



How “What We Learned in Little League” Paves the Way for Winning Litigation!

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At the beginning of each little league season, my Dad taught the young players of baseball that winning the game required the three “Cs” -

Confidence, Concentration and Coordination.

Those simple lessons, from many years ago, are the same winning ingredients of successful litigation.

Confidence: The Source of Power

As in baseball, whether being the batter, pitcher or outfielder, successful litigation requires a strong belief and conviction that one has the power to shape reality. Certainly, without the batter's confidence that he or she will hit the ball, irrespective of its speed, twists or turns, few home runs would be made, let alone "singles or doubles."

Likewise, in the context of a lawsuit, the litigator and his or her witnesses, both fact and expert, must hold the confidence and assurance that they are on the "right side" and have the power to hit the ball. The power is the ability to marshal persuasive case theories, themes, testimony and evidence. How often do we experience a witness, whether our own or adverse, who suddenly falters and loses confidence in their position? The slide down the slippery slope can be painful. The remedy is plain, though not easy - the lawyer must go the extra mile to ensure that the witness is up to the task, truly owns their testimony and has been effectively prepared to be "fluid and loose" in adjusting to the vagaries of cross-examination.

Of course, this is no simple undertaking and requires that your counsel does the necessary preparatory work to give the witness the balls to hit. What does this mean? The lawyer must view each witness as an essential player of the team, and needs to ensure that they understand the "big picture" as well as the individual role that they play. As the coach, the lawyer must have formed a well-reasoned case theory with a common sense theme that is supported by credible evidence. Only when the witness agrees and adopts the case theory, themes and supporting evidence is he or she in a position to step into the batter's box with the confidence that he or she can and will hit the ball, even if the cross-examiner throws a curve ball question.

By developing a thoughtful and well-armed game plan with thorough preparation, each member of the team (lawyer, client, expert and fact witness) will possess the confidence that they are on the winning side. With that confidence comes the ability to hit the ball into the bleachers with conviction and power.

Concentration: The Power of Focus

Like the successful batter who must concentrate to hit the ball head-on without being distracted, winning litigation requires concentrating one's powers, efforts and attention on the critical legal and factual elements, the evolving and shifting issues at hand and the hot buttons that collectively make a difference in your case.

The need to concentrate applies throughout the litigation process - informal investigation, pleadings, motion practice, discovery, expert case development and trial, as well as mediation. You and your counsel must constantly challenge your case activities to ensure that the efforts being undertaken are focused and headed in the right direction. Important questions to ponder throughout the litigation journey, include:

Are you focusing on what factually and legally needs to be developed to win?

- Are you pursuing focused, informal discovery, short of costly and timely formal discovery?

- Are the pleadings, complaint or responsive pleadings, strategically focused to position your side for prevailing? Does the complaint assert the best legal claims? As the responder, are you effectively challenging the allegations or asserting the appropriate defenses?

- Are the discovery pleadings focused to get the documents and information you need to prevail, and not just following a "cookie-cutter" approach?

- Is your technical case focused or is it a shot-gun approach? Or worse yet, is it merely reactive?

- Are you targeting the pressure points that will convince your adversary and the fact-finder that you have the winning position?

- Are you able to punch-list your "winning points" that are compelling?

- Have you figured out your adversary's strategy, so you have the best counter-strategy?

- Have you considered the priorities of discovery, and what is secondary?

- Are you mindful of the timing and sequence of your discovery and motion efforts?

- During depositions and trial, are you listening to the testimony for follow-up, and not getting glued to a fixed outline?

Only by paying attention to what's happening in the litigation and the shifting evidentiary realities are you able to tackle the toughest challenges you face. After all, a challenge can be solved only once it is recognized. With that mindset, you and your counsel are then in a position to out-think your adversary, energize your team and concentrate your resources to a win!

Coordination: The Power to Control the Game

Baseball, like all sports, calls upon the need to coordinate the team's efforts towards an achievable goal and to individually follow through with the swing or pitch, as it may be.

Winning litigation is no different. Executing a coordinated strategy is key to holding the cutting edge. As Yogi Berra said, "If you don't know where you are going, chances are you will end up somewhere else." You and your counsel must have a strategic game plan. That requires that achievable goals be set and that a flexible plan be formed to guide your activities.

Avoiding the clutter of cliches, like "thinking out of the box," "being a strategic thinker" etc., and getting down to plain talk is best. You and your counsel need to identify the true goals of the case: Is it to win at any costs? How do you define a win? Is the relief sought monetary or equitable? If it's simply monetary, how much money do you seek? Are there business considerations outside the litigation that affect how the case should be handled? Are the business people motivated to do whatever it takes to slog through the long journey? Are you willing to consider early resolution? Has that been bluntly communicated to your adversary? Have you recognized the ugly aspects of the case and the exposure risks? Have you and your counsel exam-

ined the shifting realities of the litigation, as discovery becomes available, witnesses testify, court rulings issue, and been willing to adjust your goals? Are the assumptions you held early on still true? Have you set short term and long term goals for the case?

Only after facing the realities of the above inquiries are you and your counsel in a position to establish a strategy for achieving your litigation goals. To win at the game, that strategy must be smartly coordinated so that it controls the momentum and focus of the case. Your big goal is to control and influence how the case is developed. This is achieved by focusing on the strengths of your case. It is not necessarily a matter of who has a bigger “war chest,” though it always helps. Rather the crux is to out-think your adversary strategically and to coordinate your efforts for follow-through on the necessary action items to achieve your targeted end goals. Your efforts should be prioritized.

In fulfilling the third “C” - Coordination - recognize that every step along the way counts and that fatal landmines are everywhere. Take nothing for granted. Every aspect of the case affords an opportunity to strengthen your own position or develop a vulnerability for your adversary. Focus your resources on those aspects of the case that you can influence and position to your advantage. The desire to win coupled with a coordinated strategic game plan will heighten your chances for achieving your targeted goals.

By honing the three “C’s” - confidence, concentration and coordination - your litigation team will be well prepared to hit the fast balls and to adjust on the fly for the loose balls. Enjoy the litigation game!

