Mortgage Industry Litigation: Responding to Clients' Needs in a Time of Increased Demand

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Introduction

In my current practice, I deal primarily with commercial litigation, representing several entities in the mortgage and secondary mortgage industry. The cases are very diverse and may involve disputes between entities that have purchased loans from each other or may involve borrowers suing lenders or servicing agents for a wide variety of acts and alleged omissions in connection with loans. I also represent banks in suits for lender liability arising from trust agreements, rights of setoff, deposit agreement, and many types of banking transactions. With the current turmoil in the secondary mortgage market, and the global economic downturn, I have found myself right in the middle of some of the most pressing legal issues of this decade. Although there is increased interest among attorneys with regard to entering this practice area, it is not necessarily a sub-specialty in which you can quickly acquire expertise. Because of this, there has been increased pressure on my practice and the practice of other experienced practitioners. Indeed, clients and large institutions are increasingly demanding the specialized skill set related to practicing in this type of law. The financial crisis and recessionary environment have resulted in a heightened awareness among the general populace of the presence and significance of the mortgage industry to our national and global economy, and concepts such as "securitized transactions" are now becoming part of common business lexicon, resulting in a need for more of the services that I can provide and an increased volume of litigation and general client counseling.

Developing Client Strategy

In general, developing effective client strategy begins with careful management of initial client meetings, at which expectations are discussed, detailed information is gleaned about the facts of the dispute or issue at hand, and documentation is collected from the client. A strong beginning must include thoroughly learning and discovering the facts and details.

Initial Client Meeting

I try to arrive at the first meeting with a general understanding of the facts and the issues that the client will want to discuss. Sometimes clients will

send me a file or if there is a particular legal issue, I will review any areas that I need refreshing on. If I know that a particular opposing counsel will be representing the adversary, I will find out as much information about that attorney prior to the meeting. If the core issue is something with which I am familiar because of a recent case, then that is an advantage for me and the client. If I am familiar with the topic but have not dealt with it for a while, then it is worth my time and that of the client for me to review the law, code, or statute. Another important preparatory step before the first meeting is to do some homework on the client's industry and the main players within the industry, the standing of the client's company in the industry, and how the hierarchy of the industry works and how business is affected by that hierarchy—in short, who are the players and how do they play. This information can be obtained from many different sources online and through interviews and other investigative tasks. If I believe that litigation will be part of my work with the client, then this due diligence helps me to collect information on a potential opponent. Arriving at the initial client meeting armed with information and knowledge helps to formulate strategy more efficiently and accurately.

Managing Client Expectations

There are some basic data points you need to provide to manage a client's expectations. For example, clients usually want to know a lot about my background, how long I have been practicing, and the types of cases I have handled. They are also interested in whether I will be their primary contact (versus the work being handled by associates or staff), and what the approximate cost will be for the case. Later in the case, they will often ask for a risk assessment—basically, my assessment of the likely outcome for their case. The real expectation setting begins at this point, because we are looking at specific scenarios and how they played out; the influence of facts or the tenor of the case; and whether their issue is a common issue or something new that will have to be considered by the court. For example, if a client comes with a garden variety breach of contract case, I may discuss with them what aspects of their case are commonly before the courts, what the legal temperature is on the common issues, what the gray areas of the law are—if any, how these type cases routinely proceed through the settlement process, the judicial system, and through trial, and even how juries have reacted, or tend to react, to these type of issues. I can also try to

give them advance notice of the opponent's weakness, and if the fact pattern is a typical one that I have dealt with many times, I can generally forecast some range of probability of success with certain qualifications based on the unique features that every case inevitably comes with.

Most importantly, you have to be prepared to inform your client of the actions they can and cannot take in the interim while a case is being resolved. When you are dealing with foreclosure or property issues, there are many things—positive and adverse—that can happen while a case is pending. For instance, a party can file bankruptcy, which will cause the case to be stayed or "stopped," at least for some time, and can prevent the creditor/lender from exercising some of its legal rights for a period. Currently, with the mortgage industry in such a flux, there have been voluntary moratoriums on foreclosures and evictions, which can affect how quickly a case can be resolved and a property cleared of legal issues.

Litigation Strategies

Collecting and Managing Case Documentation

The amount of documentation that is associated with a case can range from a file folder to hundreds of thousands of documents. There are a number of different products information management documents on the market, such as *Summation*, with which you can scan, store, retrieve, and catalog documents with a click of a mouse. The products enable you to define relationships between documents, or documents and witnesses. That saves time when you are forming your case strategy. I recommend creating a timetable to help manage your documentation. When you are dealing with a complex matter, staying on schedule can help you get your arms wrapped around an issue and a mountain of documents. That makes it far easier to extract pertinent facts for strategy sessions, prepare for depositions, and ultimately, prepare for trial.

