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Don't Be a 'Tilting-at-Windmills' Litigator

By Scott M. Himes
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To state the obvious, litigation occurs because parties are in a dispute. But not so obvious is that every issue, position, argument, and fact are not—or should not be—litigated to resolve the dispute. All too often, one side or both take the path of fighting over issues that do not matter, and sometimes don't even exist. When that happens—when a "fog of litigation" ensues—your client likely will be ill-served. Fight over what matters to a favorable outcome, not whatever *perceived* issue arises. Below are pointers for staying on this course:

Practice '*Objective*' Advocacy

Effective advocacy requires objective analysis of the facts and the law. Judges are paid, and juries are instructed, to see all sides to a case. Ideally, they do. One side rarely is "all right," or "all wrong."

Disputes that end up in litigation are, well, *disagreements* over what occurred or what the legal rules are that govern the disagreements. To be persuasive, it is critical to recognize the opposing position, *objectively*, and to deal with that position head on.

Advocacy requires a level of evenhandedness. That means *countering* the other side's significant positions with facts or law (or both), not cavalierly rushing past them as if they didn't exist. The judge will not; her duty is to evaluate what both sides argue.

"Objective Advocacy" sounds like an oxymoron, but it is not. Being objective when you advance your client's position means simply that you should recognize that your client is not 100% is the right on everything; that the other side has a counter-position; and yet that your arguments, considered against those

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of the other side, produce the fairer and more just outcome. Being objective about the other side's position—that is, recognizing some merit to it—enables you to focus your arguments to refute the other side's positions.

Acknowledge the Psychology of Litigants

Commercial litigation is a way to resolve business disputes. Its purpose is not to salve personal hurt feelings. But that often seems to be a client's objective. Commercial litigation can present the same kind of personal animosities that often take center stage in matrimonial cases, estate litigation, and other fraught family fights. So too, in commercial cases. The trial lawyer must deal with the client's psyche. But don't let the lawsuit become your client's "therapy."

You must (like so much in litigation) *balance* competing objectives. Although it invariably occurs, try to avoid having the inter-personal issues spill over into the litigation process itself. Counsel your client with the client's psyche in mind. But in advancing your cli-

ent's case, in court and with the opposing side proceed on the facts and the law.

Objective advocacy, the first theme above, serves well in this context. Explain to your client how your approach can in the end satisfy the hurt ego while (more fundamentally) accomplishing success at trial. After all, winning your case is the ultimate salve.

Don't Let a Client's Judgment Cloud Yours

What follows from the psychology of litigants is that clients all too frequently exhibit less-than-ideal judgment. That's expected. After all, the client needs a lawyer because judgment unaffected by actual personal interest is necessary.

The mandate to advocate zealously for your clients does not mean pursuing whatever the client proposes be done. Clear-headed, sensible, and strategic decision-making based on provable facts and applicable law are a must. That is not necessarily how clients analyze their legal problems.

The notable early-twentieth-century lawyer and statesman Elihu Root once said: "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." That is an apt admonition for the trial lawyer advising his client in a lawsuit.

Be Reasonable; Avoid Extremes

Extreme positions that go beyond what's reasonable for both sides rarely succeed. Although it's our job to be zealous advocates, and therefore present the facts aggressively, stick to a *fair* aggressiveness—meaning a common sense interpretation of what occurred that the factfinder will accept.

Sometimes the facts are hotly contested, but sometimes not. In the latter situation, ask "what do these facts *mean*?" The answer should be reasonable, rational, and consistent with a realistic assessment.

Make Risk/Reward-Based Decisions

Litigation always involves risk and reward. It starts, of course, with whether it pays to litigate in the first place, either to prosecute claims or defend against them, and whether the best course is an early and prompt settlement. But the risk/reward calculus comes up repeatedly in the decisional tree during the course of a case.

For example: Is it worth it for the defendant to move to dismiss; what's the likelihood of success *versus* the cost to your client, or the downside of revealing an argument better presented until later in the case? What's the risk of deposing a nonparty witness who you haven't interviewed in advance…could the testimony hurt more than help? If you've interviewed the nonparty and learned she can testify favorably for your client, should you take her deposition, meaning that the other side will learn the testimony and be able to cross her; or can you leave things as is, and call her at trial instead?

Virtually every step you take presents pros and cons. The key to maximizing success is thinking risk/reward at every step of the way—which is just another way of saying thinking *strategically*. And doing so will help you spotlight the issues that matter from those that don't.

