

## COMMERCIAL LITIGATION IS SOLITARY, POOR, NASTY AND BRUTISH, BUT NEVER SHORT

By: David G. Ebert

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Thomas Hobbes famously described the life of man in nature as "solitary, poor, nasty, brutish and short." So is litigation; except for the short part. And, unlike life, litigation is generally best avoided.

**Litigation is Solitary:** Litigation becomes the center of *your* world, but not *the* world. Every nuance, every good and every bad fact, every court ruling and directive, every email from the adversary, every up and every down, assumes importance in a litigant's life unlike many far more important things. But, really, with rare exceptions, no one else cares.

You'll go on endlessly with "you won't believe this" about the other lawyer/judge/your former partner/your lawyer, etc. Friends will nod in sympathy and outrage. But they're not the ones absorbing the blows. Most of the time, you and your adversary are alone in a fight that has no bearing on anything or anyone else. To the world outside, in the end there will simply be more money in the Good Guy's pocket, or in the Bad Guy's. Enough about you; they have their own troubles to worry about. It's a closed system, and the outcome generally matters not at all to anyone but you.

**Litigation is Poor:** Well, litigation will at least likely leave you poorer. Win, lose or draw, you'll be unhappy with the cost. So much of discovery is useless—but extraordinarily expensive—noise and static. Electronic discovery in particular has driven up litigation costs to the point of absurdity. Too much of what lawyers spend time on (on your behalf) is shamefully wasteful and counterproductive. If, instead of litigating, you and your enemy agreed to pool and split down the middle the legal fees to come, you would generally both come out ahead. "I don't care, it's the principle!" rarely survives the first few bills.

**Litigation is Nasty:** You're litigating, not dating. I don't recall ever having an adversary start out with "Hi, I'm Bob. I've spent time with my client and you have us dead to rights. What's fair is fair. So what do you say we head downtown and have the clerk enter judgment against my guy? We can grab a beer after."

It's an adversarial system by design, of course. You have highly-motivated advocates, each trying to achieve exactly the opposite result. No matter how right, wrong, weak, strong, unwinnable or unloseable our client's position may be, our job is to win. As a client, you wouldn't have it any other way. But with that often comes hostility, nastiness and aggression that would not be tolerated in almost any other context.

**Litigation is Brutish:** *See also, Litigation is Nasty.* Litigants rarely achieve their hoped-for outcome. Everyone in the system is overwhelmed. The process can be rough, inelegant and, too often, brutal. Sometimes, unfortunately, you do things right and the patient still dies. Your lawyer can only control and accomplish so much. You sometimes win when you should lose, and sometimes lose when you should win. And no one can know which it'll be until you've won or lost.

**Litigation is Long, Very, Very Long:** Your family, friends and colleagues' No. 1 question will be: "Wait, that's *still* going on?" It drags on, and on, and then on some more, until—finally—you have your day in court. And then there's the appeal. Being in a years-long lawsuit takes an emotional toll that's impossible to appreciate unless you've gone through it. It's chronically hostile and tense. Clients don't sleep, perseverative thinking dominates, stomach knots get tied and tightened. As the joke goes, "why do you keep banging your head against the wall? Because it feels so good when I stop." Commercial litigation is a very expensive form of protracted head banging.

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It surely takes (at least) two to settle, and sometimes you just can't. It will happen that one or more parties cannot or will not let go, leaving you with little, or, as a defendant, no choice. But for those matters you can settle, settle. Now. Pay too much; accept too little. Stop fighting over emotional dollars. Put your ego aside. Take the settlement that leaves both sides equally unhappy. Giving too much or getting too little only hurts for a minute. Full catastrophe litigating leaves deep and ugly scars.

Find a commercial litigator who can bend litigation steel in her bare hands, but also understands how to open a settlement dialogue without appearing, or worrying about appearing, weak; engage a private, professional mediator; flip a coin; split the difference and give it to charity; use binding baseball arbitration, in which each side submits a number to a neutral who must choose only one or the other; eenie-meenie-miney-moe for it—do whatever you can reasonably do to make it go away.

After one frustrating failed settlement meeting, my adversary said something close to: "I guess our clients will have to suffer more of litigation's indignities before letting go of each other." Don't subject yourself to the indignities; do negotiate the best deal you can, take it and smile. You'll wonder for a day or two whether you could have relinquished less or extracted more, but—either way—you'll be thrilled it's over.