

International Council for Shopping Centers Law Symposium

Columbus, Ohio on March 1, 2023

Strategies in Litigating and Trying Commercial Real Estate Disputes

Brief Outline

This presentation will focus on overarching strategies in real estate litigation from pre-Complaint through trial. Rather than focus on granular details regarding written discovery, depositions and the like, we will instead look at why lawsuits are filed, what to consider in determining the extent to which it should be litigated, whether and how to resolve the case, and the narrative aspect of presenting your case before a judge or jury. We will use cases that are in the public eye and our own experiences to evaluate the means and methods for achieving the best result possible for a client, which does not always equate to victory at any cost. Finally, we will cover the different approaches attorneys use at trial and the best ways to counteract those methods from the defense and plaintiff's perspective.

Pre-Trial Strategies

- What is at stake?
 - *Sanderson v. Paltrow*, 2023 WL 2951272 (Utah Dist. Ct. March 30, 2023)
 - Complaint was originally for \$3.1 million but amended to \$300,000
 - Three experts testified for Plaintiff
 - Over one week of testimony
 - She countersued for negligence and asked for \$1
 - Damages, worst case scenario, best case scenario, business implications, equitable relief
 - You do not want to end up at a trial that's going to cost \$200k *after* discovery over \$400k in damages
 - This can be *very* attorney driven
 - Tell MTI war story
- Obtain Email correspondence as soon as possible (including pre-complaint or answer)
 - The timeline of any case is key to getting an idea of what was in everyone's mind as the events were occurring, and with the proliferation of email we have greater insight than ever before
 - Not all clients will be able to pull everything right away, but getting key time periods is very helpful
 - You can typically figure out what the other side was thinking, and that's helpful for creating the narrative
 - Sometimes you have to argue someone is lying, but juries tend to frown on that
 - It's much better to show a reasonable explanation for what they were doing, because that is a credible argument that hopefully lines up with your legal theory
- Always return to the Complaint/Answer
 - Only the claims presented will be at trial, and it's easy to forget where the case started when your two or three years into a case
 - Also good to have jury instructions for those claims/defenses while preparing written discovery and depositions to make sure you hit everything

- Get an expert early
 - Had a banking case once where we didn't get approval for an expert until late in the process, and there were documents he would've wanted but it was too late to ask
 - They can also give you insight into the substance so you can more intelligently examine witnesses
- Witness Prep
 - Always overprepare; I like to do a mock deposition
 - If you don't know opposing counsel, figure out the style/approach they'll take
 - Be careful what documents you show them
- AI doc review?
 - Never done it, curious if anyone else has experience

Alternative Dispute Resolution

- What is the relationship with, and approach from, the other party?
 - Long pre-existing relationship, one-off transaction, business relationships at stake
 - Real estate is a small industry, and word gets out
 - If there are business concerns with suing a certain developer, broker, landlord, bank, etc., you would ideally hold a form of ADR prior to litigation
 - Sometimes an attorney-guided meeting can bridge the gap, or a pre-suit mediation
 - Always revisit the possibility for mediation at the end of written discovery
- Mediation
 - Good way to not only find a resolution, but test out theories and themes
 - Also gives insight into the opposition approach
- Arbitration
 - Be careful with arbitration clauses, they are becoming as expensive or more expensive than trial
 - Could reach an agreement that limits excessive testimony
 - Jury trials take a long time
 - Jiang trial was as simple as they come and took three days with jury selection

Trial – Not About the Law

- Trial is about the story and the witnesses
 - 90% of a trial is which witnesses does the jury like?
 - The other 10% is which attorney does the jury like?
 - Always be gracious and friendly with every single person in the courtroom
 - Do not over-object
 - Once the Court rules, let it go
- Real Estate and Damages can be boring
 - Use demonstrative exhibits for accounting records/damages
 - Put boring and/or bad witnesses in the middle
 - This can be difficult with scheduling and/or being on the defense side
 - Recall a witness if necessary to present a clearer picture of your story

- Use a trial tech/paralegal
 - Nothing looks worse than technical failures during trial
 - *The Juror* opening argument with the bad animation of what happened
- *Depp v. Heard*, 2022 WL 2342058 (Va. Cir. Ct. June 24, 2022)
 - His claim was whether it was true or false that “Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture’s wrath for women who speak out.”
 - “I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse”
 - Her claim was an agent of Depp saying “We have reached the beginning of the end of Ms. Heard’s abuse hoax against Johnny Depp”
 - Her claim was also her and her friends made fake sexual violence allegations
- Each witness should tell their own story
 - Use documents to keep difficult witnesses on track
 - Go chronologically or batch questions in themes (avoid jumping around)
- Closing Arguments
 - Have it written out, then throw it away
 - Use a check list if necessary
 - Not every point has to be made, i.e. cross-exam is to establish credibility
 - Be hesitant of calling any witness a liar since the jury has only known the witness for a few hours
 - Use common sense, and whichever side you are on should be a direct response to the other side’s argument