ASSOCIATION OF BUSINESS TRIAL LAWYERS

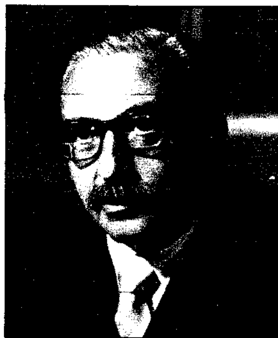
abtl REPORT

Volume II *Number 2*

Letter from the President

Court congestion — the crisis deepens perenially; daily its solution becomes more urgent and necessary. Its persistent and increasing presence affects adversely the entire judicial system and those who turn to the courts for the resolution of their judicial disputes and problems. Litigants are entitled to have their lawsuits reasonably and expeditiously determined; they should not be subjected to an interminable wait for their day in court. We all recognize the problem. We all appreciate the difficulty confronting bench, bar and government in their attempts to rectify the situation. Yet no one has been able to prescribe the arcane elixir to cure that chronic ailment which continues to plague our court system. The remedy must be found and soon.

Civil litigants, even as are defendants in criminal prosecutions, should be assured that their lawsuits, of vital concern to them, will be determined in a reasonably prompt time. The Federal Constitution and state consituations are ever-solicitious of those accused of crimes; as a matter of right, people are entitled to a speedy and public trial. Certainly there can be no quarrel with that precept. But should not those who seek civil redress in our courts be treated with equal regard. We who represent members of the community involved in commerce and industry are understandably uneasy. We are justly concerned with the uncertainty inherent in the inordinate length of time an action remains undetermined on the court calendar. On a purely practical level, business decisions are frequently predicated on the success or failure of a matter in litigation. On a different plane, decisions of the appellate courts often serve as guidelines as to the future course to be adopted by the business world. Delays in resolving pending cases at the trial level, and the concomitant postponement of final appellate rulings, are neither helpful nor profitable to those who seek prompt determination of their claims. We know the problem. Can we find the answer? It is imperative that we do so.


Murray M. Fields

The public is little served by those who constantly

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Rising Costs of Business Litigation: A View from Inside Out

There has been an increasing amount of press lately regarding the spiraling costs of legal services and, at least in my opinion, the focus unfortunately has been misdirected towards hourly rates. As an alternative approach, in the case of business litigation, I believe that concentration on improving the productivity of the attorney/client relationship is a far more fertile area to explore for potential savings.

Clearly, house counsel should take the initiative to retain sufficient legal representation at a reasonable cost. If he is not properly performing the function, however, the brunt of the resulting dissatisfaction is all too frequently borne by the outside counsel. In such situations, the counsel-client relationship is far better served by a mutual effort to reduce over-all costs through efficiency than by an attempt to justify why an attorney should charge as much per hour as a plumber. Not that a lawyer should escape comment if his fee schedule is disproportionate to the value of his services. The point is that the ultimate goal is the reduction of total cost to perform legal services; attacking the hourly rate is far less effective than improving efficiency. By efficiency, I do not mean simply improving the mechanical operations related to trial preparation and litigation, but also the joint contribution and overall division of labor that maximizes the combined productivity of all parties associated with litigation.

Richard K. Hansen

As in any effort requiring teamwork, some rather elemental disciplines are helpful. My purpose here is to touch on a few of the basic criteria that can enhance the working relationship between a business litigator and his corporate counterpart. To avoid abstract generalizations, perhaps a limitation in scope is appropriate. First, as a model for analysis, I am assuming that the litigation representation arises where some form of a continuing relationship has already been established so that the business client already recognizes, or at least suspects, the competency of the litigator. Marketing flourish should be added as appropriate, if this is not the case. Second, it is not my intent to provide a com-

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prehensive guide or a basic textbook to work efficiency. On the contrary, these are concepts that most of us have previously learned but, in the expediencies of daily operations, oftentimes neglect to apply. Requisite disclaimers made, let's examine some of the key ingredients for improving the efficiency of both litigator and his client when faced with potential litigation.

An Early Start. Because all of us share the misfortune of never having enough time to do all those tasks that need to be done, there is always the tendency to postpone starting a case, particularly when a settlement is expected. Unfortunately, this approach fails to produce, on a timely basis, the basic information necessary to plan strategies and to use effectively the resources available.

