FROM ANTAGONISTS TO ALLIES:

The New Partnering of Business and the Plaintiffs' Bar

By Ken Suggs
Janet, Jenner & Suggs

Never say never. Most of us were warned early in life about the perils of making rigid, uncompromising declarations. Still, some circumstances seem so unlikely as to rule out all possibility of a reversal of fortune. Some relationships feel so disparate that finding common ground appears not merely inconceivable, but downright unsavory. Like the Hatfields and McCoys, apparently, some of us were just born to feud.

That's the kind of relationship that the plaintiffs' bar has often had with business. Rarely have we ever seen eye-to-eye on anything. And with the bad blood in recent years that has characterized the struggle over changes to the civil justice system, the two sides have diverged ever more sharply. Until recently, most businesses and plaintiffs' law firms would have recoiled in horror at the notion of working in tandem on the same side of the courtroom.

Today, however, a new strategic alliance is emerging between these battle-scarred archrivals. With increasing frequency, businesses are hiring their old nemeses, trial attorneys, to partner with them in litigating business disputes. And among big firms that have used plaintiffs' firms, a full 94% were satisfied with the result, according to survey results released in May by market research company the polling firm, inc. (TM).

What spawned this unlikely new trend? Financial advantage. Political and professional circumstances. A new realization on the parts of both trial attorneys and business that aligning with one another can work to both of their benefits.

First, let's look at the financial reasons why businesses are hiring plaintiffs' firms. For financially strong companies, business-to-business litigation is a high-stakes gamble that can decimate the losing company's monetary resources, irreversibly damage its reputation with stockholders and the public, and send it spiraling into bankruptcy.

For the small business, going up against a big corporation usually isn't an option. A bigger firm may have stolen a smaller company's major customer, violated its patent, purloined its technology, blocked delivery of its product, or committed any of a hundred other crippling infractions. Because of the high upfront cost of litigation, the little company normally has no legal recourse. It usually just suffers the injuries and dies quietly.

That paradigm is being turned on its ear in today's commercial litigation market. Business heavyweights are breaking with their tradition of hiring large, established law firms to represent them in legal disputes. They're shedding the big hourly fees that those firms charge and, along with them, their conservative approach to litigation and their built-in incentive to create billable hours, rather than work efficiently. Businesses are realizing that plaintiffs' firms, which take cases on a contingency fee basis and are paid only if they win the case, offer a far less risky alternative. In fact, when the polling company, inc. (TM) surveyed 58 multi-million-dollar

businesses about legal services, 87% said they were interested in non-hourly billing options, including contingency fee options for both plaintiff and defense work.

Smaller companies are getting on the bandwagon, too. The contingency fee arrangement helps to level the playing field and minimize a small firm's financial risk in a David-and-Goliath match. Where fighting for its rights probably wouldn't be an option for a small company if it meant paying a high hourly fee, a contingency fee arrangement lets the little guy stand toe-to-toe with a Fortune 500 company. In business-to-business cases, trial attorneys open the doors of the courthouse for the small businessperson.

When you think about it, the whole concept is quite logical. Businesses are seeking trial attorneys' expertise for the same reasons that individuals who have been harmed by businesses have sought their counsel for years: The contingency fee arrangement minimizes risk. If you win, you pay us a percentage of the amount you recover; if you lose, you pay nothing. And trial attorneys may even advance some or all the costs of trial and trial preparation, expenses that are not reimbursed if the case is lost.

But financial advantage is not the only reason enterprising businesses are hiring plaintiffs' firms today. Plaintiff's attorneys know how to litigate. They have a prosecutor's mentality. They know how to choose unbiased jurors who will judge the case solely on the evidence presented at trial. Trial attorneys know how to communicate with juries; they're skilled at telling a compelling story and explaining complex issues in terms that juries understand. They know how to conduct aggressive discoveries, dig information out of computer databases, manage huge document productions, inoculate against weak points in the case, compile persuasive trial graphics, prepare witnesses to testify, and handle a hundred other details that combine to form a winning trial strategy. And trial attorneys approach every case they accept with a passion that is crucial to victory.

For a big company whose general counsel doesn't spend much time in the courtroom—or a small company that has no in-house counsel—the trial attorney's experience and skills are invaluable.

Now, let's look at it from the trial attorney's perspective. We're not selling out. We still believe passionately in our mission: To protect the right of every citizen to petition the court for redress when wronged. Most of us have saved lives, prevented injuries and made workplaces safer through our practices—not just for our clients, but also for thousands of other Americans, by extension of the effects of our cases.

From Thomas Jefferson to the great jurist Learned Hand, to contemporary authors and intellectuals—since her birth, America's patriarchs, statesmen and scholars have spoken eloquently of the precious right to a trial by jury. Trial attorneys believe passionately in preserving that right, and we always will. It is the single greatest reason why we chose our profession.

Commercial litigation is a perfect fit for plaintiffs' attorneys because the relationship doesn't compromise our core values. In this new role, we aren't working against the interests of individuals; we're working on behalf of businesses, against other businesses. Tapping this new

market segment allows us to fortify our practices in the face of tort reform's rigid restrictions. It doesn't replace our personal injury practices; it supplements them.

Some trial attorneys I've talked to say they are actively seeking commercial litigation clients. Others say big businesses are coming to them. Either way, the surprising new alliance between business and trial attorneys is a burgeoning legal trend.

So, once a trial attorney and a business agree to partner on a project, how do they make the relationship work? In other words, after they say, "I do," how do they keep the marriage together?

Establishing a strong relationship between the trial attorney and the company's in-house counsel is the foundation for litigation victory. Although the strength of this peculiar relationship is critical to both parties, it is most essential to the trial attorney. In accepting a case on contingency, the trial attorney invests heavily in its outcome, committing a large amount of financial resources on speculation that the case will be won. Moreover, the trial attorney usually is more aggressive, by nature and practice.

