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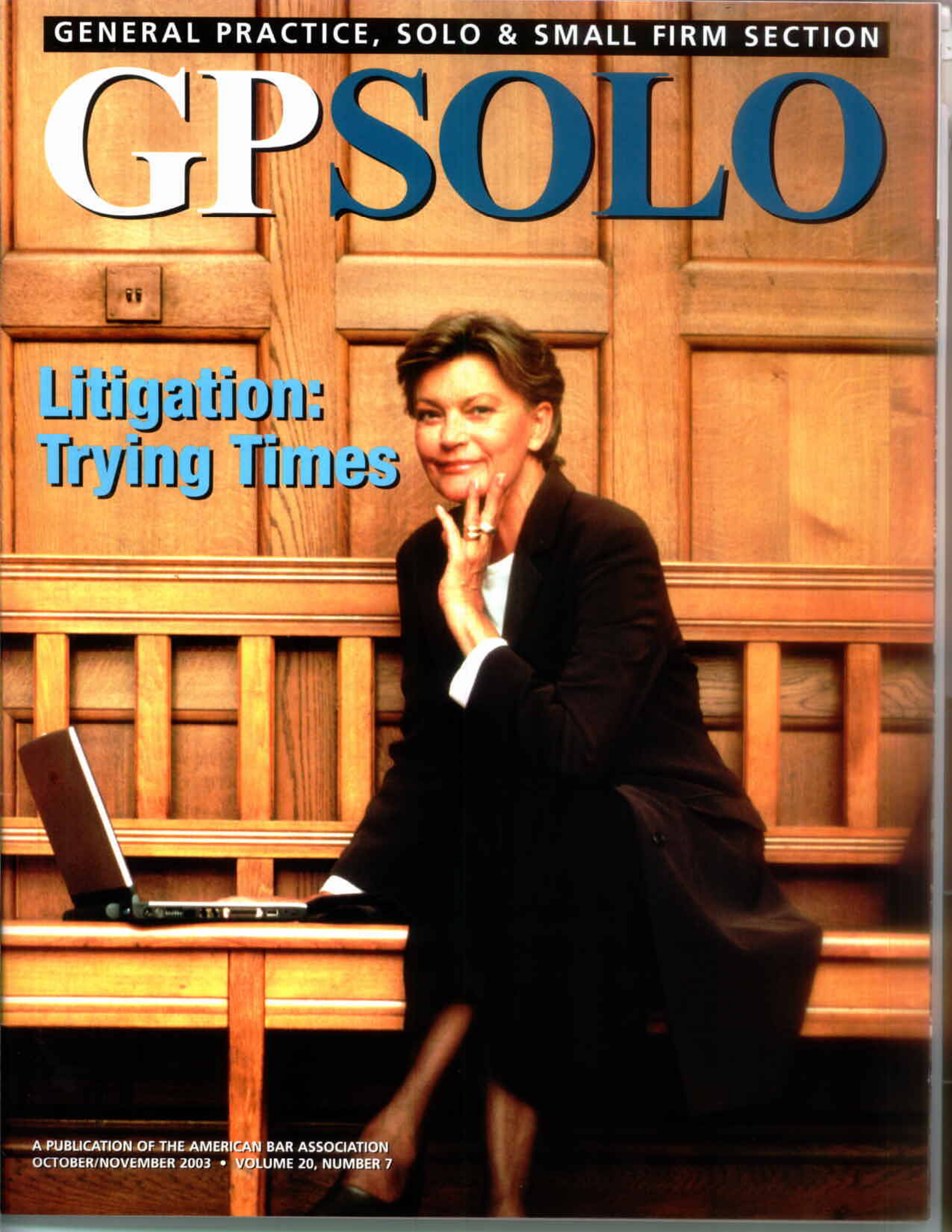
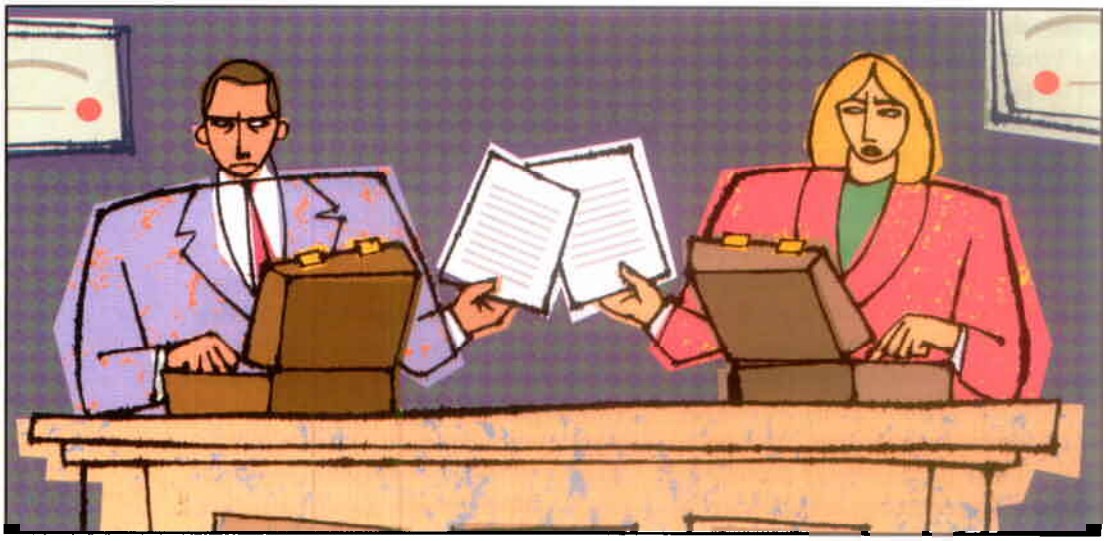
Litigation: Trying Times



