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Advanced Litigation Techniques

Canons and Myths: Strategies to Enhance Success

BY SANFORD F. YOUNG

Litigation is a combination of chess and combat. Like chess, it is a contest of strategy, calculation and risk taking. And like combat, it requires commitment, resources and perseverance. It also requires cooperative and committed clients, and, obviously, decent facts and law.[1]

While many of the concepts below may be obvious and often practiced, the purpose of this and additional articles to follow in later months is to organize and gather together various litigation strategies and philosophies to give the litigator a clear frame of reference and method of analysis to enhance the chances of success and, at the same time, help minimize the risk and aggravation inherent in potentially contentious litigation.

Building A Healthy Client Relationship

The client must "own" his case

Your client is the case. Without the client and the client's support and cooperation, there is no case — only compromise and aggravation. Moreover, what often begins as a unified and determined team relationship takes on its own dynamic,

which, if not properly managed, can itself deteriorate into a troublesome situation.

At the outset, it is important to create a team effort with the client that will last. To sustain this it is essential that the *client "own" his case*. While ownership seems obvious and integral, it does not always exists and continue to the extent necessary and desirable. As the case drags on, for example, and perhaps fees are not being paid (such as in a contingency case or, worse, a client in default in paying your fees), the client's perception of how much time and effort his lawyer should be putting into the case, or his assessment of the feasibility of fighting versus settling, becomes skewed and may be at odds with the understanding of the lawyer who feels he is carrying the whole burden of the case.

While no solution is foolproof, a number of considerations should be kept in mind from the onset of the case. First, no client should get a totally free ride. His commitment and stake in the case should be solidified through the client's initial, and ideally, continuing investment of one or more of the following: money (fees and expenses), time and effort, recognition of the criticality of the case's outcome and willingness to remain engaged in a team effort with the legal team.

Second, you must be sure to balance and temper the client's expectations. Do not get overly caught up in the client's zeal and feed into unrealistic expectations. On the other hand, you do not need to be a pessimist. As in many things, even-handedness is the key. One ever-present danger is that clients confuse initial demands and *ad damnum* clauses with what is a likely outcome. The same goes for pleading various legal theories, such as seeking injunctive relief, punitive damages and attorneys fees. While doing so may be prudent, be sure the client understands the difference between what is demanded versus what is realistic. Here, there is a paradox: the stronger you articulate or argue your client's case, the higher his expectations, especially when he has not yet seen, and as likely does not read, the opposing arguments. Often times, I find myself telling clients *"do not believe my BS*."

Be aware that the attorney-client relationship is dynamic. Often it will begin with great interest and enthusiasm. But at some point, the client — as do lawyers — may begin to lose enthusiasm and steam. The client's hopes and expectations may fluctuate

as the case progresses. Unfortunately, at some point the client's interest in the case may steadily diminish and likely reach a low at the point where the client is needed most, such as at the time for depositions or for trial. Keeping the client on board is an ongoing and sometimes difficult process. Keep him informed of the case without unnecessarily burning him out, and keep him ready and primed to cooperate with you at every step. Keep him on the team: ready, willing and able to "hit the ground running."

The Retainer Agreement

Get it in writing

While it is obvious that the retainer should be in writing,[2] it is good practice to be sure that it is signed by the client, and equally important, that in addition to memorializing the terms of the fee arrangement and scope of services, it should confirm special considerations and concerns.

Obviously, one of the main issues is the fee arrangement — how to set the fee. While it is typical to set fees in personal injury cases at the percentages prescribed in the Court Rules[3] (which rules set forth the *maximum* percentage allowed),[4] in other situations the fee arrangement is more complicated and subject to negotiation and competition, especially for commercial cases. In setting such fees, there are various possibilities and variables: hourly charges, contingencies,[5] bonuses based on success, and blended arrangements, such as where there is either a reduced hourly rate plus contingency, or an initial minimum engagement fee[6] plus contingency. For any contingency fee, be cognizant of whether there will be a problem enforcing a judgment, from which the fee will come, and also consider whether there may be some unusual settlement or award (such as creating some business arrangement between the parties) that may make fixing the amount of the fee difficult or where payment may be deferred.