Collaborating with In-House Counsel

The most important aspect of working with in-house counsel is to answer their questions promptly, and to be prepared to support your answers. Generally, the most common questions that in-house counsel will pose are

what is the company's exposure in a particular case and what is the estimated amount of legal fees it will take to resolve. Many clients express surprise when I provide prompt, accurate answers with supporting information—which leads me to believe that many attorneys delay in responding, and sometimes require repeated requests to respond, or worse, do not respond at all. Open and frequent communication, understanding the key players and their respective areas of expertise, and developing a communications protocol that defines who will provide information are all steps that make working with in-house counsel and executives more effective. For example, when home equity loans were first introduced in Texas, everybody was on a learning curve because there were new products offered by various companies. Each company had an individual who was well versed in that company's specific products. Considering the fact that there were ten to twenty requirements that had to be met under the statute, it was critical to know who the experts were so you could tap into their experience.

Identifying Key Personnel for Deposition

If the opposing side is going to call a corporate representative for a deposition, it is important for the client to identify that staff member. Often, companies have a designated individual who has proven herself or himself very skilled at withstanding cross-examination while being deposed for hours at a time. The ability to be effective in this environment is difficult yet critical because an individual's performance in a deposition can alter the outcome of a case. This type of individual can also be an invaluable resource for in-depth information about a particular subject that is germane to the case, or background about the company or prior occurrences that will help you form case strategy. Once a client identifies for me the individual who will be the corporate representative for a particular case, I schedule a time to meet or, at minimum, confer by telephone with the individual to get a sense of his or her depth of knowledge, experience with depositions, concerns he or she may have with the issues of the case or with testifying generally. Later, closer to the deposition, I will review all the pertinent documents in the case and analyze all the offensive and defensive key issues in the case, outline them, and set up a time to meet with the individual to discuss the upcoming deposition. In the meeting, I will explain the theories of the case from our perspective and our opponent's

perspective. This general overview serves as sort of a compass for witnesses when they are in the midst of the deposition and are faced with a particularly difficult question that perhaps we did not cover in the deposition. While I try to be very thorough and cover all the significant issues in the case, and particularly how to handle the weaknesses in the case, one can never anticipate every single question that will be asked. But if the witness has a general understanding of the theory of the case and what the significant issues are that will help us prevail, when they are faced with the tough, unexpected questions, they can use that knowledge to help guide them to the truthful, correct answer.

Avoiding Unintended Consequences

Two types of unintended consequences of preparing for litigation (and litigation itself) can be problematic to a company, especially if the client and counsel do not anticipate their effect: media coverage and widespread impact of adverse decisions to the company. With very few exceptions, everything filed in court is public and available for anyone to review. Thus, the prospect of negative publicity is ever-present, especially in an environment in which electronic transmission of information can bring information to the media in seconds. For example, a well-aimed text message during a recess in a trial can have the media waiting for you outside the courthouse at the end of the day. Therefore, it is necessary for you, as counsel, to understand the "hot topics" that may set off media attention. Generally, if the client has sensitivity to press issues, they already have a well-established procedure such as a designated contact person who is notified immediately upon the threat of media attention, or a hotline that those seeking information can dial and obtain certain limited information. If there is not an established procedure, we set one up for them. Typically, that involves designating a contact, establishing a media contact protocol, and training the contact for handling the media.

Another aspect of litigation that is almost completely controllable is preparation for the consequences of the adverse effect of a judgment against your client. So if there are company policies or a particular document that a company uses throughout the U.S. or globally, you need to anticipate the effect of an adverse decision. For example, if a company uses the same sales contract nationwide, and in litigation someone challenges the

validity or legality of one of the provisions in the contract and they succeed, this could have significant economic and other ramifications on the company. Let's say that a provision that states that the company can declare a default of the entire contract if the other party fails to notify them that they have assigned the contract and in court this provision is declared invalid. This would have the result of now letting anyone that has signed this contract capable of assigning it to whomever it wants. The lesson is that if there is a contract being challenged that could impact more than just the parties to the lawsuit, careful thought should be given to the possibility of more than the monetary loss that an unfavorable verdict can have on the company. Indeed, depending on the nature of the provision, a document or policy suddenly becoming unusable could have a material impact on the company's ability to conduct its business. Understanding the company's Achilles' heel (and, conversely, its hidden strengths) can be the difference between meaningful success and failure in litigation.

