Kevin Abbott, Scott Leipzig and Edith R. Matthai Share the Latest Insights on Managing Litigation

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The **Litigation Management** panel is produced by the L.A. Times B2B Publishing team in conjunction with Allen Matkins; Fennemore Law; and JAMS.

After the many unprecedented operational changes that businesses in every sector have had to make over the last three years, a whole new landscape has emerged in terms of litigation issues. This has left even the most seasoned human resources departments and C-suiters struggling to find answers to crucial questions. What should management be focusing on in terms of new standards, laws and protocols and how can litigation be most effectively managed?

To address these issues and concerns, as well as many other topics pertaining to the world of litigation, the Los Angeles Times B2B Publishing team turned to three uniquely knowledgeable experts for their thoughts and expertise about the most important “need to

know" insights and offer their assessments regarding the current state of trial law and the various trends that they have observed recently.

Q: In what ways has the practice of trial law changed over the past five years?

Scott Leipzig, Partner and Chair - Litigation Practice, Allen Matkins: This may seem obvious, but the main driver of change in our trial practice has been the use and implementation of technology, much of which was brought to the mainstream during the COVID-19 pandemic. While litigators employed "court call" prior to COVID, this was a telephone-based mechanism for attending less important hearings and wasn't universally adopted by courts. With the advent of the pandemic, using web-based video technology for court hearings, trials, arbitrations, depositions and mediations became the norm and was immediately adopted by all courts in all jurisdictions. As we turn the page on the pandemic, technology's use for litigation activities continues, as courts, lawyers and litigants all now understand the cost savings and efficiencies presented with the use of virtual technologies. It has become vitally important for lawyers to be adept at using new technology at the risk of being left behind.

Edith R. Matthai, Mediator, Arbitrator, Referee/Special Master and Neutral Evaluator, JAMS: To state the obvious: virtual proceedings. Before 2020, I had never heard the phrase "You're on mute!" nor had anyone wanted to screen share with me. We have all saved countless hours of travel, often without impairing communications. But we lost much of the easy camaraderie that occurred during hallway chats at the courthouse, deposition breaks, and at events that were canceled during the pandemic. Those spontaneous interactions fostered relationships that eased or prevented hostilities among counsel. The combination of limited social interaction and changes in societal norms, which previously required polite discourse and veracity, has fueled a loss of civility and an increase in dishonesty in the practice of law over the past five years. What I believe has not changed is the need for hard work, analytical thinking, creativity, and the need to accurately evaluate the client's position and articulate it clearly, simply and persuasively.

Kevin Abbott, Business Litigation Director, Fennemore Law: The combination of technology and the COVID-19 pandemic have changed the way we appear in court. Remote appearances by video conferencing or phone are becoming commonplace, not just for routine statute conferences but also for contested motions. Even during trials, remote appearances are becoming more and more accepted, and many arbitration hearings are taking place remotely. At the same time, juries expect to see the use of effective technology. In one recent trial, our firm had a huge advantage simply because we had better tech. Our presentation was faster, smoother and more interesting. An attorney cannot really afford to ignore the technological tools that are available now.

Q: What are the benefits of alternative dispute resolution and when do you recommend using it?

Matthai: It is rare that a case does not go to mediation at some point, which reflects the bar's recognition of the benefits of the process. However, the strategy decision on when to use mediation to the best advantage of the client should be carefully considered in each case. There are many cases that could be resolved before the cost of litigation mounts; indeed, allowing those costs to mount before a mediation can be a significant impediment to settlement. In other cases, the parties must either ascertain critical facts through discovery or air their grievances through the litigation process before they can be persuaded that settlement is the best option. Counsel should repeatedly consider, in each case, whether the time has come to mediate to obtain the best result for the client. Creative counsel should also consider the use of arbitration even when there is no arbitration agreement. If a ruling on a critical fact or a legal issue will determine the outcome of the case, counsel can select a trusted arbitrator and work with that arbitrator to structure an efficient proceeding to resolve the issue. The costs of litigation can be greatly diminished, and the vicissitudes and delays in the court system can be avoided.