One of the more heavily negotiated items is the initial retainer (whether or not it is a minimum fee)[7], which plays a big part in ensuring that fees will be covered, as well as demonstrating the client's *ownership* of the case. Ideally, the retainer should cover a substantial portion of the expected fees to begin the case and carry it through its preliminary stages, or further. In determining the size of the retainer, consider the complexity of the case, the likely scenarios, emergent situations and, of course, the

likelihood of getting paid. And, be especially wary of the client who insists that his is a "simple matter" — *in which case I would double the retainer!* It is also advisable to get an advance for expenses, which should be by way of a separate check deposited into your escrow account and disbursed as expenses are incurred. The retainer should also provide for the ability to request future advances for fees and especially for expenses. This will become very important when the case approaches trial. While the statutory [charging] lien is automatic,[8] it may also be a good idea to provide in the retainer agreement that all liens, statutory as well as retaining, apply to all recoveries in that or any other case being handled for that client. Also be aware that suing for unpaid fees is not a realistic strategy. Aside from mandatory arbitration rules,[9] suits for fees often bring on counterclaims and, as such, are frowned upon by malpractice carriers. In fact, on policy applications, some carriers are now asking about the age of the firm's receivables and whether and how many suits have been brought to recover fees.

If the fee is to be based on an hourly rate, consider whether that rate will be fixed or if it can be adjusted when your fee schedule increases. If contingency or blended, before proposing your fee, you should chart out various scenarios for yourself to determine likely down-sides and up-sides. Be sure you are compensated fairly for the contingency and be sure that you do not find yourself in a situation where you are *hungry* for work today but will regret being locked-in in the future.

Some clients will ask for a budget or a cap. While budgets do not work well for complicated litigations, a budget may be a mandatory requirement of the client and thus unavoidable. Here are some observations and suggestions. First, there is a real danger in underestimating your budget due to the many variable and unexpected contingencies that may occur. In estimating the time, do not overlook the very substantial time that will be required to communicate with your own client and engage in "hand holding." Indeed, with the advent of e-mail, clients are becoming more involved and demanding about feedback and dialogue. Second, while it is impossible to foresee every potential step in the course of the litigation, it may be possible to present a qualified budget that is broken down according to foreseeable and probable tasks and scenarios such as: fact analysis, legal analysis, pleadings, motions to dismiss and possible pleadings

amendments, document review and discovery, interrogatories, depositions, dispositive motions (dismissal, as well as summary judgment), discovery disputes, pre-trial appearances, trial, post-trial motions and appeals. Obviously, the more open-ended and flexible the budget, the more realistic and prudent it will be. It is also desirable to eliminate some contingencies from the budget such as: injunctive relief, complex and successive dispositive motions, reargument, substantial discovery exchanges, large numbers of depositions, difficult discovery disputes, complex or lengthy trials, jury selection (especially in state courts that allow extensive voir dire), enforcement of judgments, and of course, appeals and retrials.

Similar guidelines should apply to caps. However, the problem with caps is that they work against you, as you can only go below, but not above (unless you build in enough exceptions, and your client heeds those exceptions). Also, you still have to worry about billing and fee collection. For this reason, rather than caps, flat fees paid up front (perhaps with some sort of contingency or bonus) may be more desirable (see above suggestions regarding blended fee arrangements).

Finally, in setting fees, consider the "*aggravation quotient*." That is, how likely is it that the case will take on its own life and take over yours, due to overly belligerent adversaries, unreasonable court demands, and intrusive or unreasonably demanding clients. If you are willing to take these cases, be sure that you are compensated for the extraordinary time and effort that will be expended, the time that will be taken away from other cases, interests and family, as well as the increased risks that such cases inevitably bring on (whether by way of inappropriate tactics by adversaries, and clients who, in the end, may not pay for this effort). To this end, remember that:

Difficult cases mean more time.

Difficult adversaries mean more time and aggravation.

Difficult clients mean more time, aggravation and risk.

