Good Communication Matters

The Importance of Understanding Your Retail and Hospitality Client

By Jeffrey M. Wasick

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More than ever, companies in the retail and hospitality space seek outside counsel who understand and internalize their core principles, effectively communicate on developments and recommendations in assigned cases, and continue to implement innovative tactics to further client interests and big picture goals. The following are tips and recommendations on how to identify and meet client goals, communicate effectively with your client, and efficiently execute defense strategies.

Good communication between counsel and client is crucial for effective, successful teamwork in handling claims and litigation in the retail and hospitality space. Defense counsel must listen to the client and discern the client's goals for its outside counsel. In most instances, the client's business will operate in multiple jurisdictions, and so your client's in-house legal department's strategic approach will incorporate best practices gathered by way of lessons and experiences in many parts of the country. In kind, defense counsel will often be the source of novel and innovative practices that he or she can communicate to the client.

Defense counsel should adapt to broad client concerns, national trends in the client marketplace and in the law, and to the characteristics of the specific cases assigned. Clients expect their outside counsel will know and follow litigation guidelines, and consistently meeting those expectations is just the baseline. Above that baseline of meeting expectations, outstanding counsel are those who effectively evaluate cases on their individual bases with a well-defined strategy, execute strategy in a timely fashion to settle those cases that ought to be settled, and to timely advance to disposition via motion or trial those cases that ought not be settled.

Understand Your Client's Definition of a "Win"

Effective game planning requires that defense counsel and the client have a good

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mutual understanding of how the client defines a "win." What is a "win"? Does defense counsel's definition of a "win" match the client's? Important considerations to discuss include time to resolution, cost to achieve resolution, and big-picture concerns, such as how the resolution of one case might affect other pending cases or future claims.

Accepted Tender

Accepted tenders are at the top of the list of outcomes as one of, if not the most, desirable. In many situations, your client has paid consideration to some third party for risk allocation.

- The lease agreement may specify that the landlord is responsible for claims occurring outside the retail store "box."
- The vendor agreement may obligate the vendor to bear the risk of claims arising from the vendor's work stocking products on the store shelves.
- The service agreement may specify that the service provider agrees to bear the risk of claims arising out of services (*e.g.*, floor cleaning) or products (*e.g.*, floor mats).

As defense counsel you will take early action to enforce the agreement and compel the other party to fulfill its contractual obligations for which your client negotiated terms of consideration for exactly those risk-shifting indemnity and insurance procurement provisions. Too often, a party owing your client duties will sit back and wait, perhaps because that is sometimes effective for them.

- Assert tender and request coverage early and reassert the demand often.
- Be ready to step up the pressure, with client authorization, for instance by cross-claiming the other party, or by pursuing an independent action (*e.g.*, third-party complaint or separate action).

Continue to remind the other party what the party owes in terms of reimbursement of incurred defense costs. Alert the other side what its exposure is in specific dollar figures and provide continued opportunities to the other side to do the right thing.

Dispositive Motion or Motion to Dismiss

Resolution by motion will be close to the top of the scale in terms of favorable outcomes. Timing for dispositive motions and motions to dismiss will vary by jurisdiction, as well as by the specifics of each case assigned.

Is the case suitable for an early motion for summary judgment? By requiring the opposing party to respond to a dispositive motion, will your opponent be forced to put their cards on the table and commit to their theory of the case?

Settlement

Settlement may run the gamut from early direct negotiations with opposing counsel to private mediation at the pre-trial order stage. The timing of settlement efforts will likely determine your client's assessment of it directly as a favorable means to an end (or otherwise).

Clients do not want to see a case run through a cookie-cutter process that results in substantial bills just to see the matter resolve. Initiating direct negotiations with opposing counsel at an early stage, if successful, will be the best option to control and minimize defense costs.

- Engage in settlement discussion as early as practicable (unless the goal is a trial or a dispositive motion).
- Initiate direct talks, which allow defense counsel to rediscover their negotiating skills.
- Reserve private mediation for high-dollar or high-profile matters. (Because mediation tends to be more prevalent, mediation costs have risen significantly, making it less cost-effective for some cases.)
- Consider making use of "free" court-ordered settlement conferences.

