

# With All Due Haste: Five Ways to a More Expedient Litigation Strategy

By Meredith L. Strauss

Many lawyers seem to believe that Newton's third law of motion applies to litigation: every action by their adversary requires an equal and opposite reaction. The result is often to extend rather than shorten the process. If your client really needs to move the litigation along—for example, if she is terminally ill or he wants to remarry because his new girlfriend is pregnant—the typical litigation playbook doesn't work. If opposing counsel serves 50 document requests, perhaps you shouldn't serve at least 50 of your own requests plus 15 non-party subpoenas, just because. If they make a motion, your instinct to cross-move, so that you'll get a reply and therefore the last word, doesn't help.

A trickier issue, to borrow another page from the physics textbook, is how to accelerate a case that your client wants wrapped up as quickly as possible, especially when your adversary has a goal of deceleration and delay. Your goal of increasing velocity may be due to a cli-

ent's age, economic considerations, an anticipated change in the law, or a host of other reasons. At every step in this situation, you must keep the forward momentum and consider how to do less to achieve more.

Here are five quick tips on how to streamline your approach when time is of the essence:

## I. Jump the Line

If your client is over the age of 70, you may apply for a statutory preference pursuant to CPLR 3403, which allows cases to be heard out of turn rather than in the order in which the note of issue is filed. CPLR 3403 also provides that a preference may be granted under several other specific circumstances including where "the interests of justice will be served by an early trial." The preference request must generally be made at the time of the filing of the Note of Issue or within 10 days thereafter.

A preference will significantly shorten your case. Make a motion for a preference early in the case, then use it for leverage: insist on a conference with the judge in lieu of motion practice, and keep the pedal to the metal with short deadlines for discovery, pre-trial filings, and trial. Ask the court to eliminate rebuttal reports and ex-

## II. Don't Take the Bait

If your adversary sends a blistering letter to the judge as a sur-reply on a motion or to complain about a discovery issue, your first instinct is probably to respond with an equally scathing letter which brilliantly skewers your opponent. But, before you send a messenger off to court with that letter, take a moment to reflect on whether this is the best move.

Many judges simply have their part clerks discard all incoming letters from counsel. It is worth a call to the part clerk to find out whether the opening salvo from your opponent will ever be read. The part may even have a rule forbidding letters to the court. But even if the judge may

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read the letter, sending a response will likely open a can of worms, inviting a flurry of further correspondence.

A letter-writing sideshow will take up valuable time and will not serve your ultimate goal. Having the last word is not the same as being the most effective. Sometimes, silence can be the most powerful response of all.

## III. Ask Less, Give More

When it comes to discovery in a case that you're trying to accelerate, the best approach may be one that feels like acquiescence: ask for little while producing a lot. Your marching orders are to prevent the other side from claiming they don't have all the documents or testimony they need and therefore seeking to drag out discovery until kingdom come. If they're asking for receipts for every paper clip your client's business has ever purchased, just produce them and move on.

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Of course, if their requests are truly out of bounds, you will have to push back while still trying to avoid motion practice; otherwise, for every request that isn't harmful, just give them what they're asking for. Asking for a court conference can be the best alternative to a motion and if the opposition is particularly persistent, asking the court to appoint a special master to supervise discovery can short-circuit motion practice. Conversely, your own discovery requests should be fine-tuned to elicit only the most essential documents from the other side, making your preparation for depositions and dispositive motions or trial much more streamlined while also giving them no grounds for any motions.

#### IV. Drive the Bus

Everyone on your team, from your experts to your support staff, must be on board with your fast-track timeline. Make this clear when you are retaining appraisers and other testifying experts; they must be able to make your case their top priority. Next, create a spreadsheet that works backward from trial and sets hard deadlines for every task and identifies the person responsible. Circulate this task matrix on a weekly basis and require updates from every team member to confirm that they are on top of their benchmarks. Also, ensure that every expert has everything she needs to do her job.

At all times, you must be prepared to oppose any request for an extension of time by the other side. The

best way to do that is to be ready yourself to meet every deadline.

#### V. Be the Voice of Reason

When time is of the essence, you may have to make compromises that you would not otherwise have considered, such as taking less discovery and letting provocative letters go unanswered. If your case goes to trial, you may also have to adapt your presentation of evidence to the timeline you want. Your opponent, on the other hand, will be trying to run out the clock.

If faced with a choice of adding trial days, inevitably spread over several weeks or even months, versus shortening the trial, consider capitulating on any points where the time saved will outweigh any compromise or accession. For example, it may be to your advantage to simply adopt the other side's expert's conclusions so that you can skip days of expert testimony and end the trial. This will have the added benefit of simplifying the judge's job and therefore will get you a decision sooner.

Overall, think of yourself as an *amicus curae*. The judge would like nothing more than to have your case come to a conclusion, so on this you are allies. Take care to remind the court whenever possible that you're just trying to move the case along—unlike your opponent.

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