The retainer should define the scope of the services. Depending on the case, considerations may have to be made for venue or jurisdictional changes that may require travel as well as the need to retain local counsel. Other considerations may be the need to add parties, the possibility that counterclaims (whether related or unrelated,

and mandatory or permissive[10]) may be asserted by the opposing party, collateral suits, disputes over whether arbitration agreements apply, and potential liens by other counsel. Often overlooked, especially in *standard* personal injury cases retainers, are contingencies such as appeals.[11]

In complex cases, the retainer should enumerate significant client resources and the efforts the client will devote to the case. Examples may be employees of the client who are designated to help locate, assemble and organize documents, office facilities at the client location, managers to assist learning and assimilating complex technologies, technical assistance to organize documents, litigation liaisons, and so forth. Such arrangements, so long as they do not compromise the attorney's role and control of case, are very useful. For one thing, they enable the client to save on fees, especially in large cases involving numerous documents or complex technologies. For another thing, they make the case more manageable if the law firm resources are limited — such as a small firm taking on a larger cases. Such an arrangement also bolsters the team effort and goes a long long way toward a successful outcome.

In cases where you are representing larger organizations, multiple parties, partnerships, entities or even a close corporation made up of more than one principal or other joint or common interest situations, be sure to specify with whom you can freely discuss confidential client information and strategies — preferably everything with all principals — and from whom you can take directions. Also, consider what happens if conflicts occur between the principals.

It may also be advisable to include any special disclosures or concerns in the retainer. Those may involve your opinion that the case has a particularly low probability of success,[12] the potential risks that commencing suit may create, such as engendering the termination of a business relationships, inviting counterclaims, the danger of setting an adverse precedent, or contractual or statutory provisions for legal fees or other unusual costs that may be awarded against your client.

You are your client's voice

Without dispute, you should represent your client and express his interests with zeal and passion. *You are your client's voice.* But, do so in a way that neither

compromises your professionalism nor is frivolous or unjustified. Be assiduously honest and credible, and never ever jeopardize your license. In high-stakes litigation, the waters are surrounded by predators who will snap at you given the first opportunity. No case, no client, justifies jeopardizing your standards, ethics or license.

Be aware of and deal with subtle, and not-so-subtle, conflicting interests, Aside from the vast array of ethical conflicts that are studied in law school and CLE courses, also be aware that there are less obvious conflicts inherent in the practice of law that involve your own interests and biases. Those issues may involve a conflict between the duty you owe your client as compared with your own self-interest, such as your interest in earning a living, your concern not to offend or discourage other clients and potential cases, or your desire to achieve favorable or avoid unfavorable publicity. You may also have larger concerns about the societal impact of your case, or you may have various biases that will effect your loyalty and effort.

A Contest of Strategy,

Tactics and Implementation

Allow your adversary to make mistakes; but don't make your own

Some may view litigation as a contest of resources or even attrition — the big guy versus the little guy. However, this is a myth except in the most extreme situations. In most cases, rationality and sanity reign. Moreover, for the small client, litigation is an excellent opportunity to turn this smaller size and limited resources into a strength. Large and wealthy adversaries who employ large expensive counsel, who tend to assign layers of attorneys on a case, can be baited into squandering time and fees on proceedings that can be more efficiently and wisely handled by smaller experienced firms. Accordingly, while the resources must be sufficient to engage committed counsel and pay for required expenses, if well managed, they do not have to be greater than the adversary's. Indeed, the ideal strategy is to use the available resources efficiently while making it appear to the adversary that resources and commitment are limitless to achieve success, and through superior strategy and tactics, inducing the adversary to waste and use up resources.

Like chess, a law suit is won by superior strategy and tactics, as well as superior implementation. For that reason, it is imperative to think strategically about the case.

Strategy calls for determining the major goals and methods of achievement. It requires long range thinking and projecting — move after move and after move. It assesses how the other side will act or react as well as your responses. Moreover, strategy should not be formulated while "under the gun." An example of a strategy plan may be where you aim to achieve discovery of specific facts or documents, followed by a strong summary judgment motion. Strategy can change, but ideally, it will not change significantly as that loses time and resources. Yet, you must be agile enough to adjust your strategy as circumstances change and as you learn your case.

