BY ANTONY L. SANACORY

GEARING UP FOR MODERN-DAY *"Trial by Combat"*

Modern litigation is an alternative to older forms of conflict resolution, such as trial by combat. And, despite improvements in the litigation process over centuries, it may be surprising or even disappointing how similar combat and modern litigation continue to be.

Both are adversarial endeavors. Combat is decided by who can inflict a decisive blow to incapacitate his opponent; litigation is decided by which party can withstand a lengthy, expensive evidence gathering process and still be around to present evidence and testimony from witnesses, many of whom may have moved on to other work opportunities (perhaps even in other states).

Other similarities include the enormous costs and risks of engagement; the importance of strategy, courage, and conviction; and the fact that the parties can agree to stop fighting at any point in time and settle on an agreed-upon resolution. (In litigation, they almost always do.)

This article will discuss how to engage an opponent and make difficult decisions with resolve, efficiency, and confidence throughout the litigation process to increase your chance of a successful outcome.

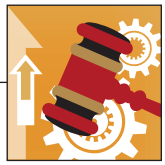
Assess the Need to Engage

Just as common sense would steer you away from unnecessary physical combat, it should also pull you away from unnecessary legal combat. Two reasonable parties are more likely to resolve their dispute by agreement rather than engage in litigation.

So what does this tell us? When litigation occurs, at least one party may have discarded common sense in favor of combat. A necessary exercise in humility is to confirm that your company is not being unreasonable before engaging in litigation; from there, all litigation decisions should be made with the knowledge that your opponent may not be making reasonable choices.

Consider Timing

When you should file a lawsuit (or even whether you should file at all) depends on the answer to a single question: What action is most likely to bring about the most efficient and desirable outcome?



Sometimes there are advantages to filing as soon as it becomes clear that the other party is not taking your position seriously to avoid any unnecessary delay to the dispute resolution process. Sometimes there are advantages to slowly playing your hand while evidence is gathered, positions are solidified, or even to complete work on the project.

This is a very case-specific determination that should focus with laser precision on the ultimate goal of a successful outcome to the dispute.

Representation Matters

The outcome and duration of the litigation process largely depends on your representation. Your attorney's job is to represent and assist your company with making difficult decisions.

If your attorney does not understand your company's values, then it will be difficult for him or her to effectively represent its interests. An experienced construction lawyer assesses the legal aspects of both parties' positions, the reputation and style of the opposing lawyer, and how a lawsuit might proceed.[1]

Focus on Recovery, Not Justice

An idealized notion of justice should rarely be considered the objective of litigation. While a case could eventually result in one side feeling that justice was served, this usually comes after a lengthy trial and at a considerable cost to your company's financial health and productivity as well as its employees' time and emotional wellbeing.

Commercial law remedies are stated in terms of damages, not justice. Damages are a monetary award aimed to place the non-breaching party in the same (or as near as possible) condition had a breach of a legal obligation not been committed. A party to a lawsuit can only recover if it can prove the following:

1) The other party breached a legal obligation;

2) Damages "flow" from the breach;

3) Damages are reasonably foreseeable (unusual damages or damages that could not have been anticipated generally are not recoverable); and

4) Damages are precisely calculated.

For example, a subcontractor claiming wrongful termination by a GC must prove that it was performing the contract and that no grounds existed for termination. It must then provide a precise calculation (supported by evidence) detailing how much financial harm it suffered.

Conversely, the GC must prove that the subcontractor *materially* breached the subcontract and failed to cure the breach (thereby justifying termination), then provide a precise calculation (supported by evidence) detailing completion costs or other damages. Witnesses must have firsthand knowledge of any fact relied upon and provide documents and physical evidence that establishes a party's position or disproves the other party's position.

Also, consider the impact of the parties' insurance. There are times where litigation implicates insurance coverage (e.g., when there is damage to property beyond defective work that needs to corrected). The availability of insurance may greatly impact settlement opportunities because it could alter the source of funding for both litigation and payment of a claim.

Avoid Stretching Claims

It is tempting to assert claims that the other party acted in bad faith or with an intent to deceive. In many states, these types of claims open the door for damages beyond those of normal breach of contract. However, unless such claims are strong and clearly demonstrable, it's best to view them with healthy skepticism.

If you exaggerate the facts, you not only lose credibility and compromise stronger claims, but also risk wasting time and money; it also sends the message that the other side should "lawyer up" and not expect a reasonable, negotiated outcome. If you can back up claims of bad faith or misrepresentation, then you should assert them, but only if you can do so factually, methodically, and without speculation.

Clearly define your desired outcome, know exactly how your litigation efforts lead to that outcome, and pursue those efforts without delay. But, never confuse persistence with wild assertions that will be difficult to prove by a preponderance of evidence in a court of law.

Keep Settlement in Mind

As author Steven Covey states, "Begin with the end in mind." That is, begin any process by carefully considering where you want to end up and exactly what it will take to get there.

