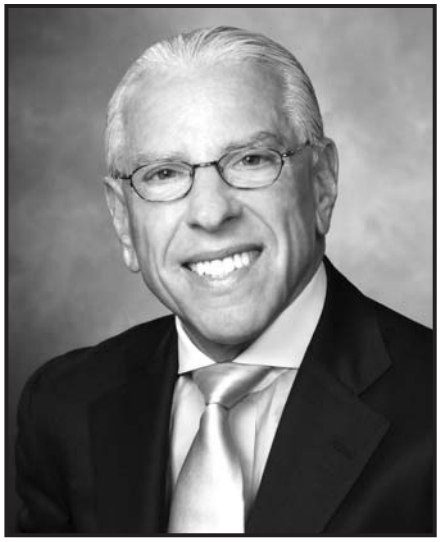
A misconception: Litigation is the antithesis of negotiation. Negotiation is the use of compromise to reach agreement, while litigation is a zero sum game with a winner and a loser. Litigation disregards the concept of compromise; in theory, when compromise cannot be reached, litigation ensues.

Some truisms: Litigation is not just about war. Litigation should be viewed as the continuation of negotiations, intensified and complicated by complaints, motions, depositions, and other weapons in the arsenal of litigators. Litigation, however, is just like war. Just as war was described by Carl von Clausewitz as ". . . politics by other means," litigation is negotiation by "other means."

Ironically, when it comes to litigation, corporations may find themselves as inexperienced and ill prepared as individuals. Many corporations, at some point, will find themselves having to litigate. Lawsuits involving corporations are generally commercial, involving disputes over money, often to recover an amount owed by one company to another in connection with the sale of a product or service. Unfortunately, as our society becomes more litigious, fewer of us will avoid its unpleasantness.



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Much civil litigation is conducted before a presiding judge, not a jury. As a result, litigation involves three parties: You, your adversary, and the judge. Hence, it makes sense to understand this dynamic. Of course, the judge isn't really a party – not technically – but the judge is critical to the outcome. Why? Because failure to settle before trial will require you to focus on facilitating the judge's recognition that your side should prevail. Therefore, you must develop approaches to make it easier for the judge to understand and agree with your position. You want the judge to feel comfortable and "right" in finding for your client.

Judges are people too – they may have families, children, even illness. They may be buying a house, or remodeling and fighting with their contractor. Maybe the neighbor's kid has a noisy garage band. In other words, judges enjoy and suffer from all the pleasures and trespasses that we all do. Hence, we should be sensitive to their humanity.

Now, for the cold truth. The outcome of your lawsuit may be of minor concern to them.

No matter how important it is to us, not only might the case be insignificant to the judge's life, but it may well be insignificant in relation to other commercial, even criminal, cases that the judge must decide. Let's face it – regardless of the outcome, the world will go on. Most likely no one will care except the parties involved. So, how do we get the judge to empathize with us instead of the other side?

Your lawyer may advise you that you have a good case because the law is on your side. That's a good thing, but that may not be enough, particularly if the strength of your case is based on a technical point. More often than not, the facts determine on whose side the "victory gavel" will fall. The equities of the case, the more compelling facts, generally determine the victor. Seldom do esoteric technical legal points win cases. Isn't that the way it ought to be? Therefore, to litigate most effectively, put yourself in the judge's position, just as you should put yourself in your adversary's position in a negotiation. You will better understand how the judge might react. Isn't it likely the judge will want to lean toward the side with the greater equity, the side whose facts make a decision in its favor seem to be the fairer result?

To determine if your position is compelling, ask yourself how the judge's spouse would respond if the facts of your case were described over dinner. Would the spouse think you had the more equitable position? That it would be fair for

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you to win? If you believe judges are just like you and me, and I assure you they are, then you must also assume that judges will seek to find for the party with the greater equities.

Your job (or your attorney's) is to determine how to best present your case so that it cries out for the judge to find in your favor. Are your facts clear and compelling? Perhaps they can be construed in several ways. Put yourself in your adversary's shoes. Put yourself in the judge's shoes. You must try to understand the different perspectives. You may think they are outrageous (that's your ego rising), but you must understand them. Allow yourself to see the other side's equities. Lift the blinders your ego creates. This preparation is crucial for effective presentation.

Litigators are trained to attack and counterattack. They use motions and briefs to win battles. But, remember, it's the war, not the battle, that must be won. Moreover, litigators are not business people. Their mindset may not always be in sync with you, their client. Not because they don't want to win, but because they may want to win too much. They may focus solely on winning. You may (rightly) see the litigation as a negotiating tool – additional leverage to resolve the aborted negotiations. Wise clients (and their attorneys) seek inflection points to increase their negotiating leverage. Then, they often seek to settle advantageously.