The goal of early preparation is for the business lawyer and his corporate counterpart mutually to develop an understanding of the scope of the potential litigation before significant effort is expended or related strategies are developed. First, the business litigator must understand the factual situation and evaluate the prospects of a successful conclusion. Personally, I favor establishing percentages to quantify the possibility of succeeding. Although I recognize that the percentage approach can be misleading and is subject to abuse (i.e., anything over 75% is a sure thing), I think the discipline of itemizing and weighing the relevant values of the various pluses and minuses results in a more definitive evaluation of the merits. Regardless of the system used, it is essential that the business client have sufficient understanding of the potential probability of success to determine the desirability of proceeding. A mere discourse or itemization of the positive and negative aspects of the issues is not helpful to the businessman or corporate counsel without relative values. His frustration is best depicted by the old story of the man who was seeking a one-armed lawyer because his own lawyer kept saying "On the one hand - - -, but on the other hand - - -."

The second and equally important aspect of early preparation is to understand the business operation and how it relates to the case, a background for which the litigator must rely on house counsel. Since a case is not prosecuted in a vacuum, it is essential that the appropriate individuals understand the interrelationship between the prosecution of the case and continuing business operations of the company. Only after such an evaluation can a decision be made as to whether proceeding with the case is economically and operationally feasible.

The Game Plan. There are many approaches to discovery which enhance success in a disproportionate ratio to the cost involved, a relationship which is not clearly understood by those not actively or frequently involved in litigation. Here the business litigator can prove invaluable to his client by a thorough discussion, very early in the case, of the various alternate courses of action and the effect and the cost of each. Together, then, they can chart the basic course the litigation is expected to take and the participation that will be required from the various players. The actual allocation of tasks will vary widely depending on the breadth and expertise of the law firm, the resources available in the law firm or company's staff, and the confidence of the law firm in the company's staff. The client's personnel are normally in a better position to know generally what documents are in existence and where they are located. Conversely, document search or audit by an untrained eye can be both wasteful and unrewarding. Accordingly, I favor Time & Responsibility schedules which are mutually developed for the particular circumstances.

Once the basic allocation of workload has been made, the business litigator should develop an estimate of costs and fees, with estimated increases or alternatives for the various contingencies. For total perspective, the client should compute the cost of the people and service that he must contribute. Those who do not yet have a corporate client with an advanced case of curiosity regarding litigation costs have the opportunity to perfect estimating techniques at a more leisurely pace; but a disinterest in the cost of litigation is a luxury that most house counsel or legal liaison will not be able to afford for any length of time. Thus, business litigators should begin to structure an accounting system for billable time and expenses in such a manner as to provide historic data on the costs of various elements of litigation. The particular client-counsel relationship will, of course, determine exactly how detailed the estimate should be; and, to avoid subsequent aggravation, both parties must understand that the estimate is only a guide and not intended as a fixed price bid. Estimating may appear to some as a difficult task, particularly as more precision is required, but businessmen are accustomed to estimating and budgeting the costs of design and creative efforts. As costs of litigation become an increasingly higher percentage of the cost of doing business, they will start expecting similar skills from the legal profession.

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charge others to be the creators of the present condition of the civil trial calendar. The day hardly passes that does not carry with it some critical attack on our court system, the lawyers who practice in it and the judges who preside over it. The range of these attacks is varied and from many sources; public officials, judges, lawyers, the media, all take turns in assigning blame on one another while decrying the volume of cases filed, the congestion of the courts, the cost of litigation, and the incompetency of bench and bar.

How much more fruitful it would be were those efforts directed to the solution rather than the genesis of the problem. We are told that in our jurisdiction there is presently a backlog of more than 50,000 cases which, if the present rate of disposition were to continue, would each take about thirty-nine months from the time the at-issue memorandum is filed to the time of trial. That is simply and bluntly an intolerable situation. It will not disappear and vanish of its own accord. If it takes the appointment of more judges to resolve the problem, so be it. If it requires a consolidated court and a review and revision of traditional court procedures, so be it. Somehow, somewhere, appropriate measures must be found to meet the challenge. Political considerations and private interests should not be permitted to frustrate the ultimate goal: the speedy and efficient administration of justice. We who are business lawyers must dedicate our efforts to that end.

