"SUE THE BASTARD! . . . I THINK"

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We live in a litigious society. When all else fails, we turn to the courts for relief. This isn't a bad thing, *per se*. In the old days, people would draw pistols at sundown to settle disputes, which isn't exactly deciding a case on the merits. Fortunately, our modern democracy provides a better forum—the court system—for settling disputes. This doesn't mean, however, that you should rush to use it. There's a great deal to consider before telling your attorney to "damn the torpedoes" and plunge into litigation.

I say this as a lawyer who litigates frequently. Litigation is not all bad and a great deal of good can and does come from it, even though it can be very expensive. Patent infringement cases are one such example. An infringement case can cost between $3 to $6 million dollars to bring to trial. Yet there are often millions, if not tens (or hundreds) of millions of dollars at stake. Spending $5 million to obtain a $30 million judgment or settlement is a sound investment. This doesn't always happen though and sometimes the plaintiff gets nothing. Listed below are a few factors to consider when deciding whether to litigate. For those who have been through this process, nothing here will be all that surprising. For those of you who are contemplating it, consider this just more food for thought.

"Live Long and Prosper." Had Mr. Spock ever been sued, I doubt he would have said this to the opposing party. The Vulcans, however, got it right in one respect: Keep emotion out of it. For the most part, when it comes to business litigation, try to separate yourself from the emotional aspects of the case. This isn't always easy to do. Yes, you may be 100% completely and totally right: The other party is heartless, dishonest, and corrupt and cheated you out of your hard-earned money.

Welcome to the rough-and-tumble business world. We are all mistreated, lied to, and abused and have encountered our share of sleazebags and crooks. While you may want to commiserate about your own loss, the sad reality is that we all belong to the same club in some way, and it's not all that elite. Most lawyers can sympathize. We've had clients who lie to us, scream at us, and suddenly become ungrateful after helping them with a difficult matter. It's an unfortunate cost of doing business. Still, this doesn't mean that you always have to sit there and take it. There are times when fighting back is also a required cost of doing business. Nevertheless, getting too emotionally involved can impair your judgment.

I've often told my business clients that unless the other side has shot your dog or raped your wife, it's typically about the money. It's a coarse way to put it, but it happens to be true most of the time. That's all the court will end up giving you anyway. If you expect the judge to turn back the clock or order the other side to beg for your forgiveness, you can forget it. All the court can do is award you money and sometimes keep the other side from engaging in certain conduct. If this is enough for you, fine. If you're fighting because of the principles at stake—and these can be important too—just realize that these principles have a dollar value associated with them (whether you like it or not). I've been involved in cases where the money does rightfully take a back seat to other more important considerations. Nevertheless, you'll need to regularly reassess your expectations and principles during the litigation. And you'll need to keep your emotions in check throughout.

6 = 30 . . . or 40 . . . or 50. If there's one misconception about litigation that clients don't realize, it's this: Preparation is time-consuming. The 2, 4, or 6 hours spent in court is a small fraction of all the work it took to get there. I've heard my share of formulas in this regard: "For every 1 hour in the courtroom, it takes 5 hours of preparation." Or 6 hours. Or 8 hours. In reality, these numbers are meaningless. It depends on so many

factors that nailing down a precise number is nearly impossible. For example, if the issues are novel or complex, this will require more preparation. The nature of the case is also a factor. A mother in danger of losing custody of her child will almost certainly require more preparation than a business dispute. The resources that are brought to bear are also important. If the other party retains 3 lawyers to fight you, this will take more time. And of course, every lawyer has a different style of preparation. Remember, lawyers are ethically obligated to give competent and zealous representation. Preparation is an important part of this.

I remember one grueling case where an attorney's failure to prepare was showcased vividly. He called his only expert witness to the stand, a respected psychiatrist who had written a favorable report to both of our clients. The expert was only available to testify during the 4 hour morning session. After 2 hours of questioning, the lawyer excused himself, walked over to me, and whispered that he had exhausted all of his written questions—even though he had only gone through half of the report. I was angry, to say the least. I had told the attorney several days beforehand that I wouldn't be ready to question his expert that day because I was busy preparing for witnesses to be called that afternoon. I whispered back that he had better ask some questions quickly or he risked compromising his client's case. Had he told the judge that he didn't prepare enough material, it would not have been pretty. He returned to the podium. For the next 1½ hours, he stumbled through his questions, taking long pauses as he read the report. It was painful to watch and obvious to everyone that he was "winging it," but he had to make it last until the end of the session. What choice did he have? Either he was going to represent his client or he wasn't. It's one thing to wing it when a witness takes testimony in a new direction. It's quite another to do so because you failed to prepare for your own witness properly. His client could have paid the price for his lack of preparation.

Don't underestimate preparation time. Yes, it may be expensive, but you certainly don't want your lawyer to be unprepared. This could be even more costly. What about "over-preparation?" I'm not sure what this means, although I hear it on occasion. Knowing every salient facet of your case isn't being over-prepared, it's simply good lawyering. Still, feel free to question your attorney as to what's involved with the preparation. This may help give you a handle on anticipated costs, but remember: It would only be an estimate. As discussed below, no one can predict what will happen throughout the litigation.

