CHAPTER 1

CIVIL LITIGATION: AN OVERVIEW

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A. INTRODUCTION

It is litigation counsel's job, among other things, to create a winning case within the strictures of the Rules of Civil Procedure (hereinafter "the Rules") and in a manner consistent with counsel's ethical obligations. "Winning" may mean obtaining a favorable settlement, a favorable disposition through a summary judgment motion, or a favorable trial verdict. Regardless, the job of litigation counsel is to create a persuasive case that advances the client's goals.

There are many litigation styles: aggressive or convivial, cooperative or bare-knuckled, theatrical or plodding. There is no single right way to litigate a case. But there are fundamentals and practical methods that should be used in every case in order to build a compelling narrative. Regardless of your style or personality type, the more effectively you develop your case, the more likely you are to achieve a favorable outcome for your client.

The primary focus of this book is case development and discovery practice. The two functions are interdependent: a competent litigator cannot fully develop a case without engaging in discovery,[1] nor can a litigator execute discovery in a considered manner without an overall case development plan. This book provides an overview of both, including specific methods, strategies and tactics applicable to the wide range of civil cases, from a simple auto crash to a multi-party, complex commercial dispute.

B. CASE DEVELOPMENT VS. DISCOVERY PRACTICE

It is important at the outset to understand what we mean by the terms case development and discovery practice. The two are separate, but related, processes.

Case development is the overall process of turning a client's problem into a legally cognizable and compelling case ready to be tried. It is the

[1] The exception to this general rule is if you are representing the defendant and are successful with a motion to dismiss under FED. R. CIV. P. 12.

process of designing and building the case, hopefully in a logical, methodical and efficient manner. It is the means by which counsel envisions what the fully realized case looks like and the plan by which she will construct it. It begins before filing the first pleading and continues to settlement, summary judgment, or trial.

In a trial skills course or a moot court program, a case file is provided to the student, including relevant law and facts. The student then advocates within the limits of the law and facts that are provided. Real cases, on the other hand, are not handed to counsel fully formed. They must be developed. The creativity and effort that counsel invests in case development will have a direct bearing on the cohesiveness and persuasiveness of the client's case.

In the event the case goes to trial, case development is what leads, ultimately, to closing argument. In order to make a compelling closing argument, what does counsel need? Fundamentally, there must be an evidentiary record that contains all of the factual support necessary to tell a persuasive story and meet the burden of proof. Case development is the planning and process by which counsel pieces together the facts and the law to create a compelling narrative for closing argument. Similarly, if the case can be decided by motion, case development is the means by which counsel constructs arguments that are case-dispositive.

Discovery practice is a necessary, but not sufficient, requirement for case development. Discovery provides for the exchange of information relating to the parties' claims and defenses. It affords the opportunity to learn about the adverse party's claims and supporting evidence, and to probe the strengths and weaknesses of the opposing party's case. Second, discovery may enable the parties to narrow issues by identifying those claims with merit and eliminating those without. As the case progresses, counsel should be able to hone in on the essential nature of the dispute and focus on those issues central to the overall case. Third, and perhaps most important, discovery practice aids case development.[2] If case development relates to developing the story to be told, discovery is an essential means

[2] At least one court has taken a decidedly darker view of civil litigators and discovery practice. In Malautea v. Suzuki Motor Co., the court observed:

> The discovery rules in particular were intended to promote the search for truth that is the heart of our judicial system. However, the success with which the rules are applied toward this search for truth greatly depends on the professionalism and integrity of the attorneys involved. Therefore, it is appalling that attorneys . . . routinely twist the discovery rules into some of "the most powerful weapons in the arsenal of those who abuse the adversary system for the sole benefit of their clients." . . . An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly . . . [T]oo many attorneys . . . have allowed the objectives of the client to override their ancient duties as officers of the court.

987 F.2d 1536, 1546–47 (11th Cir. 1993) (internal citations omitted).

by which the evidence to tell the story is gathered and created.[3] Discovery, when properly conducted, is not like randomly casting a net into the water in hopes of catching something for dinner. Instead, to conduct effective discovery you must anticipate your needs and then use the tools of discovery to achieve your specific objectives.