—Murray M. Fields

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Although "winning" is the ultimate goal of litigation, a critical secondary objective is freedom from surprises. Accordingly, the "game plan" should enable the corporate client to understand the risks and magnitude of the litigation and the various potential alternate developments of the case. Surprises are not only wasteful in and of themselves, they usually represent only the "tip of the iceberg" due to waste in related corporate activities.

Prepare Efficiently. In my opinion, the most important aspect of efficient preparation is to stay on schedule. The schedule, of course, must be a balance between unnecessary preparation for a case that is subsequently settled, and the possible access of opposing counsel to work product against the availability of sufficient information to make interim decisions regarding the case. Although I dislike wasting time, effort, and money on discovery costs for cases to be settled out of court, I still tend towards early preparation. First, most, if not all, of these costs are usually recoverable many times over because the additional knowledge facilitates negotiation of a better settlement, or in the case of adverse data, persuades the company to settle at an earlier stage in the litigation. Second, I think any cost of unnecessary early preparation ordinarily is far exceeded by the wastefulness of last-minute preparation. Work allocation at the last minute is done on the basis of availability of personnel rather than competency and efficiency. Further, this last-minute activity is usually accompanied by fatigue which further reduces productivity; and last-minute flurries create many unnecessary costs such as overtime, air freight and couriers. Continuances may be available but they are wasteful of both the litigator's and the client's time and are highly aggravating to a schedule-oriented businessman.

Maintaining a schedule enables all parties concerned to assist the litigator with maximum efficiency. As an example, in preparing a witness for deposition, assistance of the corporate staff could likely include the screening, in advance, of documentation to provide the witness, the compilation of data which may require special data retrieval programs or access to data storage areas, and a preliminary interview of the witness to assure that all relevant topics are focused upon. In this case, rescheduling would require re-preparing the witness for the deposition, assuming he is available, regeneration of reports to provide current data and juggling all the accumulated data in the interim. Conversely, if conflicts require certain aspects of discovery to be done by "back-up counsel", there is not only a great deal of lost time and money spent in preparing alternate counsel, but the fruits of the effort are not as great. Accordingly, I feel it is prudent to calendar key items in the Time & Responsibility schedule. A secretary or Calendar Maintenance person can then prevent unfore-

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Review: 4th Annual ABTL Seminar

The Fourth Annual ABTL Seminar was held October 28-30, 1977, at the Santa Barbara Biltmore Hotel. The program was devoted to an in-depth exploration of the methods and techniques for the preparation and examination of witnesses. Approximately 100 ABTL members participated in what proved to be the most successful seminar in ABTL history.

Henry S. Zangwill

The Friday afternoon panel discussion explored the problems involved in witness preparation. The panel was moderated by Marsha McLean-Utley, with the able assistance of Richard M. Coleman and Fredric J. Zepp. The panel emphasized the importance of the attorney's own preparation for trial, including his analysis of the facts needed to prove his case and the alternative methods of proof available to him, such as stipulations, judicial notice, self-authenticating documents and the various codified presumptions and inferences. The panel also observed that the most important element in witness preparation is the relationship between the attorney and the witness; the witness need not like the attorney but, at the very least, he must respect the attorney.

On Saturday, the seminar was devoted to the direct examination of witnesses. Howard P. Miller chaired a panel that included Allan Browne and John Sturgeon. The panel noted the importance of the choice and order of witnesses for direct examination, and the strategy of hiding weak witnesses near the middle of one's case. The panel also explored how to deal with surprise testimony elicited on direct examination, and proper means of using documentary evidence during the examination.

On Sunday morning, the techniques of effective cross examination were explored by a panel consisting of Marshall B. Grossman as moderator, along with Howard P. Miller and Charles S. Vogel. The panel discussed the purpose and scope of cross examination, the various methods of examination, and how to effectively impeach the witness.

Taking into heart the old adage about "all work and no play", the ABTL hosted a wine and cheese tasting party for all the registrants and their spouses on Friday evening. Saturday afternoon was devoted to rest and relaxation in the beautiful area surrounding Santa Barbara. And on Saturday evening, a cocktail reception was followed by the grand buffet presented by the Santa Barbara Biltmore Hotel.

Those attending the seminar also received an extensive syllabus containing in-depth discussions of the seminar topics, checklists to be used during trial, reprints of selected articles, and a bibliography.