Dealing with Bad Facts

Every case has bad facts provided by a client. The issue is to what degree the facts are bad and how they affect the case. You must deal with negative facts from the start of the relationship with the client, because it is more important to have them out on the table than learn about them halfway through the case. Generally, a weakness in a case will not change for the better as the case progresses. Therefore, once you have assessed the bad facts and analyzed their impact on the case, ensure that the client understands the risks or exposure inherent in those bad facts. If you and the client have a common understanding of the bad facts and their risks, it makes it far easier to figure out how to get around them. Often you will find that the certain facts while initially seem very detrimental, once they are discussed in a deposition by a well-prepared witness, turn out to not be as detrimental as they seem. This is particularly true if the witness concedes the unpleasant facts, is not defensive, and explains them in the best light possible.

Another strategy to deal with perceived weaknesses in a case is to find applicable law that you can use to have a judge rather than a jury, which might be more sympathetic to the other side or the particular issue, decide the point. For example, assume that one of the disputed points in a case is

whether the damages to be assessed are measured at the time the contract was breached or at the time of the trial. If the company you represent has become more valuable and there is the danger that the jury, when hearing about the success of the company, may be more inclined to return a large verdict based on learning about the large revenue and profits the company has enjoyed, it would be a good strategy to try and have the judge decide this point. A lot will depend on whether there are any disputed facts intertwined in the issue that would preclude a judge from being able to decide the issue.

Unique Litigation Challenges in the Mortgage Industry

This sector of the financial industry is highly regulated; there are regulations that affect nearly every transaction. To be an effective litigator in this arena, you have to know the nuances of the regulatory and statutory laws that influence your case. Those laws can be as simple as a notice of foreclosure, or as complex as the Truth in Lending Statute and its accompanying regulations. When underlying laws and regulations are complex, the interplay between them and the facts of your specific case require you to have as in depth an understanding as possible.

Negotiation and Settlement Strategies

Prior to going to formal settlement meetings such as mediation, it is a good policy to ensure that your client is fully aware of the salient facts of the case, good and bad, the pertinent legal issues and potential liability, and what you believe might be a good settlement in the case based on the facts known to date. To this end, I generally will prepare an initial or settlement evaluation report to the client sufficiently ahead of the settlement meeting.

When I am entering into negotiation, I prefer to be a listener. Even if the negotiation is not successful and does not result in a settlement, I try to learn as much about the case and the adversary's case as possible. By listening, I gain insight into their perspective on the matter and can ascertain if it will be possible to find common ground that could lead to a mutually beneficial compromise. There is great benefit to the negotiation and settlement process even if the ultimate result is that you don't settle and have to resort to trial. Another tactic that works well is fully engaging the

client. If you are involved in a difficult case and want to settle it, the best way is to engage your client and have them present and fully informed of the facts, the expense, and risks of the case so they can make an informed decision. This will help prevent a client from later saying, "I wish you had told me that this would happen,"—something a lawyer who has educated their client at every step of the way will never have to hear.

As you work toward settling the case, it is important to see the perspective of your client and the adversary. This will enable you to go back to your client and explain the risk of not settling and continuing to litigation at the same time you are trying to convince the adversary to settle. Ultimately, you want what is best for your client. If you explain that litigation will involve considerable additional time and cost, and show them the benefit of trying to reach an earlier settlement, you may be able to avoid one or both sides declaring an impasse. Just be certain to exhaust the negotiation process before giving up, as you will be doing your client a disservice if you do not. Intangibles, such as the personalities driving the case for the adversary, may not necessarily be obvious during routine discovery. But sitting in a conference room or office with the other side's attorneys for a day or half a day discussing the case and possible settlement strategy will generally give you a lot of information about your opponent, their thoughts about the case, and even some of their strategies.

Overcoming Challenging Client Issues

Counseling Clients about Case Strategy

Some clients are more easily persuaded about case strategy than others are. Typically, the clients who question your strategy will be the same ones who want to take charge of their case. Most clients will let you guide them, while others want to be part of every decision-making step along the way. My first tactic when this occurs is to adjust my style to fit the client's unique need to be involved but, frequently, I find myself having to explain to a client that his or her idea is really not the way to go. It is a difficult conversation to have with a client, but you have to explain the pros and cons and the negative ramifications of an ill-structured strategy. The client may be calling you with an idea they think is terrific, but you know that it is not. The best course is to help the client see that their idea does have some positive

aspects, but that there are also risk and possible adverse consequences associated with the idea. At the end of the day, with your assessment of the benefits and risk, the decision rests ultimately in the hands of the client. All you can do is ensure that they understand all the aspects of the strategy before they make that decision. If you can bring prior cases or experience to the table, it will help the client understand the likely outcome. Sharing the predilections of a particular judge toward the type of case can also help the client understand that the variables he or she is trying to introduce could backfire, or at best, not help at all.

