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CHIP RICE

On LITIGATION STRATEGY

I like to go both ways. I mean, of course, that I like to do both plaintiffs' and defense work. It gives me an interesting perspective on the different sides of the "v." Here are some thoughts on what works for a plaintiffs' lawyer.

Being a Plaintiffs' Lawyer

The most important job for a plaintiffs' lawyer is to make things happen. At the most basic level, a plaintiff wants to change the status quo, and the defendant does not. Every day that something doesn't happen to move the case to a resolution is a victory for the defense and a defeat for the plaintiffs.

So a plaintiffs' lawyer has to be aggressive. Defense lawyers can be phlegmatic, overly meticulous, and even lazy, and it won't necessarily hurt their client. In fact, that temperament can be extremely effective for a defense lawyer. But it won't work for a plaintiffs' lawyer.

As a young lawyer, I attended a trial setting conference with a dozen big firms representing various defendants. The plaintiff was asking for an early trial date, while the defendants were demanding more time for discovery. The plaintiff's lawyer argued that lengthy discovery would eat away at the defendants' "wasting" insurance policy (*i.e.*, one where defense costs are taken from the policy limits) and leave less for his clients to recover. He walked behind one of the seated defense lawyers, put his hands on his shoulders, looked up pleadingly at the judge and said, "Your Honor, this man has my money!" Now, that's a plaintiffs' lawyer.

Speed Kills

Defendants usually hope that plaintiffs will run out of money or desire before they get to trial. So plaintiffs' lawyers must try to get to trial quickly and use their resources effectively. I think it is a mistake, however, to try to save money by putting things off. It's better to spend what you have, while you have it, on the discovery that you think will have the biggest positive impact.

As a defendant, I usually prefer to avoid taking a position on any particular issue as long as possible. If I don't have to explain myself now, I may think of a better explanation later. And there's always more that I would like to know before committing myself. As a plaintiff, I want to force defendants to take positions and make decisions as fast as possible. It's like a full court press in basketball: force the defendants to make decisions quickly

and they will make more mistakes. For example, they will take some ill-considered position in writing or at a deposition before they have reviewed their own documents completely.

So, get a document request out right away and start taking depositions. Push for an early trial date. And keep looking for ways to make the case go faster.

Bring the Pain

As a plaintiff, getting to trial and winning is a backup strategy. What you really want to do is force a good settlement as quickly and efficiently as possible. You need to get your case ready for trial, but you should be doing it in a way that "brings the pain" to the defendants. I'm not talking about knee-capping anyone — just ways that maximize the pressure to settle by making the status quo less attractive.

Most defendants prefer aerial bombing. They want their lawyers to keep the case at a distance so they don't have to spend time or energy on it. You want to depose those defendants as soon and as thoroughly as possible. A deposition is the best possible way to force them to make decisions, give explanations, and confront the "smoking gun" documents. It will sharpen any internal contradictions in the defendants' case much faster than any other approach. It makes the case real for the principals on the other side, and it cuts through the "tiered" arguments that lawyers love to make. ("I wasn't there. I didn't do it. I'll never do it again.")

It is surprising how often a deponent is ill prepared. This is especially true in a case that involves a complex sequence of events that occurred a few years ago and generated a lot of documents. With a little hard work, you can know the documents better than the witness. Then, it is just a matter of eliciting contradictions between the documents and the testimony that defendants will be stuck with for the rest of the case.

All of this may sound a little too aggressive. If so, stick to being a defense lawyer. One last story: an American researcher asked a Buddhist monk what the Tibetan word was for "victory." The monk replied that there was no such word because the Tibetans believed in avoiding conflict. He admitted that sometimes there were conflicts, but the side that won did not call that "victory." They called it "an excellent peace."

Peace is excellent when you're happy with the status quo, but not when you feel that you have been wronged. As a plaintiff, you want justice first and peace later. That's why you need a plaintiffs' lawyer who will make things happen.

Mr. Rice is a partner at Shartsis Friese LLP in San Francisco. crice@sflaw.com



Chip Rice