So, who calls the shots—the trial attorney or corporate counsel? Who interfaces with the client on trial issues? Who directs the timing and strategy of litigation? Representing a corporation, rather than an individual, can pose many challenges, and the litigator and in-house counsel must have a clear agreement on these issues from the beginning. There may be times when corporate counsel second-guesses and criticizes the trial attorney's strategy or tactics. In such cases, the trial attorney must be open to constructive criticism, patient in explaining his reasoning and willing to compromise, if necessary.

Scheduling and reporting also can be problematic. In-house counsel may be fussy about imposing deadlines and requiring frequent written progress reports, including documentation for annual reports and securities regulators. Conversely, trial attorneys may be hobbled by the limited availability of corporate counsel, who must attend to the company's daily legal matters, in addition to issues of trial.

Perhaps the single largest challenge for the trial attorney in this strange-bedfellows relationship is working within the parameters of in-house counsel's inviolable accountability to shareholders. Absolutely nothing is as important to a publicly held company. Virtually every corporate judgment is made in light of how shareholders will react.

Looking at every decision through the shareholder lens may create a strong aversion to risk. As such, corporate counsel may make conservative business decisions that are heavily calculated on perceptions of risk. Generally, instinct has no role in their deliberations. They may demand that the trial attorney furnish hard statistics on the odds of winning a case—answers that, by nature, are often intangible and difficult to provide. This terrain is fertile ground for misunderstanding. Furthermore, the trial attorney must realize that there are sometimes business reasons, rather than trial strategy reasons, for decisions made by corporate counsel.

All these challenges can be overcome, and some may never develop at all. Ultimately, both parties recognize that they share the same goal—to win the case—and so, they work together to smooth out the wrinkles and achieve the best possible result.

If there's a downside for any business in hiring a plaintiffs' firm, it's that trial attorneys can be counted on to submit the case to rigorous, even brutal, pre-retention review before committing resources to the case. If they don't think the lawsuit is winnable, they won't accept it. But is that really a downside? Most firms want to know the truth about their cases and have no desire to take a losing case to court. By the same token, no case should clog the court's docket unless it has first undergone an exacting appraisal. So, whether the trial attorney accepts or rejects the case, a realistic assessment of its merits is good information to have.

But, how does a business ever get to the point of saying, "I do?" How does a business, large or small, go about choosing a plaintiffs' law firm—one that will do the finest work and yield the best probability of winning their case? As with any business or profession, there are good plaintiffs' firms, and there are bad ones. It's up to the buyer to separate the wheat from the chaff.

Businesses should look for a plaintiffs' firm with a successful track record in business litigation. Make sure that the firm has the financial resources to pursue the case aggressively. And ask yourself if you would hire this firm, even if you had to pay them an hourly rate. If the answer to the last question is "yes," you've made the right choice.

In my estimation, no matter which side is driving the new alliance between trial attorneys and businesses, both parties are to be congratulated. They each deserve praise for rising above their differences, thinking outside the box, and finding a way to coexist successfully in today's legal marketplace.

Ken Suggs lives in Columbia, SC, where he heads the South Carolina office of Janet, Jenner & Suggs, LLC, of Baltimore, MD, a national litigation firm. He is immediate past president of the Association of Trial Lawyers of America (ATLA) the largest trial bar in the world.

(SIDEBAR):

GETTING THE RELATIONSHIP RIGHT:
Once a trial attorney and a business agree to partner on a project, how do they make the relationship work? A strong relationship between in-house counsel and the trial attorney is crucial to the outcome of the case.

Corporate counsel must:

- Realize that it is the trial attorney's nature to be aggressive.
- Understand the trial attorney's financial investment in the case.
- Recognize that it may be difficult to quantify the odds of winning.
- Minimize reporting requirements.
- Often defer to the trial attorney's litigation experience and skills.
- Be accessible for decision-making on short notice.

The trial attorney must:

- Recognize that corporate counsel may demand explanations for tactical or strategic decisions.
- Be willing to create a budget for the litigation.
- Be open to criticism, patient and willing to compromise.
- Expect deadlines and frequent reporting requirements.
- Accept that corporate counsel may often be unavailable.
- Realize that shareholder accountability is the client's number-one priority.
- Communicate, communicate, communicate.

SIDEBAR:

Contingency Fee Based Legal
Option Levels Playing Field

What if a small business finds itself up against a giant? More businesses are finding they can level the legal playing field and minimize the financial risk involved in filing a lawsuit by hiring trial, or plaintiff's firms, which operate on a contingency basis. Following are some pros and cons:

Pros:

- Plaintiffs' firms have experience in discovery (obtaining documents, etc), jury selection, jury presentations and trial strategy. Law firms that don't routinely represent plaintiffs may not have these skills, or the necessarily aggressive mindset.

- Plaintiffs' lawyers don't typically charge by the hour, but by the outcome. The firm will take a percentage of your court award, should you win, and nothing, should you lose. (Arrangements vary, but the attorney is usually willing to advance costs for expenses such as expert witness fees.)

Con:

A plaintiffs' firm will submit your case to a rigorous pre-retention review before committing its resources (often hundreds of thousands of dollars) to your case. If they don't think it's winnable, they won't take your case. (Either way, it's good information for you to have.)

When choosing a contingency fee law firm, 1) look for one with a successful track record in businesses litigation; 2) make sure the firm has the resources to aggressively pursue your case; and 3) ask yourself if you would still hire this firm if you had to pay an hourly rate. If the answer to this last question is yes, you've made the right choice.

If you have questions about contingency fees and working with plaintiffs' firms, you may e-mail Ken at