Court-Annexed or Court-Sponsored Alternative Dispute Resolution Options

By statute, federal district courts are required to develop alternative dispute resolution (ADR) procedures for use in civil actions. With some exceptions, "[e]ach district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including but not limited to mediation, early neutral evaluation, mini-trial, and arbitration[….]" 28 U. S. C. §652(a). Under certain circumstances, a federal district judge may even order parties to submit to private mediation. *In re Atl. Pipe Corp.*, 304 F. 3d 135, 144–145 (1st Cir. 2002) (holding that a court may order an unwilling party to take part in and share costs of private mediation, within reasonable limits).

If a settlement conference is ordered under Federal Rule 16(c)(2)(I), attendance is required of at least one of the attorneys for each party with authority to stipulate to and make admissions. Fed. R. Civ. P. 16.

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Free court-annexed ADR may require in-person attendance of a client representative or an insurance adjuster, in addition to defense counsel. Fed. R. Civ. P. 16(c)(1) ("[…T]he court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.").

The "in-person attendance" rule varies by jurisdiction, and such requirement may alter the "free" character of the proceeding. So be sure to have that discussion with the client beforehand.

Other Practice Pointers to Obtain a Win via Settlement

From defense counsel's standpoint, effective *early* settlement negotiations require counsel to be *prompt* and *persistent* in asking for and obtaining settlement authority. Have the conversation with your point of contact. Knowing that your client's goal is to negotiate early settlement where appropriate, persistently communicate with the adjuster to get the express authorization that is the precondition for you to engage in the direct talks.

The somewhat intangible benefits of trying cases to verdict include building the reputation of the client's defense counsel as a trial attorney, which can be expected to hold down settlement values in other cases and may result in claims simply not making it into litigation in the first place

If there is an intermediary to whom you directly report, and the intermediary's "process" seems to be impeding your client's goal (*e.g.*, early engagement in settlement negotiations), the Model Rules provide support for the lawyer to take necessary steps. The "lawyer may initiate advice to a client when doing so appears to be in the client's interest." Model Rules of Prof'l Conduct R. 2.1 cmt. (1983) (Offering Advice).

In short, watch out for bottlenecks between you and the decision maker. Take reasonable measures to follow up with your point of contact on the file to get the authority needed to move the case closer to the desired outcome of early settlement. If necessary, step up the communication to the next level.

Trial

Winning an outright defense verdict goes in the "win" column. And other verdicts may as well, particularly when trying cases is part of a broader strategy for achieving client goals. When 95 to 96 percent of personal injury lawsuits settle prior to trial, identifying which of your cases fit into the 4 to 5 percent is important. https://thelawdictionary.org.

Have the conversation with your client about the definition of a "win." Determine whether the client agrees with your classification of a particular case as one to try. The somewhat intangible benefits of trying cases to verdict include building the reputation of the client's defense counsel as a trial attorney, which can be expected to hold down settlement values in other cases and may result in claims simply not making it into litigation in the first place.

Make Your Reporting Prompt and Succinct

Understand your client's reporting expectations, which may vary, depending on the claim size. Reporting structures differ from client to client, but all report readers have finite time, so be the reporter who communicates most effectively. Be mindful of these tips:

- Avoid unnecessarily lengthy reports and reporting efforts that don't advance goals.
- Early goal setting is part and parcel of effective reporting.
- Think creatively in terms of strategy.
- Avoid last minute resolutions.

Aim for succinct, timely reporting that achieves the following:

- Promptly inform the client about significant developments and information.
- Reflect the client's objectives in report recommendations and articulate the means of achieving those objectives.
- Provide explanation as appropriate to supply the client with information germane to important decisions (be succinct and communicate the key information).

See, e.g., Model Rules of Prof'l Conduct R. 1.4 (1983).

Pointers that bear repeating:

- No surprises.
- Revise the budget as early as possible when facts change. If the case is one for trial, supply a budget that covers expenses through the trial.
- Incorporate reporting on depositions into case strategy context. How does this deponent's testimony affect the strategy outlined previously? Good reporting goes hand in hand with defense counsel's role as advisor and good steward of client resources.

Advance Each Case Efficiently

Defense counsel's proactive role is to set the course, steer the course, and recommend and execute course corrections as new information becomes known. Understanding your client's goals is paramount and reporting the facts that relate to the plan to achieve those goals is imperative. Your clients are looking for your independent professional judgment and candid advice. *See, e.g.,* Model Rules of Prof'l Conduct R. 2.1 (1983). Be proactive in propelling the case to the optimal resolution, given the facts.

