An Oldie but Goodie for Effective Litigators to Consider: Litigotiation

By Richard L. Hurford

During the past month, I have had the good fortune to present to and learn from judges during a seminar hosted by the Michigan Judicial Institute on evidence-based practices being pursued in the state trial courts. I also recently participated in a panel discussion with excellent business litigators during an ICLE webinar program that provided insightful practice pointers for those who litigate in Michigan's business courts.

These presentations underscored how an old idea, coined approximately 30 years ago by Mark Galanter, is still a goodie and gaining greater currency in the courts: litigotiation. With the evolution of judicial case-management practices in state and federal courts, litigators would be well served to recognize this evolution and adapt accordingly.

As discussed during the recent Michigan Judicial Institute program, the Michigan Supreme Court Administrative Office (SCAO) has highly encouraged the use of evidence-based practices to assist litigants in resolving disputes at the earliest possible phase in the litigation. SCAO has summarized the evolving nature of this role as the difference between a traditional trial judge and a trial judge and dispute resolution advisor (see table at right).[1]

This evolving role of the trial judge and dispute resolution advisor ties in quite effectively with the concept of litigotiation. Galanter described this term as:

> On the contemporary American legal scene the negotiation of disputes is not an alternative to litigation, it *is* litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that we might call LITIGOTIATION—that is, the strategic pursuit of a settlement through mobilizing the court process.[2]

In sum, litigation now involves being aware of and strategically harnessing newly evolving judicial case-management processes to augment dispute resolution negotiations and vice versa. Early evaluation and assessment of the case, an early exploration of the client's BATNA (best alternative to a negotiated agreement), and early formulation of integrated litigation and negotiation strategies to achieve the BATNA are now more important than ever before, with no end to this trend in sight.

Traditional Trial Judge	Trial Judge and Dispute Resolution Advisor
Short-term and long-term goals: focuses the parties on a trial date and prepares them for trial (98.6 percent of cases will not go to trial)	Short-term and long-term goals: assists the parties to voluntarily resolve the dispute if possible (short term) and prepares for trial as necessary (long term)
Typically relies on a computer-generated scheduling order	Conducts an early case conference with counsel to establish a differentiated case-management plan and triage cases for effective ADR strategies
Presides over discovery disputes and motion practice	Stages proportional/staged discovery and motion practice to support agreed-upon ADR strategies
Orders case evaluation just before the trial date as the only ADR activity in the case (with mediation to follow in some cases)	Explores multiple and early ADR strategies throughout the life of the case and conducts periodic status updates and moderated settlement conferences on ADR possibilities involving a broader array of techniques than mediation and case evaluation
Sole focus is determining legal rights and remedies	In addition to determining legal rights and remedies, judges and neutrals explore the parties' interests and needs-based solutions

Whether in Michigan's trial courts—particularly the business courts—or federal courts, judicial case-management practices increasingly emphasize:

- Early judicial involvement during a meeting with lead counsel
- The appointment of a mutually agreed-upon neutral at the early case-management conference

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- The early mandatory exchange of base information either before or immediately after the early case-management meeting
- Post-consultation with counsel, the development of staged/proportionate discovery strategies that support an early and meaningful ADR event
- A growing reluctance to entertain traditional case evaluation pursuant to MCR 2.403 as the first and only ADR event
- The exploration of a broader array of ADR processes other than mediation and case evaluation

In the not-too-distant future, gone will be the days when a party will be afforded the opportunity to complete all discovery necessary to prepare for a trial, engage in case evaluation as the sole ADR strategy for the dispute, and then determine if a settlement will be reached during a conference that immediately precedes the trial. At the time of the case-management conference, counsel must consider which ADR processes might be most appropriate to potentially resolve the dispute at the earliest practicable date.

