How to Litigate a Lawsuit

"What is the best way to win a lawsuit?" The question, I suppose, has as many answers as there are lawyers. The wiser litigators, humbled by experience and the wiser for it, will rightly tell you that there is no one successful approach to litigating a case, and that each litigator must cultivate his own style and methods, making the most of his natural strengths and making the best of his besetting weaknesses.

If I had to answer the query in a single paragraph, I would say the following: A good litigator is one who has a solid command if not a mastery of the laws that govern the kind of dispute he means to litigate. He must then patiently listen to his client, taking in all the varied details of the case. He must then re-state this case, so that it is told in the way most likely to appeal to a disinterested listener's sense of fairness, and so that the governing laws can be applied to the case in the manner that is most helpful to the client. This is the underlying strategy, which should be formulated at the outset of the litigation, but perhaps revised as the litigation proceeds. In addition to this strategy, the good litigator will have an excellent understanding of civil procedures and the law of evidence, which he will use to gather the evidence he needs to prove that his own characterization of the case is the best explanation, the most plausible explanation, the most likely truth. He will thus gather evidence, organize it, and present it adroitly, while using procedures and evidence to discredit or exclude his adversary's evidence. In addition a good litigator must be thick-skinned, extremely hard-working, well-organized and supported by a capable staff. Lastly, he must have a sense of justice and never give the appearance of arguing in favor of an oppressive or unfair position. Do all these things well, and you have become a masterful litigator.

The First Principles

To litigate well, it is necessary first to grasp the first principles of the legal profession: Ask first, what is a lawyer? What he is supposed to do? The answer is not so difficult for us practitioners to provide: A lawyer is one who is trained in the legal principles and procedures of his jurisdiction or perhaps those of more than one jurisdiction, and who uses his training to advise his clients about their transactions and represent them in legal proceedings, or, to state the matter more exactly, who uses his training to perform the following tasks for his clients:

1. Advise his client about the laws and their possible or certain effect on his liberty, property, business dealings, and other matters. This work concerns legal consultations, which lawyers can give according to their expertise in different practice areas.
2. Negotiate and prepare the contracts and legal forms by which his clients protect their property and interests as well as pursue projects and ventures. This work is often called "transactional work," and again is performed by lawyers according to their expertise in different practice areas.

3. Represent clients in legal disputes, i.e., legal conflicts that are resolved by rule of law, which in particular means the rule of law of the jurisdiction where the dispute is litigated. This work is called "litigation" or "trial work," and again can be performed by lawyers in different kinds of cases according to their expertise in different practice areas, but every litigator must have a thorough understanding of the law of evidence and the rules of civil procedure followed by the courts in which he tries cases.

So-called "transactional attorneys" are supposed to specialize in the first two kinds of work (consultations and performing transactions), while so-called "litigators" or "trial attorneys" are supposed to specialize in the third kind of work (representing clients in disputes that are mediated, litigated or arbitrated). A good transactional attorney must have a thorough understanding of how a lawsuit proceeds, so that each of his transactions usefully protects the client as much as possible from the hazards of the different kinds of litigation that might one day arise from the transaction, and likewise a good litigator must have a thorough understanding of the substantive laws that govern the underlying controversy, or else he is operating in the dark, relying solely on his tactical skill or mastery of evidence or perhaps his photogenic charm, but without a fundamental understanding of what the law has to say about the subject at hand.

From this I conclude that in the first instance a good litigator will be able to say at the outset of the case, "here is what the law says about this kind of controversy, here are the arguments we can make in support of our position, here are the arguments we can expect our adversary to make, and here are the different possible outcomes".

This in turn presupposes that the litigator correctly recognizes what sort of controversy he has been asked to litigate. He must grasp the essentials of the case at the outset, when it matters it most. The client in nine cases of out ten does not know, nor should be expected to know how to state his own controversy, but perhaps understands only that his dealings with the adversary have gone horribly askew, and that the adversary was dishonest or oppressive during this course of a dealing in a way that has since proved ruinous. The lawyer must therefore listen very attentively to the client and patiently take note of everything the client has to say about his own circumstances.

