The 5 Weapons No Litigator Should Be Without

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Law360, New York (February 20, 2015, 4:18 PM ET) -- Choosing to practice in the arena of high-stakes corporate litigation can often lead attorneys into protracted disputes where the margin between victory and defeat stands razor-thin. But the most skilled litigators are able to rely on crucial weapons in their legal arsenal to seize the upper hand.

While lawyers can call upon a number of skills or tactics to push their case over the top,DLA Piper partner James R. Nelson said the most useful legal weapons all fall under the umbrella of "information" and being keenly aware of how to best manage, organize and use that valuable commodity.

"You have information on your claims, your people, what happened, when it happened, and you have to figure out 'Do we have an issue here?'" Nelson told Law360. "You've gotta move on that quickly so that you can evaluate the case and advise your client."

Here, Law360 lays out the most essential weapons attorneys can use to bolster their chances of victory.

Cutting-Edge E-Discovery Tools

As the legal profession continues its headlong plunge into the 21st century, the need for attorneys to embrace technology as an essential component of client service grows more and more imperative. In no other phase of litigation is that more apparent than in discovery, where **innovations** such as hold software, predictive coding and remote data collection can yield significant advantages.

Although the use of e-discovery tools has become commonplace, there are still instances in which attorneys set themselves deep in a hole when their technological toolbox is not up to snuff, according to Thomas A. Muccifori, a partner at Archer & Grenier PC, who likened a case he is currently working on to the Aesop fable "The Tortoise and the Hare."

"I'm in a case where my adversary doesn't have these tools," Muccifori told Law360. "Our clients want us to be the hare and we are the hare in that case. It's whole new race with e-discovery, and

slow and steady no longer wins the race."

While Muccifori's firm has its own internal e-discovery wing — Archer Discovery Strategies — firms without that luxury must move quickly to select the e-discovery vendor that can address its needs most effectively, according to Paul Hastings LLP employment partner Carson H. Sullivan.

"If your case is of any size, you need to have a good vendor with a good review tool and good production capabilities," Sullivan told Law360. "Good tagging and coding and organization up front makes it so much easier if you do end up going to trial."

Accessible Expert Witnesses

When litigation veers into particularly complicated territory, such as intricate circuit functions in patent cases or exhaustive economic models in antitrust work, attorneys on both sides of the bar must be judicious in selecting expert witnesses who can break down those thorny concepts without diluting the strongest arguments of the case.

Nelson explained that merely finding a person who is knowledgeable in a particular area is not enough, as lawyers must take steps to ensure that he or she is effective communicator, noting that those two qualities can be exclusive of one another.

"We've all had professors in school who know their stuff, but they can't teach it," Nelson said.

The Texas-based litigator said after identifying potential experts, he makes every effort to sit down with them face to face to discuss the specifics of the case and gauge their communication skills, a process that can prove difficult over the phone or email.

Still, the temptation to "dumb down" convoluted subject matter can go too far, notedDechert LLP partner David Bernick, who said attorneys often underestimate a jury's ability to grasp difficult subject matter.

"Juries can get a lot of complicated and nuanced things," Bernick said. "If you set out with the goal of speaking to the highest-performing ability of a jury, I think you can use that to create credibility and to elevate the overall process. If you do that effectively, the juries will listen to you."

Airtight Summary Judgment Motion

In the interest of conserving a client's valuable time and money, well-prepared lawyers must always keep an eye toward swiftly concluding the case with an expertly crafted summary judgment motion that puts the most crucial legal questions squarely before the judge, experts

stressed.

“Trials are expensive, risky propositions,” Muccifori said. “We teach our young attorneys here to start thinking about summary judgment from the minute you file your first pleading. That really is where these battles are waged nowadays.”

Muccifori and others said that envisioning the contours of a possible summary judgment at the outset of the case makes cobbling the document together much easier when the moment of truth arrives.

But even though the most precisely drafted motions carry a chance of failure, Sullivan said that a good attorney can find a silver lining when their summary judgment bid falls short.

“Hopefully you win, but if not, you have at least put the judge on high alert as to the weaknesses in your opponent's case,” she said. “Also even if you don't win on all counts, cases are often overpled and it's helpful to knock out counts to streamline for trial.”

High-Caliber Team

No litigator is an island, and on high-value cases of massive breadth and depth, the lead partner is only as good as the team that he or she lines up at the bench. Nelson, who benefits from working at one of the world's largest law firm in DLA Piper, said the key to selecting an elite legal team is identifying attorneys who will remain immersed in the dispute for the long haul.

“I try to put a team together that's going to stick with me through the case,” he said. “I don't want to have piecemeal work done by various people if I can avoid it because they won't have a concept of the whole case and what we are trying to get."

While the precise contours of a legal team will vary based on the size and makeup of the case, Nelson said that for his most extensive cases, he generally tries to draft a younger partner, a senior associate, a junior associate and a paralegal to back him up.

Sullivan added that, especially in jury trials, it's critical to make sure that at least one member of your team in the second or third chair that can take note of the jurors' reaction to certain arguments and recommend potential tweaks to the case based on those observations.

“Did some of them roll their eyes during part of your opening? If so, hearing that can help you adjust going forward,” Sullivan explained.

Affable Candor

While honesty and ethical behavior might appear to be self-evident of legal work as opposed to weapons that can make or break a suit, Dechert's Bernick made clear that refusing to engage in so-called chess games or gamesmanship such as discovery delays can do wonders for a case.

“In dealing with the other side, candor is the best way to go,” he said. “By and large, they are going to know where you're going anyhow, and it creates a better relationship and makes the case more efficient. If you start playing chess games with the other side, it is going to diminish your ability to avoid unnecessary disputes."

In the same vein, Sullivan said attorneys should always “be themselves” during trial, noting that dramatically changing your behavior to curry favor with the court more often than not can ring hollow with the jurors or other triers of fact. She said this can be especially critical when things don't go precisely as planned, adding that affability almost always plays better than panic.

“If the technology doesn't work, don't go off the rails,” she said. “Ask for a short break and get it sorted out. When you come back from the break, make a little joke about it. Show the jury you, like your client or clients, are a real person.”