> Everything moves much faster now – simple things that could once take weeks now take seconds. While this creates more of a stressful, high-paced environment for litigators, it has also created efficiencies and cost savings for clients.

— Scott Leipzig

Q: What are some of the most common causes for litigation today?

Abbott: Whether it's a business partnership relationship, an employee/employer relationship, a buyer/seller relationship, or any other connection, litigation is often the end result of poor communication. Poor communication leads to frustration, and frustration leads to a phone call to an attorney.

Leipzig: We have seen a huge influx of partnership disputes, including family or related-party partnership matters. While prior generations often operated partnerships on a handshake and without the formation of proper entities, with the explosion of real estate wealth over the last generation or two, we are now talking about hundreds of millions of dollars of real estate equity often being governed without partnership agreements or formalities. This environment necessarily breeds litigation as parties (including family members) seek to secure their interests and to formalize their specific share of ownership. These intra-family partnership disputes are more and more frequent, involve a substantial amount of document and fact discovery, and are highly emotional in nature.

Q: What specific trends are you seeing in relation to alternative dispute resolution?

Matthai: One significant trend is the elimination of joint session presentations at the outset of mediations. While there may still be an initial joint session to discuss the mediation process, posturing and the resulting antagonism are avoided by eliminating the substantive joint session. That said, no usual methodology should be followed in every single case. Counsel and the mediator may decide that a joint session is likely to be helpful in a particular matter. Instead of using a joint session for position statements, the trend has been for mediators to urge that mediation briefs be exchanged, with the option to provide confidential information to the mediator in a separate brief or letter. This gives each side a greater opportunity to consider the other parties' positions. The practice of separate premediation telephone calls with counsel has become more commonplace and is of great benefit to both counsel and the mediator. Counsel can candidly advise the mediator of issues that are likely to impact the mediation process. The mediator can candidly advise counsel of issues spotted by the mediator that should be discussed between counsel and their clients before the mediation session begins.

Q: What's a big mistake that clients make during business litigation?

Leipzig: At Allen Matkins, we have identified a few mistakes that parties make during business litigation. First, parties all too often fail to issue a "litigation hold" that instructs their own partners or employees to not destroy potentially relevant evidence. Preservation of evidence is required by applicable law. Even the inadvertent destruction of relevant documents is actionable in California and gives the adverse party leverage in the case and potential right to sanctions. Second, once litigation commences parties often make the mistake of communicating about a case internally without including a lawyer on those communications. All too often this creates e-mail or text communications that are damning in nature and "discoverable" in the litigation. It's important that all communications include a lawyer in order to preserve attorney-client privilege. Third, clients often make the mistake of assuming they don't have insurance coverage for a matter that in fact might be covered. It is vitally important for litigants to tender disputes to their insurers regardless of whether they may believe there is no coverage.

Abbott: Failing to focus on resolving the dispute is a big mistake businesses make. Litigation is by far the least efficient way to resolve a problem. While it is sometimes necessary, there are almost always better ways to solve the problem. Settlement should be discussed and considered at the start, middle and end of the pretrial process. Parties should be willing to make concessions to get a settlement to the finish line, because the outcome will still almost always be better than going to trial. Parties should be willing to be creative and open-minded about settlement.

Matthai: One common mistake is allowing a dispute to become personal or viewing it as an affront to power or prestige instead of evaluating the case objectively – including a realistic assessment of the financial impact of the litigation. While the people who were directly involved in the genesis of the dispute will likely be involved in the litigation, those people, if

possible, should not be making strategy and settlement decisions. Another big mistake is not being forthcoming with counsel. It's far better to provide excess information than to withhold information that might be critical. The consequences of withholding information can be far greater than the consequences of disclosing the information to counsel.

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— Edith R. Matthai

Q: Can a contract force a business into mediation?

Leipzig: A contract can 100% force a business into mediation, both expressly and practically speaking. The express language of a contract can require parties to mediate as a prerequisite to litigation. Additionally, many contracts provide that should a litigant refuse to mediate and should that party ultimately prevail in a case, it forfeits its rights to recover its attorneys' fees. This provides a very strong incentive to mediate. A contract can also encourage a party to participate in mediation in a less direct fashion. For example, if a contract provides that the prevailing party in a litigation will have a right to attorneys' fees, going to trial might be a risky endeavor as it brings to bear the potential of paying the other side's substantial fees. A party may be much more inclined to resolve a dispute in mediation than take the chance of going to trial and risk having to pay not only their attorneys' fees but the other party's as well.