In his book *The Seven Habits of Highly Effective People*, he states, "Sometimes people find themselves achieving victories that are empty – successes that have come at the expense of things that were far more valuable to them. If your ladder is not leaning against the right wall, every step you take gets you to the wrong place faster."[2]

This principle applies in litigation: Nearly all cases are resolved before trial, with the vast majority resolved by settlement. At the outset of the dispute, consider what realistic settlement possibilities exist and how much resolve and investment it will take to get the other party to act reasonably.

Cases where the *reasonable* outcome is full payment do exist, but this does not mean that the other party will settle right away. Again, because litigation regularly involves at least one unreasonable party, settlement usually comes later than it should. As discussed in the following sections, your litigation efforts should help position the parties for settlement.

Avoid a War of Attrition

Just as cost overruns can quickly occur on and be destructive to the outcome of a construction project, the same principles apply in a lawsuit. And, imagine how costs would escalate on a construction project if there was an adversarial contractor intent on undoing your company's work or disrupting its progress; unfortunately, that is exactly what often happens to opposing parties in litigation.

To avoid cost overruns in the litigation process, consider some cost-saving preparations. Assign an employee to help gather information, respond to discovery requests, and coordinate schedules so that the time dedicated to the lawsuit is used efficiently and productively. Paying someone overtime at the office to help with the information-gathering will cost far less than paying an attorney or paralegal to do the same work. Also, similar to avoiding rework on a construction project, getting all of the information on the first pass saves time and costs.

Strategically Navigate the Process

The rules of commercial litigation are intended so that a lawsuit can proceed with little intervention from the court until the trial. The process begins when a complaint is filed, which includes the assertion of facts and legal claims made in good faith. The defendant may then counterclaim, followed by the cooperative exchange of such information as documents, sworn testimony (depositions), and written information exchanges (interrogatories).

This exchange of information is then followed by an opportunity to convince the court that, based only on evidence not seriously in dispute, the party should prevail without need to advance to trial, which is known as summary judgment. At some point along this process, the parties will usually meet with a mediator to see if the lawsuit can be settled short of trial.

Each of these phases are points of engagement in an adversarial process and involves important strategic decisions that should not only serve to prepare for trial, but also to position the parties for a reasonable settlement. Since a majority of cases will be resolved short of trial, it only makes sense to engage in litigation effort with "the end in mind" (i.e., a negotiated settlement).

Invoke the Court's Involvement – Sparingly

The more that reasonable parties follow the rules of engagement in good faith, the clearer the likely litigation results become, and the easier it becomes for parties to assess reasonable settlement values. However, if one party is not acting reasonably (which is often the case), then that party may not follow the rules.

When the opposing party is not honoring the process in good faith, you may have to fight with purpose and clarity (i.e., "throw a punch") by invoking the court's involvement. By doing this, you attempt to clearly demonstrate to the court that you are the party acting reasonably and following the rules of engagement in all respects.

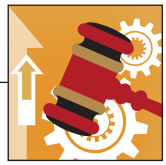
If you are successful (i.e., "land a punch"), your credibility with the court can give your party the upper hand. Invoke the court's involvement only as necessary and, when you do, be prepared to explain that 1) the other party is not following the rules of engagement and 2) the court's intervention is necessary and helpful to put the parties closer to resolution.

If you succeed in invoking the court's intervention, then you will give the other party a clear understanding of how the remainder of the lawsuit will proceed. Settlement will begin to look like a better option.

However, if you ask the court to intervene and fail, you embolden the other side and risk being perceived by the court as the unreasonable party instead of the problem-solver. This is why it is absolutely essential to follow the rules in good faith and prepare your case mindful of the burden of proof that will have to be met.

Work Toward Summary Judgement

If the parties are still unable to resolve their differences by agreement after document productions, interrogatories, depositions, and mediation, but it is clear that the evidence allows for only one possible outcome on a claim, then you will be able to file a motion for summary judgment. This will either dispose of the entire case or at least eliminate individual issues that may significantly impact it.



For example, if the other party has frivolously accused you of fraud, but you can show that the other side had full knowledge of the alleged misrepresentation, then you can dispose of that issue and simplify the case in your favor.

To "begin with the end in mind" also applies here: Approach the lawsuit with an eye toward a motion for summary judgment by determining what evidence and admissions from the other party are needed and how you can show the court that ruling on an issue will move the case toward an efficient resolution. A successful summary judgment motion reduces your risks of litigation while increasing the other party's.

Conclusion

Just as it takes courage to confront an enemy in combat, the same courage is necessary in commercial litigation. Approach the conflict with your eyes unwaveringly fixed on a well-defined and reasonable outcome to survive the conflict and increase the likelihood of a successful outcome. ■

Endnotes

1. For tips on choosing a construction attorney, check out *www.cfma.org/content.cfm?ItemNumber=4449*.
2. *www.stephencovey.com/7habits/7habits-habit2.php*

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