PREPARING CASES TO WIN: BEING "THE MAN IN THE ARENA"

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> It is not the critic who counts, not the man who points out how the strong man stumbled, or where the doer of deeds could have done better. The credit belongs to the man who is actually in the arena; whose face is marred by the dust and sweat and blood; who strives valiantly; who errs and comes short again and again; who knows the great enthusiasms, the great devotions and spends himself in a worthy cause; who at the best, knows in the end the triumph of high achievement, and who, at worst, if he fails, at least fails while daring greatly; so that his place shall never be with those cold and timid souls who know neither victory or defeat.
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> *- President Theodore Roosevelt*
> *(From a speech delivered in Paris in 1910)*

I have included this passage from one of President Roosevelt's speeches because preparing a case for litigation can be very similar to the sentiments he expressed. In today's world, many litigators are losing their trial skills and opting to settle a case when they should otherwise try the case. Some people are settling cases because they are scared to lose. Some people are settling cases because they don't work them up properly, or don't know how. Don't get me wrong, there are very good reasons for NOT trying many cases. But, if you feel strong enough to put your name on a complaint and file it, it is your responsibility to ensure the client gets your best attempt and that you do not compromise the client's claim by being timid.

A. Litigation may not always be about the issues. Lawsuits are tough and may get personal.

One important thing to remember when preparing a case is that the other party will likely use all that is within their power to make you or your client's litigation experience as hard as possible. In many contentious cases, opposing counsel will result to personal attacks about your client's credibility, your credibility, as well as the merits of the legal claims being brought. It is very easy in these situations to lose sight of what is important and become irritated and respond harshly, and sometimes irrationally. Your emotions will not vindicate your client's legal claims, but they may doom them if you lose focus. The focus should always be about what is in the client's best interest.

B. Do your homework on the opposing party.

In today's electronic world you can just about find something on anybody. If you are thinking about filing a case on behalf of a Plaintiff, you should investigate the company on the internet using any popular web browser, i.e,. Google, Yahoo, etc. If the company is publicly traded, you should look at their annual filings with the Securities Exchange Commission. Another important item to check on is if the company has ever been sued. Two good resources for this is the State of Alabama's on-line docket system and the federal PACER system. Depending on your case, you may also want to consider writing to various governmental agencies and making a Freedom of Information Act ("FOIA") request concerning the Defendant's actions with the government. Many state government's have a law that mirrors the FOIA and can also be an additional source of information.

After you do your homework on the opposing party, find out information on the opposing lawyer. This can be helpful because each person's litigation style can be vastly different. You should try and find out if this person is a "straight" shooter, or if his or her reputation is such that you probably need to put everything in a letter, e-mail and fax. You may also want to review pleadings the opposing lawyer has filed in similar cases, if any. This can help you prepare your client for their deposition and let them know where some of the key issues in the litigation may arise.

C. Outline your case and then look for model discovery and deposition testimony from other cases.

One of the most important things you can do before drafting your complaint is to sit down and list each possible claim and include the elements of each count. Then, it is important to think about how you are going to carry your burden of proving each element of each count. If you are defending a case, then the same is true with your answer. You must review the complaint and see how you can prevent the Plaintiff from proving each element of each count. As a Defendant, you must figure out how best to carry the burden that goes along with each defense you have asserted.

One of the biggest mistakes I see is when an attorney files a complaint or an answer that they simply "cut & pasted" without sitting down and reviewing the pleading. Too often, this leads to an embarrassing moment in a deposition when you realize the count or defense has absolutely no application, or worse, you realize that you should have included an additional claim or defense.

After you have done research on your opposing party and attorney and charted out your claims or defenses, it is important to draft a good set of discovery requests. Your research and the elements of your claims and defenses should serve as a guidepost to what you should request in order to be able to carry your burden. After you have drafted a set of discovery requests, it is often helpful to review discovery that was propounded in other cases to see if you may have missed something. Another helpful tool is to read past

30(b)(6) corporate depositions from similar cases. I realize that many people may not have access to past depositions for many types of cases. However, many organizations such as the American Trial Lawyers Association or the Defense Research Institute have deposition databases they offer to its members around the country. This can be an invaluable resource.