C. THE ATTRIBUTES OF AN EFFECTIVE LITIGATOR

Effective case development and discovery practice can win cases. Aimless litigating and haphazard discovery practice is expensive, unproductive, and usually leads to poor outcomes. Effective litigators know that. They are meticulous and strategic about every decision. They have mastered and can use both the Rules of Civil Procedure and the Rules of Evidence to their advantage.[4]

An effective litigator must be able to:

- Gather, organize and quickly master a wide range of case-specific information in order to create a coherent narrative that not only satisfies the elements of any given cause of action or defense, but is compelling to a judge and jury;
- Fulfill two distinct roles through every step of the case: that of an objective and trusted advisor to the client, and separately, that of a zealous advocate with the skill to persuade, both orally and in writing;
- Think strategically and tactically, often in "real time";
- Assess the risks associated with going to trial;
- Value cases for settlement purposes;
- Be an active student of human behavior so as to better understand individual motivations and group dynamics;
- Roll with the punches; and
- Establish and maintain credibility and high ethical standards in every case.

[3] Yes, *created*. Discovery allows counsel to create evidence that did not previously exist. For example, by taking a party's deposition, the responses of the party are admissions that, if relevant, may be used at trial. Or, by having physical objects photographed during discovery, counsel may be able to create highly persuasive exhibits.

[4] Knowing what facts to gather is only part of case development. Counsel also must know how those facts will *get into evidence* at trial. This requires tailoring discovery not only to get the facts, but also to get the information that will make those facts admissible. In other words, effective litigators are mindful of the Rules of Evidence not only during trial, but also during discovery.

These attributes may seem self-evident, but in the rough-and-tumble of civil litigation, with its time and financial pressures, client demands, scheduling conflicts, interpersonal conflicts, and the ongoing effort of opposing counsel to counter everything you are trying to accomplish, it is easy to neglect the fundamentals of good litigation practice.

