



# HANDBOOK FOR CONTRACT LITIGATION

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Valera Grapp



# **HANDBOOK FOR CONTRACT LITIGATION**

**Valera Grapp, J.D. LL.M**



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**Other Books by  
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## ABOUT THE AUTHOR

*Bachelor of arts*

Valera Grapp, B.A., J.D., LL.M., has been a member of the Bar of Pennsylvania since 1942. She presently performs legal research and the drafting of pleadings and contracts for attorneys in St. Petersburg, Tampa, and Citrus County, Florida.

She has been in general private practice including extensive trial practice in Pittsburgh and has been a general corporate counsel trying civil contract cases in Pennsylvania, Illinois, and New York. She has also been a contract specialist for the U.S. Air Force Air Materiel Command.

In addition she designed the paralegal course of study for the Langley Paralegal Institute and was dean of the school.

She received her B.A. and J.D. from the University of Pittsburgh and her LL.M. in Trade Regulation from New York University.

She now resides in Inverness, Florida.

This book is dedicated to my husband  
José Rafael Cabrera

# HOW THIS BOOK WILL HELP YOU SAVE VALUABLE TIME AND EFFORT IN PLANNING, PREPARING, AND TRYING YOUR CONTRACT LITIGATION CASES

This practical, experience-tested guide to contract litigation provides step-by-step methods and techniques that can save you valuable time and effort when handling cases that can bring highly profitable fees.

In this valuable desktop handbook you'll be shown how the experienced attorney handles all the aspects of the case—for example, how to:

- Evaluate a contract claim during the initial client interview to determine the form of the contract; identify the parties; discover the nature of the breach or other claim, the amount of the damages, the available proof; and set the fee arrangement.
- Attempt to settle without litigation by identifying the plaintiff's client demand vs. the demand of the plaintiff's attorney; prepare the response by the defendant and practical settlement negotiation.
- Commence a contract action: the determination of choice of venue, the handling of the initial pleadings of the claimant,

the service of process and filings of pleadings, the setting up of effective client communication networks.

- Defend a contract action through the handling of defense responses by motion, defense answers, counterclaims, cross-claims, dealing with the third party complaint.
- Respond to the defense by plaintiff motion or plaintiff replication to defense answer, plaintiff answer to defendant counterclaim and handling co-defendant response to cross claim.
- Conduct pretrial discovery, to draft and use interrogatories, requests to produce, to prepare for depositions; prepare requests for admissions; how to organize and care for pretrial discovery documents; prepare motions to compel and for protective orders; techniques for organizing your discovery plan.
- Obtain a pretrial judgment, a final judgment after default, summary judgment, judgment on the pleadings and provisional judgment remedies.
- Prepare for pretrial conferences by planning what you want to cover in the conference and in the trial; prepare for the conference itself and techniques for making the conference productive.
- Prepare for trial by examining your own needs—physical and intellectual—and the case needs—selection of a jury and how to handle a bench trial.
- Prepare the opening statement and present it to get and hold the jury's attention and, later, a favorable verdict.
- Prove a contract claim: determining the burden of proof, types of evidence; handle witnesses: direct examination, cross-examination, redirect examination; rest your case, rebuttal, documentary and demonstrative evidence, witness impeachment, objections and exceptions, the use of special verdict forms.
- Prepare a closing statement and instructions for the jury; handle the request for jury instructions; present closing statements that win verdicts.
- Get final judgment after trial begins—motion for directed verdict, final judgment order or judgment on verdict.
- Collect or defend against a judgment: seeking relief for the judgment debtor; procedures for the judgment creditor;



judgment lien and judgment proof defendant; uniform enforcement of judgment acts; motion for new trial; motion for judgment notwithstanding the verdict; handling the appeal: forms and content of the appellate brief, appellate oral argument; stay of proceedings to enforcement judgment; collecting a judgment.

- Avoid ethical problems in practicing contract litigation by knowing and applying the ABA Model Rules of Professional Conduct in Contract Litigation.

And, in addition to all this solid advice you'll find numerous warnings and cautions for applying these techniques and preparing the appropriate documents.

And this isn't all. The appendices are a practitioner's kit containing sample motions, notices, requests, orders, forms, litigation time tables, and witness preparation checklists that you or your legal staff can use to avoid having to go through numerous forms, books, and files, which will allow you more time and effort to spend on the necessary elements of the case.

With the *Handbook for Contract Litigation* as one of your working tools, your case preparation and trial work can be made easier, faster, and more manageable, can give you confidence that you're doing things the way experienced contract litigators would, and that you have a better opportunity to win cases and improve your firm's profits.

# A WORD FROM THE AUTHOR

This book is a comprehensive, practical guide to be used in preparation for contract litigation and the settlement of contract disputes.

The aim of a business lawyer who drafts a contract is to prepare a legally enforceable contract that clearly expresses the intention of all parties. The business lawyer is trained in general contract law and is familiar with statutes and regulations applicable to the particular contract.

