TEN TIPS — SUCCESSFUL ATTORNEY CLIENT COLLABORATION IN COMMERCIAL LITIGATION

by
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When a business has a dispute that leads to litigation, a successful attorney client collaboration is critical for making the most of its position on the merits. The pressures and dynamics of commercial litigation are such that without being realistic and understanding each other, the attorney and business client are less likely to resolve the case favorably, and the client is more likely to end up frustrated and disillusioned from its experience with the legal system. Here are ten tips for both the attorney and the client to promote a successful working relationship for a commercial litigation. They reflect questions they should be asking each other, what they should expect from each other and what they each need to think about as they work together to pursue the client's interest.

1. Discuss at the outset: What does the client really want? Litigation can take on a life of its own if the attorney and client lose sight of why the decision was made to litigate in the first place. Attorney and client should define the objective. Is it the recovery of money; something else unique to the case at hand; a means of beginning a negotiation; or is it the principle involved such that the client wants to send a message to others with whom he might have the same dispute. Whatever the objective, make sure it is realistic and achievable through litigation. Design the strategy -- mold the case itself -- to what the client wants. Don't forget the objective. If it changes -- and it often does as events transpire -- acknowledge as much and know that a case cannot always be turned on a dime to suit the new objective. Recognize when the objective is sufficiently achieved.

2. Call it as you see it. An attorney should never tell a client that he has a great case just to get the representation. The merits of a case -- or at least a range of likely outcomes -- must be objectively evaluated by the attorney and understood by the client. The evaluation can be preliminary at the earliest stages and refined as the case goes on so that the client knows where he stands. Better initially that an attorney should discuss how he would make the most of the strengths of the case and realistically deal with its weaknesses than tell a client only what he wants to hear. A client who does not want or ask for such explanation is only kidding himself, and his attorney client relationship is headed down the wrong road.

3. Understand the economics of the litigation. There is no getting around the fact that litigation is expensive. The client must understand that the objective -- and the likely result of the litigation -- must warrant the expense. The client paying at hourly rates should especially understand that the conduct of the lawsuit is not always within his attorney's control. Adverse parties can make moves that greatly add to expense; and they often make moves only to do just that. Judges and procedural rules can require time consuming work that does little to advance the resolution of the case. A range of costs to litigate is therefore sometimes all that can be predicted. If the client cannot live with a result within that range, he should not

proceed without a fee that is contingent, fixed, capped, or otherwise limited; or he should be periodically willing to evaluate the progress of the case and whether continuing it makes economic sense.

4. Decide what you need to prove and prove it efficiently. The attorney and client should identify the issues in the case and discuss how discovery strategy, motion practice and trial tactics tie into what has to be proven to win on those issues. The most senior attorney responsible for the case should maintain an active hands-on role. Yes, more junior attorneys should handle research, drafting, and other more substantive work appropriate to their level of experience. But it will generally be more efficient and save the client money in the long run to have senior attorneys continually thinking about the case, even with their higher hourly rates. A case handled by a hierarchy of junior attorneys who pass work up the line to the trial lawyer who is not meaningfully involved until shortly before trial is a paradigm of inefficiency.

5. Explore alternative dispute resolution. The court system does not offer the only forum for resolving business disputes. Alternative dispute resolution ("ADR") in the form of mediation, arbitration, mock trials with advisory juries or some combination thereof can expedite and minimize the cost of resolving the dispute. One word of caution, however: the delays inherent in accommodating the schedules of parties and attorneys can render illusory the prospect that an arbitration will take less time and lead to a quicker result than a court proceeding. Depending on a client's interest, there is a lot that can be said for the strict scheduling procedures of a no-nonsense judge.

6. You will have to be patient. Litigation is like baseball. There are early innings, middle innings and late innings -- pleadings and motions, discovery, trial and appeals. It can be a long game. The game can be won in the early innings or not until the late innings. The facts or the law can be so unfavorable that you can feel like you are always hitting against a Sandy Koufax or pitching against a Willie Mays. Especially in those games, every deposition or motion or trial day -- every at bat -- cannot be either a home run or a strike out. Sometimes you just hit singles, sometimes you just score a run at a time, sometimes your opponent will score some runs. You win with a combination of timely hitting and good defense that will give you just one more run at the end of the game than your opponent.

7. Litigation as therapy. Litigators send their children to college with the fees paid by clients who refuse an early settlement, spend tens or hundreds of thousands of dollars in legal fees and then end up with a result not far off from the settlement they could have had on day one. They do it time and time again because they are human, because they have been hurt, and because they want to "get the bastards". They then live through the litigation insisting on "aggressive" tactics to satisfy their own emotional needs. All of this is fine for the attorney. The client should understand, however, that when it comes to dealing with emotions a good therapist is usually cheaper and healthier.

8. Go to the park, sit down on a bench and think. One of the most unfortunate reactions to companies having paid excessive legal fees is their insistence that attorneys not bill

for conferences with other attorneys within their own firm. It is as if any such conference is necessarily wasteful, represents double billing and does not further the client's interest. Nothing can be further from the truth. Nothing better advances a client's case than just plain thinking about it. Thoughts shared with colleagues then get tested, refined, and can result in compelling arguments or even master strokes.

But the process of even an efficient collaboration must begin within the mind of the attorney -- or even his client -- who is willing to put aside the clutter of his office, clear his mind and think about his case. Hopefully some thought is outside the box -- is there some other way; how can we best exploit our opponents vulnerability? Certainly some thought is in the most basic terms of right and wrong, how a judge or juror will react to a presentation and how to keep a sharp focus on what is important. But a client should demand his attorneys thinking and efficient collaboration with his own colleagues. That is the last thing he should refuse to pay for.

9. To be tough you don't have to be obnoxious. Clients rightfully expect that their attorney will be tough. But being tough is not an end in itself. It is only the means to credibility, respect and a successful result. The toughest attorney is the one with a reputation not for being an "animal" or obnoxious, but for keeping his case on track, not succumbing to wasteful diversions, gracefully handling himself under pressure, being prepared and making an organized, thoughtful and no nonsense presentation to a judge or jury. The tough attorney can say no firmly, yet politely, and he can punctuate his message with a sense of humor and a measure of common sense. He can negotiate in good faith, yet hold firm when necessary by trying the case and letting the chips fall where they may. He can play hardball, he can be effective, he can be professional -- without being a jerk. The client who insists on obnoxious behavior as evidence of his counsel's toughness probably has his own behavior to blame for being in the litigation in the first place.

10. Organization, clarity and brevity lead to excellence in written and oral advocacy. Raw intellectual ability is useless if it cannot be effectively communicated. An argument should be made so that the reader is easily led by the hand from one sentence to the next without having to double back or stumble over awkward phrasing or verbiage. The best briefs are strongly weighted in favor of arguments simply expressed in the author's own words, not the stringing together of legal citations or cumbersome factual descriptions of other cases. Above all, when arguing a point, less is more. A client should appreciate that judges appreciate short stuff. One of the rarest talents in written or oral advocacy is the attorney who can clearly present a well organized argument -- once -- and then stop or sit down.

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