A PUBLICATION OF THE AMERICAN BAR ASSOCIATION
OCTOBER/NOVEMBER 2003 • VOLUME 20, NUMBER 7

WHAT IF THE DEAL GOES BAD? WHAT LITIGATORS (DON'T) WANT YOU TO KNOW

By David Zachary Kaufman



When we were 1Ls in law school, our contracts class talked about the ideal contract: the complete, comprehensive, contingent contract (a "4C"). This was the goal of all contracts. Because every contingency would be anticipated, there would never be any litigation. No misunderstandings would exist, and nothing would be forgotten. But even in 1L Contracts we understood that the 4C could never exist. We cannot think of everything; we cannot anticipate changes in future circumstances; many "understandings" are unspoken and therefore impossible to document; assumptions are unspoken and may be unrecognized; and the parties' needs, agendas, and players may change.

As we all learned in 1L Contracts, it doesn't matter what you think you agreed to; it's what's written down that counts, and informal "understandings" that all parties do not agree to ex post don't count. But 1L Contracts never taught the three most basic rules of contract law that litigators have learned:

- Any attempt to create a 4C is prohibitively expensive and time consuming—clients won't pay for it.
- A contract is a compromise and therefore not fully satisfactory to anyone.
- A contract is only a piece of paper until you are willing and able to enforce it. If you are not willing to enforce the contract, it is only a suggested way of operating.

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As a result of all these factors, contracts (or deals) fall apart or go bad. All kinds of deals go bad: loan agreements, business deals, personal deals. Any type of agreement can go wrong, and they go bad for many of the same reasons: bad assumptions, unanticipated changes, misunderstandings, unacknowledged agendas, and changing needs.

Preventing Litigation Before the Fact

I'm probably taking the bread out of my own mouth, since I'm a trial lawyer, but careful lawyering can solve many of these problems before they arise. Before even starting work, everybody (lawyer or layperson) who is involved in a deal must keep an eye on the ball: what is best for the client. (Of course, that presumes that you have successfully identified the client, which is probably another article entirely.)

Ask if the deal is a good one. Sometimes, what is best for the client means advising the client that he or she is making a mistake. If the client is determined to proceed even after that advice, litigation is almost ensured: If the deal doesn't work out, there will be a lawsuit and you will be blamed. This contingency is frequently discussed, but this article will say no more on the topic.

So, assuming that the proposed deal does not look like a mistake to the lawyer, what can you do to minimize all potential future problems? Initially, you should be sure you understand the client's goal. Be sure to interview the client thoroughly so this understanding is complete. A truly careful lawyer should probe for hidden issues and unspoken agendas to avoid later surprises. One issue that appears over and over again in my practice is cost: something was not done because the client did not anticipate the cost, refused at the last minute to pay for it, and later discovered the mistake. (A classic case of this is a lawsuit against a home seller by a buyer for selling a house "as is" without disclosure when the buyer had a right to a home inspector but decided not to pay for one.)

