

# ORANGE COUNTY BUSINESS JOURNAL

## CALLAHAN & BLAINE

*California's Premier Litigation Firm*<sup>SM</sup>

### Trial Lawyers Make Better Litigators

by Edward Susolik, Partner, Callahan & Blaine

**Y**our company has just been served with a complex business litigation lawsuit filed by a competitor. The plaintiff is seeking millions of dollars in damages. You have 30 days to respond to the complaint, and the clock is ticking.

Getting together with your general counsel, you begin the process of selecting a defense lawyer. After going through initial due diligence, your decision comes down to two law firms. One firm has over 1,000 lawyers and offices all over the world. The other is a litigation boutique firm with 30 senior litigation attorneys and one office.

While the larger firm has an excellent reputation and history, you immediately notice that the boutique litigation firm has a number of attorneys who are highly experienced and exceptional trial attorneys. Further, the lawyer who will be responsible for your case is known and respected as one of the leading trial attorneys in the community, with over 25 complex business litigation trials to his name.

The thesis of this article is that corporations should choose experienced trial attorneys to handle their complex business litigation matters, as opposed to lawyers who have never tried complex business litigation cases, or who have only minimal trial experience. The following are some of the reasons why.

#### 1. Your Case May Actually Go To Trial

The general mantra in business litigation is that you do not need an experienced trial lawyer to handle your case because, after all, most business litigation cases settle before trial. This is a risky proposition to accept in the context of a multi-million dollar litigation.

While it is true that over 90 percent of business litigation cases settle before trial, a significant number of such cases do in fact go to trial. In fact, many business litigation cases go to trial every week in California state and federal courts.

Thus, if your case turns out to be one of the many of business cases that does actually go to trial, you will be faced with some very difficult issues if your lead attorney has zero or minimal trial experience. Hiring a real trial attorney in the first instance eliminates the risk and uncertainty of being unprepared if your case ultimately goes to trial.

#### 2. Trial Lawyers Are Better at Discovery and Depositions

A litigator who does not have a track record of conducting actual trials in front of a jury cannot be as effective of an advocate in the discovery phase. The best example is depositions.

It is axiomatic that what a witness says at deposition is what that witness must say at trial – good, bad or indifferent. Thus, the deposition of key witnesses will frequently decide who wins or loses a case.

The critical nature of depositions works in two different ways: taking depositions and defending them. First, a litigator must be able to conduct an aggressive and effective deposition. Most importantly, the attorney taking a deposition must be able to obtain key admissions against interest that are harmful to the opponent's case. This skill is akin to effective cross-examination at trial. However, it is difficult to take an effective deposition if one has never been actually been to trial, or used a deposition at trial in front of a jury. Using deposition testimony and video depositions at trial is both a science and an art. If you have never been in the laboratory, you cannot call yourself a scientist.

Second, defending depositions, especially senior executives, is equally critical to the success or failure of a case. Again, having personally handled depositions at trial is essential to understanding how to properly protect your clients during their depositions. For example, in preparing a witness for his deposition, an attorney must properly explain to the witness how his anticipated testimony will sound to the jury. Litigators who counsel their clients to repeatedly testify "I don't recall," are giving bad advice. Put simply, a jury will not believe that an otherwise intelligent and well-informed senior manager has no purported recollection of the matters at issue in the

litigation. This is just one example of how not having actual jury and trial experience can be prejudicial to the client's case.

Ultimately, most large law firms conduct few trials and have very few attorneys who have real trial experience. While each firm will have a handful of partners who have conducted one or more trials, those lawyers will virtually never conduct the pre-trial phase of the case. Thus, the actual deposition phase of the case will likely be conducted by lawyers who have no trial experience.

#### 3. Trial Lawyers Settle More Cases

It is a truism that trial dates settle cases. What this means is that the pressure brought about by an impending trial date frequently creates a dynamic for settlement, for both plaintiffs and defendants. The most dramatic example of this phenomenon is the proverbial settlement on the courthouse steps.

This same dynamic arises from the leverage created by an expert trial lawyer. As trial approaches, the opposing party and their counsel are sizing up the respective positions of the parties. If your attorney is a highly experienced and accomplished trial attorney, you will have a significant advantage in settlement negotiations. The fact that you have a decorated trial attorney representing you will put significant settlement pressure on the other side.

By way of example, the managing partner of my boutique litigation firm Callahan & Blaine is Daniel J. Callahan, one of the most respected trial attorneys in the United States. Among his numerous accomplishments, Dan has obtained the largest jury verdict in the history of Orange County, a \$934 million jury verdict on behalf of a large corporation after three months of trial. Dan, however, settles most of his cases on extremely favorable terms to his corporate clients. Put simply, based on his track record, Callahan & Blaine's adversaries have significant concern in going to trial against Dan Callahan, and therefore settle their cases rather than risk going to trial.

Conversely, if your trial attorney lacks significant trial experience, your adversary will not fear going to trial against them, and your settlement position will be compromised. Your opponent will feel no intimidation or pressure to settle if they believe your lawyer has minimal trial experience.

Settlement is a powerful weapon in the arsenal of the trial lawyer. It is one of the true ironies of litigation that the best settlements come from the lawyer who is an expert at trials and has prepared his case for trial.

#### 4. Conclusion

Perhaps the most important question to ask when hiring a defense attorney is whether that lawyer or law firm has a track record of conducting actual trials in front of a jury. There is a huge difference in the level of advocacy between a real trial attorney and a lawyer who has never been to trial or has done so only once or twice. That type of courtroom experience is invaluable to understanding the litigation process and winning cases.

#### Edward Susolik

Edward Susolik is a partner at Callahan & Blaine, a boutique litigation firm with 28 attorneys. Mr. Susolik specializes in complex litigation of all types, including business litigation and insurance litigation. Mr. Susolik is an adjunct professor at USC Law School, and has been honored as one of the "Top 100 Attorneys in Southern California" by *Super Lawyers* for 2010, 2011, 2012 and 2013. Mr. Susolik can be reached at [esusolik@callahan-law.com](mailto:esusolik@callahan-law.com) or 714.241.4444. Callahan & Blaine's website is found at [www.callahan-law.com](http://www.callahan-law.com).



#### About Callahan & Blaine

Callahan & Blaine is California's Premier Litigation Firm. Founded in 1984, Callahan & Blaine has been achieving record-breaking verdicts and settlements for over 28 years in all areas of complex litigation. For example, Callahan & Blaine has the highest jury verdict in Orange County history, a \$934 million jury

verdict achieved after a three-month trial in Beckman Coulter v. Flextronics, a complex business litigation case. Likewise, in a complex municipal liability case, Callahan & Blaine obtained a \$50 million settlement that has been certified by West Trial Digest as the largest personal injury settlement in the history of the United States.