



BELLNUNNALLY

CALLING THE BULLPEN: WHAT TO DO WHEN OUTSIDE COUNSEL LOSES CONTROL OF YOUR CASE

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WHO IS BELL NUNNALLY ?

- Serving our clients for over 30 years
- 55 attorneys practicing within 15 areas of law including:
 - Litigation
 - Commercial Finance
 - Corporate and Securities
 - Intellectual Property
 - Labor/Employment
 - Real Estate
- Providing Transactional and Litigation Services
- Regional and National Clients from Start-up businesses to Fortune 500 Companies
- Named “Go-To” firm by *Corporate Counsel* magazine

SHOULD YOU SWITCH PITCHERS?

SWITCHING PITCHERS

- Should you switch?
 - Difference between:
 - Ordinary Litigation Fatigue or Frustration;
 - Case being out of control



SWITCHING PITCHERS

- Case Study:
 - \$2.5MM real estate development litigation in Florida Middle District (Ocala) for 3 Plaintiffs against national bank
 - Texas client hired Florida counsel on advice of co-Plaintiffs
 - Case pending for one year
 - Client appears for his deposition
 - Attorney has been suspended
 - Case was about to be dismissed for the second time under 12(b)(6)
 - Attorney conducted no discovery

SWITCHING PITCHERS

- Reasons for Switching:
 - Attorney was too passive
 - Attorney made a major mistake
 - Series of adverse rulings
 - Conflict of interest arises
 - Client and Attorney personality conflict
 - Attorney became over-matched
 - Firm did not have enough resources to handle
 - Attorney was too busy to give case attention
 - Disagreement over bills (i.e., failure to follow budget)
 - Political reasons (attorney backed judge's opponent)

SWITCHING PITCHERS

- Advantages of Switching:
 - Clean slate in relationship
 - Fresh perspective on facts and law of case
 - Clear goal-setting
 - Better relationship with a particular judge
 - Case is in better focus and can find an attorney with expertise in that area

SWITCHING PITCHERS

- Risks of Switching:
 - “Devil You Know” vs. “Devil You Don’t Know”
 - New attorney spends duplicative time getting up to speed
 - Not enough time left in case or “influential events” have already occurred
 - i.e., key depositions are complete, lost key motions already

SWITCHING PITCHERS

- Other Options:
 - Bring in as co-counsel
 - Need a clear assignment of duties/responsibilities
 - Need to manage the egos as client
 - Use threat of change as a catalyst for a “heart-to-heart” or ultimatum for counsel
 - Need a “Quick Hook”

LOOK AT THE SCOREBOARD

LOOK AT THE SCOREBOARD

- Need to know exactly what's going on in your case
 - Deadlines
 - Outstanding discovery
 - Pleadings due
 - Strategic Decisions
- Do not automatically trust prior counsel's representations or files
 - Example: Florida case

LOOK AT THE SCOREBOARD

- Checklist
 - Check Scheduling Order
 - Check Counsel's Pleadings Board to determine if any unanswered pleadings/motions
 - Check Counsel's Correspondence file to determine if any unanswered correspondence
 - Get a copy of court's docket for case to see if there are any pending hearings or unanswered motions
 - Ex. Waxahachie case

LOOK AT THE SCOREBOARD

- Checklist Continued:
 - Non-Scheduling Order Deadlines
 - Motion to Dismiss
 - 60 days after service of offending pleading. TRCP 91a.3(a)
 - Discovery Period
 - Depends on Discovery Control Plan Level. Level 1 is 180 days after serving first discovery request; Level 2 is earlier of 30 days before the date set for trial or 9 months after first deposition or due date of first discovery response. TRCP 190.2-190.3
 - Expert designation/report deadlines
 - TRCP 195.3 – Tender experts for deposition if no report
 - Motion for Leave to designate responsible third parties
 - 60 days prior to trial date. Tex. Civ. Prac. & Rem. Code 33.004. Does not apply if the limitations period for joinder of the RTP expired and the designating party knew about RTP during the limitations period

LOOK AT THE SCOREBOARD

- Checklist Continued:
 - Non-Scheduling Order Deadlines Continued:
 - TRCP 167 – Offer of Settlement
 - 45 days before trial date

APPEAL TO THE UMPIRE

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- Don't be afraid to ask for a continuance to get some breathing room
 - For a pending hearing or the entire trial
 - Judge's discretion
 - Need a good reason though
 - Don't be afraid to throw prior counsel under the bus (i.e. "I don't want prior counsel's actions to prejudice my client's rights")
- Don't overreach on continuance
 - Ask for a 2-3 month extension of trial date, not 6-12 months
 - Changing counsel is not a license to extend

APPEAL TO THE UMPIRE

- Technical requirements for continuance – TRCP 251
 - Verified or supported by affidavit
 - “Sufficient cause”
 - Judge’s discretion
 - Confer with opposing counsel

DON'T LET INHERITED RUNNERS SCORE

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- New counsel is responsible for old counsel's work
 - Review live pleading
 - Eliminate unnecessary causes of action or affirmative defenses
 - Add causes of action or affirmative defense
 - Eliminate hyperbole or unsupported allegations
 - Review discovery responses
 - Eliminate unnecessary, indefensible objections
 - Determine if prior counsel withheld any discovery
 - Supplement responses where necessary
 - Confer with client to make sure that all discovery is produced
 - Review privilege log

DON'T LET INHERITED RUNNERS SCORE

- Missed deadlines
 - Try to undo the damage by seeking leave to amend where necessary
 - Don't be afraid to throw prior counsel under the bus
 - If there's a pending motion, ask for a continuance to update briefing
 - Offer to give opposing counsel same courtesy to appear reasonable and eliminate any prejudice

DON'T LET INHERITED RUNNERS SCORE

- Reach out to opposing counsel to offer a “re-boot” of relationship
 - Much easier to go against competent counsel than incompetent counsel
 - Client’s frustrations may be shared by opposing counsel and the court



FIRE A FASTBALL UP AND IN

FIRE A FASTBALL UP-AND-IN

- Opposing counsel will try to take advantage of change in counsel
 - Counting on lack of familiarity, time, or resources
- Give yourself some breathing room by going on offensive:
 - File a no evidence MSJ
 - Send discovery requests
 - Send discovery deficiency letters
 - File a motion for continuance

IGNORE THE CROWD NOISE

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- Stepping into ongoing litigation can be like sipping water from a fire hose.
- New counsel needs to:
 - Keep calm
 - Create a to do list
 - Prioritize tasks
 - Pull together a team (associates, paralegals) to support the case
 - Avoid duplicating effort

QUESTIONS?

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