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A Business Approach to Litigation
Facing Reality – Fewer Trials

By Bernard J. Berry, Jr.

During the past holiday season we all received greeting cards many of which wished us "Peace in the New Year". When one thinks of lawsuits and lawyers, it does not conjure up images of peace. However, there are trends and developments having to do with actual trials that I thought would interest you and provide you with food for thought as we commence the new year.

An American Bar Association study shows that between 1962 and 2002, the percentage of federal, civil cases resolved by trial plummeted from 11% to 1.8%. The number of trials per year during the same 1962-2002 period dropped 20% starting at 5,800 and then falling to 4,500. Another example of the foregoing is that during the past year, the amount of civil and criminal trials heard by federal judges in New Jersey was 12 as compared to an average of 20 in 1965. What is startling about the foregoing numbers is that the amount of litigation from 1962 to 2002 has increased from roughly 50,000 to nearly 260,000 matters initiated. Moreover, the average amount of cases federal judges handled in New Jersey in 1965 was just above 200, while the average in the year 2002 was 385 cases.

State court findings are similar. While we do not have isolated numbers available for New Jersey, in an American Bar Association study of 22 states, which included New Jersey, the number of jury trials dropped from 1975 to 2001 from 25,000 to 19,000. Interestingly, the number of cases resolved by those same courts without a trial tripled to more than 3,000,000 in 2001. All of the foregoing information was reported in the *New Jersey Law Journal* of December 22, 2003.

Our Interpretation of the Statistics

While the author of the ABA report, Marc Galanter, a professor emeritus at the University of Wisconsin Law School, did not reach any formal conclusions regarding the reasons behind these figures, there are some well-known factors that have contributed to the decline in trials.

- Cost and time expenditures. GH&C has found that any business person who has been involved with a lengthy litigation process (including extensive depositions, document productions, interrogatories, expert witnesses, motion practices, trial court hearings) can attest to the level of frustration he/she feels when the matter is ultimately settled either just before or at the time of the commencement of the trial. Clearly, this frustration drives parties to, at times, radically alter their pre-trial disposition and settle cases that they may have otherwise litigated to the bitter end. So, while clients want results, they may not be inclined to incur the cost and expend the time it takes to have their day in court.

- Going to trial: risk vs. reward. There is an expression in the legal community that "a bad settlement is better than a good verdict." In most cases, the risk of pursuing a lengthy and costly trial outweighs the reward a party receives at the end of a trial.

- Institutional judicial changes which encourage trial avoidance. As the preceding statistics show, the number of initiated cases in federal and state course has increased dramatically over the past several decades. In order to relieve the pressures of the sheer number of litigation cases, the judicial system has had to find other means bringing matters to conclusion.

- Changing role of judges from trial adjudicators to instruments of dispute resolution. The aforementioned article in the *New Jersey Law Journal* provides testament to the fact that judges in New Jersey, and one can deduce elsewhere, are spending more of their time in settlement conferences, rather than conducting trials.

- Alternative Dispute Resolution ("ADR") such as mediation, binding and non-binding arbitration and other, more subtle forms of ADR, i.e. Court Appointed Masters, Fact Finders and… "Delay-Delay-Delay-Delay" (recall the expression "Justice delayed is justice denied"). Today, GH&C attorneys are serving as court appointed mediators in numerous litigation matters. Moreover, the courts' use of Masters to assist the litigation process is another way that third party intermediaries assist the settlement process.

During my 30 years of practice, I have been involved with numerous matters that were ultimately settled. Many should have had been settled at a much earlier point in time. At the initial stages of any litigation, not all the facts may be known, but an early assessment is always appropriate. While a client's temperament (or the adversary's temperament) may impede the ability to achieve an early resolution, a frank, candid and thoughtful analysis of the factual/legal issues, risk/rewards and cost of litigation may influence the client-decision maker's approach.

Strategic Litigation Plan

Thus, attorneys at the commencement of litigation should provide a client with a detailed analysis of the litigation issues based upon the facts then known as part of a Strategic Litigation Plan. The Litigation Plan may not be able to foresee every event as the matter unfolds (and as new facts become known), but it should clearly spell out the initial basis for the law suit, the initial plan for prosecuting or defending the matter, and a timeline with regard to discovery (recognizing that inevitably the timeline is extended). Included in the Litigation Plan should be at least an initial budget for the first several months with estimates for experts (known or contemplated) and any other tactical litigation recommendations. Periodically (every 4 to 6 months or sooner as the case unfolds), the Strategic Litigation Plan and litigation budget should be updated and revised to reflect the developments in a case. The litigation plan facilitates good communication between the attorney and his client.

This information is not to be construed as legal advice. If you would like more information regarding the foregoing, or if you have questions regarding litigation or alternative dispute resolution at GH&C, please feel free to contact Bernard J. Berry, Jr., Esq.