SCAO recently offered training to all Michigan trial court judges on a publication entitled *Michigan Judges Guide to ADR Practice and Procedure*.[3] The guide, which outlines more than 20 ADR processes for resolving or narrowing the issues in a dispute, is truly a must-read for litigators.[4] It generally describes for the judiciary the various processes and provides an overview of the indications and contraindications for each. Certainly, if the courts have information as to when early neutral fact-finding, an early neutral evaluation, or an expert hearing might be advisable, counsel should be knowledgeable and prepared to address these issues in an early meeting with the court. If one or more of these processes are either advisable or inadvisable to further the best interests of the client, counsel should develop the appropriate rationale to respond to the court's suggestions and potentially be prepared to suggest other processes that may be more effective in achieving the client's BATNA. If opposing counsel cannot agree on the best processes to employ and when those processes will have the best potential for success, effectively advocating the preferred position to the judge becomes an important skill.

The concept of staged/proportionate discovery in state and federal courts is predicated on the premise that the information and discovery necessary to prepare for a meaningful ADR event is only a subset of the information and discovery necessary to prepare for a trial. Thus, one more evidence-based practice being pursued by a growing number of judges to achieve a speedy, just, and efficient dispute resolution is focusing initial discovery on what is necessary to conduct a meaningful ADR event. If the ADR event (mediation or otherwise) is unsuccessful in resolving the entire dispute, the parties will be permitted to pursue additional discovery that may be necessary to prepare for a trial. Of course, the recently amended Federal Rules of Civil Procedure—particularly, Rule 26(b)—will significantly affect the additional discovery the parties will be permitted to pursue, given such factors as the nature of the case, the importance of the issues being litigated, and the amount in controversy.[5]

Determining initial discovery—as well as restricting the initial discovery of the opposing party to appropriate parameters—is a strategy that must be considered at the outset of the case. If, for example, the litigator believes the necessary e-discovery to pave the way to a meaningful mediation will involve 45 search terms and opposing counsel suggests only 20 search terms are necessary, counsel should prepare to address that dispute or develop a strategy to resolve it in a way that is most advantageous to the client.

If the parties are aware the trial judge will require the mandatory early exchange of basic information, early appointment of a mutually satisfactory neutral, and engaging in an early ADR process, then the feasibility of pursuing pre-litigation mediation may take on new significance and efficacy. Even if the parties are unable to agree to a resolution at the time of mediation, there are other significant advantages and potential opportunities that commend the consideration of such a process. If the pre-suit mediation results in an impasse in the resolution of the entire dispute, counsel for the parties may still consider using the services of the neutral to assist in negotiating an agreement on:

- The terms of any necessary protective order that might be presented to the court at the time of the early case-management conference
- The terms of a "standstill" agreement, if appropriate, that will be presented to the court for entry
- The initial discovery, including any mutually agreed-upon limitations, that might be provided to the court at the time the case-management conference is held
- The timing and type of ADR strategies that will be pursued once the litigation begins

Current and evolving judicial attitudes and practices will require new and different approaches by litigators. It may be time to consider those practices required in the strategic pursuit of litigotiation. ■

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ENDNOTES

1. See Foster, Hurford & Toering, *Business Courts, Arbitration, and Pre-Suit Mediation: A Modest Proposal for the Strategic Resolution of Business Disputes*, 35 Mich Bus L J 21 (Fall 2015).
2. Galanter, *Law 940: Litigotiation* <https://media.law.wisc.edu/m/fwfmm/gargoyle_14_1_1.pdf>. All websites cited in this article were accessed February 12, 2016.
3. See SCAO Office of Dispute Resolution, *Michigan Judges Guide to ADR Practice and Procedure* (2015) <http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf >.
4. See *id.*; see also Michigan Courts, *Guide to ADR Processes* <http://www.adrprocesses.com> (a web-based summary of the guide posted online by SCAO).
5. See, e.g., Jones Day Publications, *Significant Changes to the Federal Rules of Civil Procedure Expected to Take Effect December 1, 2015: Practical Implications and What Litigators Need to Know* (September 2015) <http://www.jonesday.com/significant-changes-to-the-federal-rules-of-civil-procedure-expected-to-take-effect-december-1-12015-practical-implications-and-what-litigators-need-to-know-09-25-2015/>.