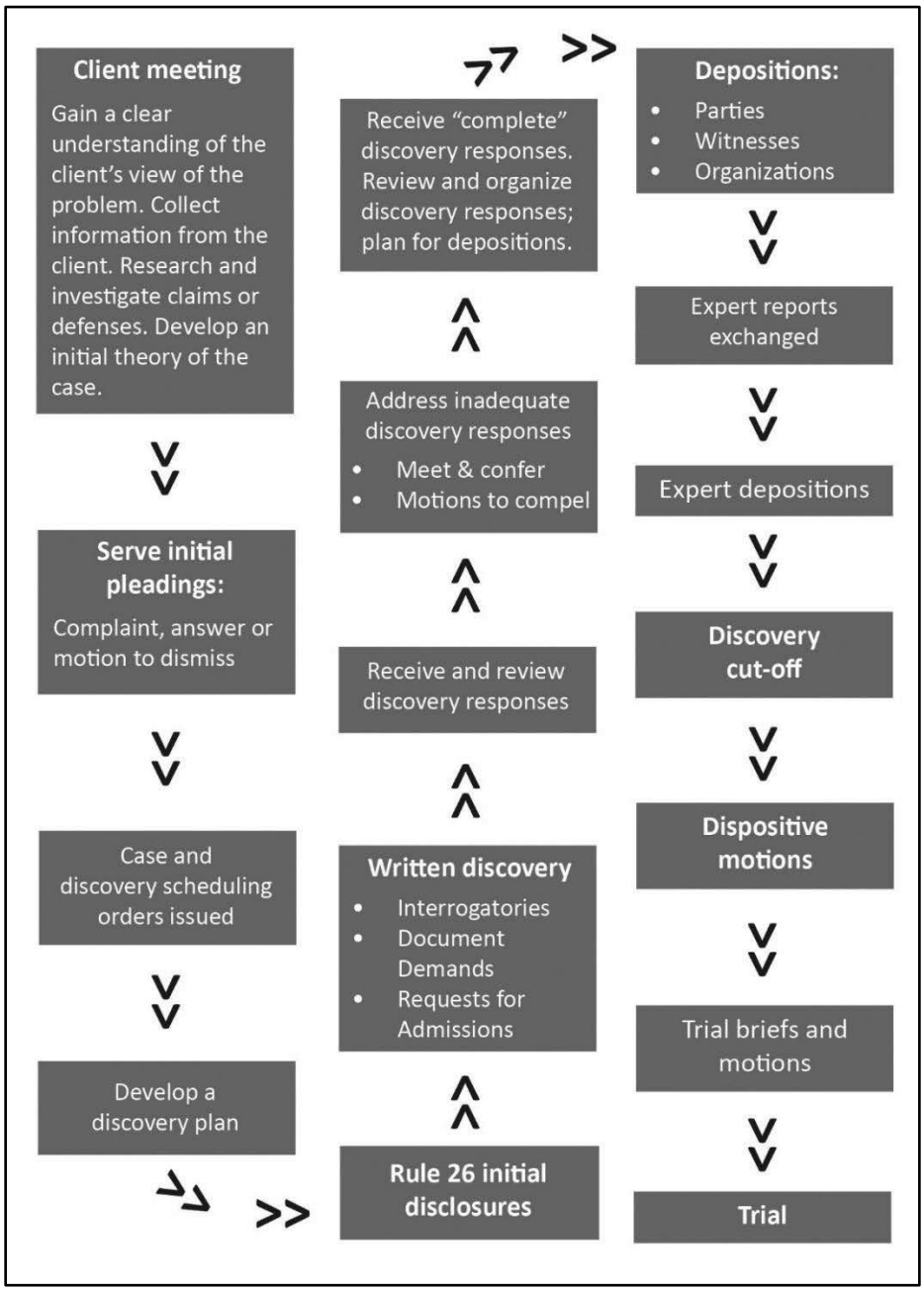
Too often, lawyers simply do what they have always done: launch into discovery in a rote fashion, without a clear set of objectives or a plan to achieve them.[5] A haphazard approach leaves to chance whether counsel will be able to cobble together a coherent case, or one that can even survive a dispositive motion. It virtually guarantees that opportunities will be lost and advantages foregone.

D. THE LITIGATION PROCESS

The following flowchart represents a simplified, but typical, case from the first client meeting until trial. This is for illustrative purposes only. There is no uniform litigation process; the Rules allow for a great deal of flexibility. Depending upon the type of case, its complexity, and the overall strategies and tactics counsel may choose to employ, a given case may proceed in any number of ways.

As you skim over the flowchart, consider how the case develops through the entire process. Each step in the process requires forethought and careful planning, whether it is formulating a discovery plan, doing legal research, interviewing witnesses, drafting and responding to written discovery, taking and defending depositions, attempting to enforce discovery rights, or worrying about what has been missed.

[5] *See* Blank v. Ronson Corp., 97 F.R.D. 744, 745 (S.D.N.Y. 1983) ("There is, in this vast expanse of paper, no indication that any lawyer (or even moderately competent paralegal) ever looked at the interrogatories or at the answers. It is, on the contrary, obvious that they have all been produced by some word-processing machine's memory of prior litigation."); Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 196 n.95 (Sept. 2013) (citing Blank v. Ronson Corp.).

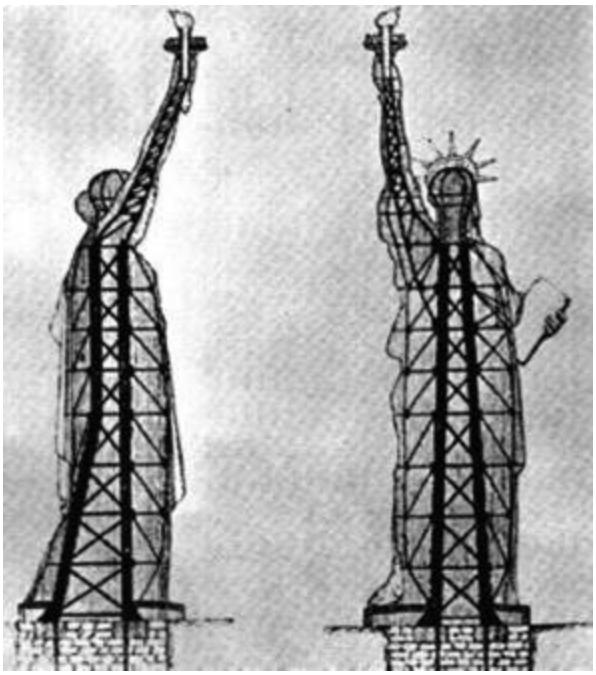


Illus. 1-1.