Tactics are the method for achieving the more global strategy. An example of tactics is when to move for summary judgment and what supporting papers and affidavits to use. Tactics are not as long term and may occasionally be adjusted or changed, even in the heat of battle. It is desirable to have the client participate in planning and adjusting strategy, and to a lesser extent, tactics. But, whatever the case, the client should be consulted to approve any moves that would result in substantial costs or risks.

Implementation is the skill that carries out the tactics: for example, the ability to try a case well, cross-exam witnesses, take a deposition or draft a winning brief. Some trial attorneys are great in the courtroom, but to be a "killer" litigator also requires being a strategic thinker.

Equally important to the proficiency with which you handle the case is how well your adversary does. To this end, the chances of success are enhanced by mistakes that your adversary makes and avoiding your own. For that reason, just like in chess, *always give your adversary the maximum opportunity to make mistakes, but avoid making your own*.

Innovation and Risk Taking

Turn negatives into positives

Formulating and adjusting strategy and tactics requires learning your case, the ability to adjust and innovate to deal with changing or unexpected situations, knowing

how to take calculated risks, and the ability to *turn negative situations into positive attributes*.

Learning your case means learning the:

(1) *facts*

(2) law

(3) commitment and resources of your client

(4) availability and quality of provable evidence

(5) availability and quality of witnesses

(6) evidence and witnesses against you

(7) quality and biases of the forum (court, judge, jury panels)

(8) and the ability and tenacity of your adversary.

Innovation requires adjusting your strategy and tactics to deal with the changing realities of the case. This includes:

(9) Budgetary concerns and available resources.

(10) Changing circumstances.

(11) How each factor interplays with the others.

(12) Minimizing your own mistakes.

(13) Maximizing your adversaries mistakes.

Risk taking is the ability to make assessments ― *i.e.* determine the feasibility ― of the costs and risks of a given strategy or tactic versus the probably of success. Every decision, whether conscious or not, is based on this assessment. The goal is to make optimal decisions where the likelihood of success outweighs the costs and risks. Where attempted strategies and tactics prove unsuccessful, innovation and risk taking become more desirable. That is how you learn your case, as well as how you grow as a strategist ― learning as you go. However, while innovation and surprise are often desirable, they are not always the optimal strategy. *When in doubt -- i.e. close calls -- "go conservative,"* unless you enjoy shooting from the hip and getting shot in the head.

It is also important to be able to *turn weaknesses into strengths*, *i.e.* take negative situations, such as the discovery of damaging evidence or the sudden unavailability of a witness,

and turn it into a positive development. For example, if a key witness becomes unavailable, it is an opportunity to reorient and simplify the case. If there is a strong adverse precedent, use it as a launching point to develop strong distinguishing points that will invite or challenge the court or, if necessary, an appellate forum to further develop and hone the applicable case law. Often, a perceived crisis in the progress of a case can be a blessing in disguise.

Dealing With Adversaries

Keep it friendly and courteous

Your adversary does not have to be treated as a mortal enemy. In most cases, it pays to keep it friendly and courteous. And, in all circumstances, be honest and maintain credibility. Credibility goes much further than evasiveness or obstructionism.

Courtesy should be the rule of the day, even if your client wants you to be discourteous — for example, by denying extensions. Indeed, basic courtesies — civility in litigation — is becoming required.[13] Denying basic courtesies never pays off. Instead, it will cost you and the client in many ways, such as in engaging in unnecessary motion practice, forcing you to act hastily, and inhibiting opportunities to have meaningful settlement discussions.

You should be sure, when appropriate, to extract reciprocal courtesies, such as providing yourself sufficient time to respond. When the courtesy is requested in a timely manner, such as before an answer is due, it should be given readily. But, if requested after time has expired, a tactical question arises of whether to forgive the default or to properly take advantage of it.

In dealing with your adversary, be aware of the tendency to engage in *knee-jerk* litigation. Thus, while you should try to avoid reactive and predictable strategies — even if they seem to be conservative — you should aim to take advantage of your adversary's own tendency to engage in predictable knee jerk strategies.

Settlement

Approach settlement at the point of heightened uncertainty

Although the great majority of cases are settled, the irony is that to enhance the chances of a good settlement, your perceived (and actual) objective must be to win the

case. The goal is to make the adversary understand that he stands a substantial risk of losing and incurring substantial costs.

