



By Drew York, Gray Reed & McGraw, LLP, Houston

# DEFINING A WIN IN LITIGATION: FLEXIBLE GOALS AND OPEN COMMUNICATION ESTABLISH A SOLID FOUNDATION

Does a “win” in litigation require a final judgment in your favor? Not necessarily. Litigation “wins” are defined by the circumstances facing a party at the outset of litigation, and how those circumstances change as litigation progresses.

If I got \$100 for every time a client told me during an initial consultation that they wanted to extract a pound of flesh from the other side, then I’d probably be living the island life right now. These clients aren’t individuals looking to sue some international conglomerate; most are entrepreneurs or business executives. And I guarantee you that I am not alone. Most lawyers would tell you they hear the same thing from clients during their initial consultation. Sometimes clients continue that mantra for several months. Some even go so far as to say something like, “I don’t care what it costs. I want justice!” I get it, too. When a client first contacts a lawyer about litigation, it’s because the client believes: (1) somebody did something that hurt the client (physically, emotionally or economically); or (2) somebody brought a bogus lawsuit against them.

Allowing emotion to dictate your litigation strategy is like Pickett’s charge at Gettysburg – you will be decimated one way or another. Litigation is costly, time consuming, distracting and emotionally draining on the parties. It is important that a client walk into an initial meeting with their lawyer willing to listen objectively to their lawyer’s counsel. Likewise, it is important for clients to make sure that their lawyer is giving them an unvarnished analysis of their case. That’s something that many people forget – lawyers

are also counselors. It is our job not only to be a client’s advocate in the courtroom, but also to provide frank, objective scrutiny of the strengths and weaknesses of a client’s case.

## Flexible Goals and Strategies are Key

Early conversations between the lawyer and client should also identify the client’s goals in the dispute. The client and lawyer should acknowledge that those goals, and the strategy to achieve them, are based on the information known at the time. Clients will achieve an acceptable outcome when they are willing to modify the goals and strategies based on developments along the way – such as the discovery of bad facts.

## Two-Way Communication is a Must

Clear communication, and a willingness to control emotions during conflict is vitally important to achieve a successful result, even if it is not the “home run” the client initially wanted. Take, for example, a client who has been sued for breach of contract and believes that certain language in the contract excuses the client’s obligations. The lawyer determines during his initial review of the contract that it does not say what the client thinks it says. Furthermore, the contract says that the prevailing party is entitled to recover their attorney’s fees. If the lawyer clearly communicates his analysis to the client early on, and the client objectively absorbs that information, the client and the lawyer usually can achieve the client’s secondary goal: quick resolution of the litigation for less than full price. Moreover, the

client avoids the double whammy of paying its own lawyer to litigate through trial, and paying the other side's lawyer through a judgment.

This article is *not* intended to convey that every client should throw in the towel early on. Different circumstances dictate different strategies. But having an open mind, and clear communication, will put the client in the best position to choose the path that the client believes provides the best return for the least amount of risk.

### Stay Tuned

*The article is part of a series featured on Gray Reed's Tilting the Scales blog. To follow the monthly series, visit [TiltingTheScales.com](http://TiltingTheScales.com). Over the next few months, Gray Reed Partner Drew York will talk about other issues that help define a win in litigation such as:*

- *Good navigators: why constantly re-evaluating litigation is crucial to meeting your goals;*
- *Why the distraction of litigation is a "hidden" additional cost to your company;*
- *The benefits of resolving a dispute prior to litigation;*
- *Mitigating the plaintiff's damage recovery at trial can be just as good of a win;*
- *Reputation matters: how your stance in litigation conveys a message to your vendors, competitors, and even your employees; and*
- *The big picture: how will the outcome of this litigation affect my business relationships going forward?*

# IT'S BACK!

## VOLUNTEER NOW FOR THE 2020 TRIAL ACADEMY FACULTY!

The 2020 Trial Academy will be held March 27-28, 2020, in Lubbock at the Texas Tech University School of Law. If you are interested in helping to train 1-6 year attorneys for their day in the courtroom, contact Trial Academy Chairs Greg Curry ([greg.curry@tklaw.com](mailto:greg.curry@tklaw.com)) or Arlene Matthews ([amatthews@cdmlaw.com](mailto:amatthews@cdmlaw.com))