It is not easy to litigate to conclusion. It's time consuming and expensive. Fewer than ten percent of all cases come to a trial and final verdict. First, there is always a risk of loss at trial. Moreover, it is generally preferable for the clients to control the outcome of the litigation via settlement. They are closest to, and most knowledgeable about, the dispute, and so in the best position to reach the best settlement. If the parties are struggling to reach settlement, most judges will (in varying ways and to varying degrees) pressure both sides to settle anyway. Trials are time consuming and costly. Court calendars are full. Judges want to move cases as quickly as reasonably possible.

Most of our personal contact with litigation is matrimonial or perhaps related to accidents and insurance. As individuals, our litigation is personal. We tend to become emotional. We therefore tend to allow our ego to blind us. We confuse the ego with the concept of "principle." Hence, in the name of principle, we look to the court system for revenge, to make sure we are not taken advantage of, or to prove we are right. The ego will not allow us to accept that the divorce, the auto accident – whatever – was, at least in part, our fault. Isn't it ironic how quickly we convince ourselves it's the other guy's fault? How often have we said or thought, "It's not about the money, it's about the principle." Well, it's rarely about the money or the principle. Usually, it's about the ego. Eventually, we learn the court system is not a modern day version of a torture chamber. It's not going to exact justice in the manner we perceive it should be exacted. It is not going to grant revenge. In fact, we may not even obtain what we think is fair. Rather, after a slow, expensive, cumbersome process, we either settle or have the judgment of a dispassionate third party (the judge) settle the matter for us.

Because matrimonial litigation touches almost all of our lives, either personally or via someone we know, and because it is so personal, it is always fraught with emotion. Hence, it is fertile for ego. It is fertile for outrage. However, ego and outrage are our enemies. If allowed to surface, they will urge us to draw blood. These emotions urge us to attempt to use the judicial system to hurt the person we once loved and adored. Yet, the judicial system cannot and will not participate in revenge. All the ego will cause is an elongated litigation that only accomplishes two results. It increases the cost to both parties, and it forces both parties to maintain their focus on the litigation. Yet, by focusing on the litigation longer, both parties focus on the past longer. Neither is able to move forward. Both remain chained to the past. The irony of matrimonial litigation (if there is no dispute over custody) is that – as is the case with most litigation involving money – any settlement the parties might agree to is usually within around ten percent of what a judge might order after a full trial. It's tough, but even in matrimonial litigation the wise party buries ego and dissipates rage. Aren't these concepts similarly applicable in commercial litigation?

How can we deal more effectively with our litigation? Let's consider corporate in-house counsel seeking to identify outside counsel to represent the corporation. Assume in-house counsel has many friends working for other corporations, and has obtained a list of recommended law firms. How might in-house counsel select litigation counsel? What are the "road rules" for "purchasing" a litigator.

Road Rule #1 is to find the "right door" to enter into the law firm. In other words, is in-house counsel entering through a powerful attorney or a lower-level friend? Of course, it should not make a difference. In fact, it may not. However, a powerful partner will likely be more effective in marshalling the best the law firm has to offer. It's common sense that a law firm with many litigators cannot have hired all "A+" quality attorneys. No one hires quite that well. Therefore, it's simply more likely that a more powerful attorney will be able to deliver the firm's "top guns" or assemble the most cost-effective team. Generally, proper staffing trumps billable rates.

Road Rule #2 addresses in-house counsel's ability to assure the litigation will be conducted cost-effectively. Road Rule #2 is the cost-benefit matrix. Someone at the law firm should be continually weighing the litigation costs to be incurred versus settlement. Settlement opportunities arise as frequently as the litigator can create appropriate circumstances. Moreover, settlement opportunities will be created by the Court, whether via mandatory mediation or otherwise. Settlement opportunities include the proverbial "on the doorsteps before trial," or even much earlier, and of course at the beginning or conclusion of an important deposition, or by virtue of unintended meetings between adversaries. Remember, litigators like to litigate. However, blind litigation, with an attitude of "full speed ahead, take no prisoners," is simply not cost effective, except in the rarest of circumstances.

Reasonable (non-ego-filled) clients are always the most suited to resolving a dispute. They are the most knowledgeable and interested in their matter, certainly more so than a third-party arbitrator or judge. Litigation is negotiation by other means. It's negotiation, pressure elevated by virtue of the cost and time of litigation and the risk of loss. These pressures have an impact on both parties. They often facilitate settlement. Settlement almost always makes sense.