Often, the best time to approach settlement is at the point of greatest uncertainty, where you have already given some meaningful demonstration of the merits of your case and your resolve to succeed. I am not talking about posturing. I am talking about a real step in the progress of the case, which can come at various times and in various forms. Commencement of the suit is an obvious example, but it is not the strongest because pleadings, by their very nature, do not provide proof or precedent for the case. They only show some resolve. Likewise, discovery (particularly depositions) is a possible step, but also does not usually show the strength of your case. While in some cases taking the adversary's deposition may produce anxiety, the earliest step to achieve that goal is probably a motion for summary judgment. A summary judgment motion is a perfect opportunity to put your best foot forward — to lay out your proof and the law while at the same time presenting an immediate threat of victory. Of course, a cross-motion is available to your adversary. (More on motions will be discussed in succeeding articles.)

Many attorneys are reluctant to be the first to suggest a possible settlement. While you must never show that you are anxious to settle, there is nothing wrong with showing interest in its exploration. Moreover, the best way to temper any fear of showing weakness is to move for summary judgment just before suggesting the exploration of settlement. Another obvious opportunity to settle comes on the eve of trial, but at that point in the litigation, expenses have been incurred and the benefits of settlement have been reduced.

Summary

Litigation is a contest that requires skill, knowledge and intuitive thinking. It must be approached as a team effort. The litigator must be able to formulate, innovate and execute feasible and goal-oriented strategies in a diverse and dynamic situation which, though avoidable, can become contentious and hostile.

Additional articles in coming months will consider myths and canons of pleadings, discovery, motion practice, trials and appeals, together with further consideration of

settlements, client relations and team building.

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1. Because most, if not all, disputes have two sides, this article assumes that your potential client has met whatever minimum threshold you require for taking the case in terms of the facts and law. Also, while most of this article speaks from the plaintiff's point-of-view, the principles apply equally to defendants.

2. 22 NYCRR §1215.1 generally requires a written letter of engagement which, at the minimum, must set forth an explanation of the legal services to be provided and of the attorney's fees and billing practices. 22 NYCRR §1400.1, *et seq*. sets forth various special rules for domestic relations matters, including specific requirements for retainer agreements which must be executed by both parties, and filed if the action is in the Supreme Court (22 NYCRR §1400.3). The rules also require giving prospective clients a prescribed written Statement of Client's Rights and Responsibilities in domestic relations matters, 22 NYCRR §§1200.11(f), 1400.2.

3. The various Departments provide two alternatives for setting contingent fees in retainer agreements covering personal injury and wrongful death claims. Thus, the following are considered "fair and reasonable": either a sliding scale [referred to as "Schedule A"] equal to 50% of the first $1,000 recovered plus 40% of the next $2000 plus 35 % of the next $22,000 plus 25% any amount over $25,000 or, in the alternative, a maximum of 33-1/3% of the sum recovered [referred to as "Schedule B"]. See Local Court Rules §603.7(e)(2) (1st Dept.); §691.20(e)(2) (2nd Dept.); §806.13(b) (3rd Dept.); §1022.31(b) (4th Dept.). In medical, dental or podiatric malpractice cases, Judiciary Law §474-a mandates a different sliding scale equal to 30% of the first $250,000 recovered plus 25% of the next $250,000 plus 20% of the next $500,000 plus 15% of the next $250,000 plus 10% of any amount over $1,250,000. In both types of cases, the calculations are based on "the net sum recovered" after deducting expenses and disbursements. Judiciary Law §474-a(3); Local Court Rules §603.7(e)(3); §669.20(e)(3); §806.13(c); §1022.31(c). The rules also provide that if the attorney "believes good faith that Schedule A above [the sliding scale], because of extraordinary circumstances, will not give him adequate compensation..." that application can be made to the Court for a greater fee "provided , however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement."Judiciary Law §474-a(4); Local Court Rules §603.7(e)(4); §669.20(e)(4); §806.13(d); §1022.31(d). In cases involving "infants", the fee must be approved by the Court. Judiciary Law §474. *See,* Local Court Rules §603.7(e)(6); §669.20(e)(6); §806.13(e); §1022.31(e). To facilitate to regulation of these fee arrangements, various Departments also require the filing of Retainer Statements and Closing Statements with the Office of Court Administration. *See*, Local Court Rules §603.7(a)&(b); §669.20(a)&(b); §§1022.2 &1022.3.