Effective Use of Consulting and Testifying Experts

Expert discovery is likely to represent a substantial component of your client's litigation expenses, so understandably, their use should be carefully considered, and prior approval obtained. Does the case warrant the employment of experts or other expert discovery? Consider strategic concerns, including the following:

- How likely is it that you can get the evidence and testimony you want to present to the jury on the issue via a discovery deposition of an opposing expert or a treating physician?
- Could you discredit the opposing expert through cross-examination?
- Would designating an opposition expert have the tendency to lend credence to an otherwise spurious theory espoused by your opponent?
- Would there likely be a substantial benefit to your client's defense to have a consulting expert supply precisely tailored cross-examination questions for use with the deposition of the plaintiff, or of the opposition expert?

Keep your duty to recommend appropriate exerts in mind. "Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation." Model Rules of Prof'l Conduct R. 2.1 cmt. (1983) (Scope of Advice).

Consider case-specific issues for which an expert may be particularly helpful, such as these:

- Expert on your client's video surveillance system or computer system, especially to neutralize contentions of spoliation.
- Expert on medical billing record-keeping, practices, and the reasonableness of charges, especially where inflated billing is identified and in cases involving surgical financing or litigation funding.

Efficiency in Investigation and Discovery

In your initial assignment and early investigation for each new file, communicate requests for material information and records to your client as early as possible, understanding that adequate response time will be needed.

- Distill voluminous discovery to its essence. (If your opponent asks for one type of information in ten different questions, synthesize those questions into one category for your client.)
- Develop a consistent and rational approach to early investigation and information and document gathering, to streamline process, save time, and reduce billing.

Most new assignments require taking a two-fold approach to investigation and discovery: first, having a conference with the other counsel to find an agreeable limitation or clarification to make a request not ambiguous or vague; and second, having such a conference with your own client to educate yourself on the topic of the discovery and to identify individuals within the organization best able to provide further information that you will need (not to respond to discovery, but also most likely to defend your client against allegations on the material issues).

The proactive lawyer will advance the client's positions by taking affirmative steps to seek reasonable limits on overly broad discovery and to game-plan effectively with the client.

Responding to any non-frivolous discovery requires defense counsel to exercise judgment in interpreting the discovery and evaluating whether it falls within the limits of fairness. Further, defense counsel must exercise judgment in defining the parameters of "reasonable diligence" in responding to proper discovery. These core principles of professional responsibility are set forth in Model Rule 3.4, "Fairness to the Opposing Party and Counsel." Among other things, "[a] lawyer shall not… in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party[.]" *Id*. Very often the solution is picking up the phone and hashing it out with the other side.

Inform the court of the same facts and concerns that make a discovery request troubling to a client. If the discovery is disproportionately time-consuming to answer, the proportionality argument (contemporary version of "undue burden and expense") may apply. The issue affects clients and courts alike: "Giving careful thought to the proportionality factors at the early stages of the case, and, especially when drafting discovery requests, can be key in preventing unnecessary discovery battles and winning the battles that do arise." Hon. Karen L. Stevenson, *Proportionality in Discovery Disputes: A Year of Changes*, Litigation News, Am. Bar Ass'n (Mar. 22, 2017), https://www.americanbar.org.

By providing recommendations to your client on disclosure strategy, aim to avoid discovery disputes where there is room to "give." Each case and situation will differ, but generally, if you that think your trial court judge is likely to compel some discovery, have the discussion with your client about it. It is important to differentiate between objections as matters of principle (taking positions in discovery where the big picture effect wins out over the expense in the individual case), and those objections where, all things considered, your client stands to gain from compromise.

Conclusion: Aim to Be Strategic, Proactive, and Outcome Driven

Retail and hospitality companies must consider the bottom line for the products and services they sell. They also are considering the cost-effectiveness of the services they buy. Your client may have already told you how it wants to dispose of the remaining 95 percent of issues that do not reach a trial, but if not, ask! Don't let process drive your strategy: be strategic, proactive, and outcome driven.

What are your client's particular priorities? Is your client's expectation for you to try every assigned case, to settle every case, or something in between? What classifications does your client use, and how can you best report to your client within those classifications? How can you best advance goals in the most cost-effective manner?

Within the highly competitive retail and hospitality marketplace, the pressure to control costs is ever present and unlikely to diminish. Understanding your client's goals and strategy for litigated claims should better enable you to provide exceptional service as defense counsel.