E. THE THEORY OF THE CASE

We refer to "the theory of the case" throughout this book. As it is commonly understood, the theory of the case contains a descriptor with a

hook, such as: "This is a case about how no good deed goes unpunished," or "This is a case about how the defendant placed profits over people." That is fine, so far as it goes. However, the theory of the case is more than a tag line or even a theme. The theory of the case contains the major design elements of the case. It is akin to a blueprint, one that ensures that the case has been well constructed—that it not only will withstand the attacks of opposing counsel but also will be compelling.[6] At the same time, it serves as a guide for building the case, i.e., case development. Consider the following illustration:



Illus. 1-2.

The Statue of Liberty is a sculptural and engineering masterpiece. It inspires. The statue's meaning is beautifully expressed through its form. But look inside. It stands, and withstands the forces of nature that would otherwise render it a collapsed pile of iron, because of its sound design, one that intelligently joins the supporting interior superstructure with its artistically rendered exterior to create a unified whole. Similarly, the theory of the case is a marriage of sound design principles with the art of storytelling.

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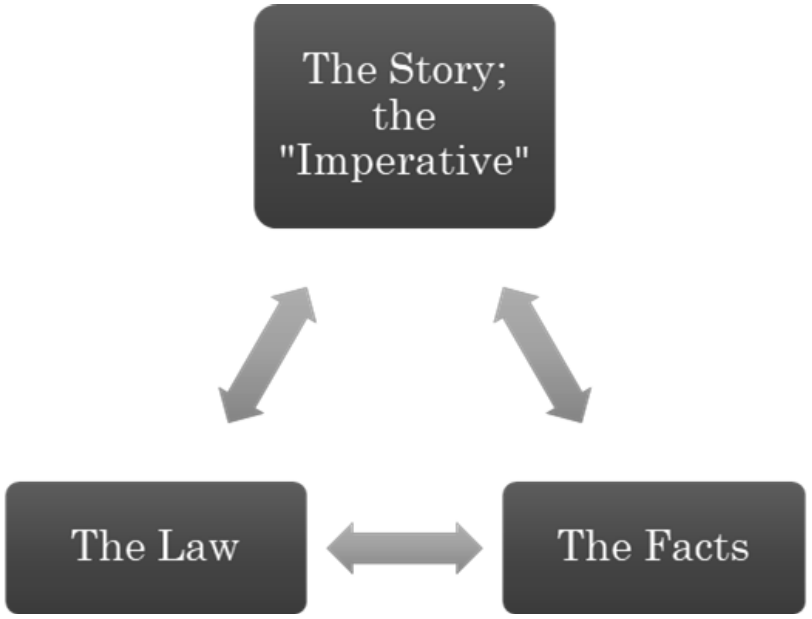
[6] JAMES W. MCELHANEY, TRIAL NOTEBOOK 78 (3d ed. 1994) ("The theory of the case is the basic underlying idea that explains not only the legal theory and factual background, but also ties as much of the evidence as possible into a coherent and credible whole. Whether it is simple and unadorned or subtle and sophisticated, the theory of the case is a product of the advocate. It is the basic concept around which everything else revolves.").

The theory of the case should include three elements:

1. The law;
2. Evidence that satisfies the requirements of the law; and
3. A compelling story that conveys an imperative.

All three elements of the theory of the case are interdependent. As claims or defenses are identified, the evidence necessary to support each must be gathered through both informal and formal discovery. As evidence is gathered, that evidence helps to determine which claims and defenses are available, and to define and support the story. As the story takes shape, it guides counsel's determination of which evidence to highlight, which to downplay or disregard, and which to attempt to neutralize or explain away. As discovery progresses, counsel must constantly re-evaluate and refine the story, not only to ensure that the available evidence supports the story, but also to create a story that rings true.