Murphy, Esq. Even thorough preparation has its limits. We're all familiar with Murphy's Law. This is the time-honored adage which states: "Anything that can go wrong will go wrong." It holds particularly true in complex situations like litigation. Even a well-prepared case is subject to all sorts of surprises and unknowns. Litigation is never a sure thing no matter how good you think your case is. Nobody knows what a judge will do, what a witness will say, and what evidence will ultimately be entered. Good lawyers try to anticipate as much as they can, but it's impossible to know what will happen. Things can and do go wrong.

I practiced for many years at the juvenile court in Massachusetts. The issues were far more significant than breached contracts. Parents could have their rights terminated and never see their children again. One would think given these critical interests that I would have had access to all of the discovery I needed. ("Discovery" is the process used to find out all information about a case.) Discovery, however, was extremely limited at this court and an attorney had to request special permission for it, which was typically denied. It was one of the more restrictive forums in which I'd practiced and was unique in this regard.

What did it mean for the case? In many instances, the first time the opposing party's witnesses took the stand at trial was the first time I questioned (or sometimes even spoke to) them. From a practical perspective, I was dealing with many unknowns—far more than in other cases where discovery was allowed liberally. I never knew what the witnesses would say. Sometimes they said things which were totally unexpected and adverse to my client. The age-old adage in the legal profession, "you shouldn't ask a question that you don't know the answer to" really didn't apply. This maxim is implicitly premised upon knowing enough pertinent information about your case in the first place to know which questions to ask. I rarely had this luxury. To make matters worse, the facts of these cases often continued to develop during trial, almost to the very end. This type of dynamic required even more extensive preparation. To say I had to thoroughly understand my client's case is an understatement. Even then, nothing ever went as planned.

While most litigation isn't as restrictive as this, it taught me a valuable lesson: Expect the unexpected. And realize that you just can't anticipate everything no matter how much you prepare. Don't expect your lawyer to be omniscient. You're not, or else you never would have done business with the party that you've now had to sue. So unexpected things will occur. How your lawyer deals with them and what impact they will have on the case is a different matter.

The Money Pit. These points about preparation and Murphy's Law translate into one thing: Money. Think of litigation as a large home improvement project. Everything takes longer, costs more, and is far messier than you first realize. Perhaps the contractor discovered hidden damage. Maybe a subcontractor has suddenly disappeared. Or maybe you've decided to make changes to the project. Whatever the reason, costs tend to escalate quickly. The same sorts of things happen during litigation. Perhaps a piece of evidence requires more investigation than anticipated. Maybe a key witness has disappeared. Your attorney may have to hire other experts, lawyers, and support staff. This gets expensive.

Whenever a client tells me, "sue and I don't care what it costs," I worry. Sooner or later, costs usually do become a factor, even with big companies. For example, I represented a software developer and sued a large company for breaching a $55,000 contract. Legal fees were mounting. We held firm with our settlement offer and refused to budge. They eventually gave in. Opposing counsel later admitted that his client realized it would be cheaper to settle than to continue paying its lawyers, which it could have easily done. Of course, the fact that we had clear evidence of their breach may have also been a factor, but the case settled for a satisfactory amount and this was all that mattered to my client. The opposing party didn't want a $55,000 case to cost $75,000 or more and made a business decision. If, however, there was more at stake and my client demanded $200,000, the results might have been different.

And remember, the money spent is only one type of cost. Don't underestimate the value of your own time. Litigation will require you to spend a great deal of your time working closely with your lawyer before and during trial. This will almost certainly cost you in terms of either an actual dollar value that you place on your time or the lost opportunity cost that could be spent doing other things (or both). And of course, don't underestimate the emotional and psychological costs of litigation. It's a stressful and demanding process. This also needs to be included in your overall decision when weighing the costs of going to trial.

The Settlement Bug. If you have a meritorious case, talk of settlement will likely be mentioned at some point. If not by the other side, it will almost certainly be brought up by the trial judge, who will more than likely try to encourage the parties to settle instead of having a full scale trial. Judges have many means at their disposal to do this. Don't, however, get the wrong impression. Sometimes settlement just isn't possible.

Good lawyers don't prepare cases for settlement; they prepare them for trial. Settlement is something that happens along the way. And this only happens if it's in your best interests to do so. The motivating factor for both parties is the uncertainty of going to trial. After all, anything can happen. When settlement occurs depends upon the case. While I've occasionally settled a case soon after I filed it, in most instances the settlement came much later in the process.

Don't tell your lawyer to prepare your case for settlement. Whenever I hear this, I interpret it to mean that my client isn't committed to going the distance should a trial become necessary. While it's true most business disputes settle, your case may be the exception. As frustrating and expensive as this may be, it's not always apparent at the outset whether your case falls into this category. Many things can and do happen along the way.

So whether there's a settlement or an all-out trial: Be prepared, because litigation is a form of battle, and battle has its price. And it's messy. If you've weighed all of the costs and benefits, are committed to your cause, and are certain this is what you want, then as Shakespeare eloquently stated centuries ago: "Cry 'Havoc' and let slip the dogs of war." Or as we say in today's vernacular: "Sue the bastard!"

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