Maintain Credibility

Nothing—literally nothing—is more important to litigation success than being credible before the factfinder. The judge or jury must trust you and your client. Maybe they won't agree with you, and therefore won't find in your client's favor, but you must always present *as believable*, in the sense of "worthy of belief." Success at trial follows when the judge or jury understands and believes in your story. You will rarely succeed if they do not.

Maintaining credulity is another facet of being reasonable and rational. Do not grasp at straws as if you have nothing to lose. You *do* lose something. The strained or illogical argument costs you invaluable credibility points. Do not squander them.

Real World Illustrations

Discovery. Often the most needless disputes involve discovery. Is it really worth fighting about every category of documents, or about the other side's answer to an interrogatory? Invariably the answer is "no." Yes, legitimate discovery issues can arise, principally over privilege or spoliation of evidence.

But the scope of discovery is rarely a fruitful topic to pursue. And, decidedly, a discovery motion should be the rarity. Judges dislike them. If there's a dispute with the other side, work it out. Compromise. Press for what you *really need*, and be able to show why. At least follow the above guidelines when fighting over discovery. Don't butt heads irrationally, without weighing risk and reward, or rotely adopt your client's mindset of "get everything."

Duplicative Claims. Consider the case where your client asserts that the counter-party to a fully executed

written contract failed to meet its contractual obligations. Is there a claim for breach of contract? No doubt. Should you also allege claims in quasi-contract, such as unjust enrichment? Or fraud—that your client was induced to enter into the contract on false pretenses?

Unless there are solid facts that the defendant had an additional duty or obligation outside of the contractual undertakings, or plausible facts exist that the defendant entered into the contract with no true intention of carrying it out, fighting to preserve the quasi-contract and fraud claims is likely a losing battle (and they probably shouldn't have been pleaded in the first place). "Plead everything," as is sometimes said in law schools, is not best practices for the courtroom.

Issues Beyond the Pleadings. Suppose you represent the officers and directors of a corporation sued for making a decision that a shareholder claims harmed him. Typically, your clients are protected by the business judgment rule, which involves decision-making done in good faith.

Your clients swear to you that they acted in good faith, and you should move to dismiss. But is the pleading really implausible on lack of good faith. Good faith is a state of mind, often determined by inference upon full development of the facts. Should you fight the good-faith battle on the pleading only? Often that is a losing fight, better presented once the facts are out there as evidence.

Not Keeping Your Eye on the Ball. Your client has spent years running a small family business. The other family-member shareholders holding the majority interests vote to remove your client from his position. Being a small corporation that does not always adhere to corporate formalities, the majority shareholders do not dot the i's and cross the t's for removal under the (decades old) governance documents. You can raise that failure to challenge the removal. But the defective procedure can be cured. And it's not the real issue.

The real claim is that your client was subjected to minority shareholder "oppression." That involves whether the majority's decision-making defeated the minority shareholder's reasonable expectations in running the venture and participating in it. The point here: when a dispute first arises, identify and focus on what really matters, not the camouflage often around it.

Provisional Remedies. Exercise well-evaluated caution when seeking a temporary restraining order and preliminary injunction, an order of attachment, and the like, or when considering filing a notice pendency.

Assuredly circumstances arise where *pendente lite* relief is warranted. Your client's neighbor is excavating her property in a way that might imperil your client's home. You learn that someone who appears to have defrauded your client in an investment scam has just booked a one-way ticket to Tahiti.

But before you seek emergency relief, you need to have your ducks in a row. Irreparable harm is critical… can you show it? Can you make a powerful showing that the merits land in your client's favor? Don't gin up a dispute for emergency relief. It can backfire, and ultimately hurt your case.

A judge's finding that you are *not* likely to succeed on the merits is obviously a setback. So, too, for a finding of no irreparable injury. This issue often arises in the context of a *client's* thinking—"*we need to stop that guy,*" or "*we need to put a lien on him.*" But the client's judgment often, understandably, is clouded. Do not go too far in seeking relief if you don't have strong grounds for it. You will be manufacturing a dispute that should not be litigated.

Conclusion

Litigators "fight," but circumstances—and often client pressures—can lead to fighting about issues that might not help win your client's case, and can even hurt it. The good trial lawyer must not be Cervantes' Don Quixote fighting windmills as if they were giants. Often the litigation windmills you confront are, well, just windmills.

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