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1. THE LAW

Researching the applicable law is a critical component of developing the theory of the case. Potential causes of action or defenses, or even potential parties, are not always self-evident. Further, counsel must make strategic and tactical decisions regarding which claims or defenses to assert, for instance, whether to take a "shotgun" or "rifle" approach in the

pleadings.[7] Moreover, in more complex cases, viable causes of action or defenses may not be apparent until the facts are more fully developed. Yet, the facts may not be fully developed until after counsel serves the initial pleadings and commences discovery. This is a chicken-and-egg problem that often arises in civil cases**.** It means that both factual and legal research are intertwined and ongoing, and that counsel must be alert and flexible enough to modify and refine the theory of the case over the course of the litigation.

2. THE FACTS

Each element of a given claim or defense must have sufficient evidentiary support in order to survive a dispositive motion. That evidentiary support must be of a kind that satisfies the requirements of the Rules of Evidence. That evidence may come from a variety of sources: the client, counsel's initial investigation, experts or discovery. Indeed, much of what litigators do relates to building an evidentiary record in support of the case. A challenge in constructing a case is that some relevant information is likely in the possession of the adverse party. This information may be unavailable and even unknowable until the case is formally joined and discovery is begun.

3. THE STORY

Humans are able to make better sense of complex fact patterns when they receive those facts within the context of a coherent narrative. Stories give meaning to facts; they link cause and effect; they keep the listener engaged and interested; they are essential to the art of persuasion. Conversely, a case that lacks a narrative will present as a disassociated jumble of information.

In addition to being coherent, the story must convey an *imperative*. The imperative may speak to emotion, morals and ethics, or logic. It is the aspect of the case that conveys a sense of *fairness* that must be upheld or *injustice* that must be remedied. It is the moral of the story. The imperative is dependent on the nature of the case and the evidence. It can be informed by something as simple as the "Golden Rule," or any number of culturally shared norms. Getting this part of the theory of the case right can be a creative challenge. But getting it right is essential: the story, and its imperative, must resonate with the judge and jury.

Must the story track with what "actually happened"? Most disputes are not black and white. There are many shades of gray and varying points of view. What is true to the client may seem like fiction to the adverse

[7] FED. R. CIV. P. 11 requires that counsel have a good faith basis to assert claims and defenses. Therefore, it is incumbent on counsel to determine whether factual and legal support exists for any given claim or defense before making it. Counsel who fails to meet this obligation risks imposition of sanctions.

party. Your job as counsel is to advocate for your client's truth within the parameters of your ethical obligations. Within that limitation, you are free to emphasize "good facts," neutralize "bad facts," and otherwise tell a story that is coherent, compelling, and that satisfies the requirements of the law. In other words, the litigator must tell a believable story that marries the requirements of the law to the evidence. Short of that, it is just a story, not a case.

F. THE LIABILITY CASE AND THE DAMAGES CASE

Within virtually every civil case, there are two separate but related cases: the "liability case" and the "damages case" (or, in cases where solely equitable relief is sought, the "remedy case"). As to the liability case, the question is: who did what wrong to whom? As to the damages case, the question is: what is the resulting harm and how may it be compensated? Whether you represent the plaintiff or the defendant, you will need to develop a case that answers each of these questions in a manner favorable to your client.

Consider an auto crash case. Plaintiff accuses defendant of running a red light and striking plaintiff's car. To prevail on a claim of negligence, plaintiff must establish both the liability case (the existence of a duty, a breach of that duty, and causation) and the damages case (the harm that resulted). To avoid dismissal, plaintiff must present admissible evidence to support each element of the negligence claim and a separate body of evidence to prove the nature and extent of the harm defendant's negligence caused. If the plaintiff succeeds in presenting a *prima facie* case, the defendant must present admissible evidence to rebut at least one of the elements of the liability case, and should similarly present evidence to rebut or to minimize the damages case.

