Advance Planning in Litigation

Seminar Topic: This material provides an in-depth examination of litigation and its many individual steps. When and how to take these steps should be decided with an eye towards the conclusion of the litigation. Further, because the conclusion is more likely to e a settlement than a trial, some steps should be deferred. One must always be prepare, but also avoid inefficiency. This program offers suggestions on how to efficiently plan litigation based upon 50 years of hands-on experience.

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.

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Robert D. Tepper treats every client's matter as if it were his own. Bob is a seasoned trial attorney with a business background, and clients seek him out for his remarkable ability to find the underlying core of each issue and navigate to a resolution.

Companies and individuals across the country turn to Bob for out-of-the-box solutions to opportunities and challenges. His 30 years of experience as a trial attorney have shown him the importance of understanding both sides of an issue. Clients count on him to shed light on the motivations and goals of the opposition, an ability that underpins his strength as a negotiator.

With a clear understanding that it is often in a client's best interest to solve disputes quickly and efficiently, Bob is a formidable opponent in the courtroom should litigation be needed, having successfully litigated matters with tens of millions of dollars at stake.

Over the course of his career, he has honed his skill at unraveling complex issues by breaking them down into manageable parts for the benefit of many commercial, real estate, probate and bankruptcy clients.

Bob has broad experience in insurance law, regularly providing insurance, coverage and interpretation counsel to entrepreneurs and privately held companies. He also defends attorneys, insurance agents and brokers, architects, engineers and designers against professional liability claims, as well as advises companies on cybersecurity.

Bob frequently lecturers on the topic of legal ethics, and has been active in special Chicago Bar Association-sponsored programs introducing law students to the rules of professional responsibility. He is fellow in the Claims and Litigation Management Alliance, an invitation-only distinction.

Bob is a member of the Circuit Court of Cook County First District Advisory Committee. This long-standing advisory committee includes the judges and representatives of the Cook County Sheriff, The Clerk of the Circuit Court of Cook

County. The committee meets to discuss issues affecting the practice of law and the services provided to the public and the bar.

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Advance Planning in Litigation

I. Introduction

A. Start with an overall plan, but subject to changes—constant adjustments

B. Each step should be taken with a view toward the total process—the best end results

1. Not the best short-term result.

2. The final score is important; the halftime score is not.

C. Common tradeoff: Vast majority of cases settle, but must be prepared for the alternative

1. Try to adjust timing of expenditures, to avoid waste, but be prepared

2. For each step

a. When will it need to be taken?

b. How much lead time is required?

c. Will it advance the process on both fronts, or just one?

3. Includes research

a. Is a legal point debatable?

1. Usually can determine if an argument can be made without doing the full research necessary to support one side or the other.

2. This may be all that is needed at the time.

b. Save notes on cases or do a short memo to avoid duplication.

D. Fee arrangement—anticipate problems

1. What will be reasonable if things go well?

2. What will be reasonable if things go poorly?

3. Better to consider at the outset than to have to change later.

4. Do not be afraid to be candid with the client. If you oversell at the outset, you only create problems later.

E. Timing—watch Statute of Limitations—do not let it expire on your watch. When talking to potential plaintiffs, set an outside date in writing for being hired.

F. Pre-suit demand—be prepared to act crisply. This sets a tone for future dealings.

G. Confirm possibly important client communications.

1. Anticipate problems

2. Confirmation is best, but an internal memo helps.

II. Pleading

A. Question of depth—how much to include

1. Court Rules—varies by jurisdiction

2. Saying more than bare minimum: Adverse Use v. Positive Use—varies with the situation.

a. Tell a story or avoid being quoted.

b. How solid are facts?

c. Will anyone ever read the pleading?

d. Language in pleading to be quoted for another purpose.

B. Joinder questions

1. Will additional parties add anything meaningful?

a. Ability to respond in damages.

b. Ability to respond to discovery.

2. Include possible delay in initiation of discovery and jurisdictional issues in consideration.

III. Motions

A. Timing; motion v. answer

1. Saving time and money

   a. Is this an issue that can be decided later?

   b. Any reason to seek resolution earlier or later?

   c. When is the judge most likely to view the motion favorably?

   d. A lost motion might prejudice a later filing.

B. Type

   1. Might sneak some facts into a pleading-based motion

   2. Fact-based motions often invite discovery—not a shortcut

C. Consider judge's general leaning both on the merits and on quick resolution—Does the judge want to get rid of the case on a motion? Consider how cases of that type are usually resolved. Example—employment cases on summary judgment in some areas.

D. Fallacy of motions before settlement—increases cost for both sides without getting anything lasting.

   1. Carrier can take the long view.

   2. Plaintiff may pay for the insurance of a sure recovery (assuming counsel has not oversold the case). Also, savings in fees if hourly.

IV. Discovery

A. As to documents,

   1. Make the request broad enough so that no one can say that you did not ask for a document you might want later.

      a. Note that there is a small problem if the other side gives all the documents—you have to read them.

      b. Overbreadth issue can be resolved by a carve-out later in consultation with counsel—temporary narrowing.

2. In framing the request, consider how documents will actually be retrieved—avoids later problems.

3. For emails between identified parties, easy and usually not burdensome to get all.

    a. Better than a filter

    b. Gives a feeling for prior communications not previously possible.

B. Interrogatories

1. Can use for objective data. This can be raw data or a summary.

2. Judge Will's comments about interrogatories—not usually helpful.

3. Response is from a party—often more usable.

4. Requires an update—will this help?

5. Can tailor discovery to a legal standard. Ask other side to set forth the factual basis of its claim. Sets the stage for a fact-based motion, like summary judgment.

C. Timing of depositions.

1. Overlapping goals:

    a. Admissions

    b. Finding evidence and

    c. Preparation for trial.

2. Often better to be early.

    a. Little downside and the other side's position is then locked in.

    b. In an extreme case, can ask to take a second deposition.

    c. Permission required in the federal system and, perhaps, as a matter of custom elsewhere.

3. Proposed questions—separate pages for flexibility in order

4. Try out cross v. letting witness prepare for trial

5. Summarize into usable admissions

6. Focus should be on a trial, not settlement

   a. Good Faith

   b. Transparent focus on settlement is clearly counter-productive.

D. Meet and confer

1. Write self-serving letter possibly to be attached to later motion.

2. Do not say anything you do not want quoted.

V. Negotiations

A. Test the waters early

B. Establish dialogue

C. Do not make later settlement more difficult

1. No threats

2. Avoid formal demands

D. Mediation to overcome communication barrier—at the right time

1. Sufficient knowledge to understand likely outcomes

2. Motivation to settle.

E. Settlement

1. Sometimes prepare agreement in advance with blank spaces—to avoid later problems.

2. Possible use of a term sheet—provides a reference for later.

3. When to create a novation as compared to a delayed deal. Important to have a deal or important to have it right.

VI. Trial

A. Cross Folder—start early

B. Motions in limine—list early

C. Exhibits—

1. Err on inclusion (if required in advance)
2. Think about foundation well before discovery closes

D. Notes

1. Every day—
   a. Use for cross
   b. Later witnesses, and
   c. Closing.
2. Also from client, etc.
   a. Might help
   b. Team effort

E. Expert

1. Maybe consult early
   a. For help in developing the facts.
   b. Maybe even deposition questions
2. Defer major work until needed—to save expense

VI. Appeal

A. Protect Record

1. Objections
2. Offer of proof
3. Put items into the record—*e.g.,* recitals in motions
   a. May not be technically correct.
   b. Might help.

B. Try to get reasons from the trial court on the record.