

Managing the Love–Hate Relationship with your Litigation Counsel

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symposium

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TOP 10 TIPS TO EFFECTIVE STRATEGY

1. **Define the desired outcome before beginning**

Determine what is the most favourable outcome: then design a strategy to achieve that end. Too often we follow Oliver Wendell Holmes' injunction to have faith and pursue the unknown end. Be creative and consider various tactics, like early settlement, mediation, injunctions.

2. **Ask the right questions**

Is litigation the only alternative? Are there extra-legal solutions? What is the opportunity cost of the litigation? What is a "win" and what is a "loss"? Horror shows can arise from failing to ask the right questions at the right time.

3. **Prepare your strategy first: then react to your opposition**

An effective strategy is one which we define first, and which is only then adjusted to reflect our opponents' strategies and tactics. Too often our strategy is defined by opposing that which our opponents desire. Our tactics too often end up mirroring those with whom we are fighting.

4. **Making choices**

Effective strategies choose between competing goals. Alternative strategies may be possible, but our training as lawyers to think in multiple alternatives often undercuts effective strategy. A good test: "If we lose on this, will we win on what is left?"

5. **Strategy is a cost-benefit exercise**

In considering different options, each should be measured by its likelihood of success – and its cost.

6. **Put it in writing**

Putting strategy in writing focuses thinking and requires us to commit our choices in a record that can then be reviewed, adapted and revised as the dispute progresses.



7. **Made to measure - with flexibility**

Effective strategy is made to measure for the dispute and the client. But things may change along the way and it is important to be able to adapt the strategy as this happens. Surprises and disappointments are often the product of following the book and ignoring novel facts, novel law, or letting the tide of process sweep the dispute into history.

8. **Don't confuse strategy with analysis**

An effective strategy is more than a product of analysis. It is the pursuit of opportunities and avoidance of risks, which a purely analytical approach will not disclose.

9. **Don't confuse strategy with tactics**

Effective strategy marshals forces to achieve the desired end. Strategies can become dissolved under the weight of short-term tactics piled upon one another until they form the history and dictate of the outcome of the dispute.

10. **Strong work ethic**

A good strategy does not flow naturally from completing the various parts of the litigation process. Strategy considerations are often deferred until just before the "Big Show" i.e., the hearing or trial. Developing an effective strategy requires hard work, discipline, and cooperation between counsel and client. To be fully successful this starts right at the beginning and requires disciplined execution and follow-through right to the end.



Top 10: Things to Expect from Litigation Counsel

1. How much will it cost? Alternative billing options.
2. What is the business issue being addressed?
3. Early case assessment.
4. Strategy.
5. What drives the in house lawyers?
6. Tactical expertise – substantive and procedural knowledge.
7. Information – what you need to know when you need to know – no surprises.
8. Understanding the risks.
9. Understanding options and related costs.
10. Integrity, honesty, honour, judgment.

