

The Civil Litigation Prenup – A Shortcut To Conflict Resolution

The Editor interviews Daniel B. Winslow, Senior Counsel in Proskauer Rose LLP's Boston office.

Editor: You have a most distinguished background as a lawyer, judge and public servant. Please describe your role as chief legal counsel to then-Massachusetts Governor Mitt Romney and as a chief counsel to Senator Scott Brown's campaign.

Winslow: I left the bench to serve as Governor Romney's chief legal counsel during the last fiscal crisis in Massachusetts. The chief counsel oversees more than 600 in-house lawyers and is responsible not only for advising the governor on legal policy and compliance but also for overseeing the executive branch role and the judicial branch budget, and drafting and reviewing all legislation that is either proposed by or presented to the governor. It was a fascinating, rigorous and completely rewarding job to work with Governor Romney, who is a problem solver and a talented leader. We were in the middle of a terrible fiscal crisis and were lacking in political power as Republicans in Massachusetts, but what we did bring to the table was innovation and a willingness to work hard.

Senator Brown and I went to college as well as law school together. He asked me to serve as the chief counsel to his U.S. Senate campaign. Subsequently, I have stayed on as the chief counsel to his political committee. My role in the campaign was twofold – one was compliance, because to run a federal campaign in a special election context is very fast paced and fraught with regulatory peril, and the second role was to develop policy and legislative proposals for use during the campaign. It was a very rewarding experience to see a candidate connect with people at a time when people were very hungry for change. That kind of an experience has translated very well into the practice of law because innovation is what sets American companies apart, making them competitive in the global marketplace. When companies can find lawyers to partner with them in that endeavor, it's a win all around.

Editor: You have been a trial lawyer as well as former Massachusetts presiding justice and appellate division justice in the Massachusetts Trial Court. As a trial lawyer, you pursued a policy of "creative advocacy." Please explain the full meaning of this term.

Winslow: Trial practice involves an element of theatre. It's important as an advocate to use all of the tools that are available to persuade and to educate fact finders, be they judges or juries, but also it's important for lawyers to think more strategically about the greater ends of a client's business strategy that any litigation is attempting to accomplish. I believe that there is a real need for that kind of creative lawyering in the business community so that lawyers become value-added partners and part of the success proposition for businesses in achieving strategic goals.

Lawyers work at the intersection of law and business and are in a position to make connections between complementary business interests. For example, if one client is a private equity fund and another client is a biotech company, there are some fantastic opportunities for synergies between clients where lawyers can be a key element of connection that is just so critical in the business world.



Daniel B. Winslow

Editor: Another avenue where your career has taken you is to act as an outside general counsel for several companies. Please describe some of your experiences in assisting various clients, not the least of whom was Governor Romney. How did your many multifaceted experiences serve you well in this capacity?

Winslow: My service as general counsel to other companies is an offshoot of having served as the chief legal counsel to the governor where we used innovation to organize the more than 600 lawyers and to enhance their missions. Because of that experience I was able to step back and become a big picture lawyer. By training, I am a trial lawyer and was a trial judge, but today I see myself as a problem solver. With these experiences I have worked with a number of companies that either do not have in-house legal staffs or have legal staffs but without the depth of team to serve as an outside counsel and problem solver, making sure that companies have the right lawyer for the right problem at the right time.

Editor: One of your principal contributions to dispute resolution has been the development of the model Economical Litigation Agreement, the "civil litigation prenu." How does this model bring about a tidy, quick and economic resolution of disputes?

Winslow: The ELA or the "civil litigation prenu," as it's called in the media, is an innovation that is just now becoming available to companies for use in commercial contracts. Basically it is a hybrid of arbitration and litigation. Conventional litigation is an infinite process for a finite dispute because contract disputes by definition are finite. In conventional litigation there is no proportionality and there is no predictability of legal costs in this infinite process. What the ELA does is it allows the parties to use the power of contract by agreeing, as part of the underlying deal, to a discovery process, a litigation management plan that is enforced by an ELA arbitrator in the event of a contract dispute. The substantive dispute, threshold motions, dispositive motions and trial all remain in the civil justice system and are decided by a judge with full appellate rights. The advantage of the ELA contract is that the expensive part of civil