Often, cost is a factor that drives clients to try to find their own strategy. From their perspective, they are trying to find a more cost-efficient way of resolving the matter. Even if the short-term result may involve some cost savings, you sometimes have to explain the potential long-term financial impact of their strategy. For example, sometimes a client will not want to disclose certain information in written discovery and instead try to object to producing the information at all because it may be time consuming and costly to gather. If you know, however, based on experience that a judge is likely going to ultimately deny any motions to prevent the disclosure of the information, it is not a good strategy to fight the discovery disclosure for months and have the client incur significant legal fees and ultimately have to produce the information anyway. A fully educated client is always in the best position to make a decision, so provide your advice and counsel to the fullest extent possible. Hopefully, the client will respect your experience, and apply his or her company experience, and jointly you will make the right decision.

Misconceptions about Litigation

Unless the client is sophisticated and knows a lot about litigation, the most common misconception is that the matter will be resolved quickly. In fact, the American judicial system is very slow. Another misconception is that there is real justice in the legal system, and that a client who is right and has done nothing wrong will always be vindicated. For example, assume a husband and wife who were victims of a fraudulent scheme come to you complaining that they lost their life's savings to a scheming investor-type and you pursue the culprit through litigation. The guilty opponent could raise many defenses and litigation generally takes years to go to trial. Even if

the couple obtains a verdict, they may find that the schemer spent or pilfered all the money and there is nothing to recover. Alternatively, some schemers are pretty good liars and can even charm a jury into believing their version of the facts and you could lose.

In this same vein, companies are often sued on frivolous grounds and they sometimes lose even though there was no merit to the suit. Anyone can file a lawsuit, but you can't always get rid of one. The unfortunate result is that sometimes a client is forced to pay a judgment or a settlement when they are not at fault. The unpredictability is an unintended consequence of having a jury of twelve peers—and strangers—deciding your fate. Clients who are familiar with litigation know that litigation takes a long time, can be very costly, and it is not always just from the client's perspective. New clients are amazed at the expense, the work involved, and the time it takes to litigate. Too often, new clients believe that once they hire an attorney, he or she will show up at court a couple of times, and get the case dismissed. This is not realistic but many television shows and movies make litigation seem easy, seamless, and not requiring much work, which helps perpetuate this misconception.

Emerging Issues in Finance Law

Potential for Errors Due to Increased Case Load

The volume of home loans that were being underwritten before the financial crisis caused an increase in errors in deeds and even foreclosure on the incorrect lot of land. There was a direct relationship between errors and caseload, especially related to the volume of buying and selling homes, mortgages, larger loan bundles that contained more troubled loans, breaches of warranty, and more legal exposure.

Economy-Driven Legal Action

In the single-family, multi-family, and commercial arenas, there is an interesting issue emerging related to a moratorium on, or time extension granted for, foreclosures. That possibility will raise issues that none of us have anticipated. New precedents will be set during cases, which will result in new types of lawsuits. The actions that led to the financial crisis will likely

result in new trends in litigation, such as civil remedies and director/officer liability. The behavior of juries may change as well. It is interesting to consider the reaction of a jury to someone who is attempting to sue for breach of contract in a recessionary economy, and the likelihood of being able to recover a significant sum. We are going to see an increase in bankruptcies, deficiency actions, and collection actions because it is a difficult time for everyone.

Final Thoughts: Advice for New Practitioners

There are numerous pitfalls that result from a lack of experience. There is so much to learn as a new attorney builds experience that it is beneficial to find a mentor with whom you can work closely. A mentor relationship will provide you with opportunities to observe a specific aspect of a case before attempting it yourself, whether it is taking a deposition, attending a hearing, or drafting pleadings. Identify the best attorneys in your firm and make an effort to spend time with them so you can observe the way they prepare for a case. More observation and preparation is always better for a newer practitioner, especially because it is easy to make obvious errors such as failing to check if a case or statute has been overturned. Oftentimes new attorneys are not even aware of critical issues that may be very apparent in a case, due to lack of experience. Thus, partnering with a more experienced attorney to turn to for second opinions or guidance is always useful and recommended.

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Ms. Lehtola received a J.D. from Duke University School of Law in 1984 and a B.A. from the University of Notre Dame in 1981.

LEADING LAWYERS ON BEST PRACTICES FOR BANKING AND FINANCE LITIGATION

Banking and Finance Litigation Strategies is an authoritative, insider's perspective on managing litigation in the banking and financial industries. Featuring partners from law firms around the nation, these experts guide the reader through key strategies for building a positive attorney-client relationship during litigation, including understanding motivations and goals, managing expectations, and realistically assessing risk. From obtaining key information through documentation and depositions to dealing with bad facts and considering settlement options, these leaders outline how to obtain the best possible outcome for the client. These top lawyers provide insight into litigation best practices through the lens of the current economic environment and discuss trends and developments in a continually changing marketplace. The different niches represented and the breadth of perspectives presented enable readers to get inside some of the great legal minds of today, as these experienced lawyers offer up their thoughts around the keys to navigating this ever-evolving area of law.

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