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The Importance of a Plan in Litigation

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For decades, teachers of trial advocacy have told their students that the first thing to do in preparing a case for trial is to write the closing argument. Why? Because once you know what you are going to tell the jury in closing argument, everything you do during trial will be designed to build up to that closing argument.

The same principle applies at the outset of the whole case. Everything you do during the life of a lawsuit should promote a strategic objective. If you think the case can be won at summary judgment, develop a plan to take the discovery needed to set up your motion for summary judgment. If you think you cannot win the whole case on summary judgment but you can narrow the issues to be tried, have a plan to eliminate claims or defenses before trial through motions for summary adjudication or motions in limine. If the case might be tried, identify the handful of issues likely to matter at trial. If you do these things, interrogatories will be more focused, document requests narrower, and depositions shorter and directed to the key issues in the case.

This approach seems obvious, right? So why do many litigators — both plaintiff and defense — embark upon the discovery road without a map of where they want to go? Why do they draft or respond to interrogatories, serve or respond to document requests, and take or defend depositions as if they're on autopilot, without regard to any particular litigation objective except possibly to overwhelm the other side?

The most cynical critics say that lawyers are churning cases to generate higher fees. I don't agree. While there may be unscrupulous lawyers, just as there are unscrupulous doctors, bankers and stockbrokers, the vast majority of professionals are genuinely trying to do what is best for the clients, patients and customers. Plus, only lawyers who are paid by the hour would benefit financially by churning cases, but the lack of a strategic plan plagues many lawyers, whether they are paid by the hour, on a contingency, or with a fixed fee.

One reason for the absence of strategic plans in many cases is that fewer litigators are actually trying cases. Until you try cases, it is hard to see what you need to do to win; and if you don't know what you need to win, it is hard to devise a plan to get there.

The first time I went on a camping trip, I took far more gear than I needed. I ended up carrying about 30 extra pounds on my back. On my next trip, I took a lot less.

Too many lawyers litigate cases as if they're on their first camping trip. They don't know what they need, so they play it safe by covering every possible base (serving every interrogatory, deposing everybody and asking every conceivable question at depositions). Costs skyrocket.

Faced with ever-growing litigation expenses, some clients have used the meat-ax approach to control litigation. They insist on discounted rates, reduced staffing or other rigid cutbacks, thinking that these techniques will somehow reduce costs overall.

This is a sensible goal, but it's rare that you can cure a financially ailing company by budgeting or by cutting back expenses 10 percent across the board. A cure usually requires something more fundamental — reordering priorities, setting goals and revising plans. So, too, with litigation.

Some years ago, a journalist I know was sued for defamation arising from a newspaper story she had written in a few days. Her deposition dragged on for 19 days.

Unless the case involves the reasons for the fall of the Roman Empire and a single witness saw it all, no witness requires 19 days of deposition. The reason the journalist's deposition went on so long is that neither side had thought through the handful of issues on which the case would turn, the issues on which the case would either be settled or tried.

Many courts, state and federal, require early case management conferences to help streamline the pretrial process. But the results are mixed. Many judges use these early conferences effectively to force the parties and lawyers alike to develop focused pretrial plans that will govern the rest of the litigation. In other cases, however, lawyers submit meaningless plans that list the discovery they intend to take, propose scheduling dates (like trial) much too far out in the future, and fail to identify key

legal or factual issues that, if addressed early in the litigation, could lead to early settlements or trials.

It is beyond the scope of this article to analyze every possible way to streamline litigation, reduce costs and accelerate time to trial or settlement. I offer the following suggestions not because they are the only, or even the best, solutions but in the hope that they will stimulate continued discussion of these important issues:

Encourage all litigators to try cases, including pro bono cases;

Encourage all senior lawyers to mentor more junior lawyers by teaching them how to try cases and how to conduct pretrial discovery pursuant to strategic objectives and a strategic litigation plan;

Require both sides, at the earliest possible time in the life of a case, to submit a litigation plan explaining what discovery they intend to take and why, as well as what motions (both summary judgment/adjudication and major in limine motions) will frame the case for trial or settlement;

Require meaningful early case management conferences at which the judge would question the attorneys about the litigation plan and make sure both sides are focusing on the issues that matter; and

Schedule trial to begin 12 months after the complaint has been answered. Courts often use a number of other ways to streamline litigation — like restricting the number of interrogatories and document requests, limiting the length of depositions and prohibiting all attorney colloquy at depositions (other than the questions asked and any legal grounds for the objections). I do not object to any of these. But we will get more out of these reforms if lawyers figure out what they need to do to win and then develop a plan to get there.

The American justice system is the best system the world has ever known for resolving disputes. If all of us — lawyers, clients and judges — work together, we can make sure it maintains its place as the fairest, most democratic means of resolving disputes in the world.

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