Recognizing that there are actually two "cases" provides the litigator a measure of clarity in terms of: (1) overall case development, (2) developing a theory of the case, (3) developing a discovery plan, and (4) valuing the case.

Regarding case valuation, a litigator cannot fulfill the critical role of settlement advisor without having first performed an accurate assessment of the strengths and weaknesses of the client's case. Though it may seem like a digression from our subject, a short primer on case valuation will help illustrate the connection between case development and case value.

G. VALUING THE CASE: LITIGATION AS A MEANS TO ASSESS RISK

Ninety-seven percent of all civil cases are resolved before trial.[8] To best protect a client's interests, whether plaintiff or defendant, a litigator must know how to assess risk and value cases for settlement purposes.

When the age-old complaint is voiced, sometimes with a huff, that most civil cases settle only after they reach the courthouse steps, the implied criticism betrays an ignorance of what civil litigation essentially is: an ongoing process of gathering and evaluating information in order both to prepare for trial and to assess the risks associated with going to trial. *The more information counsel has, the more likely that there can be an informed valuation of the case*. Sometimes a case simply cannot be settled until all the salient facts are known.[9] Case development and discovery play a vital role in aiding counsel to assess risk, value the case, and advise the client as to the prospects of settlement.

Case valuation is inherently subjective—more art than science. There usually are multiple variables that bear upon the value of a case, many of which are almost impossible to quantify, e.g., how the parties may present to a jury, or whether the case will be tried in a "plaintiff friendly" or "defense friendly" venue. However, that does not mean that case valuation lacks method. One approach is to begin with two fundamental questions:

1. What is the strength of the liability case?
2. What is the strength of the damages case?

Answers to these questions are usually informed by evidence gathered through informal and formal discovery. However, there are times when counsel must answer these questions without the benefit of full discovery. Courts have increasingly pushed for early case resolution through court-initiated settlement conferences or mediation. This often requires the parties to assess their cases prior to discovering all the relevant facts. The further down the road the case progresses, and the more completely it is developed, the more information counsel will have to evaluate the case. The tradeoff, of course, is that the longer a case is litigated, the more expensive it becomes.

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[8] *See Government survey shows 97 percent of civil cases settled,* PHOENIX BUS. J. (May 30, 2004, 9:00 PM), https://www.bizjournals.com/phoenix/stories/2004/05/31/newscolumn5.html. (citing U.S. Department of Justice study of state courts in the nation's 75 largest counties). The percentage of cases that terminate prior to trial is even higher in federal court. *See* Case Statistics Data Tables, Table C-4, *U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken* (annual reports available for 12-month periods ending March 31), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=C-4&pn=79&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=.

[9] Sometimes the salient facts go beyond what can be learned through discovery, such as who the trial judge is, and what kind of jury gets empaneled.

The following illustrates how counsel may value a case by considering the strengths of the liability case in relation to the strengths of the damages case. Assume a case in which the potential damages are $1 million. Further, assume that counsel has evaluated the case and determined there is a 50/50 chance of the plaintiff establishing liability on the part of the defendant. If both parties think that plaintiff has a roughly 50% chance of convincing a jury that defendant is at fault, and both parties think the likely damages award will be $1 million, then a simplistic valuation calculation can be made: $1 million × .5 (i.e., 50%) = $500,000. If the parties are rational actors, and there are no material factors beyond the merits of the case bearing on the decision to settle,[10] the case can be said to have an approximate value of $500,000, and a rational outcome would be for the case to settle in that range.[11]

Now assume that counsel views the case as a "case of liability," that is, the defendant is highly likely to be found liable by a jury, but counsel believes that a jury is likely to award damages in the $100,000 to $300,000 range rather than $1 million. Settlement might logically be reached in that same dollar range. Whether the case settles closer to $100,000 or $300,000 will depend on other factors, such as the added cost of going to trial, the risk of adverse publicity, the client's tolerance for risk, the negotiation skills of counsel and so forth.