4. In some states, attorneys sometimes set fees in personal injury cases on a competitive basis. Nothing prevents the negotiation of such fees in New York, although it has not commonly done.

5. 22 NYCRR §1200.11(c)(2)(I) prohibits contingent fees in domestic relations matters.

6. An initial "minimum" engagement fee should be distinguished from a "nonrefundable" retainer, the latter of which is be prohibited as an impediment on a client's ability to discharge his attorney. *See*, Matter of Cooperman v. Grievance Committee for The Tenth Judicial District, 83 N.Y.2d 465, 473, 611 N.Y.S.2d 465 (1994) (the use of a special nonrefundable retainer fee agreement clashes with public policy because it in appropriately compromises the right to sever the fiduciary services relationship with the lawyer). In domestic relations matters, the Disciplinary Rules are fairly clear: Thus, while 22 NYCRR 1200.11(c)(2)(ii) prohibits nonrefundable fees ("A lawyer shall not include in the written retainer agreement a nonrefundable fee clause"), 22 NYCRR §1400.4 makes the distinction clear: "An attorney shall not enter into an arrangement for, charge or collect a nonrefundable retainer fee from a client. An attorney may enter into a "minimum fee" arrangement with a client that provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion." Hence, it would appear that the retainer agreement may provide for a minimum engagement fee if the attorney handles the matter to its conclusion, so long as the agreement also provides for refundability in the event the attorney is discharged. *See also,* 22 NYCRR §1200.15(a)(3) ("A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned"). While no comparable rule exist for non-domestic relations matters, since domestic relations matter are, as a matter of public and statutory policy the more protected and regulated, a strong argument can be made that the same distinction between minimum and nonrefundable retainers can be made for other types of cases. *See*, In re Cooperman, 83 N.Y.2d 465, 476, 611 N.Y.S. 465, 470 (1994)("we intend no effect or disturbance with respect to other types of appropriate and ethical fee agreements... Minimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services, will continue to be valid and not subject in and of themselves to professional discipline"; *citation omitted*).

7. *Id.*

8. The statutory attorney's lien set forth in Judiciary Law §475 (which codifies the common law "charging" lien) comes into existence, without notice or filing, upon the commencement of an action or proceeding and constitutes a vested interest in the cause of action. LMWT Realty Corp. V. David Agency Inc., 85 N.Y.2d 462, 467, 626 N.Y.S.2d 39, 42 (1995). Judiciary Law §475 provides that prior to commencement of an action, a lien can be created by a notice of lien.

9. 22 NYCRR§§137.2, 1200.11(e), 1230.1.

10. *See, e.g.*, Fed.R.Civ.P. Rule 13(a)[mandatory counterclaims] and 13(a)[permissive counterclaims].

11. In the case of appeals, while you may be more likely to agree to defend an appeal, such as where you won a trial, than prosecuting one from a defeat, it would be wise to exclude all appeals (whether final or interlocutory) and retain the ability to decide on the feasibility and merits if and when the situation arises.

12. Hopefully, even a somewhat weak case will be above the threshold so that you are not accused of bringing on a frivolous law suit. For example, 22 NYCRR §130-1.1 provides for the imposition of sanctions against a party or an attorney or both, including costs and attorneys fees, for frivolous conduct which is defined as conduct which is completely without merit, is undertaken to delay or harass, or falsely asserts false material facts. *See*, Drummond v. Drummond, 305 App.Div.2d 450, 759 N.Y.S.2d 522, 523 (2nd Dept. 2003). *See also*, Fed.R.Civ.P. 11(b); Healey v. Chelsea Resources, Ltd., 947 F.2d 611, 622 (2d Cir. 1991).

13. New York Standards of Civility, McKinney's New York Rules of Court, Supreme Court, Appellate Division, All Departments, Part 1200 App.A.