Once the desired end is understood, there probably is more than one way to achieve it. Itemize and evaluate all the different ways to achieve the goal before selecting the approach to be used in the contract.

Assume that there will be problems later on. Once starting work on the deal, you should make it clear to everybody, including yourself and your partners, the client, and all the other parties involved that you do *not* represent the deal; you do *not* represent both parties; and you *do* represent the entity that is paying you. (There are exceptions to this rule, but that, too, is another article.) Furthermore, as you begin work, do not assume that all will go well; that everybody "understands" what is intended; that unforeseen things will not occur; that circumstances will not change; that you know all the facts, motivations, or agendas of your client; or that you know *anything* about the other parties, their wants, needs, or desires. You should always assume that the other side will do whatever is necessary to gain an advantage; that the other side will do whatever is necessary to make an additional profit; and that if something goes wrong you will be blamed.

What to build into the agreement. Now that we have considered what can go wrong, and the probability that something will go wrong with the deal, what can you do? There are some things that should *always* be included in the contract. Be sure to have a severance clause in the agreement. That way, even if there is a problem with some parts of the agreement, the agreement will still be in effect. Also, be sure to put in choice of law and choice of venue clauses.

The choices of law and of venue affect both the substantive law of the agreement and how disputes will be resolved. If the parties are from different states (or in some cases counties), if the agreement will be made in a different place than it will be carried out, if the agreement will be carried out in a different place than the parties' chief place of business, or if there is *any* possible advantage to one choice over the other, it is imperative to evaluate the choices for both the controlling substantive law and the procedural law. A failure to put in a severance clause and choice of law and choice of venue clauses could become a major collateral source of litigation.

A good example of the problems that can come up is a recent case of mine (the names and other identifying information have been changed): Two real estate developers, one from Virginia and the other from Maryland, had signed an agreement in Washington, D.C., to cooperatively develop

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a large property in Pennsylvania. There had been no severance clause, nor choice of law or venue clauses. When the deal fell apart, the first question was *where* to file the claim, and whose state laws to use to settle the dispute. One point of contention was *which* federal court to use: The U.S. District Court for the District of Columbia, the U.S. District Court for the District of Maryland, the U.S. District Court for the Western District of Pennsylvania, and the U.S. District Court for the Eastern District of Virginia all had different local rules with distinct advantages. Furthermore, the different laws of contracts of the different venues provided varying interpretations of key clauses in the agreement. This collateral litigation almost doubled the cost and time necessary to conclude the case.

Depending on circumstances, it is frequently useful to include a liquidated damages clause and a fee-shifting clause for attorney fees. Be aware, however, that some parties with large resources like fee-shifting clauses because they know they can overawe or outgun opposing parties with significantly smaller resources. If you represent the smaller party to the agreement, never forget rule three above ("a contract is only a piece of paper until you are willing and able to enforce it").

Finally, beware of arbitration agreements. Yes, everybody loves arbitration agreements, the courts will enforce them come hell or high water, and they are supposed to be a nice, neutral, less expensive alternative. I'm going to fly in the face of general opinion: Arbitrations are an easy way for the stronger, more experienced party to win. Rule three again controls. Furthermore, there are key issues that arise frequently: How many arbitrators? One? Three? One is cheapest, but then the parties are at his mercy. Three? More expensive but it could be fairer. Who picks the arbitrators? Mutual agreement? If only one arbitrator is used, this is one possibility; there are others. Be sure you know the alternatives. What rules are you going to use? The American Arbitration Association rules are complex but designed to be fair to the parties. There are other rules, however. (There is at least one group that offers dispute resolution according to Christian principles.) The agreement should be sure to specify the rules to be used. Does the other side have the power and influence to affect the arbitration? If the other side is a large firm that frequently uses the same arbitration firm, there may be some unconscious bias.

What to do outside the agreement. Ultimately, if this deal goes bad, the litigator will need to know what was going on and why. Therefore, a careful lawyer should document everything in the file's notes. All conversations, all goals, all desires, and all understandings by the client and the different parties to the negotiations should be documented. A careful lawyer should be sure she has a note explaining every unusual clause and why it was used: She may be required to testify about the parties' intentions and understandings if something goes wrong.

For some reason, most of the lawyers who interview and hire me never knew about the problems their clients were having with the agreement until disaster stuck and either the clients were sued or were themselves contemplating a lawsuit. Continued client contact can give advance notice of problems and may actually give the alert lawyer time to smooth things out—and deprive me of additional revenue.

