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The Thirty (Plus) Year View— Lessons In Adding Value Learned From Legends of the Bar

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The Thirty (Plus) Year View—

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I. Introduction

In in the thirty or so years I have been in practice, I have had the honor of working with and against the very best from all sides of the tort and insurance bar. This paper will focus on the lessons from these "war story" experiences. Most involve a tactic or approach that made the ultimate result wildly successful. Some involve situations where tactics enhanced value, but a smart, reasonable approach allowed value to be preserved when it could have been lost. Finally, some will involve greed and other factors leading a lawyer to take a great opportunity to make gold and turn it into straw,

II. The Lessons

A. The Hinojosa Rule—Nothing Beats The Element of Surprise

Bill Edwards is a Texas legend. He was a *patient* man. In one particular oil and gas injury gas I monitored, he had a clear theory of how to try the case to maximum effect under a "right of control" tort theory. He understood that a defendant found to have a right of control in a situation where they simply could never have perceived it was vulnerable in several ways. If you have a duty and do not realize it, you most certainly fail to act or do anything, especially if you are relying on an independent contractor. The biggest concern is that believing you can ever handle something as dangerous as an oil rig and have no duty to do anything is a recipe for punitive damages and disaster.

Edwards simply never shared his "right of control" theory. It quietly resided in a complex contract between the owner and the purported independent contractor, like a ticking time-bomb. Edwards did not even reveal the strategy in discovery. Like a pro quarterback setting up a screen play, he let the defenders rush in to emphasize they had no duty to do anything and that they accordingly admitted they had done nothing to prevent the accident.

The case is an example of the *benefits of friendship,* especially an unexpected one. At trial, Edwards also allied himself with the defendant independent contractor, who had a ton of lability exposure but a little insurance and an empty purse for paying any judgment. As I remember the case, he did not even depose but one of this defendant's employees before the trial. He lined experts up against them though, as if he were targeting them. This defendant turned viciously on the owner defendant at trial, supporting the right of control theory and the rights of the owner to control under the contract.

The end result: a big surprise for the owner defendant and a $64 million dollar judgment. As we will learn below, the surprise element was aided by close connections with the judge, who allowed pleading amendments adding then uncapped punitive damages claims the day

before trial. However, this is the point where the story turns to one of the first lessons in how to preserve the big win, or how to not be the hog.

B. Hogs Get Slaughtered—Understand Shortcomings and Dangers and Change Tactics to Preserve A Significant Recovery

> *Realistically assess your case*

> *Kenny Rogers Rule—"Know when to hold 'em and know when to fold 'em."*

> *Beware of winning "too big"*

> *For some policyholders, working with the carrier may be the best option*

1. Anticipating How Your Opponent Will React and Changing Course to Protect Against Shortcomings

Two things lurked dangerously behind the scenes that may have actually surprised the plaintiffs in the tale started above. First, the judge was partial to the plaintiffs, too partial, and thus the appellate record looked like something was badly off "kilter. Second, the judge had been a business partner of some of the plaintiffs team. An disclosure was made, but the impression was that the relationship had clearly ended.

Now, if you shoot a bear, you better shoot to kill. The plaintiffs underestimated how intense the fight would become if they scored too big and pushed too hard to recover the whole thing. *The defendant joined with its carrier* rather than considering entering any type of assignment against its carrier for falling to settle, and a blank check was provided to fight every aspect of the case, including hiring a team of investigators to determine if the business relationship with the judge was really over. This ultimately resulted in motions to disqualify and a related motion for new trial relating to the disqualification. The judge had to recuse himself from hearing the issue, and it went to a very defense oriented presiding judge. Ultimately, a new trial was granted and the case only then settled.

The plaintiffs failed to cash in quickly. It would most certainly have been less than the verdict. Waiting to settle until after the disqualification and new trial motions were ruled upon resulted in a big change of momentum that badly damaged settlement prospects. Remember the old saying, "Pigs get fat, and hogs get slaughtered." This lesson unfortunately has many examples in law practice.

2. Winning Too Big

Brent Cooper is fond of warning plaintiff's and policyholder counsel that they do not want to win "too big." The simple message is that astronomical verdicts attract unnecessary and unwanted attention from appellate courts, insurance executives and policyholder executives. The *threat* of an enormous verdict is more helpful sometimes better than the reality. I was

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