litigation, which is discovery, is all defined by and managed by the companies involved in the dispute with cost and fee shifting throughout the dispute. For example, in the event of a discovery dispute the ELA provides that the loser pays the attorneys' fee of the winner. That does two things: one, it makes discovery much less expensive and does not reward scorched earth litigation tactics, but it also makes lawyers step back and think about what they really need to advance the client's interests. From a broader policy perspective the cost of litigation can be reduced as much as 40 percent by companies that use the ELA. Every dollar saved in litigation costs is a dollar of profit for companies, creating a huge competitive advantage for American companies in the global marketplace. By shifting disputes out of arbitration where there are no appellate rights to litigation, we allow the common law to keep pace with changing technology. I believe from a broad perspective the real value of the ELA is not the dollar that a company saves by reducing litigation costs, but it is the \$50 of costs and problems that the company avoids because lawyers then will have the common law on which to advise a company on what they can and cannot do.

Editor: We work with CPR, which has adopted some of these techniques.

Winslow: CPR was at the cutting edge of ADR and arbitration when it first evolved as a dispute resolution technique, and CPR once again is at the cutting edge of this new concept of civil litigation prenups.

Editor: You've already discussed the fact that arbitration is used in this context.

Winslow: As litigators have transitioned their practices to arbitration, arbitration has started to display many of the characteristics of litigation that companies were trying to avoid, and so arbitration has become slow, expensive and unpredictable. We need a better solution. I think that there is universal agreement that we have a problem, but what we have not agreed to is what the way forward is. The ELA is one of the options for companies to consider going forward. It is a brand new mechanism. We are on the drafting team with CPR and other major players including DuPont, Abbott Labs, Cisco, Microsoft, GE and Bechtel as well as law professors, arbitrators, and other lawyers from firms, who serve as a focus group, and over the last year have revised the ELA model so that it is at a point now where it is about to be implemented.

Editor: Did you read the discussion of ELA by Fios's Mary Mack in our May issue?

Winslow: Her wonderful comments only reinforce the kind of response that we're getting in the corporate world from small and large companies. ELA is an idea whose time has come. The Wis-

consin Law Journal called it a "game changer" in civil litigation.

Editor: Have you espoused other cost-saving measures or ways of streamlining the dispute resolution process?

Winslow: When I was a judge, I received national recognition for creating something called the "Smart Calendar," which is a trial-scheduling system that results in civil jury trials being reached on the first scheduled date more than 85 percent of the time, an idea that has continued to be in use in some courts in Massachusetts and elsewhere. The concept underlying the "Smart Calendar" is that we need to have prompt and affordable justice. When the justice system itself is a drag on business, then it hurts our economy. One often forgets that there is a nexus between how well or poorly our judicial system works and how healthy or unhealthy our economic system is, and so we need to have the ability for business disputes to be promptly and cost effectively resolved. I developed this Smart Calendar in order to have witnesses, experts and others show up for trial in a timely manner.

Editor: Please tell our readers about the litigation team in the Boston office and how you complement one another. I understand that your team has received many accolades.

Winslow: We work as a cohesive national trial team with all the offices at Proskauer. Although our IP and commercial litigation teams, of which I am a part, are in Boston, our practice is not limited to Boston.

Editor: The firm has a strong corporate governance practice in your office. Is your practice a part of this activity?

Winslow: Most of my compliance and governance has been in the context of political or election law for political candidates or office holders. Working with Scott Harshbarger and his team, we do corporate internal investigations. If a client calls on Proskauer Boston to conduct an internal investigation, the client has the opportunity to have representation by a former attorney general, a former chief counsel and judge, and former prosecutors. We have good team depth for corporate compliance as well as governance issues.

Editor: Why did you decide to join the Proskauer team in Boston?

Winslow: Proskauer is a firm on the move. It is well positioned to help clients achieve success as we come out of a really terrible and challenging recession. Proskauer is a firm that is prepared to be part of a solution for business by offering a comprehensive full-service range of legal services. I also liked the fact that the firm was well positioned, not just in Boston, but nationally and globally, to help clients achieve their business aims.

Please email the interviewee at dwinslow@proskauer.com with questions about this interview.