The Top Ten

By Chancellor Ellen Hobbs Lyle

"This is like watching paint dry," the substitute court officer said at the trial break. Not being a chancery court officer, he was unaccustomed to commercial cases.

"Now hold on," I said laughingly but meaning the protest and defense.

*For me the interesting thing about commercial cases is not so much the showmanship of the lawyer nor the facts, which are usually mostly undisputed. The dynamite is the attorney's strategic use of the law, especially remedy. I have always thought that it is in commercial cases where the attorney makes the most difference. Here is how I think they do it: the **TOP TEN** practices I see the best attorneys use in trying commercial cases.*

1 **Original Sources**—Commercial cases usually stem from a few core documents: the partnership agreement, the noncompete clause in the employment agreement, the contract for the sale of the business, etc.

Practice Pointer: When you are first assigned to the case, read these core documents **IN THEIR ENTIRETY**. Do not just read the parts you think are relevant. Read all of the provisions of the documents.

This is my first, top suggestion, and there is no substitute for doing this.

The reason is that you are very likely to find provisions, in unlikely places in the document, which support your position, or which detract, and you need from the beginning to be aware of these assists and pitfalls. Also, absorbing the entire document gives you a basic understanding and feel for the transaction which will carry you throughout the case.

2 **Remedy**—A unique aspect of commercial cases is the remedy because of the variety and their strategic use narrowly tailored to the facts of the case. This is where the ingenuity of the attorney is at a premium.

Money damages are just one of many options. Specific performance; rescission; dissolution; appointment of a receiver, custodian or accountant; reformation; accounting; injunction, redrawing a noncompete agreement so as not to restrain trade; requiring a

declaration of a dividend; a buyout—the list goes on and on, and is as various and customized as the facts of your case.

Practice Pointers:

— Research preliminary to pleading is important to: (1) find the available remedies and options to discuss with your client and make strategic choices and select back-up remedies to plead alternatively; and (2) make sure you know their specialized requirements which many remedies have. If you know in advance of discovery the specialized requirements of the remedy you are seeking, you will be certain to obtain discovery on those specialized points.

— Be sure to plead the remedy specifically so there is no risk of waiver or being denied an untimely amendment.

3 **Phases**— Be aware that with a commercial case it is not always lumped into one big trial. Often there needs to be a phase one accounting, or declaration that the partnership or corporation is dissolved, or other preliminary decision. These may be followed by a phase two trial on liability issues of causes of action devolving from the initial phase one. Then there may be a phase three determination of the remedy which fits.

Practice Pointers:

— Realize and think through phasing at the pleadings stage to avoid winning the battle but losing the war.

— Consider filing a motion for a Tennessee Rule of Civil Procedure Rule 16.02 Pretrial Conference to adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions." TENN. RULE CIV. PRO. 16.03(10).

— Remember Tennessee Rule of Civil Procedure 42.02 which authorizes separate trials for different phases of the case.

4 **Rules of Contract Construction**—Anyone who practices in the commercial area should know by memory the rules of contract construction. You can find the rules in these cases: *Allmand v. Pauletic*, 292 S.W.3d 618, 630 (Tenn. 2009); *Wilson*

v. Moore, 929 S.W.2d 367, 373 (Tenn. App. 1996); *Drake v. JPS Elastomerics Corp.*, W2003-01579-COA-R3CV, 2004 WL 1908798 (Tenn. Ct. App. Aug. 23, 2004).

5 **Definitions**—An often overlooked and forgotten source is the definition section of a commercial document or statutes. Surprisingly, it is not just specialized terms which are defined. Ordinary terms are frequently specified in these definition sections. This advice to check the definitional section goes hand in glove with the suggestion above to read the entirety of a commercial document to locate all provisions which have a bearing on your issue.

6 **Reconnaissance Research**—Scan through all the sections of the AMERICAN JURISPRUDENCE or other legal encyclopedia on the topic of your case, such as "Corporations" or "Partnership," etc. to quickly inform you of the key concepts, theories, remedies and lexicon. Admittedly, this is counter-intuitive. You probably will discard this suggestion and not take this advice because you think it will take longer to add this step. Taking this step actually saves time.

There are several reasons to take this extra step of reading the legal encyclopedia first:

— These sections are short; you can learn a lot quickly. This basic information will help you to see the big picture so you can plan out your strategy of the case.

— Do this first, before diving into specific computer search terms research on Tennessee law, because Tennessee commercial law is sparse. Usually you cannot find a Tennessee case on point or even close.

— Reading a legal encyclopedia on your topic first familiarizes you with the specialized terms and lexicon of your case to help with subsequent search terms.

7 **Rethink Notice Pleadings**—There are two things to keep in mind. First, the *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011) notice pleadings standard is usually not as much in play in commercial cases. The contest you often see in personal injury cases about whether enough specific facts have been pled

to provide notice is usually not a concern in commercial cases because often many of the facts are undisputed.

Practice Pointers:

— Under these circumstances, it may be to your strategic advantage to go on and put your factual cards on the table in the complaint or counterclaim by alleging very specific facts to receive back, at the outset, an answer which accomplishes an "admit" or "deny" on key facts and documents.

— Keep in mind TENN. R. CIV. PRO. 10.03 which requires foundational written instruments to be attached to the pleading as an exhibit.

Secondly, don't let the effort of narrating the facts slight the very important part of the complaint or counterclaim of (1) selection of legal claims; (2) the identification and linking of the particular facts to the essential elements of the claim; and (3) identification of the remedy you are seeking. It is item 2: the facts specified for the essential elements of the claim where I see the most pretrial motion skirmishing.

8 **Manage Complex Content In Briefs and Oral Argument**—To be successful in handling commercial litigation you must develop methods to reduce complex content to communicate it understandably and efficiently. This is especially challenging in the Information Age. If you are not careful, the details of important but not dispositive background or context can marginalize the legal and factual basis of dispositive points.

Practice Pointers:

— Cull. Don't let your ego compel you to say all you know. Provide only what is necessary.

— Collect like details into groups, and caption the groups into broad categories.

— Provide overall organization of a complex statutory scheme before arguing the statutory section pertinent to your motion. By giving the "big picture" context, you make the detailed smaller section of the statute more understandable.

— Factor in preparation time to reduce and synthesize the complex content. Remember the old saying "I could have made this shorter if only I had had more time."

9 **Customized Jury Instructions and Verdict Form**—Analyze carefully whether your client is best served by a jury or bench trial. If you determine a jury trial should be demanded, know that you will probably need to create your own instructions on key points.

Practice Pointers:

— Instructions are important to juries in commercial cases; juries rely upon the instructions in deciding the case.

— The TENNESSEE PATTERN INSTRUCTIONS does not have many instructions for commercial cases.

— For these reasons, you need to start early on analyzing your instructions. Be thinking throughout the lawsuit about the questions you want the jury to answer on the verdict form and the instructions to go with them so that your questions in depositions can be based on the instructions and verdict form the jury will have.

— If you have to craft your own instructions, find Tennessee cases as a source for wording but also consult a legal encyclopedia, such as AMERICAN JURISPRUDENCE, because these use short sentences and concrete terms which are good in jury instructions.

10 **Understandable, Not Complexity, Wins These Cases**—If you really understand something complex you can explain it to anyone. Don't fall into the trap of thinking your superiority in reciting all the legal and factual complexities will advance you in the esteem of the court or jury. The genius makes that which is complicated understandable. This is hard to do, but it is the quintessential skill of the best commercial trial lawyers.