Developing the Underlying Strategy

Using his understanding of both the law and the facts at hand, the litigator must strive to recognize how best to summarize or characterize the client's situation, so that the existing laws (or some variation on them) can be applied as usefully and favorably as possible to the situation that he has thus re-characterized. This is the essential work of a litigator - the initial conception of how to articulate and argue the case. Do this work poorly, and all your ensuing efforts, no matter how exhaustive and strenuous, will be misguided and off the mark. Do this work skillfully, and you will have charted a successful strategy, which now awaits only your diligence and tenacity in the implementation.

So now we have two related tasks that in my estimation determine how well a litigator can handle any given case: Having a thorough understanding of the laws that govern the kind of

dispute at hand, and striving to characterize the dispute in the most helpful possible manner, so that the applicable laws can be applied to the dispute thus characterized in such a way as seems most likely to lead to the best possible result for the client under the circumstances. This is not easy work, especially if the opposing lawyer is doing precisely the same thing, but in the opposite direction.

But even if a litigator performs this initial work with unmatched talent, he will not succeed unless he is (1) proficient in civil procedures and the law of evidence, (2) thick-skinned and able to thrive amid controversy, and (3) perseverant.

Civil Procedures and Evidence

You cannot state your case well if you do not have an excellent grasp of the civil procedures that are followed in the forum where the case is being litigated. Some attorneys place too much stock in the mastery of these details, which makes them masters of tactics, but all too often at the expense of having a successful underlying strategy. Nevertheless, a good litigator must have a very firm grasp of the procedures, and he should always review them at each stage of the case, if only to confirm his own exact understanding of them.

As for evidence, it is the "bricks and mortar" of a case: If you don't have any, you have no case to build. The strategy is the telling of the client's story and the application of the law to this story, thus told. But this story, or version of events, must be proven by evidence, or else you are merely bellowing in the wind, or recounting a tissue of lies that your cagey opponent will expose as a sham. You must have evidence to support your case, or you have no case at all.

From this it follows that you must know how to use civil procedures to obtain evidence, and then you must have an excellent system in order to organize and present the evidence, and lastly of course you must know the laws of evidence so that you can have yours admitted and your adversary's discredited or even perhaps excluded.

These then are the essential tactics of successful litigation: The gathering, organization, presentation, admission, refutation, impeachment and exclusion of evidence. I think it usually takes a good litigator at least a decade of active practice to become reasonably proficient at these skills.

Without these basic skills of litigation, all the rest is so much wasted effort. This said, I repeat that you will almost never win your case merely by an astute manipulation of evidence and procedures. Some lawyers seem to think otherwise. To me they are tacticians who lack a winning strategy. But no litigation strategy, no matter how brilliant, has any prospect of success unless you can skillfully use procedures to gather evidence that you then present in a convincing manner at trial.

Restatement of the Essentials

So now I have boiled it down to an underlying strategy and necessary tactics: Your strategy requires a superb understanding of the substantive law that governs the kind of matter your client presents to you; a superb talent for summarizing his case in the most helpful manner possible; and artfully applying the law to the matter thus stated. The tactics refer to skillful use of civil procedures and evidence in order to compile evidence that you use to prove your points.

A Thick Skin Is Best

There are other attributes that are likewise indispensable: You must be thick-skinned and easily able to withstand the derision and insults of your adversary: If insulting comments affect you too much, you should not become a litigator, as your whole life you will find yourself insulted, openly and subtly, by your adversaries. Some will mean it in earnest and have genuinely concluded that you are a pitiful, hapless lawyer. At least from them you can learn something, as each of us can always draw some benefit from any criticism, even if it serves only to a shed a little light on the one making the criticism. Others still will deride you because in truth they are frightened by your prowess and hope to put you down and discourage you before you succeed at your task, which they fear you have begun in an excellent way. Others still, at the end of the case, will become angry with you over the successful results you have gotten for your client. You have to be able to shrug it off in a moment and rise above the fray, or else you will be angry or intimidated and very certainly an unhappy camper your entire working life. A good litigator will take the long view and the high road for living well, never nursing a grudge and never holding a resentment. Fight as hard as you can for as long as you must to win for your client, but never let the poison of rancor sully your countenance or becloud your judgment.

