

The Case for Ultralight Litigating

David G. Ebert © 2012

Ultralight backpacking challenges its adherents to carry the lightest kit possible without compromising their safety.¹ The goal is to stow and haul enough gear to be safe, comfortable and confident, and no more.²

The ultralight backpacker is committed to reducing weight, even if by fractions of an ounce. He takes great care to distinguish *wants* from *needs*. He scrutinizes each item—no matter how small—before committing to it. And unless it's indispensable to his safety, confidence and comfort, it stays home.

So, for example, if you *must* bring a watch, remove the band and clip it to your pack—there's .75 ounces. Break the seal on a soda or water cap, and that plastic ring at the base serves no purpose: cut it off. Saw off your toothbrush handle. Each unnecessary item weighs *something*. Taken by itself, each fraction of an ounce is inconsequential. But shed enough of them, and you achieve The Wearable Ultralightness for Fleeing (which, for literary trivia buffs, was the original title of Mr. Kundera's novel before he decided to go in a different direction).

Non-ultralight backpackers, by contrast, strive to shlep as much “just-in-case” gear as they can stuff into the most capacious pack they can carry without falling backward. When they do, of course, they have only themselves to blame; they reap what they sow (they shlep what they stuff).

Years long, high-stakes, complex commercial litigation is typically about as non-ultralight as it gets. But in lawyering—unlike backpacking—the non-ultralight lawyer isn't the one who bears the brunt of his own overstuffed briefcase; the client does, in the form of ultraheavy fees. And it can get out of hand rather quickly.

It takes uncommon skill for the ultralight backpacker to pack less, without compromising his own comfort, safety and confidence. It requires great patience, directed experience, intense awareness, constant scrutiny and

¹ *Lighten Up: A Complete Handbook for Light and Ultralight Backpacking*, Don Ladigin (2005).

² *Lightweight Backpacking and Camping*, George Cole; Ryan Jordan; Alan Dixon (2006).

unrelenting self-editing. But they streamline artfully, and travel lighter. In much the same way, ultralight litigating is harder for the lawyer, but far better for the client because it will go faster and cost less, without compromising the client's interest or prospects.

It's hard to litigate well. It's harder still to litigate well by doing less. There are endless opportunities in any litigation to do more, few of which typically are squandered. Deciding which of the 25 potential party and non-party witnesses *not* to depose requires mastery of your case, good litigation instincts and the self-assurance to be leave yourself open to being second-guessed; deposing them all requires hardly any thought at all. Cost aside, a litigator can never be seriously criticized for relentlessly pursuing every angle, deposing every witness, subpoenaing every document, etc. But cost aside engagements are becoming increasingly rare.

The challenge now is to strike the appropriate balance between lawyering *wants* and *needs* to achieve commercial litigation's version of safe, comfortable and confident. A successful hourly-based attorney-client partnership—in which the participants agree, remarkably, that the client will pay more for the lawyer to take longer to do more, *outcome notwithstanding*—demands from the client an extraordinarily high level of trust. In return, the client must always receive the same extraordinarily high level of care, skill and devotion; this is non-negotiable. The somewhat subtle shift in focus here, though, is to discern and pursue tasks and strategies that will affect the outcome, and discard the rest.

This is not about corner-cutting or inattentiveness. It's about litigating mindfully. It's about actively scrutinizing each step and alternative presented over the course of a litigation before spending the client's money. If it truly *needs* to be done, then do it. If it doesn't, cut the weight and devote your energy—and your client's resources—to other aspects of the case. Each non-essential or unproductive task costs the client *something*. Forego enough of them over the long haul and the client's burden lightens.

The commonly accepted ultralight backpacker's threshold is ten pounds, which is easily achieved by jettisoning your sleeping bag and tent. But then you'll be exposed to the weather, spending the night on the ground, a long way from safe, comfortable and confident. You'll be ultralight and ultra-miserable. Commercial litigation works much the same way. It does my clients little good to pay me less to do less—and fail. Ultralight

litigating is about adopting a mindset in which the default is to do less, where less can be done without compromising quality or jeopardizing your client's position or prospects.