—Henry S. Zangwill

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seen schedule conflicts or reschedule sufficiently in advance to prevent wasted effort or duplicate activity.

Another aspect of efficient preparation is an analysis of the desirability of the various types of discovery. The "game plan" must initially focus on all the desirable avenues of inquiry but, unfortunately, economics usually supersedes *Quaere de Dubiis.* To hold costs down, early elimination of lines of inquiry that will not warrant the costs is desirable. A business decision? – perhaps, but an essential element to reducing total cost of litigating with minimum impact to rate structures. A second area of potential savings is the elimination of CYA (cover your assets) discovery conducted solely for malpractice purposes. Unfortunately, the possibility of malpractice litigation is driving an increasingly wider wedge between the ultraconservative litigator and his corporate client who pays the price of unnecessary conservatism. Since the distinction between "good preparation" and "CYA" is highly subjective and not likely to be defined with any degree of unanimity, I will not dwell on the subject. The business litigator should, however, constantly revisit the subject to determine the necessity of his discovery efforts, but the final decision should ultimately reflect a compromise between the litigator and his client as to what work is reasonably necessary and proper.

Regular Communication. An equally important aspect of litigation is communication between the attorney and the client on a regular basis. "As required" communication unfortunately is subject to diverse opinions on what communication is needed and frequently leads to inaccurate assumptions regarding the status; it should be replaced by scheduled communications.

Regular communication is a two-way street with a twofold purpose: first, the litigator must keep house counsel and the client appraised of the status of the case; and second, house counsel must keep the litigator abreast of activities or changes within the company.

House counsel must be kept advised because he acts as an interface among corporate management on many business decisions not directly related to the case but affecting, for example, the availability of evidence. Often these decisions are made in circumstances that do not provide the opportunity to check with outside counsel. House counsel frequently provides status reports within the company on an impromptu basis and, more importantly, is responsible for budgeting cost changes. Even if the desired goal of litigation has been achieved, the justification of large legal fees is not always an easy task, but is even more difficult if the case is lost or substantially higher costs are incurred, and these are "surprise" developments.

Since a corporation cannot maintain a status quo during litigation, regular communication from house counsel keeps the litigator advised of developments which might affect the potential outcome of the case or the company's settlement posture. Frequently, changes in the company's personnel, goals, policies, or operating procedures may alter conclusions, proofs or approaches developed from earlier discovery. Constant communication continually reminds the corporate liaison of his reporting obligation and serves as a constant parity check on the accuracy and completeness of the litigator's discovery – a process that may uncover previously forgotten clues to new areas of evidence.

Certainly the primary responsibility for communication is on house counsel, since a failure in the communication chain substantially increases the possibility of funds being wasted in a lost cause. Yet, the business litigator's reputation is also at stake. To advise house counsel that he failed to communicate properly will neither repair the damage of a loss nor, I suspect, improve counsel's evaluation of the litigator's competency. Communication, therefore, becomes the responsibility of both the business litigator and his corporate counterpart; if it breaks down, both parties will suffer.

Work Organization. If it appears as if I'm advocating that all business litigators should become business managers or efficiency experts, I should perhaps plead guilty – if the charge is reduced to second degree. One response to the rising cost of litigation, as various authors have noted, is an increase in the size of corporate staffs, which, if appropriately utilized, cost substantially less than outside counsel. This creates a twofold problem for the business litigator: first, he is more likely to be dealing with a client with sufficient background to evaluate legal costs who also has as a primary objective the reduction of costs; second, corporate staffs perform many of the functions which have previously served as a profitable training ground for associates. The result requires an increased consciousness of the *value* of services required as opposed to the more traditional "billable hours" approach to invoicing. Efficiency and productivity must become the compromise between the lawyer's desire for a "comfortable living" and the client's desire to harness legal costs. This means the litigator must organize to not only fully utilize his own unique talents, while delegating to others that which does not require his level of expertise, but also to maximize the productivity of the full resource of talent available to him from his firm and from the corporate staff. Organization and the ability to manage and delegate will become as important to the prosperous litigator as creativity, oratory, and endurance. **—Richard K. Hansen**

Author's Note: For the record, I should clarify that the bad examples used in the article do not reflect the performance of our present outside counsel. To the contrary, they are not only talented and responsive but have been increasingly efficient.

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