

On Litigation Skills

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Speed kills, but it's a double-edged sword. Thinking and acting quickly are crucial for good litigators, but going too rapidly can hurt you and your clients. That is why most young lawyers need to learn how to speed up and then they have to learn how and when to slow down.

Tossing Back Ticking Time Bombs

Let's face it: the pace of litigation can be brutal, and it seems to be getting faster all the time as a result of modern technology. There are always letters, e-mails and voicemail messages to be returned, and any delay can and will be used against us. In particular, a letter for the record from opposing counsel is a ticking time bomb that must be tossed back as quickly as possible, but inexperienced or inattentive counsel often procrastinate and let their opponent create "undisputed" evidence about a discovery or other dispute.

In addition, every case has its own list of deadlines that will change in ways that we can never predict with confidence. And, worst of all, just when we really ramp up for trial, our case will often be settled or postponed — a particularly frustrating form of litigation interruptus.

Crisis Engagement

To make matters worse, most litigators are adrenaline junkies. We enjoy feeling in the flow when we are fully engaged in a crisis, but we tend to get a little bored and lazy when not challenged. As a result, we fall easily into a hunter-gatherer rhythm that peaks with the big kill: a deposition, hearing or trial. Attending to details during the lulls is just not as much fun.

Under the pressure of tight deadlines and competing demands, litigators have to be quick studies who can digest complicated and often conflicting evidence and legal principles. As a result, we learn to focus on what is important and disregard what is not. But if we are not careful, we will be fast but shallow — what I like to call being "too quick to a B+." We have to force ourselves to take the time to think things through.

Getting Feedback from Colleagues

We also need to take the time to ask for help. Litigators tend to fall in love with their own arguments, and their own momentum can keep them from seeing any holes or inconsistencies until it is too late. So it is important to get feedback from colleagues to guard against your own blind spots. Even a short letter will usually benefit from review by someone else, who will often see typographical or even substantive errors that your eyes will pass over.

Speed can be particularly dangerous when trying to understand a complex set of facts by alternating between reading the relevant documents and interviewing your client and other witnesses. We have to suspend our inherent tendency to start drawing conclusions while we absorb as much information as possible, and we should not rush the process. No one can listen quickly, and no one can master a complicated situation without hours of careful reading and cloistered contemplation.

When litigators are in too much of a hurry, they never really listen to their clients or understand all of the important documents. As a result, they are embarrassed when one of their favorite theories goes up in smoke in a deposition because opposing counsel asks their client a question that should have been thoroughly discussed in private long before. Even worse, going too quickly can lead to mistakes in front of the "decider" — whether it is a judge, jury, arbitrator or mediator.

The ultimate impact of such mistakes will depend on how they are interpreted. Some judges seem to think that mistakes are just part of the game and that it is unsportsmanlike for a lawyer to draw too much attention to opposing counsel's errors. But other judges believe that mistakes by counsel show a lack of respect for the truth, and they start discounting what that counsel says.

Slowing Down

At the risk of sounding self-righteous, I prefer the latter kind of judge. Lawyers do a tremendous disservice to their clients and the legal system when they go too quickly to be careful. Many meritless claims and defenses are asserted because some lawyer had a bright idea that he or she did not bother to take the time or trouble to check out. We litigators have a professional responsibility to slow down enough to get things right, and judges should hold us accountable if we don't.