As a Plaintiff, if you are in state court, you should always file some discovery with the complaint. In federal court, after the Defendant answers, you should quickly have the *Report of the Parties Planning Meeting* and file your discovery shortly thereafter.

D. Figure out what depositions you want to take.

The discovery phase of the litigation does not end with the filing or receiving of the initial requests. You may often need to propound additional requests based on new information. One way of obtaining new information is through deposition testimony. Depositions can be a powerful tool at trial. Under certain circumstances they can be used as direct evidence or used to impeach a witness. However, this does not mean that every witness needs to be deposed. Depositions can be costly and many times the parties can jointly agree to various stipulations on certain witnesses. A party may also be able to get a sworn declaration or affidavit from a witness to preserve their testimony. As a general rule, I would encourage you to take the deposition of all the key witnesses. In my opinion, a key witness is any individual whose testimony can establish a disputed fact, or whose testimony you will use to argue makes a fact more or less probable. In many cases, videotaping the key witnesses makes the best sense.

E. Do you need an expert ?

If you are not fully prepared and knowledgeable about your case, the use of an expert witness can be a disaster. There is no worse feeling than when an expert is used against the party offering their testimony. Since it has been my experience that many jurors disregard much of an expert witness' testimony, due diligence should be given before going down this path.

There is no question that in some litigation you have to offer an expert witness to meet your evidentiary burden. In those cases, it is paramount that you become familiar with the expert witness standards in your jurisdiction and what is expected for an expert witness to be able to testify. When deciding on experts, I have always found that a good place to start is with the trial judge's previous rulings entered in other cases. This will let you know the areas this particular judge finds most compelling, or most indicative of acceptable expert testimony.

If you do not need an expert witness to prove a point, do not get one. An expert who is repetitive and cumulative of other evidence is distracting. The exception to this rule is when you have the rare expert who can boil down your theory in bit size pieces where your jury can better understand the argument. There are some experts that,

through illustrations and charts, can better explain a legal theory. In these instances, an expert may very well be worth the expense.

F. Make sure to use all the discovery tools available.

One of the most unused discovery tools is the Requests for Admission. Under *Rule* 36 of the *Alabama Rules of Civil Procedure* ("*A.R.C.P.*"), a party can request that another party admit the truth of any matters within the scope of Rule 26(b), including "statements or opinions of fact," "the application of law to fact," or the "genuineness of any documents."

Requests for Admission are a good way to put some added pressure on a party to act civil and to give you the information they are supposed to provide. Under the terms of the rule, if a party fails to admit certain facts, they may be required to pay the reasonable cost incurred in proving the fact requested. This means that if a party fails to admit to the authenticity or admissibility of some documents, they may be on the hook for the cost you incur in proving up those documents.

Non-party subpoenas are also valuable tools that can often provide non-redacted and unfiltered information. This tool can be used to gain information on an opposing party and on certain witnesses.

File a document request with a deposition notice. Under *A.R.C.P.* 30(b)(5), a party may be commanded to appear at their deposition with certain documents you have requested. This tool allows you to explore how the documents are typically recorded, maintained and who controls them. In many instances, this type of request will provide you with the opportunity to see the original documents instead of the edited copies that are routinely provided. We have won several and/or settled many cases based on what was handwritten in the margins of some of these documents. Always demand to see the originals.

G. Don't be afraid to leave money on the table when it is not in the client's best interest to accept settlement.

The previously cited passage from President Roosevelt never had more application than right here. It is an extraordinarily tough job to advise your clients on how much they should accept in the settlement of their case. Opposing parties try to make this more difficult by offering you less than they know the case is worth. In fact, it is a common strategy to offer less money than the case is worth in the hopes that you will be either too scared to try the case or too afraid to lose. I recently heard one seasoned defense lawyer say that attorneys today have lost their litigation skills and are afraid of the courtroom. And, because of this, he always sees the other side settle for less than he otherwise would have paid.

Having a well prepared case is one way to combat lowball offers. If the other side knows that you have put a lot of time and effort into the case, they will know that your beliefs about the value of the case during settlement talks will be more honest and rooted in fact and law. On the other hand, if you didn't do much in the way of discovery and were not prepared in the depositions you took, you are opening yourself up to this type of attack. Even worse, the client will suffer by having her claims diminished by the attorney's lackadaisical approach.