Toil and Sweat, if not Blood

In addition to all the rest you must be perseverant. The law is not a place for the idle. If you do not work very hard on your cases, and if you are not a very diligent, tireless sort of person who takes initiatives, you are employed in the wrong line of work. For the indolent lawyer, it is only a matter of time before he is embarrassed and his client harmed by his more assiduous, harder-working adversaries. Litigation is best done by those who are natural beavers, laboring away as a matter of course because that it is how work in the world gets done.

There are two final points I wish to make, each all on its own.

The Importance of Organization

Each successful litigation is always a well-organized effort. You must have your dates properly calendared and meet all your deadlines (preferably well within time). "Last-minute" guerilla warfare might seem colorful, but it is often disastrous in the practice. A good lawyer will know what tasks he must do and by when, and he must be certain to meet his deadlines by starting each task well in advance of its deadline. For every appearance and each appointment, the litigator must arrive prepared, with all his necessary papers or information within easy reach, and with all necessary people in attendance or available at a moment's notice. This in turn requires the skillful use of task lists, deadline lists, a litigation calendar - a system of

organization in short. Computer programs have made this work much easier. Even so, there is no substitute for an excellent assistant or team of assistants, who help the litigator to organize the effort. Behind every successful litigator you will find a competent support staff.

The Justice of Your Cause

Last but most important of all, a litigator must be a man of justice. If the role of the litigator is to represent his client in a legal dispute, he must remember that the laws exist to try to promote and further the ends of justice. The governing law of any given topic is usually the imperfect, cumulative effort of legislators and judges to figure out the most sensible, fair way to dispose of the controversies and contested issues that have come before them. Statutes and case decisions are the means by which they do this work, and the judge in each case will be influenced by the circumstances and posture of the litigants as well as by the arguments made by their advocates.

Always try to show why for the sake of fairness you client must win. You should never openly adopt an oppressive position. Every one in the room will look for some way to derail your merciless scheme, even if the letter of the law favors you on all fours. Plead justice, plead fairness, and show that both require that your client obtain relief. This should be part of your characterization of the case and indeed the foundation on which the rest of your case is built.

Sometimes it is hard to explain why fairness and equity favor your client's cause. Try putting yourself in your client's shoes, or, as the old saying would have it, "try to walk a mile in his shoes" before attempting to state his case. This necessary work will allow you to state difficult cases with eloquence and conviction, and, when you represent a defendant, it will also tell you when you should seek to settle a case that you cannot have dismissed before trial. But in other cases it is only too easy to explain why fairness and equity require a judgment for your client, if only you will make the effort to connect the simple dots. Lawyers must have sufficient detachment to assess and litigate their cases skillfully, but detachment does not mean "void of all meaningful human emotion." A lawyer must be the champion of his client's cause, and this means that at times he must convincingly explain how his client has suffered because of the adversary's villainy. A trial lawyer is not a dry bureaucrat, but rather a director of a live documentary that he presents to a group of people who above all wish to do the right thing now that they have been dragged into the proceeding and forced to sit in a box to listen to the dispute for days on end. First our director gives an overview of what he plans to show by testimony, documents, video clips and demonstrations. Then he presents this evidence. Then he explains what it all means in light of the controlling law that the judge in the meantime has explained to the jury. All the while his adversary is doing the same thing, and each seeks when possible to discredit the other's points. A lawyer cannot do this work well unless he has profound empathy and a profound sense of justice, even if he must always remain professional and not allow his indignation to interfere with good judgment.

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