Preventing Litigation after the Fact

Once the agreement blows up and a litigator is necessary, you might think your work is done. You'd be wrong. To ensure success, you (the original lawyer), the client, and the litigator must form a close-knit team.

Before hiring a litigator. Any litigator is going to need some things right away. It will be up to you to provide that information. After all, the client is yours, and so is the knowledge. The issue, then, is how to best bring the litigator up to speed quickly. It's best to prepare this information before even hiring a litigator; of course, if the client is the defendant, you may have to do this at the same time as hiring the litigator.

Organize the files. Assemble the files in a logical order, showing what occurred, who was responsible for it, why it was done, and when it occurred. As necessary, gather additional facts to provide this information.

Prepare the initial briefing. The initial briefing to the litigator should always start with your understanding of the client's goals, desires, and needs in terms of litigation outcomes. This will affect the litigation

strategy and tactics chosen and will reveal to the experienced litigator a great deal about the assumptions and agendas at play.

After setting out the client's needs, the initial briefing should set out, to the extent known, what happened and how it violated/did not violate the agreement. Unknowns should be indicated and earmarked for further work by the litigation team. This summary of preliminary conclusions should be accompanied by a complete package of supporting information. The initial briefing should also contain a summary of the legal issues in the case along with supporting statutory and case law. Where additional work is necessary, the work should be earmarked for follow-up by the litigation team.

It is standard practice for me (but not for all litigators) also to ask for a briefing complete with mini-biographies of the complete cast of characters and the roles they play in the events in question. These mini-biographies should also contain an assessment of the characters' motivations and reliability, as appropriate. The discussion of those members of the cast of characters who are also witnesses should indicate what knowledge they have, what they witnessed, what they know via hearsay, etc. (Note that this checklist contains no assessments of credibility; only the litigator should make such assessments.) If this knowledge is not available, it should be earmarked for follow-up by the litigation team.

In preparing this initial briefing do not assume the litigator (or the litigation team) knows the law of case as well as you, knows the facts as well as you, knows the various "understandings" or agendas at play, or knows the client. In other words, be simple, be thorough, and be complete. Be sure to include information about the applicable statute of limitations and a copy of the agreement itself.

Decide what you're looking for. Before hiring a litigator, you and your client should, jointly, assess the operating "styles" of the key contacts and clients' representatives. Litigation teams take their personality from the first chair litigator, and if his style antagonizes your client, the odds of a favorable outcome fall.

Hiring the litigator. When hiring a litigator, check carefully to be sure you are getting what you want. Many large firms have one or two actual trial lawyers, but most "litigators" specialize in motions practice: They are very experienced in arguing motions in front of judges but have only tried a few cases to completion. Furthermore, beware of "bait and switch": You hire a firm with a famous trial attorney but find that junior lawyers are doing the actual work. Finally, even though every lawyer who ever graduated from law school wants to be a trial attorney, not everyone is temperamentally or intellectually able to do so. It is a legal specialty all by itself, as the British have recognized.

So what is the best way to evaluate a potential litigator? First, check his track record. When there is a trial, two walk in, only one walks out. Bear in mind, however, that someone who claims a very high percentage of wins either doesn't take hard cases or settles everything and counts every settlement as a trial win. Ultimately, it's best to go with what you have seen or people you know have seen personally. (Some of my best cases have come to me from people who have seen my work up close and personal. In fact, one of my best sources of referrals is a lawyer I opposed in a hard-fought case about two years ago.)

Once you have a possible litigator selected, interview her with the client present. Both you and the client must be satisfied that she has the ability to work with you, the client, and the key witnesses. If she does not, don't hire her. Do not forget, you will have to be her advisor and second chair throughout the case.

Your Role Doesn't End Once the Fun Starts

Obviously, your role does not stop when the litigator is hired. But control of the case and the client must pass to the litigator. There can be only one person in charge—and that must be the litigator. It's your job to make sure the client understands this and why.

Once the litigator has control, your job is to support him as best you can. This means providing him with all the additional legal and factual research he asks for and working with the litigation team to be sure no fact is missed. The litigator needs your help and cooperation to ensure the best possible result for your client. GPSOLO

Before hiring a litigator, decide what you're looking for—and then check carefully that you're getting it.