LITIGATING ON A SHOESTRING

You may wonder how in the world many of the cases that with legitimate causes of action, but with lower damages, can be economically and efficiency pursued. Lawyers sometimes forget that to the average client, a few hundred dollars in damages is significant, and that a few thousand dollars in damages may be catastrophic. How do lawyers handle those cases, yet not go out of business themselves? I have heard that it is not uncommon for firms of any significant size to refuse to take cases without at least six figure damages.

While not the focus of this article, many pursue their claims in small claims courts. While the amounts and subject areas that may be handled are often limited, you can get a case to trial quickly and efficiently - often within 60-90 days. While some small claims courts may not like or even allow attorneys, most do, and either alone or with the assistance of their attorney, a client can get a case to trial.

Years ago litigation may have been trial by ambush. In theory, we are now more civilized, pursuing discovery and motions to limit the issues and otherwise sorting the wheat from the chaff. The problem with such practice is that it can be quite expensive for the client (or the attorney if taken on a contingency). Regardless of the size of the case, the time and energy (hence money) spent preparing a substantive motion can easily exceed $5,000.00. What if you only have $10,000 or $20,000 of damages in the case you are asked to try?

Thanks in substantial part to *Rule* 26, of the *Federal Rules of Procedure*, the substance of which are followed by many if not most states, it is possible to handle, relatively efficiently, cases that might at first glance seem too small to pursue.

Rule 26(f), *F.R.C.P.* provides that as soon as practicable and at least 21 days prior to the due date of the scheduling order (which per *Rule* 16(b) *F.R.C.P.* is within 90 days after the appearance of a defendant or 120 days after service), the parties are to confer to consider the nature and basis of their claims and defenses, the possibilities for a prompt settlement or resolution of the case, and to develop a proposed discovery plan. Unfortunately, the "planning meeting" is often done by telephone, if at all, and a stipulation is put together by one of the parties with the default dates and time periods proscribed by the local rules. The parties' counsel should, but often do not, take the opportunity to discuss the respective positions of the parties and the merits of the case.

A key requirement of the planning meeting is that the parties provide the initial disclosures as are required by *Rule* 26(a)(1). The parties are to disclose, without the need for discovery, 1) the identity of everyone likely to have discoverable information; 2) a copy or

description of all documents to be used to support that parties claims and defenses; 3) a computation of that party's damages; and, 4) any insurance policy that may be in place to satisfy part or all of the judgment.

Rule 26(a)(2) requires that experts be disclosed and a report produced. These disclosures must be made, if not otherwise ordered by the Court, within 90 days of trial. If solely intended as rebuttal, it is to be provided within 30 days of the other party's expert witness disclosure.

Rule 26(a)(3) goes on to require that each party, 1) identify each witness that the party expects to present and those that the party may present at trial; 2) designate those witnesses whose testimony is to be presented by deposition; and, 3) identify each exhibit the party expects to offer and those which the party may offer.

I submit that these required disclosures provide everything *necessary* to defend or prosecute the case. Have you turned over every stone? No. Have you researched and filed every possible motion? No. Can you zealously assert the client's position under the rules of the adversary system[1] and if necessary try the case? YES! For example, instead of depositions, witnesses may be interviewed, either in person or by telephone.

Of course, such a plan of attack must be discussed with the client at the inception of the representation. It is further recommended that it not only be discussed with the client, but that this plan be put in writing and consented to by the client.

While it is possible that the client may be upset with the result, that is true of every case. I have had more clients upset with the process than I have with the results. Furthermore, you will have provided your client a service that they may not otherwise been able to afford. While we all prefer to win, in one of my earliest trials, I discovered that often what the client really wants, even needs, is the opportunity to be heard - win, lose, or draw.

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[1] Preamble, Model Rules of Professional Conduct.