In addition, he will get factual information to draft the contract. In some cases he will gain that information from his client. In some cases he will have gained that information from his participation in the negotiation of the contract. In others, he will rely on documents obtained from his client or from the public records.

Future litigation is usually not expected and all may go well during the negotiation, drafting, and execution of a contract; but the knowledge of court procedure in the event of a future problem is helpful during the negotiation and drafting of every contract. The ability to foresee trial problems and solutions will help the lawyer draw the contract to avoid *unnecessary* future litigation or to be ready with required proofs if litigation does become necessary.

An attorney who handles business legal matters and drafts the relevant documents is usually a thoughtful and knowledgeable decision maker, and he is also a lawyer. There is no reason that he cannot confidently become a court advocate in a civil case in his field if he follows the practical guidelines in this book. Feeling confident about the results of a possible trial of a contract case will lead to better and earlier settlements of contract disputes.

This book gives practical advice on conducting contract litigation from the moment the client comes to you with a breach of contract problem, whether he is the prospective plaintiff or defendant. There are sample demand letters for specific performance and for notice of breach demanding damages or rescission. An effective demand letter may lead to settlement of a contract claim without further legal action.

In the Appendix there are complete suggested forms for use during pretrial proceedings, during trial, and for filing an appeal, if necessary.

The forms are headed with an imaginary Florida court name. The author is a member of the Pennsylvania Bar who now resides in Florida. Florida has adopted rules of civil procedure almost identical to the federal rules of civil procedure which are cited as authority for procedure throughout the book. The forms can be used "as is" in all federal court contract litigation and in most states which continue to adopt similar rules. The forms are easily adaptable for use in states that have not yet adopted the modern rules.

Success in trying any lawsuit under modern rules of civil procedure depends on pretrial preparation and procedure as well as on trial technique. The good old days of "trial by ambush" are over. For that reason, this book devotes many chapters to the ins and outs of pretrial discovery and procedural techniques to be used in contract litigation.

In addition, this book gives practical hints for trying the case.

Some of the practical suggestions in the physical and psychological areas of contract litigation may seem too elementary to a litigation lawyer, but personal experience and observation for over forty years of practice have shown the author that observance of these simple suggestions can make a material difference in the outcome of litigation. In the normal stress of trial, the "brightest" lawyer can do some rather silly things. If space would permit, some really funny "war stories" could be recounted to illustrate this point.

There are checklists for preparing and samples for pleading general contract actions. In addition, the use of pretrial motions and discovery in contract actions is discussed in depth and illustrated by sample motions, requests for admissions or production, and interrogatories appropriate for basic contract actions. Practical examples showing both the use and abuse of pretrial and trial procedures are given in the text and in the Appendices.

The book contains a pretrial conference checklist and a sample pretrial conference order for a contract action. Proper pretrial conference preparation in a contract action can produce a second chance for settlement or a solid base for success in the trial of a contract case.

Chapter 1, "How To Evaluate a Contract Claim at the Initial Client Conference," alerts the contract litigator to modern legal theories of recovering in a contract dispute with citations to authority for further consideration by the litigation lawyer. Chapter 1 does not attempt to discuss that substantive law in depth as this is a procedure book, not a treatise on substantive contract law. The references to substantive law in Chapter 1 and the inclusion of sections of the Uniform Commercial Code that refer to *remedies only* (cross-referenced in Appendix 1 to the commercial code of every state) describe various procedures and means of enforcing or defining a commercial contract remedy. Those references to substantive law in this procedure book are made to alert the litigator that "there is more than one way to skin a cat," even in a contract action.

Recognizing the problem in a legal matter is as important as finding the answer. The references to substantive law are made for the purpose of stimulating creative substantive law solutions that will be executed by using the procedures that are the subject of this book.

For example, although punitive damages are not usually recoverable in contract actions, there are exceptions to that rule.

If attorney fees are to be recovered by the prevailing party in a contract action, there must be a provision for such in the contract or in an applicable statute. This book gives citations of authority for claiming attorney fees in a contract action. The citations are to consumer protection legislation and some other modern statutes affecting business law that provide for statutory minimum damages and/or attorney fees for the prevailing party in many circumstances.

Chapter 3 gives sample allegations for claiming statutory minimum damages and/or attorney fees under statutes or contract provisions, as the case may be.

The numbered sections in the book are interrelated and cross-referenced to alert the contract litigator to future procedural considerations that will affect present procedural decisions and techniques. Immediate use of those cross-references will make this litigation tool more effective.

Many of the trial practice suggestions in this book may be applied in civil trials other than in contract litigation. However, the emphasis is on the trial of contract actions and the specific problems and solutions involved in such actions.

Please excuse the homey advice on trial strategy and conduct that appear in Chapters 9 and 10.

*Valera Grapp*

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