Matthai: A contract can include a provision that the parties must engage in mediation before a lawsuit can be filed or an arbitration commenced. However, it is highly unlikely that a court or an arbitrator would dismiss a case if a mediation had not occurred; instead, a stay might be imposed to allow a mediation to take place. The difficulty is that a "forced" mediation – when a party has no desire to participate – is antithetical to the mediation process. Unless counsel believes that there is a realistic prospect of convincing the parties to participate in good faith, it may be better to advise a client to waive the contractual requirement and mediate when all are willing to participate in the process.

Q: What aspect of litigation has changed the most since the start of your career and what elements have basically stayed the same?

Abbott: Technology has changed many of the details of litigation. Legal searches are more powerful. Trial presentations are more powerful. Remote appearances are more possible. But the core of litigation has remained the same. First and foremost, 99% of cases settle, and in my view that hasn't changed. The most efficient outcome, even with all of the technological advances, is a settlement. Parties should be open to settlement and make it work. Second, if a case doesn't settle, what matters most of all is to make a streamlined, easily understandable presentation to a jury or judge. Ninety-nine percent of the time, those

thousands of pages you fought about in discovery won't matter. The complex legal arguments won't be persuasive. Attorneys will need to work with their clients to make a clear case based on easily understandable legal principles that a jury will want to support.

Leipzig: I'm aging myself, but when I started my legal career, correspondence between counsel and transmission of court documents were all done through "snail mail" and fax machines. Correspondence, meetings, and hearings were painfully slow and expensive to plan. All of this has changed with communication through e-mail and the advent of court-based technologies. Everything moves much faster now – simple things that could once take weeks now take seconds. While this creates more of a stressful, high-paced environment for litigators, it has also created efficiencies and cost savings for clients. So what hasn't changed? Simply put, no amount of technology has changed the importance of a lawyer's diligence, communication with clients and written work product. There's no substitute for great research, writing and attention to detail, and clients still need a lawyer who is diligent and thoughtful.

> Juries expect to see the use of effective technology. In one recent trial, our firm had a huge advantage simply because we had better tech.

— Kevin Abbott

Q: What do you do when a client wants to settle late in the game but you feel they have a strong case?

Matthai: The client is entitled to a full and honest evaluation of the case, which includes a discussion of the likely – but not guaranteed – outcome, the risks of trial and the expense of trial, which includes not only the legal fees and costs, but also the expense of lost time and perhaps lost opportunities for the client or their company. As much as a lawyer may be itching to try a case, the lawyer must remember that it's the client's case and it's the client's decision whether to go forward after getting that full and honest evaluation.

Q: What keeps you up at night as a litigator?

Abbott: It's cases that become severely "underwater" in terms of efficiency. Whether it's due to the other side or my client, nothing is worse than when the costs of litigation outpace the actual amount in dispute. Even when there is a contractual clause that awards "reasonable" attorney fees to the prevailing party, this is still a bad situation to be in. An attorney cannot guarantee success, cannot guarantee an attorney fee award, cannot guarantee a fair attorney fee award, and cannot guarantee collecting on an attorney fee award. Ideally, all cases should be handled from start to finish to avoid this kind of "underwater" situation.

Matthai: The greatest fear for a litigator is of the unknown – a fear that despite all the work one has done, all the digging to learn the facts and all the research to be sure one knows the law, something unexpected will dramatically impact the case. An excellent trial lawyer

operates in diametrically opposed psychological states. They are determined to be in control, but they are often in situations that cannot be controlled. While being well prepared provides some level of comfort, litigation inevitably involves the unexpected. Any lawyer who has spent significant time in trial has had a witness who did not testify as expected or a judge who made a surprise ruling. The secret is to stay calm and carry on, without showing any angst, while simultaneously adjusting to address any twists. This is why trial lawyers are notorious insomniacs but are addicted to meeting the challenges that arise in the courtroom.