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WHEN EVALUATING A CASE, LOOK AT ‘THE BIG PICTURE’

Often, expensive litigation
produces no winners –
and unhappy clients

By **NEAL L. MOSKOW**

I was asked to write about the state of construction law. I thought about several of the construction arbitrations and trials I've been involved with recently and my concern that the litigation costs have been astronomical – through no fault of mine! In fact, the amount of attorney and expert

controlling attorneys' fees and costs than by resolving cases before those charges are generated.

We were taught as young lawyers to “look at the big picture,” to analyze our cases' strengths and weaknesses, and to evaluate probable outcomes. We were taught to do this because we owe a duty to our clients and the profession to try only those

We want to believe our clients when they say these things because our advice may be based on it, and our future may well depend on the fees generated by such situations and sentiments. But here's a little secret I've learned over the last 20 years: clients don't mean it. Oh, they think they do, and, when they hire, us they're honestly committed to the litigation. When it's all over, though, clients resent having paid us a lot of money for what has been a stressful, unpleasant, and costly chapter in their lives. What clients really want is to win and have that result reflected in whether there was value in our legal services and whether there was a return on their investment in legal fees. If a client can get value early on in the process without devoting lots of money, time, energy and stress, so much the better. That's why we need to look at the big picture from day one.

No One Happy

I recently concluded a case where I was hired by a homeowner to discharge a mechanic's lien and sue for costs to correct and complete the work. My position was that the AIA Form A-101/201 contract in question did not contain a three-day right of rescission and, therefore, violated the Home Improvement Contractors Act. Opposing counsel disagreed. We decided to discharge the lien by agreement and go to binding arbitration rather than have a protracted preliminary hearing on the lien's viability. We selected an arbitrator, scheduled the hearing, and did some limited discovery. So far so good: we looked for ways to streamline the process and to limit time and money involved in resolving the matter. But we still missed the big picture because, after two years of litigation that included hearings,



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time involved, not to mention the volume of documents exchanged in discovery (and costs associated therewith), often creates a situation where winning the case is no longer enough: a win without an award of attorneys' fees is now considered a loss.

In thinking about the greatest challenges we face as construction lawyers (other than the economy), I can think of no greater obstacle than getting control of litigation costs. And I can think of no better way of

cases that need to be tried, settle those that should be settled, and avoid or withdraw those cases that are of little merit. All too often, though, we get caught up in the fight, and the benefits of litigation to our clients are dubious at best when the fees and costs are factored in. In this time of economic crisis, it is even more imperative that we remember to evaluate the big picture.

Clients hire us because they have a conflict that they cannot resolve on their own. Often, clients are angry and are itching for a fight. They say things like, “I'd rather pay you than them,” or “I don't care what it costs, just sue him,” or “Since attorneys' fees are recoverable, make 'em pay!”

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post hearing briefs, and the payment of arbitration fees, there was no “value” to the case. The arbitrator found that the contract did, in fact, violate HICA and, therefore, the contractor was barred from recovery, but he also awarded only a fraction of the damages sought so that the monies expended by both sides on the litigation accomplished little, if anything. No one is happy.

My first boss (and one of the best trial lawyers I know) taught me that while the clients are fighting with each other, lawyers shouldn't. By the time I started working with him he had been trying cases for a couple of decades, and he would tell me war stories about the epic courtroom battles he had had with the deans of the Connecticut bar. I had the privilege of witnessing a few skirmishes myself. As comfortable as he was in the courtroom, though, my mentor would resolve many matters with a simple phone call to opposing counsel. It seemed to me at the time that he knew everyone, and I was amazed how quickly he could size up a complex piece of litigation, communicate his views to opposing lawyers, and convince them of the appropriate outcome. I learned from him that this was only possible if you were willing to extend professional courtesy whenever possible. I also learned that sometimes extending courtesy is harder than trying the case itself.

Sensible Solutions

There's a lawyer in Hartford who I deal with regularly on large construction mat-

ters. We tried a case against each other more than a decade ago and have probably had several dozen matters together since. I have tremendous respect for his knowledge and skill, and I have hoodwinked him into thinking I have a little myself. We pride ourselves on the fact that we save our clients tens of thousands of dollars each year because we can call each other up, openly discuss the merits of the matter at hand, and then fashion sensible resolutions that are fair to both sides.

In doing this, we take the risk that we may appear weak and that we undoubtedly make the other lawyer's job easier by disclosing things that would otherwise take lengthy discovery. We also know that settling what could be a very large case before the bullets fly is not good for our own pecuniary interests. We do it because we understand the need to make the system work fairly and economically, even if that means that neither of the clients (or lawyers!) “wins” the case.

I'm not trying to preach, and I'm sorry if this article comes across that way. I try many cases each year so I understand better than most that just because you want to resolve a matter doesn't make it so; one hand clapping makes no noise, so even if you and your client get it, opposing counsel and/or his client may not.

What I'm talking about, though, is the need to identify the big picture at the outset of a case because it's good for business – *the client's and yours!* In my experience, the three best sources for construction

litigation business are repeat clients, referrals from other lawyers, and referrals from existing clients. Each one of these groups will make the decision to use you based on your professional skill and your ability to deliver value. No one wants to win the battle against the opposing party only to learn he lost the legal fee war with his own attorney.

If we honestly handicap the potential outcomes and costs of a case early on in the process, several things happen: 1) our client can fairly evaluate the upside and downside of the litigation before spending a ton of money; 2) the discussion surrounding outcomes will help us identify what is most important to our client; 3) we will establish a level trust with our client and confirm that we want what's best for him, even if that means that it's at the expense of our own fees; 4) the client's expectations are controlled and appropriate so that he will be more receptive to settlement; and 5) we create a perception that no matter what happens, we provided both the professional judgment and value that the client initially sought. In the end, that's all any client can reasonably expect.

I'm proud to be a trial lawyer. Professionally speaking, there's nothing better than being on trial. However, true professional satisfaction comes from knowing that I achieved a fair result for my client under all of the circumstances. Well, that and when the next case comes in the door because my clients and other lawyers know that I get the big picture. ■