It is when the parties, or more typically their counsel, do not similarly assess the liability case and/or the damages case that the likelihood of trial increases. Often, when a civil case actually gets to a trial it is because one or both sides have incorrectly valued the case. To the extent the parties similarly assess the risks, the chances of settlement increase; to the extent they diverge, the chances of trial increase. In any event, counsel must be able to advise the client using some *rational* basis to assess the liability case, the damages case, and the cost and risks associated with trial. It is the litigation process, and particularly discovery, that informs the lawyer's continuous analysis of the value of the case.

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[10] The illustration above should be viewed as a *starting point* to valuing a case. There are other considerations that go into case valuation, including, for example, avoiding additional legal fees, ending the disruption to the lives of the litigants, and so forth. Further, there are times when other considerations trump the valuation process, such as a litigant who would rather try the case and risk a big loss than settle because of concerns about appearing to be an "easy target" in future cases, or because the litigant is sending some other message that has little to do with the merits of the particular case.

[11] We offer this simplified approach for purposes of providing an introduction to case valuation. There are volumes written on risk assessment and management, and dispute resolution theories. *See, e.g.*, Russell Korobkin, *A Positive Theory of Legal Negotiation,* 88 GEO. L.J. 1789, 1795 (2000) (providing information on Best Alternative to a Negotiated Agreement, or BATNAs); Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291 (1990) (discussing game theory).

H. THE RELATIONSHIP AMONG CASE DEVELOPMENT, THEORY OF THE CASE, DISCOVERY PRACTICE AND CLOSING ARGUMENT

Question: When the demand is $10 million and the offer is $0, what does that make you?

Answer: A trial lawyer.

Sometimes cases cannot be settled. Sometimes they go to trial. Closing argument at trial is the distillation of all that precedes it, from the initial client meeting through pretrial litigation and discovery, the trial, right up to charging the jury. Closing argument is the compelling story; *it is the theory of the case fully realized*: the law, the supporting facts, and the story with its imperative.

The body of evidence available during closing argument depends on how well you developed the case. Effective case development, in turn, requires purposeful and effective discovery practice. Aimless litigating and haphazard or rote discovery practice loses cases and compromises the opportunity for more favorable settlement terms. Effective case development and discovery practice wins cases and produces more favorable settlements.

I. ETHICAL CONSIDERATIONS: AN OVERVIEW

Lawyers are subject to rules of ethics[12] as well as, one would hope, a personal sense of right and wrong. Ethical challenges in the litigation context are common given the inherent tension between zealously advocating for the client while at the same time dealing fairly and honestly with the adverse party and opposing counsel.[13] For example, what if the client insists that counsel take an extremely aggressive litigation posture, must the lawyer comply with the client's wishes? What if counsel believes that the client's motive in pursuing litigation is to harass the adverse party?[14] What if the client wants counsel to assert "boilerplate" objections to virtually all written discovery? Is this practice ethical, or is it actually intended to thwart legitimate discovery?[15] What if the client's deposition testimony is at odds with what he told counsel under protection of the

[12] As we go forward, when addressing ethical issues, we will refer to the American Bar Association's Model Rules of Professional Conduct.

[13] MODEL RULES OF PROF'L CONDUCT pmbl., ¶ 9 (2020) ("Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.").

[14] *See id*. pmbl., ¶ 5; *see also id*. R. 4.4.

[15] *See id*. R. 3.4(d).

attorney/client privilege?[16] For each ethical issue that arises, you are required to exercise independent judgment,[17] and to rely upon your own conscience.[18]

Sadly, civil litigation is rife with bad behavior by litigants and their counsel. It is human nature to want to respond in kind to those who are disrespectful or who engage in gamesmanship. Resist the impulse. An adverse party's misconduct, or that of their lawyer, is not a license to lie, cheat or bully. Further, bad behavior in the litigation context has a way of coming back to bite the miscreant. Losing credibility with opposing counsel or the judge or the jury undermines the lawyer's ability to persuade, which in turn does a disservice to the client. And once credibility is lost, it is very hard to get back.

[16] *See id.* R. 3.3(a)(3).

[17] *Id.* R. 2.1.

[18] *Id.* pmbl., ¶ 7.